ARTICLES

Two Promises, Two Propositions: The Wheeler-Howard Act As a Reconciliation of the Indian Law Civil War

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I. INTRODUCTION

Increasingly over the last thirty years, American Indian tribes have asserted broad governmental power over persons living and doing business within the boundaries of Indian reservations. These persons include as many as 350,000 non-Indian reservation residents and countless other nonmembers.\(^2\)

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2. As will be explained later, nonmembers generally stand in the same shoes as non-Indians. See infra notes 319-321 and accompanying text. Thus, the terms “non-Indian” and “nonmember” should be read interchangeably. See generally Duro v. Reina, 110 S.Ct. 2053 (1990).
who conduct business on the reservations.3 Surprised and angered at such assertions, nonmembers have begun challenging tribes on the ground that such assertions are beyond the scope of tribal governmental power.

In the face of these challenges, courts have had difficulty articulating the nature and scope of tribal governmental power. The United States Supreme Court has stated that Indian tribes are “unique aggregations possessing attributes of sovereignty over both their members and their territory.”4 It is said that those attributes of sovereignty that have never been extinguished5 retain their preconstitutional status; those attributes are thereby shielded from constitutional scrutiny.6 In theory, of course, Indian tribes must respect some of the Bill of Rights protections as embodied in the Indian Civil Rights Act of 1968 (ICRA).7 In fact, constitutional protections are often unavailable because of the Supreme Court’s holding in Santa Clara Pueblo v. Martinez8 that, except for habeas corpus, tribal forums enjoy exclusive jurisdiction over actions brought to enforce the ICRA; therefore, there is absolutely no guarantee that Indian tribes will provide due process or equal protection in the exercise of their governmental powers.9 Such

5. Congress has plenary power to limit, modify or eliminate the powers of local self-government that the tribes otherwise possess. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); see also Stephens v. Cherokee Nation, 174 U.S. 445 (1899); Head Money Cases, 112 U.S. 580 (1884); The Cherokee Tobacco Case, 78 U.S. 616 (1870).
9. Id. at 59. Indeed, according to the United States Department of Justice, “substantial evidence now exists that tribal forums may . . . fail fully to protect individuals from arbitrary and unfair action[s] of tribal governments.” Letter from John R. Bolton, Assistant Attorney General, to Senator Daniel Inouye, Chairman, Senate Select Committee on Indian Affairs (Jan. 26, 1988) [hereinafter “Bolton Letter”]. No doubt, such abuse stems partly from the fact that most tribal governments lack any separation of powers. A 1984 presidential commission found that “the failure to establish a clear separation of powers between the tribal council and the tribal judiciary has resulted in political interference with tribal courts, weakening their independence, and raising doubts about fairness and the role of law.” Report and Recommendations to the President of the United States, The 1984 Report of the Presidential Commission on Indian Reservation Economies, Part One, 29. In many cases tribal courts are simply an arm of the tribal council; at the council’s whim judicial orders may be quashed and judges may be removed or even barred from holding any further political offices. See, e.g., Runs After v. United States, 766 F.2d 347 (8th Cir. 1985); Shortbull v. Looking Elk, 677 F.2d 645 (8th Cir. 1982). The Justice Department notes that “in at least 27 tribes the council hears appeals from tribal court
a scheme is an American civil rights anomaly.\textsuperscript{10}

For example, one of the preconstitutional powers of an Indian tribe is the power to select the members of the tribe.\textsuperscript{11} Only members may participate in the tribal governmental process. Thus, simply because of their race,\textsuperscript{12} non-Indians are denied the right to vote in tribal elections, the right to participate as candidates for tribal office, and the right to organize and meaningfully participate in the tribal political process. In any other context, the denial of such fundamental rights by a local government would be quickly challenged and struck down as unconstitutional.\textsuperscript{13} For historical reasons, however, Indian tribal governments merit special consideration.

The United States made treaty promises to Indians whereby the tribes were removed to lands where they were to continue to enjoy their original independence and sover-

\textsuperscript{10} Confronted with this constitutional anomaly in the criminal context, the Supreme Court flatly denied that tribes possessed any such powers. By virtue of their dependent status, Indian tribes have been implicitly divested of criminal jurisdiction over non-Indians, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), and nonmember Indians. Duro v. Reina, 110 S.Ct. 2053 (1990).

\textsuperscript{11} Roff v. Burney, 168 U.S. 218 (1897).

\textsuperscript{12} Some might argue that the tribes are not racially based organizations but rather political organizations. The distinction is illusory, however, because unless a person has a certain blood quantum he or she may not become a tribal member. Thus, race is the crucial, if not determinative, factor with respect to tribal membership. Cf. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 52-53 (1978); but see Morton v. Mancari, 417 U.S. 535, 551-55 (1974).

\textsuperscript{13} See, e.g., Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (striking down an annual poll tax of $1.50); Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (striking down statute limiting the right to vote in school district elections to people who either (i) owned or leased property within the district or (ii) were parents of children in the district’s public schools); Turner v. Fouche, 396 U.S. 346 (1970) (right to participate as a candidate for political office); Williams v. Rhodes, 393 U.S. 23 (1968) (right to organize and meaningfully participate in the political process).
Pursuant to these treaties and the overall early federal policy of nonintercourse with Indian tribes, non-Indians were forbidden to pass over or settle on these reservations. In light of this nonintercourse policy, the treaties essentially promised that, in exchange for confining themselves to reservations, the tribes would be allowed to retain their powers of self-government over tribal members in Indian country. This Article will refer to this promise of tribal self-government as "the first promise."

Pursuant to its plenary power over Indian affairs, the United States later broke its first promise, however, by breaking up the communal tribal property system. In its stead, through the allotment acts of the late 1800s, the federal government instituted a system of private property ownership. Under those acts, individual Indians were allotted 160-acre parcels carved from reservation lands. The allotment acts were an effort to "Americanize" the Indians; that is, to teach them the virtues of farming and private property ownership and, eventually, to make them American citizens. To further this policy of assimilation, the allotment acts provided that Indian allottees were to have "the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside . . . ." Thus, Indians were to be subject to the

16. See, e.g., Treaty with Yakima Nation, 12 Stat. 951 (1859). This language merely duplicated what was already federal law under the nonintercourse acts.
17. "It is long settled the 'the provisions of an act of Congress, passed in the exercise of its constitutional authority, . . . if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty.' . . . This Court [has] applied that rule to congressional abrogation of Indian treaties. . . ." United States v. Dion, 476 U.S. 734, 738 (1986) (quoting Fong Yue Ting v. United States, 149 U.S. 698, 720 (1893)).
white men’s law, but the white men were to be free from tribal law.

When the United States abrogated its treaty promises, it also made new promises—to which this Article will collectively refer to as “the second promise”—to non-Indian American citizens. To facilitate the process of assimilation of Indians into American society, the federal government invited non-Indians to purchase surplus reservation lands and to establish their homes and businesses there. Inherent in this invitation was the non-Indian expectation that they would be governed by, and be afforded the protections of, state (or territorial) and federal law.20 Indeed, the allotment acts contemplated the end of all tribal governmental power.21

The current “civil war”22 being waged over the extent of tribal government power over nonmembers23 and their lands and resources within the original reservation boundaries simply reflects the tension24 between the two sets of promises: the first promise made to the Indian tribes in the treaties and the second promise made to non-Indian citizens in the allotment acts. In federal judicial forums, litigants generally base their arguments on either the first promise or the second promise. For that reason, federal courts must often reconcile the two.

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20. See Montana, 450 U.S. 560 n.9. See also allotment acts discussion, infra notes 124-149 and accompanying text.
21. See infra notes 124-149 and accompanying text.
22. “The United States is in the midst of a new civil war. Unlike the last civil war, it is not between the states and the Union; rather, it is a challenge by American Indian tribes against states and the United States. Unlike the last one, this civil war has seen many of its battles occur in state and federal courts.” Martone, American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?, 51 Notre Dame L. Rev. 600 (1976) [hereinafter Martone, Congressional License?].
23. This Article uses the terms “nonmember” and “non-Indian” interchangeably.
24. A more general articulation of this tension is as follows: “The principle of self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the States, on the other.” Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 156 (1980) (citing McClanahan v. Arizona State Tax Comm’n, 411 U.S. 164, 179 (1973)). Notice that the quote implicitly ignores the interest of the federal government in protecting its non-Indian citizens from assertions of power from a government in which they have no voice. But see Duro v. Reina, 110 S.Ct. 2053, 2063 (1990) (“we hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them.”); Brendale, 109 S.Ct. 2994, 3011 (1989) (Stevens, J., noting that it is “improbable that Congress envisioned that the Tribe would retain its interest in regulating . . . nonmembers who lack any voice in setting tribal policy.”).
Academic commentators, however, generally focus only on the first promise, largely ignoring the ramifications of the second. In an attempt to open up the academic debate, therefore, section II of this Article will examine the nature and scope of tribal governmental power, and will survey and critique the competing theories thereon.

This Article submits that the Indian law “civil war” can be settled through a judicial interpretation of the Wheeler-Howard Act’s reconciliation of the two promises. In section III(C), perhaps for the first time, the legislative history of that major piece of legislation will be thoroughly tracked and analyzed.

With that legislative history as a backdrop, section IV rethinks the state of Indian law, beginning with an analogy to the tenth amendment. Applying that analogy, this Article argues that current Supreme Court reasoning concerning the reserved powers of state governments undermines Supreme Court reasoning with respect to the retained powers of tribal governments. This Article also argues that tribal assertions of power over nonmembers constitute “state action” and, as such, should be subject to constitutional due process and equal protection constraints. Third, this Article will apply its thesis by discussing and critiquing a recent Supreme Court decision concerning tribal zoning authority over nonmembers. Fourth, the Article posits an explicit theory concerning tribal governmental powers that is consistent with the legislative history of the Wheeler-Howard Act and the implicit reasoning of recent Supreme Court decisions.

As part of this theory, this Article also posits two general normative propositions that will help produce a just and efficient resolution of the current civil war within Indian country. First, subject to extensive federal oversight and control, an Indian tribe should maintain exclusive jurisdiction over its tribal members and their property and resources. This first proposition allows the tribes to maintain their powers of internal self-government. Second, states should maintain exclusive jurisdiction over nonmembers and their property and resources. This second proposition should ameliorate the cur-

rent threat to constitutional protections afforded nonmember citizens.

Finally, to ensure that these general propositions do not operate too harshly and do not nullify each other in practical operation, this Article proposes that the Court explicitly establish and apply a mirror image, strict scrutiny test that is consistent with the implicit reasoning of some recent Court decisions. Under this test, tribes would maintain some jurisdiction over nonmembers or their property and resources, but only if such tribal jurisdiction is necessary to protect the tribe's effective control over its members, their property, or resources. Likewise, in similar circumstances, states would maintain some jurisdiction over tribal members and their property and resources. This test thus recognizes that some tension between these two propositions might still remain, and provides a means of resolving that tension. This Article, therefore, offers a practical escape from the current jurisdictional labyrinth of Indian law.

II. THE NATURE AND SCOPE OF INDIAN TRIBAL POWER

A. The Concept of "Sovereignty" as It Relates to Indian Tribes

The uncertainty surrounding the nature and scope of tribal governmental powers has created the modern Indian law civil war. The summation of these powers is sometimes referred to as "tribal self-government," and other times as "tribal sovereignty." The distinction is significant because self-government merely connotes governmental power over a limited class of persons, i.e., tribal members, whereas true sovereignty includes governmental power over territory and all persons within that territory.

While the word "sovereignty" is both powerful and elusive, it is a word frequently invoked in Indian law circles. As

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a result, in spite of strong admonitions of the effort's futility, some attempt must be made to define the concept of sovereignty. For purposes of international law, the Restatement (Second) of Foreign Relations Law defines a "state" as "an entity that has [1] a defined territory and [2] population under the control of a government and [3] that engages in foreign relations." Tribes do have defined territories: Indian territory is all land to which the Indian title has not been extinguished. At one time Indian territories were easily demarcated as all land within the exterior boundaries of the reservations. The allotment acts, however, changed the ease of that demarcation. When fee patents were issued, Indian title was extinguished. Today, therefore, the current territory of many Indian tribes often resembles a checkerboard rather than a solid geographic area.

Tribes also have defined populations: a tribe's population includes all people who accept tribal offers of membership.

on the concept of "inherent tribal sovereignty" fell on deaf ears in the Supreme Court. Before Wheeler, the only other court in this century to analyze "inherent tribal sovereignty" did so in the context of "sovereign immunity." In United States v. U.S. Fidelity & Guaranty Co., 309 U.S. 506 (1940), the Court stated: "These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did." Id. at 512 n.11.

28. "Who or what is a sovereignty? What is his or its sovereignty? On this subject the errors and the mazes are endless and inexplicable." Martone, Congressional License?, supra note 22, at 600 (quoting Chisholm v. Georgia, 1 U.S. 419, 456 (1793)).


30. [A]ll that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas, and also that part of the United States east of the Mississippi River, and not within any State to which the Indian title has not been extinguished, for purposes of this act, be taken and deemed Indian country.

