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COMMENT: INHERENT INDIAN SOVEREIGNTY*

Jessie D. Green and Susan Work

Inherent sovereignty is the most basic principle of all Indian law and means simply that the powers lawfully vested in an Indian tribe are those powers that predate New World discovery and have never been extinguished. Some of the powers of inherent sovereignty which have been recognized by the courts are the right to determine a form of government, the power to determine membership, the application of Indian customs, laws, and tribal jurisdiction to domestic relations and descent and distribution of property, power of taxation, exclusion of nonmembers from tribal territory, power over tribal property, rights of occupancy in tribal lands, jurisdiction over property of members, and administration of justice. Whether tribal sovereignty exists by the grace of courteous regard for the past by the courts, or by the rights of historical precedent ratified in treaties and statutes by Congress, it is an important past and present force which sets the Native American people apart from their fellow Americans.

Even though no specific federal statute, constitutional provision, or executive order establishes or reiterates the concept of inherent Indian sovereignty, it has been plainly stated by the Supreme Court to exist. Having deep historical roots, the inherent sovereignty doctrine has been recognized by the Court as the ordinary, if not the uniform, interpretation of the basis of Indian tribal power. The doctrine has been challenged as a mere tool used to justify decisions, in essence making inherent Indian sovereignty a legal fiction of the courts. Nevertheless, such a view is not readily reflected in the reasoning of recent Court decisions and is in direct contradiction to the opinions of many learned writers. Moreover, a denial of the legal validity of the doctrine of tribal sovereignty ignores or fails to consider that such sovereignty has in fact been exercised by the tribes, resulting in the preservation of a communal culture in the face of the adverse individualist influences presented by the dominant culture.

The legal fiction idea bears examination because it points out that to a large extent the perpetuation of the sovereignty doctrine rests on governmental branches other than the courts. The court may hear only those matters where it has jurisdiction, and often that

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jurisdiction is obtained only by the Congress conferring it. Furthermore, it has long been the rule of the courts to follow the decisions of other governmental branches whose special duty is determination of the recognition of an Indian group as a tribe. Thus, if other governmental branches refuse to recognize an Indian group as a tribe, the courts will find no tribal sovereignty to be protected. These factors mean that to a large extent the sovereignty doctrine rests on the support of the executive and legislative governmental branches and without that support, tribal sovereignty would cease to be mentioned in court opinions and relegated to die a slow death in the speculating minds of knowledgeable writers. The slow death has not occurred. On the contrary, tribal sovereignty has been recognized and endorsed in several recent opinions, illustrating the historical strength of the doctrine.

**Historical Roots of Sovereignty in Case Law**

The problem of jurisdiction has plagued Indian tribes from earliest history. In *Cherokee Nation v. Georgia*, the Supreme Court held that Indian tribes were not foreign nations in the constitutional sense and that Indian tribes were as a consequence without the jurisdiction of federal courts when suing a state. The decision construed Indian nations as having a peculiar and unique status in relation to the United States resembling "that of a ward to his guardian." Also, the court declared that Indian nations were so completely under the sovereignty of the United States that any attempt by a foreign power to acquire their lands would be viewed as a direct act of hostility against the United States. *Cherokee Nation v. Georgia* relegated Indian nations to an absolutely dependent position in the legal redress of wrongs, for sovereign immunity protected the states and the United States from suit by an Indian nation in the absence of legislation to the contrary. *Cherokee Nation v. Georgia* disposed of the question of whether an Indian nation could exercise sovereign power in the national sense and began the controversy of what sovereign power an Indian tribe could possess.

*Worcester v. Georgia* is considered the leading case in the field of Indian sovereignty. Coming shortly after *Cherokee Nation v. Georgia*, *Worcester* primarily represented the struggle of an Indian nation to retain self-government in the face of state encroachment. Although *Worcester* reaffirmed the dictum of *Cherokee Nation v. Georgia* that Indians were subject to federal control, it pointed out that the subjection was wholly in accord with the doctrine of the law of nations whereby a weaker power does not surrender its right
to self-government by association with a stronger power and by tak-
ing its protection. Moreover, the Worcester holding spoke directly
to the continuing struggle of states and Indian nations by holding
that a state has no power over an Indian tribe and that the whole
intercourse between Indian nations and all of the states is governed
by the Constitution and laws of the federal government.

To reach the aforementioned decision, Chief Justice Marshall in
Worcester reflected on the roots of Indian sovereignty that pre-
existed the United States. Marshall stated that the rights of Euro-
pean discoverers to the land which they “discovered” gave only the
exclusive right to purchase from those natives who wished to sell as
among Europeans, and that those rights were not founded on the
denial of any Indian rights. Worcester viewed the idea that Euro-
pean charters gave the exclusive right to govern as absurd and ex-
travagant, and stated that such grants of power and title between
and among Europeans were blank paper so far as Indians were con-
cerned.

Looking back on the history of the United States, Chief Justice
Marshall commented that because Indian tribes were nations in the
sense that they were capable of war, peace, and self-government,
treaties were sought and obtained by Congress to avoid hostilities
and cement friendships. To construe such treaties by the United
States or its predecessors in interest as a surrender of sovereign In-
dian rights would, in Marshall’s language, “be a perversion of their
[treaties’] necessary meaning, and a departure from the construction
which has been uniformly put on them.” Worcester explains that
both the treaties and laws of the United States contemplate com-
plete separation between states and Indian nations and provide
for the respect and protection of Indian rights by the federal gov-
ernment.

Worcester has not remained untouched by time, but Williams
v. Lee recognized that the basic policy is still relevant. Construing
the Worcester doctrine, the Court stated that “essentially, absent
governing acts of Congress, the question has always been whether
the state action infringed on the right of reservation Indians to make
their own laws and be ruled by them.” Following this reasoning,
the Williams Court denied a state court the power to adjudicate a
sale between an Indian and a non-Indian, because it would under-
mine the authority of tribal courts over reservation affairs. The
Court was not blind to the then existing legally sanctioned exercises
of state law over Indian reservations and territory, but distinguished
those instances by pointing out that such control by state courts
involved non-Indians.
Mescalero Apache Tribe v. Jones stressed that the conceptual clarity of Worcester has given way to more individualized treatment of Indians. Whereas Williams reflected the continuing aspects of Mr. Marshall's opinion in Worcester, Mescalero presented the image of the differences between past and present construction. Mescalero endorsed the Williams infringement test, but rested its decision that a tribe's ski resort was subject to a state gross receipts tax on the basis that it was construing a tax matter as to an Indian activity off the reservation. McClanahan v. Arizona Tax Commission noted in Mescalero, recognized that some state tax action cases do not turn on the Indian sovereignty doctrine; however, it held that inherent Indian sovereignty precluded state taxation of activities or lands within reservation boundaries absent congressional consent. McClanahan, in speaking to the individual treatment concept of Mescalero, pointed to a test used in the past to determine whether an Indian tribe is subject to state control. The determination depended on whether an Indian tribe had preserved its tribal organization and was recognized by the federal government as a distinct people. According to the Court, this test still has usefulness, even though other factors are also involved in decisions concerning tribal sovereignty. Although the McClanahan Court noted that the doctrine of inherent Indian sovereignty expounded in Worcester has undergone considerable evolution, the doctrine was construed to be relevant as a backdrop for the reading of relevant treaties and federal statutes. The Court further enforced such reasoning by full endorsement of the Williams infringement test.

Inapplicability of Constitutional Restrictions on Tribal Action

Even though the doctrine of inherent Indian sovereignty may have been modified since Worcester, federal courts have refused to extend constitutional restrictions over Indian tribal activities and have adhered strictly to inherent sovereignty as the reason for such a steadfast position. Elk v. Williams stated that general acts of Congress do not apply to Indian tribes unless a clear manifest intent is so expressed. With such a background, consistency required that general constitutional provisions receive the same treatment. Thus, in Talton v. Mayes the Court held that Indian nations were not subject to fifth or fourteenth amendment restrictions. Talton's conclusion was the logical extension of tribal sovereignty and case wording clearly explained that the decision rested on inherent Indian sovereignty. By setting out that the origin of tribal power does not spring from the United States, Talton presented a case which con-
continued the reliance on the *Worcester* doctrine and emphasized that Indian tribes are not federal entities. Even though *Talton* was decided some time ago, more recent opinions indicate that its decision has remained intact.

In 1968 Congress enacted the Indian Civil Rights Act. Expressing concern that individual Indians had no personal rights in situations involving conflicts between the tribe and the individual, Congress by statute enumerated specific rights which are not to be abridged by tribal government. These rights are those found in amendments one, four, five, six, seven, and eight of the United States Bill of Rights, with some variations. The Act also contained the requirement that a tribe will not deny to any person within its jurisdiction the equal protection of the laws and a prohibition against bill of attainder and ex post facto laws.

This Indian Bill of Rights was an infringement on tribal sovereignty and has been criticized, particularly because it did not allow for tribal consent to its application. But some of the lower federal courts have indicated that there is nothing in the Act showing that Congress intended to sweep aside the doctrine of Indian sovereignty. Following this observation, the Fourth Circuit in *Crowe v. Eastern Band of Cherokee Indians, Inc.*, held that although the Cherokee tribal action was properly set aside for failure to comply with due process and equal protection, the district court was not empowered by the Act to go further and substitute its judgment on the merits for that of the tribe. The court emphasized that the controversy, which involved tribal lands, was not to be resolved by the common law, but in light of the traditions and customs of the Indian tribe, and remanded the case to the tribal court.

A literal reading of the due process and equal protection provisions in the Indian Bill of Rights to mean the same standards as applied to state and federal governments could result in seriously undermining the tribes' cultural autonomy. Some courts have found different standards applicable, while others have indicated that traditional Anglo standards are appropriate. The ultimate development of a rule in this area will be determinative of the extent to which tribal sovereignty has been undermined by the restrictions of the Civil Rights Act of 1968. Some courts have reasoned that, in effect, it waived tribal sovereign immunity, and by virtue of the equal protection and due process clause, granted the courts subject matter jurisdiction over matters previously characterized as internal affairs beyond the federal courts' jurisdiction. Thus, the full impact of the Indian Bill of Rights on tribal sovereignty is yet to be determined.
Federal Control Over Indian Sovereignty

As surely as Worcester established inherent Indian sovereignty as a bar to state interference with Indian self-government, Cherokee Nation v. Georgia, decided before it, established the federal government as a superior authority over Indian nations. Although this conclusion may have had its foundation in pure coercion, it is doubtful whether a challenge to its legitimacy would succeed. Court holdings have long indicated that Indians do not exercise sovereignty of the same nature as that exercised by the federal government or even by the states. Standing in the peculiar position of an Indian tribe under the Constitution, an Indian tribe in effect bears the same relationship to the federal government as a territory in that it is a secondary government which may exercise complete jurisdiction over its members within its boundaries, subordinate only to the expressed limitations of federal law.

The Nature of Plenary Power

The control exercised by Congress over Indian tribes is so extensive that characterization of such power as plenary is justified. Although plenary power is generally considered to originate from the wardship status, the commerce clause, and treaty implication, courts have not defined its exact origin. Worcester stated that Indian tribes were within the ambit of federal supervision, but plenary power is more far-reaching. After review of previous cases and consideration of the impact of the mention of Indian tribes in the commerce clause, United States v. Kagama, relying on Cherokee Nation v. Georgia reasoning, held that the wardship status of Indians formed a basis for invoking the power of Congress to make criminal laws applicable to Indian tribes for the Indians' own protection. The opinion in Kagama, however, was carefully worded and did not preclude use of the commerce clause as a foundation for congressional action in the proper situation.

Although Kagama reached beyond the holding in both Cherokee Nation and Worcester and embroidered on the dictum of those cases, it did not reach as far as Lone Wolf v. Hitchcock. In discussion of the plenary power of Congress over Indians, Lone Wolf stated that Congress had exercised the power over Indians from the very beginning and that the power is of a political nature not subject to judicial control or review. This Lone Wolf dictum points out that where important questions of plenary power are involved, the Court may describe the issues presented as political in nature and decline to adjudicate the matter.
Although the plenary power of Congress over Indians is of a broad nature, it is not absolute. Plenary power is only a complete power when exercised completely, and therein lies tribal sovereignty. The statutes of Congress only operate as limitations rather than determinations. What is not expressly limited or expressly abrogated remains within the domain of Indian determination by virtue of the doctrine of inherent sovereignty.

Vague or doubtful inferences drawn from congressional action do not extend to take away Indian sovereignty. Good faith is demanded on the part of the United States in all exercises of control and management of Indian affairs. Even Worcester noted that the language of treaties was to be construed as understood by the Indians, rather than according to the technical meaning of words as understood by legal minds. Under no circumstances is treaty language to be construed to Indian prejudice. This same high degree of good faith extends to congressional action in the field of statute making as well as the area of treaty ratification. All statutes which affect Indian tribes are to be liberally construed with all questionable expressions being resolved in the Indians’ favor. True, the plenary power of Congress is broad, but the good faith implied in all congressional action serves to have the court act with forbearance when any congressional action might infringe on an Indian tribe’s inherent sovereignty.

The good faith demands of the exercise of plenary power is supplemented by the demand that all legislation be designed for the protection and best interests of Indians. Kagama, which pointed to wardship as at least one basis of the plenary power of Congress, stressed that protection was a duty of Congress arising from the Indians’ own inability to protect themselves due to intercourse with the federal government. Lone Wolf extended Kagama’s view of legislative power by stating that Congress had the power to govern Indians by direct statute, and pointed out that such legislation must be in the best interest of the Indians themselves. An example of good faith, protection, and best interest demands is seen in Kennerly v. District Court. There Congress passed a measure which would allow a state to extend its laws over Indian tribes and reservations. Kennerly, stating that Congress had not expressly extended state jurisdiction, held that the state had not complied with the explicit requirements of the act and denied the state jurisdiction. The demands of good faith, protection, and best interests toward Indians in legislation require exacting compliance with congressional action before plenary power seriously infringes on the concept of tribal self-government.
If, on the other hand, the requirements set out by Congress are explicitly followed by states and Congress expresses an intent to abrogate Indian sovereignty, then at that time the plenary power would be absolute. There seems to be no doubt that Congress could abolish Indian tribes immediately if it saw fit. It has long been pointed out by the courts that Congress may directly overrule treaty provisions. The other party to the treaty could have an action for breach of the agreement, but only if the United States submits itself to the jurisdiction of a legal forum where the cause may be heard and judgment rendered. The old case law which points out that Congress may terminate a tribe directs that such be done in good faith on the part of Congress, with Indian protection and the Indians' best interests in mind. Nevertheless, the forum problem may well prevent any court adjudication of such, for in Lone Wolf v. Hitchcock it was stated that the courts presume the perfect good faith of Congress. The plenary power of Congress is certainly broad, but it is not absolute until absolutely exercised and for the present there is no such explicit action contemplated by Congress.

Constitutional Sources of Plenary Power

The plenary power of Congress over Indian tribes arises at least in part from the constitutional powers of Congress to ratify treaties, to regulate commerce with the Indian tribes, and to admit new states. Worcester referred to the constitutional powers involved in treaty-making and commerce regulation as the authorization of exclusive federal control over Indian nations. Further, the constitutional power of Congress to admit new states has allowed the federal government to retain exclusive power, because Congress, by enabling act legislation, has forced new states to deny any claim of jurisdiction over Indian affairs.