Act of June 30, 1834, ch. 161, 4 Stat. 729 (codified in scattered sections of 25 U.S.C.); see also Bates v. Clark, 95 U.S. 204, 208 (1877) (eliminating potential ambiguity in statute by ruling that the definition applies to all lands, whether east or west of the Mississippi River); United States v. Chavez, 290 U.S. 357, 364 (1933); F. Cohen, Handbook of Federal Indian Law 309-310 (1942) [hereinafter 1942 Cohen Handbook]. Note that for purposes of criminal jurisdiction, the definition of "Indian country" is much broader. That definition includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent. . . ." 18 U.S.C. § 1151 (1979). But section 1151 "does not have general applicability in the civil context." Confederated Tribes & Bands of the Yakima Indian Nation v. County of Yakima, 903 F.2d 1207, 1217 (9th Cir. 1990).

Tribes may govern the internal relations of these members pursuant to their preconstitutional (or inherent) sovereignty.\textsuperscript{32} Subject to extensive federal oversight and control, tribes continue to exercise both criminal and civil jurisdiction over tribal members.\textsuperscript{33}

It is well settled, however, that tribes no longer enjoy any powers to engage in foreign relations (e.g., enter into treaties with foreign nations).\textsuperscript{34} But that fact alone does not mean that tribes cannot be considered sovereigns. Depending on all the circumstances, a state may delegate the conduct of foreign relations and other functions without necessarily ceasing to be a state under international law.\textsuperscript{35}

Nonetheless, compared to that of most "nations," the "sovereignty" of Indian tribes is quite limited\textsuperscript{36} because, as a general rule, tribal jurisdiction is based upon consent.\textsuperscript{37} One gives consent by accepting the privileges of tribal membership or by establishing what might be termed "minimum contacts" with a tribe.\textsuperscript{38} Thus, tribal governmental power is a personal, rather than a territorial, sovereignty.\textsuperscript{39} Additionally, even this personal sovereignty is subject to the overriding plenary power of Congress.\textsuperscript{40} Before concluding that the term "tribal self-government" more aptly describes the nature and scope of tribal governmental powers than does "tribal sovereignty," this Article will first briefly examine and critique a spectrum of competing theories of tribal governmental powers. Then, this Article will turn to the historical evaluation of the exercise of congressional plenary power over Indian affairs and how that exercise has affected tribal powers of self-government.

\begin{footnotes}
\item[34] Worcester v. Georgia, 31 U.S. 515 (1832).
\item[35] Id.; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 4 comment b (1965).
\item[37] "Tribal authority over members, who are also citizens . . . is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests upon consent." Id. at 2064. Nonmembers may consent to tribal jurisdiction by entering into consensual relations with a tribe. Montana v. United States, 450 U.S. 544, 565 (1981).
\item[38] For nonmembers, these "minimum contacts" will not be implied. Duro, 110 S.Ct. at 2065.
\item[39] See infra notes 207-219 and accompanying text.
\end{footnotes}
B. The Competing Theories of Tribal Governmental Powers: A Quick Survey

Perhaps because tribes do not fit neatly into our constitutional democracy, academic legal journals abound with conflicting theories on tribal "sovereignty." The debate covers a sweeping terrain. One theory postulates that tribal self-government is merely a congressional license. Another states that tribes are independent nations and should be recognized as such by the United Nations. Finally, a number of theories occupying the middle ground of this continuum accept the doctrine of congressional plenary power but differ on what the exercise of that power means. Since the repudiation of the termination policy in the late 1950s, Indian law battles have been fought in the trenches of this middle ground.

1. The Tribal Self-Government As Congressional License View

An implicit general rule seems to govern academic Indian law commentators: Appeal to the white man's guilty conscience and propound an expansive vision of exclusive tribal sovereignty and self-determination. The works of Frederick J. Martone are the exception to that rule. Rather than dwell on what should or should not have been done in the past, Martone performs his analysis on the "actual state of things."\(^{42}\)

Martone argues that because "[t]he Constitution was not designed with tribes in mind . . . Congress has been caught between changing tides of opinion running from full separation to total assimilation."\(^ {43}\) He argues that the concept of inherent tribal sovereignty is really a legal fiction: "Allotment, termination, and grants of jurisdiction could not pass muster if tribes had inherent rights to self-government, with origins other than the Congress."\(^ {44}\) The subject of Indian affairs is a political

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41. Even the more radical commentators recognize, as they must, that federal plenary power over Indian affairs is an "axiom of United States' jurisprudence." McSloy, An Argument for Nationhood, supra note 27, at 141.

42. This was also the approach taken by Chief Justice Marshall in Worcester v. Georgia. "[P]ower, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions." Worcester v. Georgia, 31 U.S. 515, 543 (1832).

43. Martone, Congressional License?, supra note 22, at 634.

44. Id. Martone refers to tribal self-government, not tribal sovereignty.
question to be dealt with largely through the legislative, not the judicial process. Therefore, the Supreme Court "should forthrightly deny the existence of inherent tribal sovereignty." Finally, he argues that "[a] contrary conclusion would render the entire legislative scheme unconstitutional."

The latter argument presents an interesting and difficult question. Would not the denial of all inherent tribal powers, rather than the acceptance of some inherent tribal powers, render the entire American Indian legislative scheme unconstitutional? If no Indian powers are inherent, then they all must be delegated. If they are all delegated, then none are extraconstitutional. In other words, if no Indian powers are inherent, then, surely, Congress cannot set up, and the Court cannot countenance, the current tribal political scheme. At least with respect to internal tribal affairs, this is not the law.

The defect in Martone's thesis lies in its attempt to establish an absolute theory concerning the nature of tribal governmental powers. He tries to prove too much. It is not necessary to resort to a dichotomy to solve the "mystery which surrounds

45. Id.

46. Id.

47. The Court has expressly rejected this proposition. In Wheeler, the Court held that the federal government could try a Navajo Indian for rape when he had already pleaded guilty to a lesser offense in tribal court without violating the federal prohibition on double jeopardy.

The power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority. It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.


48. If none are extraconstitutional, then all tribal powers, even those over tribal internal affairs, would be subject to the Constitution.

49. Tribal members are denied any guarantee of effective judicial review for alleged violations of the Indian Civil Rights Act. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Even more troubling, by virtue of their ancestry, non-Indians are denied any voice in the tribal political process by which their property or liberty may be affected.

the tribes' claim to sovereignty." 51 That is, the concept of tribal self-government is not necessarily either an inherent right or a congressional license. 52 Because modern tribal governmental powers derive from both sources, the proper inquiry should focus upon which attributes are inherent and which are congressionally licensed. This Article argues that tribes retain inherent power to govern internal relations concerning tribal members, tribal lands (defined as all land to which the Indian title has not been extinguished) 53 and tribal resources. By considering state action principles, 54 however, this Article argues that external relations are, in Martone's words, "congressionally licensed" and therefore subject to the Constitution. Perhaps the greatest lesson of the Martone article is a simple reminder on methodology: look to the relevant treaties and statutes. 55 In other words, Martone argues for an inquiry into the specific promises made to tribes in the the treaties and the means in which Congress qualified those promises by enacting later statutes.

2. The Views of Felix S. Cohen

The views of Felix S. Cohen represent the academic middle ground of the competing theories of tribal sovereignty. In an opinion issued by the Department of the Interior just months after the enactment of the Wheeler-Howard (Indian Reorganization) Act of 1934, Felix S. Cohen 56 wrote:

Perhaps the most basic principle in all Indian law . . . is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. 57

Cohen's 1942 Handbook of Federal Indian Law further developed the thesis of the 1934 opinion as follows:

The whole course of judicial decision on the nature of Indian

51. Martone, Congressional License?, supra note 22, at 635.
52. Id. at 600.
53. See supra note 30 and accompanying text.
54. See infra notes 261-274 and accompanying text.
55. Martone, Congressional License?, supra note 22, at 635.
56. Felix S. Cohen is the preeminent commentator on Indian law, and perhaps the key player in the history of the Wheeler-Howard Act of 1934. See infra notes 171, 199-238 and accompanying text.
tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its power of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of governments.\(^{58}\)

Although Cohen views tribal powers as inherent, he also recognizes that they continue to exist only at the sufferance of Congress: Without a treaty or some form of federal recognition, the Court will not recognize any claim of tribal power.\(^{59}\)


It is a highly debatable question whether American Indian policy is based on Spanish thinking. Cf. Mitchel v. United States, 34 U.S. 711 (1835). There are fundamental differences between the Spanish empire in South and Central America and the British and French empires in North America. For instance, the Spanish came the New World primarily as single males. Soldiers, in search of gold and treasures, sought to integrate the Indian civilizations, such as the Incas, and replace their despots with the Crown of Spain. Moreover, Spanish missionaries sought to convert aborigines to Catholicism. These actions are "assimilationist" in nature. To the contrary, the settlers in North America came as families. They feared the Indians. While wishing for peace, the North America settlers originally established a policy of complete separation and nonintercourse with Indians.

As a practical matter, resolution of the question presented above is largely irrelevant because even Vitoria's teachings on the nature of just war and legitimate title provide wide latitude for retrospective arguments supporting European, and later American, actions. See Schwarzenberger, THE FRONTIERS OF INTERNATIONAL LAW 52-53 (1962). Moreover, regardless of whether one agrees with the original moral justification of such actions, it is a well settled principle that "power, war, conquest, give rights, which, after possession, are conceded by the world . . ."; hence, our legal analysis must proceed on "the actual state of things." Worcester v. Georgia, 31 U.S. 515, 543 (1832).

\(^{59}\) For example, with respect to a federal taking of land, the Court has held that mere Indian occupation of land without federal recognition of ownership creates no vested rights in a tribe. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 285 (1955). See also Martone, Congressional License?, supra note 22, at 602-603, citing Cayuga Indian Claims (Great Britain v. United States, 20 AM. J. INT'L L. 574, 577 (1926)). In an arbitration in which Roscoe Pound participated, it was stated that, "so far as an Indian tribe exists as a legal unit, it is by virtue of the domestic law of the sovereign nation
This qualification of tribal self-government raises several critical issues that Cohen, in effect, avoids addressing. First, if Congress once divests tribal governmental powers but subsequently enacts legislation that permits the same, then arguably most modern tribal powers are truly delegated. Second, it is unclear whether it should matter that the powers are divested explicitly, as in the allotment acts, or merely implicitly, as in the context of tribal criminal jurisdiction over nonmembers who commit crimes on Indian lands. Third, Cohen provides no basis for the assertion that all powers are inherent and none are delegated. Finally, given that tribal self-government is subject to congressional plenary power and thus continues to exist only because the Congress so wills, an argument can be made that no tribal powers are inherent.

This Article argues, however, that tribes may continue to enjoy the inherent power to govern tribal members. Going further, some commentators have interpreted Cohen's principles to mean that tribes have inherent sovereignty over nonmembers as well. But, even assuming arguendo that Congress, or one of its duly constituted arms, has never fully extinguished tribal powers of self-government, in no way does that assumption lead to the conclusion that tribes enjoy extra-constitutional power over nonmembers. The treaties promised land to the Indians for their "exclusive use"—a promise of complete separation and nonintercourse with non-Indians. The treaties did not envision that non-Indians would live and do business on the reservations under the current checkerboard land ownership patterns that exist within the reservations today. Thus, it is disingenuous to suggest that

within whose territory the tribe occupies the land, and so far only as that law recognizes it").

60. See infra notes 124-149 and accompanying text.


62. The issue is not trivial. Clearly, a delegation of power is a state action and, as such, would invoke constitutional scrutiny. If a power is deemed "inherent", then the Court will apparently shield such a power from constitutional scrutiny. See, e.g., United States v. Wheeler, 435 U.S. 313 (1978); Talton v. Mayes, 163 U.S. 376 (1896).

63. Wheeler, 435 U.S. at 323.

64. See, e.g., Collins, Implied Limitations On the Jurisdiction of Indian Tribes, 54 WASH. L. REV. 479, 510-13 (1979) [hereinafter Collins, Implied Limitations].

65. But see generally, infra notes 124-149 and accompanying text, and in particular note 167.

66. As the Court recently recognized in Duro, Congress may not, even under its treaty power, deprive any United States citizen of his or her constitutional rights.
the treaties promised inherent power over nonmembers. In effect, the treaties promised that the issue of such power would simply not arise.

3. The Permanent-Separate-Extra-Constitutional View\textsuperscript{67}

Another theory along the continuum of competing views of tribal governmental powers, we come to a third theory. The Supreme Court once declared that "Indian tribes are states in a certain domestic sense and for certain municipal purposes, though not foreign states or States of the United States..."\textsuperscript{68} Professor Charles Wilkinson, however, would clarify that declaration as follows: Indian tribes are "permanent, separate sovereigns, a third level of government in this constitutional democracy."\textsuperscript{69} Wilkinson also asserts that tribal powers are both preconstitutional and extra-constitutional.\textsuperscript{70}

Professor Wilkinson states that contemporary judges face two divergent and irreconcilable lines of Indian law jurisprudence. He calls the first line, which traces to Supreme Court decisions in United States v. Kagama,\textsuperscript{71} McBratney v. United States,\textsuperscript{72} and Lone Wolf v. Hitchcock,\textsuperscript{73} the "pragmatic and logical" line.\textsuperscript{74} The Supreme Court's more recent decisions in Oliphant v. Suquamish Indian Tribe\textsuperscript{75} and Duro v. Reina\textsuperscript{76} also fit into that category. This first line is premised on modern realities. By setting the cases in contemporary social and economic

\textit{Duro}, 110 S.Ct. at 2063. See also Boos v. Barry, 485 U.S. 312 (1988); Reid v. Covert, 354 U.S. 1 (1957). If this is so, then Talton v. Mays and its progeny should be reevaluated.