History, as well as the Constitution, indicates that the federal government has exclusive and absolute treaty powers. This is a source of the plenary power of Congress, but the primary source is considered to be the commerce clause. The commerce clause authorizes Congress to regulate commerce with the Indian tribes, but the question of the exclusiveness of the nature of that federal power has been questioned on occasion by states. Such questioning has been vigorously answered by the Court, which held that the congressional power was both exclusive of state action and absolute in its field of exercise. United States v. Nice construed the exercise of commerce control to be exclusively vested in the federal government by virtue of the commerce clause of the Constitution and the wardship

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status expounded in *Kagama*.* Moreover, if the wardship status of Indians has always existed, as *Kagama* implies,* then it is possible that all constitutional sources of plenary power over Indians are derivatives of that status.

Whether the wardship status of Indians is responsible for the constitutional provisions, the constitutional provisions responsible for wardship, or a third force responsible for creating the two former, it remains that wardship provides Congress with virtually unlimited power over Indians.* With roots in *Cherokee Nation*,* explanation in *Kagama,* and extrapolation in *Lone Wolf,* wardship has emerged as a broad, well-documented concept consisting of the peculiar relation of Indians and the federal government which justifies federal protection.* Wardship, with its potential for Indian abuse* as well as Indian benefit,* has left one area less than fully defined: whether wardship is a federal duty borne of choice or of obligation. *Kagama,* in its early explanation of wardship, said that the duty "must" exist with the federal government because Indian weakness was due in large to intercourse with the federal government.* Board of County Commissioners v. Seber,* in construing *Kagama,* stated that the duty was assumed by the federal government of necessity.* However, such a recognition of duty was commensurate with an immediate need for protection.* And the Court in later dictum pointed out that it was within congressional power to choose when the wardship status would cease to exist.* The power of wardship termination would be consistent with the plenary power of Congress, but the recent decision of *Williams v. Lee* states that Indian independence was "exchanged" for federal protection.* Consistent with such an exchange concept is the implication of an agreement or contract, which might form a basis for an unending wardship duty.

However the nature of the duty of wardship is viewed, whether of choice or of obligation, it is a presently continuing rather than an extinguished method of federal supervision and protection of the Indian tribes. Although some treatise writers feel the government has wearied of its role as guardian,* appropriations statutes indicate otherwise.* Moreover, the Court has pointed out that as long as the federal government recognizes the Indian tribes as possessing attributes of national character or attributes of the tribal relationship, the wardship status continues.* Furthermore, the conferring of rights and privileges on Indians does not change the wardship situation.*

Although *In re Heff* stated that once citizenship is granted to Indians they are outside federal control, the Court by specific reference later overruled such a stand,* because congressional intent reflected by later enactments was not as the Court had earlier in-

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The on/off status of wardship in this era was confusing, to say the least, especially when allotment in severalty was adjudged not to affect Indian guardianship. Citizenship rights were conferred on all Indians born in the United States after 1924, and if the In re Heff ruling had continued to be enforced, the special relationship of the American Indian with the federal government and possibly Indian sovereignty might well have been relegated to a historical study. But because Indian wardship has continued, Indian sovereignty has continued, and Indian citizenship has been granted, the Native American has a tripartite status unique in American society.

All in all, federal control over Indian tribes is awesome. On occasion Congress has even disbanded tribes, thus terminating their recognition by the federal government, which includes court standing and wardship protection. Even the direct constitutional control over commerce with Indian tribes is unavailing to protect Indian tribes from state encroachment, if the tribal relationship is no longer recognized. Nevertheless, for that awesome power to be felt it must be exercised and as long as the federal government refrains from the exercise of the power of termination, inherent Indian sovereignty can be a powerful force.

**Inherent Sovereignty in a Historical Perspective**

Court decisions rarely, if ever, give voice to a completely original doctrine, and inherent Indian sovereignty is no different. As the Court pointed out in *Worcester*, the origin of Indian sovereignty reaches to roots which predate European discovery of the North American continent. There seems little doubt that at one time Indians were in fact completely independent sovereign entities. The British treated the Indian nations as sovereigns and the Americans initially followed their example, although primarily as a war measure. Implicit in that treatment by the negotiation of treaties was the notion of the independence of Indian tribes. Noting the subject matter of treaties—war powers, boundary and frontier regulation, passports, and extradition—it is easily understood that the treaties are indicative of an international rather than national relationship.

Generally, until the year 1829, the federal government continued to act under the traditions of a time when colonists were contending with the tribes for possession of the continent, and dealt with them under principles of international law. But, there were indications of a policy change earlier, in fact some authors point out that the
change actually began immediately after the Revolution.\textsuperscript{173} Congress unilaterally regulated trade and intercourse with Indians for the first time in 1790.\textsuperscript{174} Such regulation did not necessarily impinge on Indian independence, for the regulations may be construed as a limit on the intercourse United States citizens were allowed with Indians and an action akin to the requirement of passports for entry into Indian country.\textsuperscript{175} In 1817 Congress passed a measure which extended federal criminal jurisdiction over all offenses committed within the Indian country except those offenses committed by one Indian against another and except those tribes which had treaties to the contrary.\textsuperscript{176} This action definitely infringed on any international relationship, and at the time was questioned in its breadth by some courts.\textsuperscript{177} In 1819, $10,000 per year was appropriated toward employment of teachers for the Indians.\textsuperscript{178} This action, which strengthened the Cherokee Nation\textsuperscript{179} and Kagama\textsuperscript{180} wardship claims, could be explained as merely a grant-in-aid to a friendly sovereign nation in need, although reflection in retrospect might reveal otherwise.

**Treaty Period**

The year 1829 marked the beginning of the treaty period of United States dealings with Indian tribes. The growing power of Anglo civilization, marked by the administration of Andrew Jackson, initiated this period, which is characterized by compulsory emigration under the form of consent by voluntary treaty.\textsuperscript{182} Although compulsion was new, the policy of removal was not. Efforts were made in colonial days to remove Indians to unsettled lands in the west.\textsuperscript{183} In 1802, Georgia surrendered its claim to western lands to the federal government in a cession known as the Georgia Compact, which provided that the United States extinguish Indian title to all lands in Georgia as soon as possible.\textsuperscript{184} Even the Louisiana Purchase of 1803 was made, according to President Jefferson, with a view of furnishing a new area for the habitation of eastern Indian tribes.\textsuperscript{185}

During this period, the Supreme Court entered the area of policy, giving landmark decisions in *Cherokee Nation v. Georgia*\textsuperscript{186} and *Worcester v. Georgia*.\textsuperscript{187} Whatever cruelties may be chargeable to other governmental branches in this period, the courts always maintained the obligations of good faith due the Indians from the federal government.\textsuperscript{188} Although the Court did not accord Indian tribes the status of independent nations,\textsuperscript{189} it recognized in this era that Indian tribes were distinct, independent communities under exclusive federal control.
The legislative policy prevalent in this period was isolation of the Indians. In 1830 Congress made provisions for the exchange of Indian lands in the East for lands in the West, and for removal of the Indians involved across the Mississippi River. The Commissioner of Indian Affairs was created in 1832, to proscribe and manage Indian affairs. To complement that action, Congress created the Bureau of Indian Affairs in 1834. After 1837, Indians no longer received direct payment for lands ceded or sold, as Congress provided that the proceeds of such sales were to be kept in the Treasury for Indian benefit. Couched in phrases proclaiming benefit and protection of Indians, Congress passed other measures which narrowed the Indians' ability to determine their future, deteriorated tribal autonomy, and compelled the status of wardship. Indian nations became tribes and the gap between them and sovereign nations was widened in the eyes of Congress and the courts. Finally, in 1871, in a rider tacked at the end of an Indian appropriations act, Congress legislated away the Indian tribes' right to contract with the United States by treaty. Thus a new period was ushered in where Indian tribes were controlled by agreement and statute.

Agreement Period

The end of treating with Indian tribes is illustrative of the struggle that took place between federal governmental branches in the period that immediately followed. Congress was in essence struggling for control of Indian policy and striving to find the best means to attain such control. The amendment of 1871 narrowed the scope of executive power over Indian affairs because it ended the executive negotiation of treaty terms with Indian tribes. However, although executive power was narrowed, it was not yet destroyed because although treaties were forbidden to be made after March 3, 1871, contracted agreements were not and thus such a means was pursued by the executive branch in an effort to confine Indians on reservations of ever shrinking dimensions.

It is doubtful that any essential difference between treaty and agreement was noticed by the Indian tribes. Although certainly the 1871 action of Congress indicates the doctrine of Indian sovereignty was accorded much less deference by Congress than other federal governmental branches, this is not to say that the executive branch honored the letter and spirit of the treaties negotiated. The Indian tribes were forced by the executive power of the army to keep treaty and agreement terms, while Anglo settlers invaded their reservations and broke those terms. When Indians complained, they were
forced to surrender the part of their lands desired by Anglo settlers or lose their tribal integrity to the Anglo influx.204 Faced with the reality of the situation Indian lands shrunk, but tribal integrity and self-government were maintained.205 Because treaties were so easily set aside by the compulsion of the Anglo populace, agreements were no actual step down for Indian tribes. The contract that an agreement embodied was just as powerful and as enforceable as treaties ratified by Congress.206

In 1883 the Court protected Indian sovereignty by denying federal court jurisdiction to prosecute the killing of one Indian by another.207 Congress, voicing its disapproval of the situation of Indian justice and directly infringing on inherent Indian sovereignty, extended federal jurisdiction in 1885 over the seven major offenses of murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny committed by one Indian against another in Indian country.208 This congressional action did not, however, abrogate existing treaties and thus those Indian tribes with the foresight to provide for exclusive Indian jurisdiction were unaffected by that legislation.209

The executive control over Indians accomplished by forced negotiation was contested by Congress in 1871, and won by Congress in 1886 as the Court in United States v. Kagama210 established Congress as the Indian policy-making power.211 Even as early as 1846, it was implied that Congress could govern Indians by direct legislation.212 Kagama, a landmark decision, questioned the validity of the 1885 Seven Major Offenses Act213 and found that Indian people are subject to the authority of congressional legislation.214 Because treaty abrogation was not an issue, the question of the extent of congressional power was unanswered in Kagama, but Indian self-government was held vulnerable to invasion by direct congressional legislation. The decision ended the executive power over the Indian tribes because the semblance of negotiation was no longer required.

Assimilation Period

Kagama is interpreted by some authors as recognizing a duty on the part of the federal government to "civilize" the Indian by legislative means.215 Such an interpretation, even if not intended by the Court, was certainly apprehended by Congress, or so its action reflects. From the time it first fought for Indian policy control in 1871, Congress set as a goal the elimination of Indian tribal structure and the assimilation of the Indians into Anglo society.216 The General Allotment Act of 1887217 is typical of that goal. It was the first of

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many allotment acts which were designed to force individual ownership of tribal lands so as to terminate the age-old Indian practice of holding land in common.

Allotment in severalty's purpose was to force the Indian to indulge himself in the habits of "civilized life" and create a surplus of land for further white settlement. The latter conclusion as to purpose is well supported by the fact that tribal holdings shrank from 155,632,312 acres in 1881 to 52,651,343 acres in 1933.

During the late 1800's it was becoming apparent that the property rights of the Indians were rapidly increasing in pecuniary value. In all fairness to Congress, the pressures to open Indian land to Anglo settlement were tremendous. The welfare of the nation Congress represented demanded the efficient use of the lands within its borders and the Indian utilization of those lands not only did not contribute to this national demand, but represented a hinderance on it. The purpose of the General Allotment Act represented a confrontation between Indian self-determination and the needs of a growing nation. The result was that the Act wrecked the land base of Indian tribes with experience showing that allotted lands and the Indian soon parted.

Congress, confronted with the resistance of the tribes to allotment and the problems which allotments would create, became generally inattentive to Indian matters and let allotment proceed at a moderate pace. The longer complete allotment took, the more time Congress had to realize that the habits of ten thousand years could not be repealed by handing the Indians a piece of paper. Confronted with Anglo society, which was usually discriminatory and often hostile, the Indian allottee found himself in an environment to which he could not quickly adjust; consequently, the usual course of events led to the Indians' loss of lands and an impoverished condition.

During this assimilation period the judiciary was not silent. Reinforcing the Kagama decision, the In re Mayfield opinion delivered in 1891 repeated that Indian tribes were subject in the exercise of their sovereignty to congressional action. Recognizing that the Court is bound to respect congressional policy and construe all action in consonance with such policy, the Court determined that Indian self-government was on the same policy level as assimilation through "civilization." The assimilation attempts of Congress, pursued chiefly by allotment of lands in severalty and to a lesser extent by the granting and later imposition of citizenship status on Indians, made congressional policy difficult for the Court to understand. Thus, in 1905, in the case of In re Heff, the Court decided
that Congress had embarked on a new policy looking toward the end of the exercise of Indian sovereignty. However, in 1916, *United States v. Nice*, which explicitly overruled *In re Heff*, pointed out that although the General Allotment Act of 1887 did contemplate that the tribal relation of Indians was to be dissolved, it was not to occur when allotments were completed or citizenship undertaken. It stressed that Congress alone has the power to determine if, when, and how dissolution will occur.

The assimilation period represents a time when congressional policy lacked respect for tribal sovereignty and thus for the tribal entity. By choosing to deal with Indians on an individual rather than the traditional tribal basis, Congress attempted immediate induction of Indians into the Anglo civilization. In its efforts to strip Indians of their own culture and communal society by allotment acts, the government seriously infringed on tribal self-determination, integrity, and culture. The adverse effects of the policy of assimilation compelled remedial action and brought about a complete reversal of congressional policy.

**Present Period**

Because the anticipated assimilation of Indians into Anglo society did not occur and because Indian sovereignty was preferred over Indian destruction, Congress passed the Wheeler-Howard Indian Reorganization Act of 1934. The Act is the last universally recognized major policy revision dealing with Indians and represents a congressional policy designed to utilize the local self-governing capacity of Indian tribes. At least once since 1934 there has been a serious erosion of that policy but subsequent action of Congress indicates that the erosion has been curtailed.

Although held by the Court to be an abrupt change, the policy revision of 1934 was not an overnight project. In 1928 the Meriam Report, published at the request of Secretary of the Interior Hubert Work, pointed out that the two most serious deficiencies in Indian administration were the exclusion of Indians from managing their own affairs and the poor quality of public service rendered by public officials. In 1929 President Hoover appointed a new Bureau of Indian Affairs Commissioner who inaugurated a determined effort to do away with the major legal discriminations suffered by Indians. In 1932 Congress passed the Leavitt Act, which canceled a mass of debts unjustly attached to Indians by past administrations for wasteful, unneeded projects. Thus, Congress began to change its mood at least two years before the Indian Reorganization Act changed basic Indian policy.
The Wheeler-Howard Act, passed during the presidency of Franklin D. Roosevelt, could easily be called the “Indian New Deal.” As an answer to a century of abuse and maltreatment inflicted on a nearly helpless minority, the Act recognized the importance of the integrity and cohesiveness of the tribe in the social, political, and economic aspects of Indian life. For those tribes who voluntarily submit themselves to organization under the Act, substantial benefits are available. Although election under the Indian Reorganization Act is purely voluntary, of federally recognized tribes have been incorporated and chartered pursuant to the Act. Provisions of the Act include the end of land allotment in severalty, extension of trust or other protective restrictions on land already allotted, restoration of surplus lands to tribal ownership, authorization of the purchase of new lands for tribes, and the confirmation of numerous inherently sovereign powers. Through such provisions, Indian tribal government was strengthened and revitalized with an eye toward encouraging Indians to retain their communal way of life and exercise the inherent power of self-government they possess.