\textsuperscript{68} Holden v. Joy, 84 U.S. 211 (1872); see also Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) (referring to modern Indian tribes as carrying out "municipal functions")

\textsuperscript{69} C. Wilkinson, American Indians, \textit{supra} note 27, at 31.

\textsuperscript{70} Id. at 62.

\textsuperscript{71} 118 U.S. 375 (1886).

\textsuperscript{72} 104 U.S. 621 (1882).

\textsuperscript{73} 187 U.S. 553 (1903).

\textsuperscript{74} C. Wilkinson, American Indians, \textit{supra} note 27, at 29.

\textsuperscript{75} 425 U.S. 191 (1978).

\textsuperscript{76} 110 S.Ct. 2053 (1990).
conditions, courts following this line generally deny most powers of tribes and look to states, as more egalitarian and comprehensive governments, to exercise police power over non-Indian and Indian citizens alike.\textsuperscript{77}

Professor Wilkinson terms the second line, which traces to the Supreme Court decisions in \textit{Worcester v. Georgia},\textsuperscript{78} \textit{Ex parte Crow Dog},\textsuperscript{79} and \textit{Talton v. Mayes},\textsuperscript{80} the "pre-Columbian line."\textsuperscript{81} The Supreme Court's decision in \textit{United States v. Wheeler}\textsuperscript{82} also fits into this second category. Courts following the second line reject the modern realities as a premise and apply an almost mechanical, linear analysis of whether relevant attributes of preconstitutional sovereignty have been extinguished or qualified by the United States. If not, the tribal powers retain their preconstitutional status.\textsuperscript{83}

Although Wilkinson recognizes that the former line is more in tune with the "forward-looking and progressive" notions of common law jurisprudence that have served our nation well, he rejects that line in favor of the second.\textsuperscript{84} "Damn the anomaly, damn the illogic of seating a nearly 'foreign' government in rural Minnesota, South Dakota, or for that matter, downtown Tacoma, Washington."\textsuperscript{85}

\textsuperscript{77} C. WILKINSON, AMERICAN INDIANS, supra note 27, at 29.

\textsuperscript{78} 31 U.S. 515 (1832). Wilkinson's reading, and this classification of \textit{Worcester}, is questionable. Chief Justice Marshall's opinion in \textit{Worcester}, and his other seminal decisions in Indian law, properly belong to the more pragmatic group. Chief Justice Marshall reached his decision in \textit{Worcester} not on some platonic notion of inherent sovereignty but on the "actual state of things." He reasoned inductively not deductively. First, he examined the Constitution, the applicable statutes, and the treaty itself. Then, he found that the federal treaty guaranteed the tribe the right to govern itself (during the separationist policy of the nonintercourse era). Thus, he concluded that the state of Georgia could not override the federal treaty. Perhaps because of the named parties, the case is often miscited as involving state sovereignty versus Indian tribal sovereignty. In fact, it involved Federalist issues—state sovereignty versus federal sovereignty. Lest there be any further doubt that Chief Justice Marshall took this view, and not the view of some modern tribal advocates, see G. HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS—1789-1835, 597-605 (1944) (quoting correspondence by Chief Justice Marshall, President John Quincy Adams, Justice Story, President Jackson and Governor Lumpkin of Georgia).

\textsuperscript{79} 109 U.S. 556 (1883).

\textsuperscript{80} 163 U.S. 376 (1896).

\textsuperscript{81} C. WILKINSON, AMERICAN INDIANS, supra note 48, at 29-30.

\textsuperscript{82} 435 U.S. 313 (1978).

\textsuperscript{83} Id.

\textsuperscript{84} C. WILKINSON, AMERICAN INDIANS, supra note 27, at 29-30.

\textsuperscript{85} C. WILKINSON, AMERICAN INDIANS, supra note 27, at 30. Note that much of downtown Tacoma sits within the original boundaries of the Puyallup reservation.
Wilkinson's absolutist thesis of tribal governmental powers can be challenged on several grounds. First, as the legislation enacted during the termination period demonstrates, Indian tribes are not necessarily permanent entities.86 Unlike federal, state, and local governments, Indian tribes have no constitutional peg upon which they can hang a right to permanent entity status.87 Nonetheless, the tenth amendment has been invoked by analogy to support the proposition that Indian treaties reserve to the tribes those powers not expressly or impliedly relinquished to the United States.88 The analogy should be of little import to the modern tribes, however, due to the 1985 emasculation of the tenth amendment in Garcia v. San Antonio Metro Transit Authority.89 Thus, although the Constitution acknowledges Indian tribes,90 the framers of the Constitution did not envision Indian tribes as constituting a third level of government or as permanent entities in our constitutional democracy.91 Indeed, Professor Wilkinson concedes

According to 1980 census data, Indians comprise only about 3 percent of the citizen population residing on the Puyallup reservation. See 1980 Census, supra note 3.

86. Broadly speaking, the termination period lasted from 1943 to 1961. Pursuant to a congressional policy of assimilation, many reservations were disestablished with a view toward making Indians subject to the same laws and entitled to the same privileges and responsibilities as other citizens of the United States. See H.R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. 132 (1953); F. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 170-175 (1982).

87. This is because "[C]ongress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); see also Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982) (Indian tribal sovereignty is not derived from the Constitution); United States v. Wheeler, 435 U.S. 313, 323 (1978); Martone, Congressional License?, supra note 22, at 603; C. Wilkinson, American Indians, supra note 27, at 103.

88. See infra notes 243-260 and accompanying text.

89. 469 U.S. 528 (1985).

90. Only one provision in the Constitution directly relates to tribes. Article I, § 8, cl. 3, the so-called Indian Commerce Clause, provides that "Congress shall have the Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." Seizing upon the fact that Indian tribes are delineated separately, Chief Justice Marshall concluded that they are not foreign nations. Cherokee Nation v. Georgia, 30 U.S. 1, 18 (1831); see also Martone, Congressional License?, supra note 22. Through the exercise of its article 1, section 8, power Congress has preempted state regulation of Indian affairs. Article VI, § 2, cl.2, provides that "all Treaties made . . . shall be the supreme Law of the Land." Id. Article I, § 2, cl.3 and its amended version, Article XIV, section 2, refer to "Indians not taxed" for purposes of House of Representatives apportionment; however, these latter provisions are largely irrelevant to Indian tribal power.

91. The Federalist Papers mentioned Indian tribes only four times. Two of these comments were by Alexander Hamilton who argued that a standing peacetime army was "indispensable . . . to guard against the ravages and depredations of the Indians."
that "although a truly substantial portion of early federal business involved Indian affairs, the Founding Fathers almost certainly assumed that tribes would simply die out under the combined weight of capitalism, Christianity, and military power."92

Second, because the federal government invited non-Indians onto the reservations during the allotment era, many reservations, especially those in the Northwest, are composed of checkerboard land ownership. Therefore, many tribes are no longer physically separated from nonmembers,93 as they were during the Nonintercourse Act era. Furthermore, all Indians were granted citizenship in 192494 and as a result, are no longer as politically and culturally separate.

Third, while some tribal powers may retain their preconstitutional status,95 a host of recent decisions holds that tribal sovereignty is no cornucopia of exclusive extra-constitutional sovereignty over all people, property, or resources located within the original reservation boundaries.96 Not completely unsympathetic to the plight of nonmembers on the reserva-

92. C. WILKINSON, AMERICAN INDIANS, supra note 27, at 103; see also 3 J. KENT, COMMENTARIES 318 (1st ed. 1828) (predicting the imminent demise of all Indian tribes).

93. See discussion infra notes 124-149 and accompanying text.


95. Preconstitutional powers are limited to matters of self-government, that is, control over internal affairs. See Brendale v. Confederated Tribes & Bands of the Yakima Nation, 109 S.Ct. 2994 (1989). Thus, the Court has held that Congress has not extinguished tribal power to punish offenses against tribal law committed by tribal members. United States v. Wheeler, 433 U.S. 313, 328 (1978); Ex parte Crow Dog, 109 U.S. 556 (1883). Nor has Congress extinguished exclusive tribal jurisdiction over adoption proceedings where all parties are tribal members and reservation residents. Fisher v. District Court, 424 U.S. 382 (1976); Mississippi Band of Choctaw Indians v. Holyfield, 109 S.Ct. 1597 (1989) (federal Indian child welfare Act definition of "domicile" pre-empts state law; tribal member mother may not avoid exclusive tribal jurisdiction over adoption proceedings merely by giving birth off-reservation).

tions, however, Professor Wilkinson does suggest limited judicial review when ICRA rights are alleged to be abridged by tribes.\(^97\)

4. The Full Sovereignty and Independence View

Some commentators argue that even today some Indian tribes meet the international law statehood test and, under the principle of self-determination, should be given an opportunity to secede from the Union to form independent nations.\(^98\) These commentators morally and factually dispute the traditional legal rationales restricting Indian tribal sovereignty: (1) discovery and occupation; (2) conquest; (3) cession and agreement; (4) acquisitive prescription; and (5) changed circumstances.\(^99\)

97. C. WILKINSON, AMERICAN INDIANS, supra note 27, at 115.
99. In terms of historical reality, however, none of the arguments against these traditional rationales are very persuasive. First, to refute the occupation and acquisitive prescription rationales, it is necessary to ignore that for over 100 years many non-Indians have owned and lived on non-Indian lands owned in fee simple within original reservation boundaries. The current checkerboard land-holding patterns on reservations cannot be so summarily dismissed.

Second, in discussing the conquest rationale, Clinebell and Thomson posit contradictory statements. Compare the statement that "[m]any native nations were never subdued by military force" with the statement that "the U.S. has throughout its history used physical force and violence to drive Indians from their land." Clinebell & Thomson, supra note 98, at 688-89. Moreover, even if some Indian tribes were not "conquered" in the true sense of the word, if any tribe were to attempt to secede from the Union now, surely it would be. In other words, the "legal sovereignty" of Indian tribes is dependent upon their "political sovereignty." BROWN, THE AUSTINIAN THEORY OF LAW 271-81 (reprinted 1926).

Third, in their discussion of the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 153 principle, rebus sic stantibus (literally, "at this point of affairs"), Clinebell and Thomson fail to grapple with the exception to the qualification: where the change in circumstances is consistent with the purposes of the agreement, then rebus sic stantibus validly applies even if such a change is brought about by the party seeking to invoke it. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 153 comment c. Long before the allotment acts, Chief Justice Marshall deemed Indian tribes to be "in a state of pupilage" and "wards" of the United States. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831). The allotment acts were an attempt to teach the Indian "pupils" the benefits of individual property ownership. Because the allotment acts were not enacted in bad faith, these sovereign acts of the United States were "consistent with the purpose of the agreement." Thus, the allotment acts affecting Indian reservations are sustainable under the doctrine of changed circumstances and the principle of rebus sic stantibus.

Finally, it would be remiss here to fail to point out the well settled principle that the validity of a state action must be judged by the legal standards in effect at the time.
The full sovereignty theory is not novel. In 1831, two proponents of this full sovereignty view sat on the Supreme Court. Speaking for himself and Justice Story in a dissent to *Cherokee Nation v. Georgia*, Justice Thompson stated: "[t]esting the character and condition of the Cherokee Indians by [E. de Vattel's indicia of statehood], it is not perceived how it is possible to escape the conclusion that they form a sovereign State."\(^{101}\) Thompson argued that since 1775, the executive and legislative branches had regarded Indian tribes "not only as sovereign and independent, but as foreign nations or tribes, not within the jurisdiction nor under the government of the States within which they were located."\(^{102}\) Even though these full sovereignty and independence arguments may have intellectual appeal, however, they have never commanded a majority on the Court.\(^{103}\)

of the action. Clinebell and Thomson concede that "[p]rior to the 20th century, international law used the rule of force and physical power as the foundation for international relations." Clinebell & Thomson, *Sovereignty and Self-Determination*, supra note 98, at 700. Therefore, in inviting non-Indians onto the reservations pursuant to the allotment acts, Congress met both the standards of international law and the standards set by Chief Justice Marshall more than a half century earlier.

100. 30 U.S. 1 (1831). 101. *Id.* at 53. Thompson also queries: "If the Cherokee were then [prior to 1492] a foreign nation, when or how have they lost that character, and ceased to be a distinct people, and become incorporated with any other community?" Clinebell & Thomson, *Sovereignty and Self-Determination*, supra note 98, at 700. Apparently, Thomson would answer: "So long as they are permitted to maintain a separate and distinct government; it is their political condition that constitutes their foreign character. . . ." *Id.*


103. In this regard, Chief Justice Marshall's 1831 opinion in *Cherokee Nation v. Georgia* merits quoting in full:

[I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.

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

*Cherokee Nation*, 30 U.S. at 17-18.
III. THE EXERCISE OF CONGRESSIONAL PLENARY POWER
OVER INDIAN AFFAIRS

Ever since the landmark opinion in Worcester v. Georgia104 there has been little dispute that Congress maintains plenary power over Indian affairs.105 Chief Justice Marshall stated that "[the Constitution] confers on Congress the powers of war and peace; of making treaties, and of regulating commerce . . . with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with Indians."106 Federal plenary power over Indians is a major doctrine in Indian law today.107

Although tribalism traces to pre-Columbian origins, tribal powers are now subject to complete defeasance by Congressional exercise of plenary power. For more than two hundred years, Congress has exercised its plenary power in various and often conflicting ways.108 This Article will focus on one of the byproducts of inconsistent Indian law and policy making: the conflicting promises made by the federal government to Indians in the treaties and to non-Indians in the allotment acts. Further, this Article will examine the attempted Congressional reconciliation of those promises as embodied in the legislative history of the Wheeler-Howard Act.