After the 1934 policy of Indian self-determination was inaugurated by Congress, other significant legislation followed. In 1935 Congress set up a special agency to assist Indians in marketing their native arts and crafts products. This exemplified the about-face in Indian policy, for after a century of efforts to eradicate the Indian culture, Congress was now subsidizing it. Congress granted tax exemptions to Indian homesteads purchased with Indian trust funds and extended provisions similar to the Wheeler-Howard Act to Oklahoma tribes, who had been previously exempted. The Supreme Court in 1938 recognized that minerals and timber on Indian lands belonged to Indians and not the government. Congress acted immediately on the basis of that decision and assured Indians the right to lease their own minerals.

The year 1940 saw Congress refund taxes that Indians had been forced to pay when trust-exempt estates were terminated without Indian consent. Again, in 1941, the Supreme Court construed Indian land title-holding to be that Indians have legal title to lands which they had occupied from time immemorial without regard to formal treaty confirmation. In an effort to free Indians from any burden they might feel from government protection, Congress, in 1948, conferred upon the Secretary of the Interior authority at his discretion to issue fee patents to land and remove restrictions on alienation and allotment for those Indian individuals who applied. At this point in time Indians could choose in which “civilization”
or culture they wished to belong. Indian tribes still retained enough sovereign powers to protect themselves and their members, but for Indian individuals who wished to assimilate with the Anglo society provisions were made so that the desired assimilation could be accomplished.

The choice of closer ties with the states and Anglo culture was available not only to Indian individuals, but to tribes as well. After consultation by the Bureau of Indian Affairs with the tribes affected, criminal jurisdiction was transferred to Kansas, North Dakota, Iowa, New York, and California. Under this same consultation method, California obtained civil jurisdiction over one reservation in 1949 and in 1950 New York obtained civil jurisdiction over the Indian tribes within its borders. The delegation of civil jurisdiction to a state by the federal government is a serious infringement on the inherent sovereignty of a tribe, for it withdraws intra-tribal disputes from tribal determination. Yet, such action is well within the wardship power of the federal government and could be considered a policy shift away from Indian self-determination. One prominent author notes such a move from 1948, the time Indian individuals were allowed to petition for fee patents. However, congressional action, such as the enlarging of the Rocky Boy's Reservation in Montana in 1950, is inconsistent with such a conclusion.

Any inconsistencies in congressional action were overcome in 1953 when Public Law 280 was passed. The mood of Congress had definitely changed. As an attempt at compromise between wholly abandoning jurisdiction over Indians to the states and maintaining them as wards subject only to federal or tribal jurisdiction, the statute transferred to five states and offered all others civil and criminal jurisdiction over reservation Indians, but did not terminate trust status. The legislation was without question an infringement on Indian sovereignty because jurisdiction was granted to the states involved and given to those that desired it without regard to tribal consent. As compromises often do, Public Law 280 left both the respective Indian tribes and the states dissatisfied—the Indians due to lack of state protection and the states because of the inability to finance their responsibilities in the newly acquired jurisdiction. In 1954 Congress took even stronger action by passing termination acts for several tribes and in 1956 continued the tactic. In 1958 Alaska was added to the Public Law 280 states which mandatorily have jurisdiction over Indian tribes.

The aforementioned action of Congress was so forceful that one Supreme Court opinion ventured to recognize it as a new period of
assimilation.\textsuperscript{201} Plainly the legislative branch undertook a new direction in 1953 and some experts view the action as a wearying of the federal government of its guardianship role.\textsuperscript{202} However, such conclusions are not supported by further legislation as the forceful action came to a standstill. Congress found termination acts were more easily passed than implemented,\textsuperscript{203} and the response to Public Law 280 by optional states was not great.\textsuperscript{204}

Congress failed to produce broad legislation during the early 1960's and not until 1968 was any policy direction implied by legislation. At that time Congress provided in the Civil Rights Act of 1968 actions indicated that no policy of assimilation was in force or diction without Indian consent and also authorized states to return jurisdiction to the federal government.\textsuperscript{206} Actions consistent with wardship and Indian self-determination continued, for in 1970 the Secretary of Agriculture was authorized to make loans to tribal corporations established under the Indian Reorganization Act,\textsuperscript{207} Quapaw Indian restrictions were extended an additional 25 years from 1971,\textsuperscript{208} and the act dealing with final disposition of the Choctaw Tribe was repealed.\textsuperscript{209} In 1972 Indian tribes were authorized to participate in federal revenue-sharing funds.\textsuperscript{300} Although these post-1968 actions indicate that no policy of assimilation was in force or if in force was terminated, in 1973 doubts were resolved as Congress repealed the Act terminating the Menominee Indians and reinstated all rights and privileges of the tribe.\textsuperscript{301}

Current federal policy is designed to encourage stronger tribal governments,\textsuperscript{302} which was the object of the 1934 policy change. The shift in congressional mood in the 1950's was relatively short-lived and had some distressing consequences.\textsuperscript{308} But plainly it represents that Indian tribes are no longer immune from state control as early Supreme Court decisions intimate.\textsuperscript{304} The early complete exclusion of states from intercourse with Indian tribes has been undermined and the pattern of that erosion is not yet clear.\textsuperscript{305}

\textbf{NOTES}

1. Margold, \textit{Powers of Indian Tribes}, 55 \textsc{Dep't of Interior} (Dec. 14, 1934) [hereinafter cited as Margold]; F. Cohen, \textit{Federal Indian Law} (1945) [hereinafter cited as Cohen].

2. Margold, \textit{supra} note 1, at pp. 30-32.


5. See Margold, supra note 1, at 42-46.
7. Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975).
9. Id.
10. Id.; Gritts v. Fisher, 224 U.S. 640 (1912); Hayes v. Barringer, 168 F. 221 (8th Cir. 1907).
15. Id. at 232.
17. Oliver, supra note 12, at 230.
18. For examples of court construction of various sovereign powers exercised by tribes, see supra notes 2-11.
20. Oliver, supra note 12, at 203.
25. Id. at 17.
26. Id. at 17-18.
27. Id.
28. Oliver, supra note 12, at 228.
31. Oliver, supra note 12, at 195.
32. Jurisdiction was obtained by federal courts because a white citizen was involved. See also Swindler, supra note 23.
33. 30 U.S. (5 Pet.) 1 (1831).
34. Id. at 17-20.
36. Id.
37. Id. at 542, "America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their 'own laws.'"
38. Id. at 544-45.
39. Id. at 544.
40. Id. at 546.
41. Id. at 548-61.
42. Id. at 553.
43. Id. at 557.
44. Id. at 556.
46. Id. at 219.
47. Id. at 223.
48. Id.
51. Id. at 148.
52. Id.
56. Id.
57. Kansas Indians, 72 U.S. 737, 755 (1866): “If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a people distinct from others . . . separated from the jurisdiction of Kansas and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority.” See The New York Indians, 72 U.S. 761 (1866).
59. Id. at 169-70.
60. Id. at 171.
61. Id. at 172.
62. Id. at 171-72.
63. The Constitutional Rights of the American Tribal Indian, 51 VA. L. REV. 121, 141 (1965) [hereinafter cited as Constitutional Rights].
64. 112 U.S. 94 (1884).
65. Id. at 100.
66. See Constitutional Rights, supra note 63, at 129.
67. 163 U.S. 376 (1896).
68. Id. at 384.
69. Constitutional Rights, supra note 63, at 130.
70. Talton v. Mayes, 163 U.S. 376, 384 (1896): “It follows that as the powers of local self-government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government.”
71. Id. at 383-85. See also The American Indian—Tribal Sovereignty and Civil Rights, 51 IOWA L. REV. 665-69 (1966) [hereinafter cited as American Indian].
72. For example, in Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir.), cert. denied, 356 U.S. 960, reh. denied, 357 U.S. 924 (1957), Talton was a controlling precedent in a holding that a tribe may determine its membership without fifth amendment restrictions. See also Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959); Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956), for the rule that the Constitution is binding upon Indian
tribes only where it expressly binds them, or is made binding by treaty or by an act of Congress, and federal courts have no jurisdiction over a claim of violations by tribal governments of the first and fifth amendments.


75. The variations were as follows: the establishment of religion is not prohibited; the right to counsel is guaranteed only at the defendant’s own expense; and complementing the statute’s limitation of Indian courts to criminal penalties of six months and $500 for one offense, there is no right to indictment by a grand jury and the petit jury right assures a jury of six members in all cases involving the possibility of imprisonment. 25 U.S.C. § 1302 (1968). See Indian Rights, supra note 74. The courts have noted that certain procedural requirements of the fifth, sixth, seventh, and in some respects the fourteenth, amendments, were not imposed by the Act. See Tom v. Sutton, 553 F.2d 1101, 1104 (9th Cir. 1976); McCurdy v. Steele, 506 F.2d 653, 655 (10th Cir. 1974); Groundhog v. Keeler, 442 F.2d 674, 682 (10th Cir. 1971).


77. The National Tribal Chairman Association adopted a resolution December 5-6, 1973, calling for an amendment to Section 1301 which would require tribal consent to the Act. See 1 Indian L. RpTR. no. 1, pp. 63-65.


79. 506 F.2d 1231 (4th Cir. 1974).

80. Id. at 1236.

81. Indian Rights, supra note 74, at 1355.

82. In Yellow Bird v. Oglala Sioux Tribe, 380 F. Supp. 438 (D.C.S.C. 1974), the court stated that the legislative history of the Indian Civil Rights Act indicates that the Anglo definition of equal protection is not to be embraced in its entirety by that Act. In Lohnes v. Cloud, 336 F. Supp. 620, 623 (D.C.N.D. 1973), “...the thrust of the courts’ reasoning is that the lengthy legislative history of the Indian Civil Rights Act and a long standing federal policy of respect for tribal self-determination require that a clear distinction be maintained between the requirements imposed on the tribe through the Indian Civil Rights Act and the requirements imposed upon federal and state governments through the Bill of Rights and the United States Constitution.” 1 Indian Civil Rights Act—Developing Doctrines, Indian L. RpTR. no. 1 pp. 29, 32. In Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976), it was held that the due process requirement in the Indian Civil Rights Act does not require tribal courts to provide counsel for indigent defendants in criminal cases, in light of another provision in the Act providing that a person may have counsel at his own expense. In McCurdy v. Steele, 506 F.2d 653, 655 (10th Cir. 1974), the court stated: “The Act tracks to some extent the language of the United States Constitution, but this does not necessarily mean that the terms ‘due process’ or ‘equal protection’ as used in the act carry their full constitutional impact.” But see Johnson v. The Lower Elwha Tribal Community, 484 F.2d 200 (9th Cir. 1973), which contained dicta to the effect that “it was the clear intention of that body [Congress] that the due process

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restrictions of the bill should be interpreted in the same way when applied to a tribe as when applied to the United States or to the States." And in White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973), it was held that the one man, one vote principle is applicable to tribal elections of a tribe which has established voting procedures precisely paralleling Anglo procedures, under the equal protection clause of the Indian Civil Rights Act.

83. Indian Civil Rights Act—Developing Doctrines, 1 Indian L. Rptr. No. 1, pp. 29, 32; Indian Rights, supra note 74, at 1355.

84. Laramie v. Nicholson, 487 F.2d 315 (9th Cir. 1973), cert. denied, 419 U.S. 871; Thompson v. Tonasket, 487 F.2d 316 (9th Cir. 1973), cert. denied, 419 U.S. 871; Daly v. United States, 482 F.2d 700 (8th Cir. 1973). See also Johnson v. Lower Elwha Tribal Community, 484 F.2d 200 (9th Cir. 1973).

85. 30 U.S. (5 Pet.) 1 (1831).

86. Id. at 17-18.

87. Oliver, supra note 12, at 203.


90. See Holden v. Joy, 84 U.S. 211, 242 (1872); Mackey v. Coxe, 59 U.S. 100, 103-104 (1855); Margold, supra note 1, at 51-53.

91. F. Cohen, Federal Indian Law 91 (1946). Plenary means full and complete; plenary power is power as broad as equity and justice require, according to Ballentine’s Dictionary 955-56 (1969).


93. Constitutional Rights, supra note 63, at 129.


95. U.S. Const. art. I, § 8: "The Congress shall have power . . . to regulate commerce with foreign nations and among the several states, and with the Indian tribes."

96. 118 U.S. 275 (1886).


98. United States v. Kagama, 118 U.S. 375, 383-84 (1886). "It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power."

99. Id. at 378-79; The commerce clause has been construed as the basis of congressional action in many cases, most notably cases which involve the sales of liquor. See Ex parte Webb, 225 U.S. 695 (1912); United States v. Forty-Three Gallons of Whisky, 93 U.S. 188 (1876); United States v. Holliday, 70 U.S. 407 (1855). See also Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1889), where the Court in upholding the federal power of eminent domain over Indian lands in Indian

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Territory, noted that this power was consistent with the commerce clause. That case challenged federal statutes granting railroad right-of-ways through Indian lands.

100. 187 U.S. 553 (1903).


102. The lack of jurisdiction over controversies of a political nature is a standard constitutional doctrine not limited to Indian matters, which gives the courts considerable leeway to avoid case decision. But the courts have passed on the constitutionality of federal legislation affecting Indians. For example, see Stephens v. Cherokee Nation, 174 U.S. 445 (1899), where the constitutionality of statutes which gave the Dawes Commission the power to make up tribal rolls for the Five Tribes and decide citizenship claims was upheld.

103. United States v. Alcea Band, 329 U.S. 40 (1946); Stephens v. Cherokee Nation, 174 U.S. 445 (1899). This view is considered a complete and accurate summary of a century and a half of statutes and decisions. See also Oliver, supra note 12, at 195.

104. Margold, supra note 1, at 19.

105. Id.


108. Seufert Bros. Co. v. United States, 249 U.S. 194, 198 (1919); United States v. Winans, 198 U.S. 371 (1904); Jones v. Meehan, 175 U.S. 1, 11-12 (1899); Choctaw Nation v. United States, 119 U.S. 1, 27-28 (1886); Kansas Indians, 72 U.S. 737, 760 (1866); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 552 (1832). The above cases apply and/or repeat the following principle of treaty construction: "We will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counter poise the inequality 'by the superior justice which looks only to the substance of the right without regard for technical rules'."


115. 67 Stat. 590 (1953). Section 7 of that statute provided: "The consent of the United States is hereby given to any other state not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, . . . to
assume jurisdiction at such time and in such manner as the people of the state shall by affirmative legislative action, obligate and bind the state to assumption thereof.”

116. See infra footnote 288, where tribes have been terminated. See also Oliver, supra note 12, at 210.


118. Oliver, supra note 12, at 203.


120. 187 U.S. 553 (1903).

121. Id. at 568. “We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts.”


124. U.S. Const. art. I, § 2: “He [the President] shall have power, by and with the advice and consent of the Senate to make treaties, provided two-thirds of the senators present concur.”


127. U.S. Const. art. IV, § 3: “New states may be admitted by the Congress into this Union; but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the jurisdiction of two or more states or parts of states without the consent of the legislatures of the state concerned as well as of the Congress.”

128. The Oklahoma Enabling Act, 34 Stat. 1286 (1907) provides that the people may adopt a constitution, provided that nothing contained in the constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians so long as such rights shall remain unextinguished, or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if the Act had never been passed. This reservation of the authority of Congress to legislate in the future respecting Indians has been held constitutional, Ex parte Webb, 225 U.S. 663 (1912). And the broad power of Congress to interfere with the affairs of Oklahoma tribes and their property has been recognized since statehood in numerous cases. See Bunch v. Cole, 263 U.S. 250 (1923); Tiger v. Western Inv. Co., 221 U.S. 286 (1911). See also Organized Village of Kake v. Egan, 369 U.S. 60 (1962), which discusses the effect of the Alaska Enabling Act on the federal relationship with Alaska tribes. For other enabling acts preserving federal control over Indians and their lands, see 28 Stat. 109 (1894) (Utah); 36 Stat. 557 (1910) (New Mexico); 25 Stat. 676 (1889).