A. The First Promise: The Treaties in Light of the Nonintercourse Acts

The United States Senate ratified 370 Indian treaties109

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104. 31 U.S. 515 (1832)
106. Worcester, 31 U.S. at 543. In that same opinion, Marshall also explained that "[p]ower, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend." Id. See also Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Kagama, 118 U.S. 375 (1886). C. Wilkinson, American Indians, supra note 27, at 78.
109. House Comm. of Interior and Insular Affairs, 88th Cong., 2d Sess., List
before 1871, the year Congress abolished the making of any further treaties with Indian tribes. Viewed in the light of overall Indian policy of the times, as exemplified by the nonintercourse acts, the treaty promises made to Indian tribes were simply this: All land reserved to Indian tribes would be for their "exclusive use and benefit." To ensure this exclusivity, the treaties generally forbade non-Indians to "pass over, settle upon, or reside in the reservations." Although some treaties used slightly different language, the basic promise made to all the tribes was the same—retained powers of self-government over tribal members in Indian country.

Early federal Indian policy was directed from a military standpoint and, accordingly, must be evaluated as such. Indeed, following the adoption of the Constitution, one of the first congressional acts vested authority over Indian affairs in the Department of War. To avoid the expense and strain of long drawn-out Indian wars, President Washington and Secretary of War Knox followed the practice of Great Britain of negotiating treaties with tribes.

The early treaties also must be evaluated in light of another important early federal policy—the regulation of trade between Indians and non-Indians. Through the use of treaties and the enactment of sporadic nonintercourse acts, the fed-

10. "Hereinafter 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 ...." 25 U.S.C. § 71 (1970) (originally enacted as Act of March 3, 1871, ch. 120, 16 Stat. 544).

111. See, e.g., Treaty with the Yakimas, 12 Stat. 951 (1859).

112. Id. This language merely duplicated what was already federal law under the nonintercourse acts.

113. E.g., Second Treaty of Fort Laramie, 15 Stat. 549 (1868) ("absolute and undisturbed use"); Treaty with Navajo, 15 Stat. 667 (1868) (same); Treaty of Medicine Creek, 10 Stat. 1132 (1854) (same).

114. "Indian country" was defined as property "to which the Indian title has not been extinguished." Act of June 30, 1834, ch. 161, 4 Stat. 729 (repealed in part) (codified as amended in scattered sections of 18 and 25 U.S.C.); see also Bates v. Clark, 95 U.S. 204, 208 (1877) (clearing up potential ambiguity in statute by ruling that the definition applies to all lands, whether east or west of the Mississippi River); United States v. Chavez, 290 U.S. 357, 364 (1933); Federal Indian Law, United States Dept. of Interior 309-310 (1966).

115. See, e.g., 1 Stat. 49 (1789).


eral government achieved reasonable success towards its twin goals of ensuring westward settlement and minimizing conflict. The principal policy tool was simply the separation of Indians from non-Indians.118

As the march towards manifest destiny quickened in pace, the inadequacy of a piecemeal legislative approach towards Indian affairs became apparent. In 1834 Congress enacted its first truly comprehensive piece of Indian legislation; it was aptly titled "An Act to Regulate Trade and Intercourse with Indian Tribes and to Preserve Peace on the Frontiers."119 According to Martone, the Act:

provided licensing for trade with Indians, prohibited non-Indians from bartering with Indians for hunting and cooking items, prohibited non-Indians from hunting in Indian country, prohibited non-Indians from grazing their animals in Indian country, prohibited settlement in Indian land, prohibited the conveyance of Indian land except by federal treaty, prohibited speeches in or messages to Indian country designed to disturb the peace, and extended federal criminal jurisdiction to all crimes committed in Indian country except as 'to crimes committed by one Indian against the person or property of another Indian.'120

To administer the Act, Congress formally established the Department of Indian Affairs.121

All of the American Indian treaties were negotiated during the time of the federal policy of complete separation of non-Indians from Indians and Indian country (as embodied in the Nonintercourse Act of 1834 and its predecessors). Had the measured separatism envisioned by the treaties and nonintercourse acts continued, the civil war concerning the extent of tribal civil jurisdiction over non-Indians122 would not

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federal consent for all Indian alienation of land. Note that "between the years 1802 and 1813, no federal legislation existed regulating affairs with Indians." Martone, Congressional License?, supra note 22, at 608.

118. See F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS, 1-3 (1962).


120. Martone, Congressional License?, supra note 22, at 609.

121. 4 Stat. 735 (June 3, 1834). This department stayed within the Department of War until 1848 when control over Indian affairs was transferred to the Department of the Interior. 9 Stat. 395 (Feb. 2, 1848).

exist today. No non-Indians would reside or do business on the reservations. "The only non-Indians [on reservations] would be, for the most part, federal officials with the Indian Service and federally licensed Indian traders."123 However, federal Indian policy changed dramatically during the 1880s.

B. The Second Promise: The Allotment Acts

By the 1880s, America had achieved its so-called manifest destiny. "The Indian wars were nearly at an end, the tribes were subjugated, and westward expansion was complete."124 In this dawn of a new era, a different federal Indian policy emerged. Congress embarked upon a policy of assimilation, what today might be called "Americanization." This policy was to be implemented primarily by education, allotment to Indians of lands in severalty, and the eventual destruction of tribal government.125

As early as 1880, bills were introduced in Congress that generally provided for the allotment of reservation lands to Indians.126 The Court in Montana v. United States127 recognized that the legislative history of S. 1773, a bill substantially similar to the General Allotment Act,128 sheds light on the purpose of the various allotment acts.129 The members of the Senate, at the outset and throughout the legislative debates, clearly understood that the purpose of the allotment acts was to "civilize" Indians—in part by dissolution of tribal relations.130 For example, Senator Saunders stated early in the debates on S. 1773:

Heretofore we have recognized the tribal relations. . . . But now a new order of things is about to be established, as I understand. The people of this country are in favor largely,

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123. Id. at 3.
124. Martone, Congressional License?, supra note 22, at 610.
125. See, e.g., Reports of the Secretary of the Interior: (1885) pp. 25-28; (1886) p. 4; (1888) pp. XXIX-XXXII; (1894) p. iv; Reports of the Commissioner of Indian Affairs: (1887) pp. IV-X; (1889) pp. 3-4; (1890) pp. VI, XXXIX; (1891) pp. 3-9, 26; (1892) p. 5.
in my opinion, of giving the Indians the rights of citizenship, of making them citizens, and requiring of them all that is required of others . . . I only wanted to say that I favor the principle of the bill, that I wish it to be known that I am in favor of dividing the lands up into severality to these people, and favor of the earliest possible breaking up of the tribal relation and making them citizens in every sense of the word.131

As part of the effort to Americanize the Indian allotees, the bill expressly provided that, upon issuance of the patent for the allotment, the Indian allatee was to become subject to the laws of the territory or state in which the allotment was situated.132 Thus, the extension of state jurisdiction was to result in the termination of tribal jurisdiction.133 Moreover, Congress intended that the Americanization of the Indian population would be facilitated in part by non-Indians who would settle upon the surplus and alienated allotted lands and would thus expose the Indian allotees to the virtues of private property ownership and the ways of "civilization."134

The underlying understanding and intent of S. 1773 was carried forth into the bill that was ultimately enacted in 1887, the General Allotment (Dawes) Act.135 Senator Dawes, the author of and one of the primary spokesmen for the General Allotment Act, stated that "this . . . very important bill . . . has been considered, as I have already said, a great many times in

131. 11 CONG. REC. at 783-84.
133. As stated by Sen. Hoar during the debates on S. 1773:
An Act of Congress may undoubtedly take away that shield, may destroy the tribal relation, and very likely do what this statute in express terms undertakes to do—that is, subject the Indian to State law . . .
So if you make an Indian subject to the law of the State, it is not by limiting or by extending the operation of that law; it is by taking away from the Indian the tribal character.
134. See Montana v. United States, 450 U.S. 554, 560 n.9 (1981). See also 11 CONG. REC. 876 (Sen. Morgan), 877 (Sen. Hoar); XVII CONG. REC. 1762-63 (Sens. Teller and Dawes); Reports of the Secretary of the Interior: (1891), p. vi; (1892), p. xxxiii; Report of the Commissioner of Indian Affairs (1891), pp. 46-47;Mattz v. Arnett, 412 U.S. 481, 496 (1973); Collins, Implied Limitations on the Jurisdiction of Indian Tribes, 54 WASH. L. REV. 479, 506-07 (1979) [hereinafter Collins, Implied Limitations] ("[A]llotment schemes directly contemplated non-Indian settlement within the reservation on what was deemed to be "surplus" Indian land and the resulting integration was an affirmative policy of the government."
the Senate.” The importance of this act cannot be overemphasized: it ushered in “the most critical period in the whole history of Indian—White relations in the United States.”

The current civil war over the scope of tribal authority is largely attributable to the opening of reservations to non-Indian settlement. The congressional intent behind the federal policy of allotment and assimilation is extremely important because Congress surely knew that it would lead to the development of many predominantly non-Indian towns and communities. In repudiating its first promise, Congress did not intend that Indian tribes would retain inherent or treaty-reserved tribal authority to exercise general governmental power over non-Indian reservation residents. The Supreme Court recognized as much in *Montana v. United States*:

There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with dissolution of tribal affairs and jurisdiction [citations omitted]. It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

The General Allotment Act and its progeny modified, if not completely destroyed, the treaty promise of exclusive tribal use of, and benefit from, all lands within the exterior boundaries of Indian reservations. In its stead, Congress made new

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136. 17 Cong. Rec. 1559.
137. C. Wilkinson, American Indians, supra note 27, at 19 (citing F. Prucha, American Indian Policy in Crisis—Christian Reformers and the Indian, 1865-1900 (1987)).
139. The general allotment act did not delegate or congressionally license any such powers.
142. C. Wilkinson, American Indians, supra note 27, at 19 (opening the reservations modified the treaty promise of a “measured separatism”).
143. “[T]reaty rights with respect to reservation lands must be read in light of the
promises to non-Indian American citizens. Whatever the wisdom of the policy in retrospect,

the fact remains that the United States invited its citizens to homestead Indian land and that non-Indians accordingly built homes and livelihoods within reservation boundaries. If many entered by means of illicit if not illegal transactions born of avarice, many others came simply in pursuit of honest dreams opened up in the homestead policy.\textsuperscript{144}

In the face of conflicting federal promises, the task of the modern Court is to make a just reconciliation of competing federal, tribal, and state interests.\textsuperscript{145} The Court could do this in one of two ways. First, the Court could strike the balance itself by fashioning some sort of federal common law of tribal sovereignty. Second, it could attempt to discern the intent of Congress, as embodied in specific statutes and treaties, with the concept of tribal sovereignty providing only a "backdrop" for the interpretive process.\textsuperscript{146} If, as the Court suggests, the latter method is the proper approach,\textsuperscript{147} then the Court should heed Justice Blackmun's advice and "direct its attention not to the intent of the (General Allotment) Dawes Act, but rather to the intent of the Congress that repudiated the Dawes Act, and established the Indian policies to which we are heir"—the Wheeler-Howard (Indian Reorganization) Act of 1934.\textsuperscript{149} Although Justice Blackmun points to the right statute, he chose the wrong interpretation. The correct interpretation would recognize that the Wheeler-Howard Act both confirmed the second promise, that promise made to non-Indians in the allotment acts, and partially restored the first promise, the

\textsuperscript{144} C. Wilkinson, American Indians, supra note 27, at 23. The quote continues: "Doubtless there are cases where homesteaders were altogether oblivious of the fact that their new homes were within Indian reservations. These settlers came as families to open new land, not to do business with Indians." Id.


\textsuperscript{146} McClanahan v. Arizona Tax Commission, 411 U.S. 164, 172 (1973) (proper approach is to ascertain how Congress has struck the balance, with concept of tribal sovereignty providing only a "backdrop").

\textsuperscript{147} Id. Note that this is also the approach taken by Chief Justice Marshall in his much cited opinion in Worcester v. Georgia, 31 U.S. 515 (1832).

\textsuperscript{148} Brendale, 109 S.Ct. at 3025 (Blackmun, J., dissenting).

\textsuperscript{149} Id.
Two Promises, Two Propositions

promise of self-government made to the Indian tribes in the treaties.

C. The Reconciliation: The Wheeler-Howard (Indian Reorganization) Act

The original Wheeler-Howard Act, now commonly referred to as the IRA or Indian Reorganization Act of 1934, was an extremely comprehensive and controversial piece of legislation. It contemplated a major reversal of federal Indian policy. Perhaps for that reason, the original bill was abandoned in favor of an extensively revised bill.

Although the Chairman of the Committee on Indian Affairs, Mr. Howard, stated that "[i]t is doubtful if any piece of legislation in the history of the country has been more thoroughly and intelligently studied and debated . . . ,"150 surprisingly, there has been no definitive construction of the Act.151 Perhaps this explains the myth that persists in surrounding it.