129. The federal treaty power has been deemed exclusive since constitutional ratification. Truly, any effort on the part of a state to make an alliance with a foreign or even a domestic power (Indians) in the nature of a treaty would be viewed as void by the federal government and possibly even an act of rebellion.

130. American Indian, supra note 71, at 662.


133. Id. at 597-98.

134. 118 U.S. 375, 379 (1886).

135. Oliver, supra note 12, at 106.


137. 118 U.S. 375 (1886).

138. 187 U.S. 553 (1903).

140. Choctaw Nation v. United States, 119 U.S. 1, 27 (1886).

141. Id. at 37-38. It is notorious historical fact that great pressure has been brought upon Indians, not so much for their benefit as to effectuate other policies of the United States.

142. Wardship extends to authorize the United States to exercise the power to legislate in favor of Indians to a state’s detriment. Minnesota v. United States, 125 F.2d 636, 640 (8th Cir. 1942).

143. United States v. Kagama, 118 U.S. 375, 384-85 (1886). “It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.”

144. 318 U.S. 705 (1943).

145. Id. at 715.

146. Id. See also Tiger v. Western Inv. Co., 22 U.S. 286, 310 (1911); United States v. Kagama, 118 U.S. 375, 384-85 (1886).

147. Tiger v. Western Inv. Co., 221 U.S. 286, 315 (1911). “Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.”


149. Oliver, supra note 12, at 241.


152. Brader v. James, 246 U.S. 88, 96 (1918); Kansas Indians, 72 U.S. 737, 757 (1886).


154. 197 U.S. 488 (1905).


160. American Indian, supra note 71, at 655. The Indian is, "(1) a member of a tribe which is treated for many purposes as if it were a foreign sovereign, (2) a 'ward' of the federal government, and (3) a United States citizen." U.S. COMMISSION ON CIVIL RIGHTS, Rep. No. 5, JUSTICE 125 (1961).


164. American Indian, supra note 71, at 656.


167. See Treaty of Dancing Rabbit Creek with Choctaw Nation, 7 Stat. 333, 334 (1831); Treaty of Hopewell with Cherokees, 7 Stat. 18 (1785); Treaty with Cherokees, 7 Stat. 39, (1792); Treaty with Six Nations, 7 Stat. 15 (1784). These treaties recognized the power to make war, provided for prisoner exchange, and fixed hostage provisions.


169. Treaty with Creek Nation, 7 Stat. 35 (1790); Treaty with Cherokees, 7 Stat. 39 (1792). See also Cohen, supra note 1, at ch. 4, § 6.


171. Constitutional Rights, supra note 63, at 127; Higgins, supra note 163, at 85.


173. American Indian, supra note 71, at 656.

174. 1 Stat. 137 (1790). The statute provided for trade licenses between United States territories and that occupied by Indians. See also 1 Stat. 329 (1795); 1 Stat. 452 (1796); 1 Stat. 743 (1799); 2 Stat. 139 (1802); 2 Stat. 402 (1806).

175. Higgins, supra note 163, at 85.

176. 3 Stat. 383 (1817).

177. Oliver, supra note 12, at 199.

178. 3 Stat. 516 (1819).

179. 30 U.S. (5 Pet.) 1 (1831).

180. 118 U.S. 375 (1886).

181. Oliver, supra note 12, at 199.
By the 1800’s the eastern Indians had begun to complain to the federal government of the infringement of Anglo settlers who were stealing their livestock, trespassing, and settling on their land. It was initially out of sympathy to Indian claims and the inability of the federal government to protect their interests that treaties of removal were offered. But only a few, if any, Indians actually desired removal and although removal treaties were eventually signed, removal did not take place voluntarily. Andrew Jackson, being an Indian fighter, did not hesitate to move the Indians against their will and thus began an important era in Indian history. From the Jackson administration forward, the idea of strict observance of Indian treaties faded. As often as not Indians were forced to move to prescribed areas different and distant from treaty honored hunting grounds. See also Higgins, supra note 163, at 82. See also Swindler, supra note 23.

183. Laws of Colonial and State Governments Relating to Indians and Indian Affairs (1833). See also Prucha, American Indian Policy in the Formative Years (1961).


185. Id.


188. Abbott, supra note 172, at 171.


192. 4 Stat. 411 (1830).

193. 4 Stat. 564 (1832).

194. 4 Stat. 735 (1834).

195. 5 Stat. 135 (1837).

196. Oliver, supra note 12, at 200; Jurisdiction, supra note 13, at 242; American Indian, supra note 71, at 659.

197. 16 Stat. 570 (1871), which provides that “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 United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be invalidated or impaired.”

198. Constitutional Rights, supra note 63, at 127.

199. Abbott, supra note 172, at 173.


201. Abbott, supra note 172.


203. ManyFenny, Our Indian Wards 416 (1880); Oliver, supra note 12, at 201.

204. Id.

205. Id.

206. In considering whether an agreement provision has been superceded by a general law, an agreement is accorded the same status as a special law. Marlin v. Lewallen, 276 U.S. 58, 67 (1928); Washington v. Miller, 235 U.S. 422 (1914). And in Dick v. United States, 208 U.S. 340, 359 (1908) the Court determined that a prohibition against liquor contained in an 1893 Nez Perce agreement was a “valid regulation based upon the treaty-making power of the United States and upon the power of Congress to regulate commerce with those Indians.”

207. Ex parte Crow Dog, 109 U.S. 556, (1883). Crow Dog had made the amends
demanded by Indian customs for his act, but federal authorities pursued an indictment for murder. See 1 Haas, The Indian and the Law (1949).


210. 118 U.S. 375 (1886).

211. Abbott, supra note 172, at 173.


213. 23 Stat. 385 (1885).


215. Constitutional Rights, supra note 63, at 129.


217. 24 Stat. 388 (1887). The General Allotment Act of 1887 had three principle provisions: (1) individual citizenship to Indians who took allotted lands, (2) individual Indian ownership of allotted land, and (3) sale of surplus reservation land after allotment. See also Fruchta, American Indian Policy in the Formative Years 44-50, 238 (1961).

218. Amendments to the allotment system as established by the General Allotment Act, supra note 217, were as follows: 26 Stat. 794 (1891); 28 Stat. 386 (1894); 28 Stat. 641 (1895); 36 Stat. 269 (1910). In 27 Stat. 612, 645 (1893) Congress inaugurated a policy of the allotment of the lands of the Five Civilized Tribes in Oklahoma. The allotment acts for these tribes were embodied in various agreements: Cherokee Agreement, 32 Stat. 716 (1902); Choctaw and Chickasaw Agreement, 30 Stat. 495, 505-13 (1848); Creek Agreements, 31 Stat. 861 (1901); 32 Stat. 500 (1902); Seminole Agreement, 30 Stat. 567, 568 (1848). These agreements were supplemented by a volume of legislation, Cohen, supra note 1, at 435-38. See also Osage Allotment, 34 Stat. 439 (1906); 25 U.S.C. § 331-58 (1970).

219. Individual rights in occupancy of communal tribal lands have been described as follows: While tribal members had vested equitable rights to their just share of communal lands as against strangers and fellow members of their tribes, they had no separate or individual right to or equity in any of those lands which they could maintain against the legislation of the United States or tribal legislation, Cherokee Nation v. Hitchcock, 187 U.S. 553 (1902); Stephens v. Cherokee Nation, 174 U.S. 445 (1899). The tribes with respect to tribal land were not limited by rights of occupancy which the tribe itself might grant to its members, and the occupancy of tribal land did not create any vested rights in the occupant as against the tribe. Sizemore v. Brady, 235 U.S. 444 (1914); Gritts v. Fisher, 224 U.S. 540 (1911).