1. The Myth

The stated purposes of the Wheeler-Howard Act as enacted was to extend to tribal governments the right to form businesses and other organizations and to grant certain rights of home rule.152 Nonetheless, some academic commentators contend that the Act was a congressional affirmation of the existing retained sovereignty of the tribes.153 For example, Professor Collins, a strong supporter of the full sovereignty view of tribal government power, contends that, in spite of the workings of the allotment acts, in 1934 tribes maintained inherent sovereignty "over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders."154 If this proposition were true, however, it would not have been necessary to enact the legislation at all.

By halting the allotment process, the Wheeler-Howard Act

150. 78 CONG. REC. 11,731 (1934).
151. C. WILKINSON, AMERICAN INDIANS, supra note 27, at 68 n.82.
153. See Collins, Implied Limitations, supra note 64, at 510; see also Comment, Tribal Self-Government, supra note 26, at 969; C. WILKINSON, AMERICAN INDIANS, supra note 27, at 68.
154. See Powers of Indian Tribes, supra note 27 (opinion written by Felix S. Cohen after defeat of his original Wheeler-Howard Act in Congress) cited with approval in Brendale, 109 S.Ct. at 3025 (Blackmun, J. dissenting). For the history of that defeat, see infra notes 155-198 and accompanying text.
reversed much of the pre-1934 federal Indian policy. But, it did not turn the Indian policy clock back to pre-allotment act times and fully restore the first promise. Rather, as will be shown, the legislation was an attempt to reconcile the two promises.

2. The Legislative History

In his opening remarks concerning the original bill, the Commissioner of Indian Affairs, John Collier, explained that "[t]he point of departure for this legislation is the land-holding system of the Indians within the allotted areas. . . . The allotment was a cruel but well-meant scheme to make [the Indian] abandon his tribal relations."\(^{155}\)

As explained further in the legal memorandum accompanying the original bill:

[T]he bill is not limited to the correction of the allotment system and restoration of lands to Indians.

It deals with a number of matters which are of intense concern to all Indians without exception.

The first of these is Indian self-government or home rule, or participation in Indian business. At present, such self-government or participation as the Indians may enjoy is a matter of privilege exclusively. It depends upon the whim of the administration. Fundamentally, under existing law,\(^{156}\) the Government's Indian Service is a system of absolutism.\(^{157}\)

In both the Senate and the House of Representatives, the bill received unprecedented attention. In the House alone, the Committee on Indian Affairs held 29 different sessions on the

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155. *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 29-30 (1934)* [hereinafter "1934 House Hearings"].


157. *1934 House Hearings*, *supra* note 155, at 18; see also *Readjustment of Indian Affairs: Hearings on S. 2755 Before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., 63-64 (1934)* [hereinafter "1934 Senate Hearings"] ("At present the Indians . . . are under the almost unconditioned discretionary authority of the Secretary of the Interior. He may be benevolent and wise; he may not be. But, in any event, he is an absolutist. The law makes him that. That is why the Indians are unorganized today . . . We may extend to them the right or organize, the right to do their own thinking, and their own work, and our successors can take it away. [The Indian] has no rights . . . . Even the making of contracts by ward Indians is subject to the Secretary of the Interior." Statement of John Collier, Commissioner of Indian Affairs.*
bill. In these sessions the original bill was subjected to rigorous study and debate. And, after this study and debate, the bill's objectionable features were eliminated.

Among the provisions that Congress stripped from the original bill were: (1) the municipal power of an Indian tribe to pass ordinances affecting nonmembers of the tribe; and (2) the power of local Indian courts to enforce these ordinances against nonmembers residing within the Indian community. "It was so drastically amended that they took out everything but the title."

In spite of these drastic amendments, modern commentators continue to refer to the original bill as the key to understanding the "objectives and philosophy" behind the final legislation. As Congressman Ayers of Montana pointed out on the floor, however, the original bill "was never Wheeler's or Howard's baby—it was laid on their doorstep, and they have cast it off and brought forth legitimate offspring."

This Article's examination of the Wheeler-Howard Act and its legislative history illustrates two important points. First, with respect to the unallotted reservation lands, the Act restored the original treaty promise of "exclusive use and benefit." The Wheeler-Howard Act ensured that there would be no further shrinkage of the Indian land base. Second, with respect to the reservation lands owned in fee simple by nonmembers, the Act affirmed the second promise that non-Indians would be free from tribal governmental control.

a. The Original Wheeler-Howard Act

Drafted within the Department of the Interior, the original bill was organized into four separate titles: Title I—Indian

158. 78 Cong. Rec. 11,726 (1934).
159. Id. at 11,731 (statement of Mr. Howard).
160. Id. at 11,124 (statement of Senator Wheeler).
161. Id. at 9268 (statement of Mr. Peavey).
163. 78 Cong. Rec. at 12,165. (Compare the original bill, introduced as H.R. 7902 and S. 2755, with the bill passed by Congress, S. 3645.)
164. Cohen's 1942 Handbook explains the background of the legislation as follows: When Harold L. Ickes was appointed Secretary of the Interior in 1933, he chose Professor Nathan Margold to be his Solicitor. Margold asked Felix Cohen, whose talents and work he had known for years, to give up a year of private practice to help draft basic legislation which would transfer to Indian tribes and individual Indians greater authority over their economic and political affairs. The act, originally called The Wheeler-Howard Act, later became known as the Indian Reorganization Act of 1934.
Self-Government; Title II—Special Education for Indians; Title III—Indian Lands; and Title IV—Court of Indian Affairs. Title I, "Indian Self-Government," was the heart of the original bill. Congressman Hastings, an enrolled Cherokee tribal member, summed up his extensive analysis of Title I as follows:

There are many . . . details provided in title I, but to sum them all up it would permit segregating one or more or any number of areas as chartered communities within any state and granting to the members of the respective chartered communities, to all intents and purposes, the authority and powers exercised by Indian tribes a century ago. And Congress would be asked to make all necessary appropriations to pay the necessary expenses of these separate governments.

Under section 2 of title 1, the Secretary of the Interior would have been given authority to issue charters creating and transferring to Indian communities "any and all such powers of government as may [have] seem[ed] fitting in light of the experience, capacities, and desires of the Indians concerned."167

165. See generally '78 CONG. REC. 9265-71 (1934).
166. 78 CONG. REC. 9266 (1934).
167. As the following exchange further illustrates, the bill was presented to Congress as an executive transfer of governmental power over Indian affairs—it was not a confirmation of inherent tribal sovereignty:

Mr. O'Malley. Here is what I would like to know. It says:
It is hereby declared that those functions of government now exercised over Indian reservations shall be gradually relinquished to the Indian?

What, broadly, are all those functions?

Mr. Collier. That is understood by crossing over to the specifications in section 4. Might I say in advance of coming to that section, that it specifies powers which may be given to the chartered communities. I take it that the intent there is to say that this very wide range of discretion which we took not of at the least hearing, the discretionary power now vested in the Secretary of the Interior, shall gradually be transferred to the Indian community . . .

1934 House Hearings, supra note 155, at 179 (emphasis supplied). See also 1934 Senate Hearings, supra note 157, at 67-68 ("We [the Indian Bureau] do all the things which are listed in that long list you read [in Section 4; Title 1]." Statement of John Collier, Commissioner of Indian Affairs).

One example of the wide range of discretion which Commissioner Collier referred to above is as follows:

Let me illustrate and cite a concrete case which can happen anywhere in the Indian country . . . .In January 1923, . . . the Secretary of the Interior by one flat smashed in the Navajo tribal government. It ceased to exist . . . .He wiped it out and dictated a new Navajo tribal council.

Id. at 37.

Thus, Congress, by delegating its plenary power over Indian Affairs to the Department of the Interior, had allowed the extinguishment of all retained sovereign powers of even the most organized of Indian tribes. The IRA sought to change this bureau-
Section 4 spelled out in more detail the powers that could be included in these charters. The first is found in subsection (a):

To organize and act as a Federal municipal corporation, to establish a form of government to adopt and thereafter amend a constitution, and to promulgate, and enforce ordinances and regulations for the effectuation of the functions hereafter specified, and any other functions customarily exercised by local governments.¹⁶⁸

Subsection (d) granted another important power:

To establish courts for the enforcement and administration of ordinances of the community, which courts shall have exclusive jurisdiction over all offenses of, and controversies between members of the chartered community, and shall have power to render and enforce judgments, criminal and civil, legal and equitable, and to punish violations of local ordinances by fine not exceeding $500, or in the alternative, by imprisonment for a period of not exceeding six months . . . .¹⁶⁹

Title I made no provision for an appeal from the local municipal court.¹⁷⁰ However, Title IV of the bill addressed this concern by establishing a court of Indian affairs. Section 3, subsection 4 of this Title spelled out the broad jurisdiction of that court, which included jurisdiction “of all cases, civil or criminal, arising under the laws and ordinances or a chartered Indian community, wherein a real party in interest is not a member of such community.”

The drafter of the original bill, Felix Cohen, explained the connection between the local court and the special Court of Indian affairs:

The court of Indian affairs has general power to review decisions of the local court wherever a person not a member of the community is involved in the dispute. That is to say, if a person not a member of the community enters the community and commits any misdemeanor he may be tried by the

cratic absolutism—once the Secretary had issued a federal charter, only Congress could revoke it.

168. 1934 House Hearings, supra note 155, at 2.

169. Id. at 3.

170. Considered in light of Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), subsection (j) of the bill placed an interesting limitation on the enumerated powers: “[t]o exercise any other powers, not inconsistent with the Constitution and laws of the United States, which may be necessary or incidental to the execution of the powers above enumerated.”
community court, but the Federal court has the power to remove that case to the Federal court or to review the case.\textsuperscript{171}

Clearly, then, a chartered Indian community\textsuperscript{172} was to have legislative jurisdiction over nonmembers residing within it as broad as those of any municipal corporation or other unit of local government.\textsuperscript{173} And, as Mr. Cohen testified, the local tribal courts and the Court of Indian affairs would have broad jurisdiction over nonmembers as well.\textsuperscript{174} However, because of the Senate Committee on Indian Affairs' objections, these provisions were eliminated from the final bill.

\textbf{b. Objections to the Original Wheeler-Howard Act}

The exact reason for the committee's objections to the legislative and judicial provisions is somewhat complicated. It was generally conceded that the original bill might work on reservations where Indian lands were already consolidated. But the committee did not think it would work on checkerboarded reservations, such as those in the Pacific Northwest.\textsuperscript{175} Responding to these objections, the chief spokesman for the original

\textsuperscript{171} 1934 House Hearings, supra note 155, at 80.

\textsuperscript{172} Definitions given in the original bill for "territory of a chartered community" and "reservation" make two things clear. First, the "territory of a chartered community" could be smaller than the limits of the original "reservation"; it could be a subset. Second, fee patent lands owned by nonmembers would be construed to be within the boundaries of the chartered Indian community and therefore subject to its jurisdiction; provided if the charter was so defined. Title 1, § (13)(1)(m).

\textsuperscript{173} Indeed, as the following exchange illustrates, the jurisdiction of the Indian communities would actually exceed the jurisdiction of traditional local governments:

The Chairman. The thing that puzzles me is just how far they can go under this bill in setting up ordinances and laws which might conflict with the laws of the State. Can you answer that, Mr. Commissioner.

Commissioner Collier. They could go, theoretically, just as far as they can go without conflicting with existing Federal law, which is pretty far, Senator.

\textsuperscript{174} 1934 Senate Hearings, supra note 157, at 177.

\textsuperscript{175} An example of the committee consensus on this point is as follows:

Senator Thomas of Oklahoma. If the bill would not work in the Navajo Reservation, where there is a great area populated exclusively by the Navajos, I can hardly see where it could operate in a State like mine. . . . Then they would be surrounded very likely with thickly populated white sections. . . . I just cannot get through my mind how this bill can possibly be made to operate in a State of thickly settled population. I think it may be all right in a place like the Navajos, so far as I can see now, or the Menominees or the Klamaths.

The Chairman. I thought it would work among the Navajos and the Indians in New Mexico and Arizona if it would work any place.

\textit{Id. at 145.}
bill, Commissioner Collier, assured the committee that tribal jurisdiction over nonmembers would not be as extensive as it appeared. The bill did not contemplate, for example, that an Indian minority would exert jurisdiction over a non-Indian majority. In the readjustment of Indian affairs, the Secretary of the Interior would, pursuant to the provisions of the original bill, take account of the fact that many Indian reservations had substantial non-Indian populations. As Commissioner Collier explained, "Title III [Indian Lands] is pretty closely linked with Title I [Indian Self-Government]."

Only when an extensive consolidation of both Indian land and Indian population had been achieved would the tribe be allowed to set up an "Indian community." The original bill set no specific guidelines as to just when there would be enough consolidation to set up a self-governing community, but Commissioner Collier assured Congress that "[t]his bill in Title I deals with self-government of Indian tribes and provides that an Indian community which has a solid geographic area may have a court and enforce its laws through the court."

The principal defect in the original bill was the uncertainty as to which would come first—the consolidation of lands or the federal municipal charter. As drafted, it appears that this matter would be left to the Secretary of the Interior's dis-

176. Id. at 63.
177. The following exchange demonstrates the BIA's contemplation of a consolidation of Indian land and population as a pre-condition of any issuance of a municipal charter:

   Commissioner Collier. . . . Now, let us look into the future. Here is what might come about in a place like Montana. Going back to [T]itle 3-[T]itle 3 directs the Secretary of the Interior to proceed and demark those areas which are to become consolidated areas, the areas within which an attempt is going to be made to get the land consolidated into Indian-owned land. Where such a consolidated area is big enough, the population in it homogeneous enough, the time might come when it would want to set up a town government . . . .