220. Cohen, supra note 1, at 78. See also Oliver, supra note 12, at 234; Otis, The Dawes Act and the Allotment of Indian Lands (1972).


222. Abbott, supra note 172, at 175.

223. American Indian, supra note 71, at 663.

224. Abbott, supra note 172, at 236.

225. Oliver, supra note 12, at 236.
227. Jurisdiction, supra note 13, at 293.
228. Oliver, supra note 12, at 236.
229. Id.
230. 142 U.S. 107 (1891).
231. Id. at 112.
232. Id. at 115-16. “The policy of Congress has evidently been to vest in the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization.”
233. In addition to special statutes, such as the Indian Territory Naturalization Act, 26 Stat. 81, 99-100 (1890), which provided for application for naturalization by members of particular tribes, there were general statutes naturalizing allottees, see 24 Stat. 388, 390 (1887), as amended by 34 Stat. 182 (1906). There were also general statutes which naturalized women who married United States citizens, 25 Stat. 392 (1888), 25 U.S.C. § 182 (1970), and which naturalized Indian men who enlisted to fight in the First World War, 41 Stat. 350 (1919). In 1924 Congress gave a general grant of citizenship to Indians born in the United States, 43 Stat. 253 (1924), but this act was repealed by 54 Stat. 1137, 1138 (1940), which enacted a similar provision, see 8 U.S.C. § 1301(2) (1970).
234. 197 U.S. 488 (1905).
235. Id. at 494.
236. 241 U.S. 559 (1916).
239. Constitutional Rights, supra note 63, at 236.
240. Jurisdiction, supra note 13, at 293.
241. Oliver, supra note 12, at 203.
242. Jurisdiction, supra note 13, at 293.
244. Oliver, supra note 12, at 203.
246. Id. See also Cohen, The Erosion of Indian Rights 1950-1953: A Case Study in Bureaucracy, 62 Yale L.J. 348 (1953) [hereinafter cited as Cohen].
247. Id.
248. MERIAM ET AL. THE PROBLEM OF INDIAN ADMINISTRATION (1928).
249. Cohen, supra note 246, at 348.
250. MERIAM ET AL. THE PROBLEM OF INDIAN ADMINISTRATION (1928). See also COHEN, supra note 1, at 26-27, 83-97.
251. Cohen, supra note 246, at 348.
252. 47 Stat. 564 (1932).
253. Cohen, supra note 246, at 349.
255. American Indian, supra note 71, at 664.
256. Id.
258. Oliver, supra note 12, at 203.
259. Margold, supra note 1. According to this authority, tribal powers of internal sovereignty are vested in tribes under existing law within the meanings of Section 16.
of the Indian Reorganization Act (Wheeler-Howard Act), which provides: "In addition to all powers vested in any Indian tribes or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers..." Thus this provision protects such vested powers, and the manner of their exercise may be expressly defined or limited by the terms of a constitution adopted by a tribe and approved by the Secretary of Interior.

260. Oliver, supra note 12, at 236.
262. Cohen, supra note 246, at 350.

264. Provisions in the Wheeler-Howard Act, 48 Stat. 984 (1934), explicitly excluded Oklahoma tribes from coverage in sections 2, 4, 7, 16, and 17. The Oklahoma Indian Welfare Act, 49 Stat. 1967 (1936), provided for the acquisition of land for agriculture and grazing, a preference to the Secretary of Interior in buying restricted land, the right to organize and incorporate as a tribe or as a cooperative association, loans to the corporations or associations, the sharing of Wheeler-Howard Act funds with Oklahoma tribes, and a provision excepting Osage County from the provisions of the Act.

266. 52 Stat. 347 (1938).

271. 54 Stat. 249 (1940). Kansas was given criminal jurisdiction over all Indians residing within its borders. The statute continues federal jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations. This statute was repealed by 62 Stat. 1161 (1948) and jurisdiction is now covered by 18 U.S.C. § 3234 (1970).
272. 60 Stat. 229 (1946). North Dakota was given criminal jurisdiction over Devil's Lake Reservation. The statute continues federal jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.
273. 62 Stat. 1161 (1948). Iowa was given criminal jurisdiction over all Indians residing within its borders. The statute continues federal jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.
274. 62 Stat. 1224 (1948). New York was given criminal jurisdiction over all Indians residing within its borders.
275. 63 Stat. 705 (1949). California was given criminal and civil jurisdiction over the Agua Caliente Reservation.
276. Id.
277. 64 Stat. 845 (1950). The act contains a provision allowing the governing bodies of New York tribes to declare those tribal laws and customs which they desire to preserve, which will be published in the Federal Register and govern in all civil
cases involving reservation Indians when the subject matter of such tribal laws and customs is involved, and provides: "Nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts. . . ." The act also protects Indian lands from taxation, execution sales, and alienation, protects hunting and fishing rights. In Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 680 (1974), the Court noted that during consideration of this legislation, "both federal and state officials agreed that the bill would retain ultimate federal power over the Indians and that federal guardianship, particularly with respect to property rights, would continue." For discussion of this legislation, see The New York Indians' Right to Self-Determination, 22 BUFFALO L. REV. 985 (1973) and 25 U.S. 332 (1970).


279. Oliver, supra note 12, at 237.

280. 64 Stat. 463 (1950).


282. Oliver, supra note 12, at 237.

283. Goldberg, supra note 270, at 537.


285. 28 U.S.C. § 2460(b) (1970); 28 U.S.C. § 1162(b) (1970). In 1954 an act was passed providing for the termination of the federal trust relationship as to property of mixed blood Utes in Utah, making federal legislation inapplicable to them, making them ineligible for federal services, and making state law applicable to them. 68 Stat. 868 (1954).


287. Goldberg, supra note 270, at 538, 551-58. "Local governments acquiring jurisdiction were required to hire more police, more judges, more prison guards, more probation and parole officers, and more juvenile aid officers, and to build new police stations, courthouses, and jails. . . . The new resources available to the states under PL 280 such as fines and court costs were clearly inadequate; estimates based on federal experience indicated such funds would cover only about 10 percent of all newly-acquired law enforcement expenses. . . . Financial hardship for the states translated into inadequate law enforcement for the reservations."


290. Id.


292. Oliver, supra note 12, at 241.
293. Expenses were great and required appropriations legislation for the expenses and delays were not uncommon. For example, see 71 Stat. 260 (1957); 71 Stat. 347 (1957); 72 Stat. 158 (1958); 72 Stat. 290 (1958); 73 Stat. 95 (1959); 74 Stat. 867 (1960).

294. See Goldberg, supra note 270.


302. Goldberg, supra note 270, at 594. In 1971 Congress acknowledged a policy of Indian self-determination in Senate Concurrent Resolution 26, passed on December 11, 1971, which states in part: “That it is the sense of Congress that—(1) our national Indian policy shall give full recognition to and be predicated upon the unique relationship that exists between this group of citizens and the Federal Government and that a government-wide commitment shall derive from this relationship that will be designed to give Indians the freedom and encouragement to develop their individual, family, and community potential and to determine their own future to the maximum extent possible. . . . (3) improving the quality and quantity of social and economic development efforts for Indian people and maximizing opportunities for Indian control and self-determination shall be a major goal of our National Indian policy.” In 1975 Congress created the American Indian Policy Review Commission, whose duty was to make a comprehensive investigation and study of Indian affairs. The Commission was designed to include Indian input and participation, and its recommendations may determine congressional policy for many years to come. See The American Indian Policy Review Commission: A Prospect for Future Change in Federal Indian Policy, 3 AM. INDIAN L. REV. 243, 262 (1975).

303. 5 U.S. COMM’N ON CIVIL RIGHTS, REPORT: Justice. Note 5021, at 148 (1961) (particularly the lawlessness on Indian reservations after states took jurisdictional control under Public Law 280).


305. Goldberg, supra note 270, at 535.