   Senator Thomas of Oklahoma. How do you proceed to get those lands in that community?
   Commissioner Collier. By purchases.
   Senator Thomas of Oklahoma. Suppose you cannot purchase it; then what are you going to do?
   Commissioner Collier. We are out of luck.

   Id. at 70-71.

   See also Title III, § 8 ("any Indian tribe or chartered Indian community is authorized to purchase or otherwise acquire any interest of any member or nonmember in land within its territorial limits . . . whenever . . . necessary for the property consolidation of Indian lands.") (emphasis supplied).

178. 1934 House Hearings, supra note 155, at 317.
cretion. 179 Depending upon the "experience, capacities, and desires of the Indians concerned," the Secretary could sanction all, some, or none of the enumerated powers mentioned in the bill. 180 A major factor in this decision would be whether the consolidation mechanism, a $2 million annual fund, had brought about "unbroken areas of Indian land." 181

Of course, there would be a recurring problem in creating unbroken areas of land out of the existing checkerboards. As the Commissioner explained, the Indian communities would acquire by condemnation the fee lands owned by non-Indians who were unwilling to sell.

It is difficult to see how it can be solved unless there could be given to the Indian community the power of condemnation to acquire the land necessary for consolidation. It raises that question. . . . It is given in this bill, insofar as State Laws permit condemnation, but there we may be up against the limit. 182

The grand scheme was thus plagued by an inherent problem. Until a proper consolidation of tribally owned fee land had occurred, the Secretary would supposedly grant only limited municipal powers to the Indian community. 183 As Commissioner Collier stated:

It is perfectly evident that a group of Indians who are scattered among whites, who are attending the public schools or

179. An Assistant Solicitor explained as follows:
Mr. Fahy. . . .No specific powers are granted by the bill itself. Section 4 [of Title I] merely provides that the Secretary of the Interior may grant certain chartered powers and that he may qualify those powers.

Id. at 327 (statement of Mr. Siegel).

180. Title I, § 2.

181. The Commissioner of Indian Affairs explained as follows:
Commissioner Collier. Now it is our idea that the land bought with this appropriation [$2 million annually, Title III, § 7], if made, would first of all be land within the checkerboard area; that we aim to consolidate the Indian holdings so there will be unbroken areas of Indian land which would then be held intact. . . .

182. 1934 Senate Hearings, supra note 157, at 59-60.

183. The House of Representatives later eliminated the discretion of the Secretary of the Interior on the matter by specifying criteria for consolidation. Under section 17 of the amended H.R. 7902, in order for an Indian tribe to even "organize for its common welfare" or "adopt an appropriate constitution and bylaws", the Indian tribe must have held at least 40 percent of the original land" in restricted or tribal status. See H.R. Rep. 1804, 73d Cong., 2d Sess., 4 (1934). But note that it was ultimately the Senate version which was enacted as the Wheeler-Howard Act.
using the common institutions . . . would not form a territorial government . . . They might do other things . . . It is equally evident that Indians living in great solid geographical areas would do precisely that.\textsuperscript{184}

A proper consolidation was highly unlikely, however, unless the Indian community was to receive a grant of what is potentially one of the most oppressive of all sovereign powers—the power of condemnation. Moreover, this oppressive power would have to be exercised over nonmembers of the tribe.

The original bill contemplated that eventually, through the consolidation process, checkerboarding on the reservations would be eliminated. In the meantime, there would be a “problem”: Within the organized Indian communities marked for consolidation, there would be non-Indian settlements that would “kick like steers” if subjected to the jurisdiction of the Indian courts.\textsuperscript{185}

Chairman Wheeler, a former county prosecutor in Montana, had two main objections to the original bill. First, he was worried that the Secretary of the Interior would not wait until there was a solid block of Indian land and Indian population before issuing the charters creating the Indian communities. Second, he feared that establishing a “government within a government” would lead to “conflicts in the Northwest between the Indians and the whites.”\textsuperscript{186}

\textsuperscript{184} 1934 Senate Hearings, supra note 157, at 67-68.

\textsuperscript{185} The following exchange depicts this jurisdictional problem:

Commissioner Collier. . . . Picture the condition. Let us take the Crow Reservation and say that it does organize a community, gets a charter, an area is marked out for consolidation, and you start getting the land. There will be 10 years in which there will be a large number of white settlements in there. Now, what about this Court of Indian affairs? Is it going to have jurisdiction over these white settlements?

Mr. Yellowtail [of the Crow Reservation]. That is another subject I was not familiar with.

Commissioner Collier. I do not want to get away from that, because it is a real problem.

Mr. Yellowtail. Yes; it is a real problem.

Commissioner Collier. By the language of this bill, as drawn, those white settlements within the Indian community would be subject to the Federal Court of Indian affairs [and the local Indian municipal courts] . . . [A] lot of them are going to kick like steers when you try to subject them to that court.

\textsuperscript{186} 1934 House Hearings, supra note 155, at 136.

The following exchange is just one example in the hearings where the Chairman articulated his belief that the bill, if enacted as introduced, would lead to conflicts:

The Chairman. But it seems to me—for instance, take your Montana
Commissioner Collier tried to assuage these fears. For example, he assured the committee that the Montana Indians, "who [were] scattered among the whites, . . . would not [attempt to] form a territorial government." But a representative of Montana's Blackfeet Tribe told the committee that the Montana Indians would indeed attempt to form a tribal government within the already existing county and state government, as a pertinent part of his testimony reveals:

Senator Thomas of Oklahoma. Which would you do? Would you surrender your participation and activity in the present set-up, or would you form a new charter, new form of government, and move over and get into that? Mr. Brown [of the Blackfeet Tribe]. We would take both of them. We would take both of them under the bill.188

What bothered the Senate committee about this arrangement envisioned by the the Blackfeet representative was the

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Indians—here is what you do: you say [reading Title 1, § 4, introduction to (a)]:
Now, what do you mean by establishing a form of government?
Commissioner Collier. Municipal government.
The Chairman. . . . If that is true, you are going to let them [reading Title 1, § 4(b) through (g)]—
In other words, you have practically delegated to the Indian Office all of the powers and the right to execute any power not inconsistent with the Constitution. Now, my own view about that matter is, as far as the Montana Indians are concerned, that it would be a step backward for them rather than a step forward.
Commissioner Collier. But Senator, the Montana Indians would not do that.

The Chairman. Well, you might possibly, Mr. Commissioner, get, for instance, some tribe of Indians in Montana who would want to try this, and they might get a sufficient number of signers to a petition to have a charter issued.
Commissioner Collier. Yes.
The Chairman. But if they did do it, in my judgment, it would bring about all kinds of conflicts between your Indians and the white people, and in addition to that, it would set back the Indians, in my judgment, considerably by doing it, and I am afraid that would lead to conflicts in the Northwest between the Indians and the whites.
I mean, supposing the Indian Bureau went out there, for instance, if you had this provision in there; your Indian Bureau could go out there and take those Indians possibly and propagandize them and get sufficient numbers of them to sign it and issue a charter, and then attempt to set up this government within a government out there which would be, in my judgment, a serious mistake on the part the Indians to do it.
Now, I am not as familiar with the Indians down in the Southwest, and it might be possible that it would work out all right for the Navajos.

1934 Senate Hearings, supra note 157, at 66 (emphasis supplied).
187. 1934 Senate Hearings, supra note 157, at 67.
188. Id. at 170.
fact that the Blackfeet Indians already dominated the existing political community in their region, and in such a case the original act piled another Indian-dominated system on top of the existing system.\textsuperscript{189} Thus, an irony of the original Wheeler-Howard Act is that on those reservations where it might have worked best—where the existing system of local government was Indian-dominated—it was needed least. Further, the committee feared setting up an Indian community government that might enact laws and ordinances that would conflict with those governing that system.\textsuperscript{190} Precisely because of this fear, the

\textsuperscript{189} An illustration is as follows:

The Chairman. . . . Here you have at the present time some Indians in the Blackfeet who are members of the school board; you have them running for the legislature at times, and some of them have been elected to the legislature, as I recall it.

Mr. Brown. Yes.

The Chairman. You have them holding county office positions and every position of that kind, and you are taking part absolutely in the public life of that whole community up there, and, in fact, the Indians practically dominate it in that section of the country, don't they.

Mr. Brown. In that county.

\textit{Id.} at 169.

\textsuperscript{190} The following exchange illustrates this concern:

Mr. Brown [of the Blackfeet Reservation]. You are fearful of the community government part of it for us?

The Chairman. Yes.

Mr. Brown. Rather than what we are permitted now?

The Chairman. Yes, because you are dominating the community up there now. I mean the Indians practically run that community up there now. They run the schools. They run the city and the county and they run the whole community.

Mr. Brown. We are ready to just merge into this new proposition and take it over [both the county government and the Indian government.]

. . . .

Senator Thomas of Oklahoma. Well, then, if you take both, supposing the laws under the Indian charter would be different from the laws under the white Government?

Mr. Brown. We would take chances on what the law would be under the community government, because we would make them. [Laughter.]

The Chairman. You might—I am not saying that you would, but you might—set up laws which would absolutely be, and could set up laws which would absolutely be, in conflict with the laws that govern your county at the present time, and then you would immediately have conflict between the white people and the Indians there. In my judgment, if you do that, if would bring about a great deal of confusion and a great deal of bitterness and strife between the two classes of people, which would be to the detriment, in my judgment, of the Indians in the long run.

Mr. Brown. . . . I think we could amend that provision.

. . . .

The Chairman. We will amend it.

\textit{Id.} at 170-71. See also \textit{id.} at 179, 198-200.
provisions creating the new system were stricken.

c. The Revised Wheeler-Howard Act (S. 3645)

As finally enacted, the Wheeler-Howard Act did not specifically authorize the Secretary of the Interior to convey or confirm any nonconsensual governmental power over Indians, much less non-Indians.191 In the words of Chairman Wheeler: "[t]he Committee on Indian Affairs eliminated all those compulsory provisions and eliminated from the bill as originally presented the right of the Indians to make laws upon the reservations."192 Thus, the 73rd Congress did not view the Wheeler-Howard Act as a confirmation of "inherent tribal sovereignty."193 After being stripped of all its controversial provisions, what the Act did do, primarily, was: (1) stop further alienation of Indian lands; (2) provide for acquisition of land for landless Indians; (3) stabilize the tribal organization by vesting them with "real, though limited, authority, and by prescribing conditions which must be met by such tribal organizations;"194 and (4) provide that "Indian tribes may equip themselves with the devices of modern business organization through forming into business corporations."195

191. The following exchange explains the intent of the amended section 3645 Wheeler-Howard Act:

Senator Frazier. If they set up a government they have the right to tax.
The Chairman. You are not setting up a government, in the first place, you are simply vesting in the tribal council certain authority to make contracts. But certainly when you come to give a tribal council the power to tax I do not think it can be done.

Senator O'Mahoney. The point is that the member of any voluntary organization could withdraw and could refuse to pay the assessment, but under this, if Congress vests in the tribal council the right to levy or assess, then the individual could not refuse to pay.

Id. at 249.

The assessment provision was stricken. From the hearings above, it is clear that Congress intended that a recognized tribal member would be able to avoid the civil regulatory jurisdiction of his own tribe by withdrawing his membership in the tribe. Accord Wheeler-Howard Act—Interpretation, 1 Op. Solic. Gen. 484, 489-91 (Dept. Interior 1934). This view is consistent with the rationale behind the Supreme Court's recent decision in Duro v. Reina, 110 S.Ct. 2053 (1990) (tribal authority rests on consent).

192. 78 CONG. REC. 11,123 (1934).

193. Chairman Wheeler made the following explanation of S. 3645: "[T]his bill proposes to give the Indians an opportunity to take over the control of their own resources and fit them as American citizens." 78 CONG. REC. 11,124 (1934).

194. Id.

195. Id.
In eliminating the objectionable features of the original Wheeler-Howard Act, what Senator Wheeler¹⁹⁶ and Congress refused to do was to "segregate a small minority into groups, styled 'chartered communities'" who "would have special ordinances enacted for their benefit . . . so as to place them under different laws from the other citizens of [the] community."¹⁹⁷ It was thought that the creation of such governments within governments would "poison [the Indians] against their State constitution" and "their local governments, of which they are a part."¹⁹⁸

In summary, then, the BIA drafted a bill in the Solicitor's Office of the Department of the Interior and sent it to Congress in February, 1934. This bill would have gradually transferred to Indian tribes or communities all of the governmental functions then exercised over them by the Secretary of the Interior. In addition, this bill would have vested in the Indian tribes broad, general governmental powers over nonmembers lawfully residing within the boundaries of the chartered com-

¹⁹⁶. A summary of Chairman Wheeler's views is as follows:
Title I—Indian Self Government:
My thought about the bill is simply this: That you are going entirely too far at the present time in letting these tribes set up these rules and regulations, because they might conflict. As I said, when you take the Northwestern Indian reservations, as I pointed out, you have Indians at the present time holding county and State offices. Then, if you give them the power to set up an entirely new government within their reservations and to pass ordinances and regulate all Indian affairs, I think it would bring you into all kinds of conflicts. . . . 1934 Senate Hearings, supra note 157, at 199-200.
Title III—Indian Lands:
. . . I agree with you with reference to the lands and the handling of the lands, and I agree entirely with the revolving fund to allow these Indians to borrow money to get started in cultivating that land up there. I think that could be done rather than to have it doled out and controlled and leased to white people. Id. at 169.
Title IV—Court of Indian affairs:
. . . As far as the court feature of the bill, the setting up of a new court, is concerned, I am opposed to it absolutely, and I think it is unnecessary, and it would entail an expense to the Government and deprive our present district courts of that power and supersede the present Federal district courts and their functions. . . . Id. at 146.
If you ever get this through Congress I will be surprised, because it is perfectly ridiculous in my judgment. Id. at 208; see generally id. at 205-09.
Title II—Special Education for Indians:
This title was simply an extension of the Johnson-O'Malley Act passed earlier in 1934. An uncontroversial provision, the substance of Title II sailed by Congress almost without comment.
¹⁹⁷. 78 Cong. Rec. 9268 (statement of Congressman Hastings.)
¹⁹⁸. Id.
munities. Extensive hearings were held in both houses of Congress to discuss the policy implications of the bill. After thorough study and debate, Congress eliminated the objectionable features. In July 1934, therefore, Congress refused to give Indian tribes the expansive sovereign powers that many tribes and tribal advocates now claim fall under the rubric of inherent tribal sovereignty.

d. Executive Understanding of the Wheeler-Howard Act

In what might be termed "damage control," Felix Cohen wrote an opinion under the auspices of the Solicitor's Office of the Department of the Interior just months after the enactment of the Wheeler-Howard Act, entitled Powers of Indian Tribes. This opinion broadly construed the following phrase contained in section 16 of the Act: "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest [enumerating specific powers]."

Focusing on this language, Cohen reasons that had "the intent of Congress been to limit the powers of an Indian tribe to those previously granted by special legislation, it would naturally have referred to 'existing laws' rather than 'existing law' as the source of such powers." Cohen then argues that the "term 'law' is a broader term than the term 'laws.'" Using this distinction as a guide to legislative intent, Cohen

199. See Powers of Indian Tribes, supra note 57.
200. Id. at 447. Those rights and powers "also vested" in tribes were enumerated as follows: "To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments." S. 3645 § 16.
201. Powers of Indian Tribes, supra note 57, at 447.
202. Id.
203. Such reliance is clearly misplaced. First, note that the Solicitors Office of the Department of the Interior drafted the original version of the Wheeler-Howard Act. See 1934 Senate Hearings, supra note 149, at 237. Sensing the imminent defeat of the whole scheme, Cohen also drafted the final version which supposedly eliminated the controversial provision of the original bill. Id. Second, the "existing law" phrase received almost no attention during the long and contentious legislative debates. Id. at 244. Nonetheless, from a close study of both the legislative history and the powers of Indian tribes opinion, one cannot help but admire the genius of Felix S. Cohen. Although he has been widely regarded as a brilliant legal scholar, he was perhaps an even greater political and legal tactician. Cohen's 1942 HANDBOOK OF FEDERAL INDIAN LAW laid the groundwork for future tribal advocates to attain through the judicial process what they were unable to attain in the legislative process.
then lays down his now famous basic principle of Indian law, the premise that "those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent power of a limited sovereignty which has never been extinguished."^{204}

From such sweeping premises, one would expect that Cohen would proceed to enumerate broad powers over non-Indians as part of the powers vested by existing law. But, surprisingly, the discussion of inherent powers principally relates to what the opinion calls "internal sovereignty", i.e., self-government or power over members.^{205} The opinion thus fits into the existing case law but lays out a doctrinal means for future expansion.

Interestingly, with respect to tribal jurisdiction, the opinion draws a distinction between tribal lands and all lands within the reservation. "Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty."^{206} But, absent some relationship with it,^{207} the tribe, apparently, lacks inherent sovereignty over nonmembers occupying reservation lands "under lawful authority," i.e., persons invited onto the reservation pursuant to the federal allotment policy and not there merely at the sufferance of the tribe.^{208} Thus, although Cohen's post-Wheeler-Howard Act opinion as to the scope of "existing law" directly contradicts the legal memorandum accompanying the original bill,^{209} Cohen was clearly aware that "existing law" included the allotment acts.

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204. Powers of Indian Tribes, supra note 57, at 447. His principle thus stated, Cohen argues that one must look to judicial decisions and federal statutes "to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content." Id. What is not expressly limited remains within the domain of tribal sovereignty, and therefore properly falls within the statutory category, "powers vested in any Indian tribe or tribal council by existing law." Id.

205. See Powers of Indian Tribes, supra note 57, at 445.

206. Id. at 467.

207. The opinion states that, "[e]xcept where Congress has provided otherwise, [the power to tax] may be exercised over . . . nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to with which taxes may be attached as conditions." Id. at 465; see also Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Montana v. United States, 450 U.S. 544 (1981).

208. Powers of Indian Tribes, supra note 57, at 467; see also United States v. Chavez, 290 U.S. 357, 364 (1933); Bates v. Clark, 95 U.S. 204, 208 (1877).

209. "Indian self-government or home rule . . . is a matter of privilege exclusively. . . . Fundamentally, under existing law, the Government's Indian Service is a system of absolutism." Purpose and Operation of the Wheeler-Howard Indian Rights Bill (S. 2755; H.R. 7902); 1934 House Hearings, supra note 155, at 18.
This lack of inherent power to tax or otherwise regulate the persons or property of non-Indians on non-Indian land was made explicit in a subsequent opinion, issued just two months after Powers of Indian Tribes. In this opinion, entitled Wheeler-Howard Act—Interpretation,\textsuperscript{210} the Solicitor of the Department of the Interior faced squarely the extent of the tribal power of condemnation.

First, the source of this power was considered:

The power of eminent domain is one of the usual powers of sovereignty. It is, as the United States Supreme Court held in Cincinnati v. Louisville and Nash R.R. Co. (223 U.S. 390, 404), “one of the powers vital to the public welfare of every self-governing community.”

No Federal statutes terminating the exercise of this power by an Indian tribe are known. Therefore, under the doctrines advanced in the recent opinion of this Department on “Powers of Indian Tribes” (M-27781, approved October 25, 1934), the power of eminent domain is one of those powers which are vested in an Indian tribe within the meaning of Section 16 of the Wheeler-Howard Act.\textsuperscript{211}

Yet, the opinion reached the following conclusion: “I am of the opinion that the Indian Service is correct in assuming that a tribe organized under section 16 may exercise the power of eminent domain in the acquisition of land as against its members, but not in the case of land owned in fee by nonmembers.”\textsuperscript{212}

Thus, it was understood that inherent tribal sovereignty extended only over tribal members. Moreover, it was understood that such tribal power ceases to exist where an Indian abandons his tribal membership.\textsuperscript{213} “Threatened oppression in

\textsuperscript{211}  Id. at 489.
\textsuperscript{212}  Id. (emphasis supplied). Cf. Duro v. Reina, 110 S.Ct. 2053 (1990).
\textsuperscript{213}  Wheeler-Howard Act—Interpretation, supra note 210, at 490. Further, “as was said in the opinion of this Department on [Powers of Indian Tribes, at 36], ‘any member of any Indian tribe is at full liberty to terminate his tribal relationship whenever he so chooses.’”  Id.

This view is consistent with the understanding of congressional sponsors of the Wheeler-Howard Act as it was finally adopted. For example, during markup, the enumerated power to “levy assessments on the members of the tribe for tribal purposes” was stricken from section 16 of the final bill. Pertinent parts of that debate are as follows:

Senator Thomas of Oklahoma. The theory of this bill, as I understand it, is an enabling act for any tribe of Indians to form its own government.
the form of condemnation, taxation, or other incidents of social control may be avoided by the termination of the landowner's tribal status. But if he remains to share in the benefits of tribal life he must bear its burdens."\textsuperscript{214}

As the opinion makes clear, termination of tribal status places an Indian in the same position as a non-Indian.\textsuperscript{215} In 1934, therefore, it was a generally accepted principle that tribal governmental power sprang from the source of consent. Thus, whether the question involved condemnation, taxation, or any other form of civil jurisdiction, it was thought that, absent some sort of consensual relationship, tribes enjoyed no inherent general powers over nonmembers.\textsuperscript{216} Although this view of tribal power seemingly contradicts Cohen's broad "basic

Chairman Wheeler. No.

Senator Thomas of Oklahoma. Just like we gave an enabling act to any Territory to form its own government and come into the Nation.

Chairman Wheeler. Yes; but this provision is the very thing [the enabling act]. Any group of people can get together now, call themselves the Ancient Order of Pendos or anything else, and they can adopt a constitution and bylaws.

Senator Frazier. They tax their members too.

Chairman Wheeler. Of course, but that is a voluntary proposition. . . . They can charge a membership fee and make assessments.

Senator O'Mahoney. The point is that any member of any voluntary organization could withdraw and could refuse to pay the assessment, but under this, if Congress vests in the tribal council the right to levy or assess, then the individual could not refuse to pay.

Chairman Wheeler. Exactly. . . . They haven't any right to do it.

. . . .

Commissioner Collier. If that be stricken the rest will be taken care of.

Chairman Wheeler. Yes.

\textit{1934 Senate Hearings, supra} note 157, at 249. Note that in \textit{Duro}, the Court stated that tribes are a good deal more than "private voluntary organizations." \textit{Duro}, 110 S.Ct. at 2061 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)). Yet, rejecting tribal jurisdiction based on implied consent, the Court stated that express consent of the governed is needed. \textit{Id.} at 2064. Thus, it appears that one may "quit" a tribe just as one may quit a private club. But if one consents to tribal membership, then, unlike private clubs, tribes enjoy all sorts of governmental power, such as criminal jurisdiction.

\textsuperscript{214} Wheeler-Howard Act—Interpretation, \textit{supra} note 210, at 490. The opinion continues: "The restricted land of the Indian who has severed his tribal affiliation is not subject to tribal condemnation proceedings under tribal law." \textit{Id. Cf. Duro}, 110 S.Ct. at 2064.

\textsuperscript{215} Accordingly, patented land may be condemned, as it may be taxed on exactly the same basis as the lands of non-Indians. An Indian tribe will have whatever rights of condemnation the laws of the State may give to it. . . . Land held in fee, therefore, whether owned by Indians or by non-Indians, may be condemned by an Indian tribe only in accordance with State law, through proceedings brought in State courts.

\textsuperscript{1} Op. Solic. Gen. at 490-91.

\textsuperscript{216} Cf. \textit{Duro}, 110 S.Ct. at 2064.
principle," it is a statement of the law with which he apparently would have concurred.

Fleshing out his earlier work, *Powers of Indian Tribes*, in 1942 Felix Cohen published his now famous Handbook of Federal Indian Law.\(^{217}\) In this latest work Cohen warned that we must "beware of reading into the measure of this [Indian] jurisdiction the common law principle of territoriality of criminal law."\(^{218}\) As Cohen recognized, the source and scope of Indian powers derive from the "unextinguished fragments of tribal sovereignty," and "it must be recognized that this sovereignty is primarily a personal rather than a territorial sovereignty. The tribal court has no jurisdiction over non-Indians unless they consent to such jurisdiction. Its jurisdiction is solely a jurisdiction over persons."\(^{219}\)

3. The Modern Ironies

In light of the long legislative history of the Wheeler-Howard Act, there are many ironies in the current state of American Indian jurisprudence. First, the original bill would have established a federal court of Indian affairs with jurisdiction over "all cases, civil and criminal, arising under the laws or ordinances of a charter Indian community, wherein a real party . . . is not a member of such community."\(^{220}\) This court would have been required to recognize and observe "all . . . rights guaranteed by the Constitution of the United States."\(^{221}\) But Congress thought that this court unnecessarily duplicated the function of state and federal courts,\(^{222}\) and stripped it from the final version of the bill. The absence of such a court today, however, means that nonmembers may, in certain circumstances, be hailed into a tribal court that is not necessarily independent, and from which there is no constitutional right of

218. 1942 COHEN HANDBOOK, supra note 29, at 360.
219. Id. (emphasis supplied).
220. H.R. 7902 and S. 2755, 73d Cong., 2d Sess. Title IV, § 3(3).
221. Id., § 10.
222. The following statement of Chairman Wheeler is illustrative: "As far as the court feature of the bill, the setting up of a new, is concerned, I am opposed to absolutely, and I think it is unnecessary, and it would entail an expense to the Government and deprive our present district court of that power and supersede the present Federal district courts and their functions. I do not think it is necessary at all . . ." 1934 Senate Hearings, supra note 157, at 146.
appeal.\textsuperscript{223} Clearly, the Congress that enacted the final Wheeler-Howard Act would have abhorred this unintended result.

Second, the original bill would have provided for the organization of Indian tribes as "Federal municipal corporations\textsuperscript{224} which would have allowed them to set up laws that might conflict with laws of the states.\textsuperscript{225} Because Congress thought that this provision would be a step backward instead of a step forward,\textsuperscript{226} it also eliminated this provision from the final version of the bill.\textsuperscript{227} Today, however, a major conflict between tribes and states concerns the problem of "exemption marketing." For example, a state may have environmental regulations more restrictive than federal law.\textsuperscript{228} But in an

\textsuperscript{223} See Bolton Letter, supra note 9.
\textsuperscript{224} H.R. 7902 and S. 2755, 73d Cong., 2d Sess., Title 1, § 4(a).
\textsuperscript{225} The following exchange illustrates this fact:
Chairman Wheeler. The thing that puzzles me is just how far they can go under this bill in setting up ordinances and laws which might conflict with the laws of the State. Can you answer that, Mr. Commissioner?
Commissioner Collier. They could go, theoretically, just as far as they can go without conflicting with existing Federal law, which is pretty far, Senator.

\textit{1934 Senate Hearings}, supra note 157, at 177.

\textsuperscript{226} See id. at 199 (Chairman Wheeler).
\textsuperscript{227} Another exchange is illustrative:
Chairman Wheeler. If you say to the . . . Indians, "Under this law you can make rules and regulations for the control of your own property, and control your property, hold your property in common if you want to, under this law, but we are not going to extend you the right to set up laws which might conflict with the laws in the State[s] . . . in which you are living at the present time.
Commissioner Collier. I think you have pointed toward a necessary amendment. Where they exist as municipalities they could be allowed to set up ordinances like any other municipality, provided that they do not conflict with the laws of the State.
Chairman Wheeler. Yes.

\textit{Id.} at 179.

\textsuperscript{228} See, e.g., Washington Dep't of Ecology v. United States Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985). In that case, the court affirmed an EPA decision to exclude Indian lands from an approved state hazardous waste program. Because the applicable federal statute did not define the term "Indian lands," the court accepted the EPA interpretation that the definition of Indian country for criminal jurisdiction purposes controlled. \textit{Id.} at 1467 n.1. As argued elsewhere in this Article, however, reliance on 18 U.S.C. § 1151 (which defines Indian country for the purpose of criminal jurisdiction) is misplaced. Further, the court did not decide the question of whether a state is empowered to create an environmental program reaching into the exterior boundaries of reservations when that program is limited to non-Indians. \textit{Id.} at 1468. The Court's reasoning in \textit{Brendale}, however, suggests that this extension would be allowable. \textit{See also} Allen, \textit{Who Should Control Hazardous Waste on Native American Lands? Looking Beyond Department of Ecology v. EPA}, 14 \textit{ECOLOGY L. Q.} 69 (1987).
effort to attract industries to their reservations, Indian tribes might enact less restrictive regulations than those of the state, thereby effectively destroying the ability of the state to implement and comprehensively enforce its environmental policies. Again, this state of affairs seems to be exactly the sort of conflict which Congress wished to prevent.

Third, although the original bill received almost unprecedented study and debate, the phrase that has turned out to be the most important sailed through markup without a single comment concerning its substantive effect. This phrase is, of course, the one concerning "existing law" in section 16 of the final Act. Ignoring the Act's long and contentious legislative history, one leading modern commentator argues that the Act "specified certain tribal powers but largely relied on the existing, retained sovereignty of the tribes." The legislative history outlined above clearly precludes such an assertion.

229. One of the sponsors of the bill, Representative Howard, stated to Congress that "[i]t is doubtful if any piece of legislation in the history of the country has been more thoroughly intelligently studied and debated." 78 CONG. REC. 11,731 (1934). Indeed, in the House of Representatives alone, the Committee on Indian Affairs held 29 different sessions on the bill. See id. at 11,726.
230. 1934 Senate Hearings, supra note 157, at 244.
231. See supra notes 200-209 and accompanying text.
232. Collins, Implied Limitations, supra note 64, at 510. One might also wonder why some commentators place such great emphasis on an April 28, 1934 letter written by President Roosevelt to Senator Wheeler and Representative Howard. Indeed, as Representative Carter did, one might query why this letter was even included in the House and Senate Reports:

Mr. Carter. I notice in the [May 28, 1934] report a letter from President Roosevelt to the Chairman of the Indian Affairs Committee in which he endorses the basic and broad principles set forth in the so-called "Wheeler-Howard" bill. I am wondering why this letter was published in the report, as the bill reported out by the committee is an entirely different bill than the [revised] Wheeler-Howard bill, and this letter was based on the [original] Wheeler-Howard bill. 78 CONG. REC. 11,738 (June 15, 1934); cf. H.R. REP. NO. 1084, 73d Cong., 2d Sess, 8 (1934); S. REP. NO. 1154, 73d Cong., 2d Sess, 3-4 (1934).

233. In the text and footnotes appear numerous quotes reflecting the viewpoints and concerns of those charged with the legislative and administrative responsibility over Indian affairs. Supra notes 155-198 and accompanying text. Although it was the Senate version which was ultimately enacted, the following House floor colloquy, which, occurring just three days before the final bill was adopted, suggests that the "intent" of the members of the House should be controlling:

Mr. Christianson. Is it not a fact that the House bill as it appears before us, was written by those who objected most strenuously to the original Wheeler-Howard bill?

Mr. Howard. That is absolutely true.

Mr. Christianson. And it represents the viewpoint of the critics of the legislation against which the attacks have been leveled?
Indeed, it defies common sense to suppose that Congress would, with one hand, expressly deny Indians broad governmental powers (especially over non-Indians) while, with the other, implicitly confirm those very same powers.

Fourth, one of the most interesting ironies concerning the Act’s legislative history is that although the author of the bill, Felix Cohen, was present at all of the legislative sessions, he made himself almost invisible. The markup eliminating (from what ultimately became section 16 of the final version of the act) the conferral of the power to levy assessments is instructive:

Chairman Wheeler. Who is your legal advisor that drew up that phase of it? Did any lawyer draw it up? If he did, I would like to hear from the legal advisor on that point.
Commissioner Collier. He is not here.
Chairman Wheeler. I have never been able to find out who in the name of goodness drew up any of this bill.
Commissioner Collier. A good lawyer did it.

The ultimate irony of the legislative history of the Wheeler-Howard Act is that today there would be significantly less conflict between Indian tribes and state and local governments, and non-Indians would be in a significantly better legal position, had the original bill been enacted. The consolidation mechanism would have eliminated the checkerboard land-holding patterns that give rise to conflicts, for—as Commissioner Collier had assured the Congress—the boundaries of the Indian communities would not have extended to areas highly populated by non-Indians. Moreover, as federal municipal corporations, the tribes would necessarily have to observe and

Mr. Howard. That is right.
Mr. Christianson. And when the bill, in its final form, was submitted to the committee, there was not a single dissenting vote.
Mr. Howard. That is right.
78 Cong. Rec. 11,732 (1934).

234. Felix S. Cohen’s name appears in the record of attendance preceding all of the hearings.
235. 1934 Senate Hearings, supra note 157, at 248. As history has shown, however, the “good lawyer” did not remain invisible for long. Within just a few months after the adoption of the final version of the act, Felix S. Cohen would, under the auspices of the Department of the Interior, issue his opinion on the meaning of the “existing laws” phrase contained in section 16. The “Powers of Indian Tribes” opinion, of course, was later fleshed out into the most influential of all Indian law treatises, F. Cohen’s 1942 Handbook of Federal Indian Law. See supra notes 58-67 and accompanying text.
236. See supra notes 175-190 and accompanying text.
respect the United States Constitution. And non-Indians would enjoy the right to appeal local Indian court decisions to a federal court of Indian affairs. In the face of these ironies, perhaps the Congress should consider enacting new legislation modeled after Cohen's original bill. In any event, those ironies call for a fundamental rethinking of Indian law.

IV. RETHINKING INDIAN LAW

A. In General

There are many ways to approach the field of Indian law. One may seek to divine the content of a Platonic notion of Indian sovereignty through an exegesis of the Supreme Court's opinions; or one may attempt to discern the intent of Congress, as manifested in relevant treaties and statutes. The Supreme Court has correctly been moving away from the former approach and toward the latter. Indeed, one of the Court's two remaining proponents of a broad vision of inherent tribal sovereignty recently called for the court to direct its attention to the 1934 Congress that "established the Indian policies to which we are heir."

As section III of this Article illustrated, the 1934 Congress attempted to reconcile its two earlier inconsistent promises. In the Indian treaties, the federal government promised Indian tribes reservations for their exclusive use and benefit. This promise is their charter for self-government. In the allotment acts of the late 1800s, the federal government both broke its promise to the Indians and made new promises to non-Indians by inviting them onto the reservations pursuant to a federal policy of assimilation. To be sure, the Wheeler-Howard Act of 1934 halted the further allotment of reservation lands. With respect to those lands still held by Indians, the Wheeler-Howard Act restored the federal government's earlier treaty prom-

237. See supra note 170.
238. See supra notes 169-174 and accompanying text.
240. See Martone, Congressional License?, supra note 22, at 635 (arguing that this is the proper methodology).
ise. Except to the extent that Indian tribes were given a new lease on their existence, however, the Wheeler-Howard Act did not repudiate the allotment promise made to non-Indians. That is, the clock was not turned back to pre-allotment time. The Wheeler-Howard Act reconciliation leads to the two legal propositions posed in the introduction of this Article. Before turning to these propositions, however, two other questions must be considered: first, the extent to which court precedent relating to the tenth amendment affects our rethinking of Indian law; second, whether state action principles should be invoked in the area of Indian law.

B. The Tenth Amendment Analogy in Light of Garcia v. San Antonio Metro Transit Authority

The tenth amendment does not expressly mention Indian tribes. Nonetheless, some commentators have argued that "Indian treaty negotiations are parallel in concept to negotiations with representatives of states over statehood," and in an analogous manner reserve to the tribes those powers not expressly or impliedly relinquished to the United States. Of

244. U.S. CONST. amend. X.
245. C. WILKINSON, AMERICAN INDIANS, supra note 27, at 102.
246. It has also been argued that Indian treaties are "essentially contracts between two sovereign nations." Id. (citing Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658, 675 (1979)); but see Martone, Congressional License?, supra note 22, 606-07 (refuting the proposition by examining treaty language limiting tribal authority by the United States Constitution and federal law and arguing that the 1871 act abolishes the making of any further Indian treaties and establishes a congressional intent to "extinguish tribal sovereignty vis-a-vis the United States"). Also of interest is the following correspondence from Andrew Jackson to President Monroe:

I have long viewed treaties with the Indians an absurdity not to be reconciled to the principles of our government. The Indians are the subjects of the United States, inhabiting its territory and acknowledging its sovereignty, then it is not absurd for the sovereign to negotiate by treaty with the subject?

(quoted in Higgins, International Law Consideration of the American Indian Nations By the United States, 3 ARIZ. L. REV. 74, 82 (1961)). Some commentators have argued that "Indian treaty negotiations are parallel in concept to negotiations with representatives of prospective states over statehood," and/or that the "Indian treaties are "essentially contract[s] between two sovereign nations." Id. (citing Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658, 675 (1979)). If accepted, however, the proposition may be a two-edged sword; tribal powers might lose their extra-constitutional status. In a 1988 decision, the Court declared that the protections of the Bill of Rights could not be abrogated within the continental United States, for "it is well established that 'no agreement with a foreign nation can confer power on the Congress or on any other branch of Government, which is free from the restraints of the Constitution.'" Boos v. Barry, 485 U.S. 312, 324 (1988) (citing Reid v. Covert,
course, because they are facially reserved in the Constitution, state powers are more permanent than tribal powers.\textsuperscript{247} In any event, current Supreme Court thinking undermines tribal attempts to gain any strength from the analogy.

After suffocating it for nearly 40 years, the Supreme Court breathed new life into the tenth amendment in 1976, stating that "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in the federal system."\textsuperscript{248} Five years later, the Court elaborated a more specific test: The tenth amendment is violated only by federal laws that would "directly impair [the states'] ability 'to structure integral operations in areas of traditional functions.'"\textsuperscript{249}

In that same year, the Court established a similar test with respect to reserved tribal powers. In \textit{Montana v. United States},\textsuperscript{250} a case involving tribal regulation of nonmember hunting and fishing on the reservation, the Court announced the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."\textsuperscript{251} The Court then stated two exceptions to that general proposition,\textsuperscript{252} the second of which parallels the tenth amendment reasoning employed in \textit{National League of Cities} and \textit{Hodel}. A tribe may retain inherent power to exercise civil

\begin{footnotesize}
\begin{enumerate}
\item 354 U.S. 1, 16 (1957)); accord Duro v. Reina, 110 S.Ct. 2053, 2064 (1990). See also DeGeofroy v. Riggs, 133 U.S. 258, 267 (1889) (The treaty power does not "extend so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent." (citing Ft. Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 541 (1885)). All American Indians were granted United States citizenship in 1924. 8 U.S.C. § 140 1(a)(2)(1970) (originally enacted as Act of June 2, 1924, ch. 233, 43 Stat. 253). In theory, the rule of \textit{Boos v. Barry} would threaten extra-constitutional assertions of tribal jurisdiction over even its own members, not to mention nonmembers with no voice in the tribal political process. Cf. Duro, 110 S.Ct. 2053.
\item 247. C. Wilkinson, American Indians, supra note 27, at 102.
\item 251. Id. at 565.
\item 252. The first exception is the so-called "consensual relations" test: "A tribe may regulate, through taxation, through licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through a commercial dealing, contracts, leases, or other arrangements." Id. The court did not elaborate this test, and, apparently, has not invoked it since \textit{Montana}. The cases cited, however, indicate the exception relates to direct commercial dealings between a non-Indian and a tribe. See, e.g., Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (non-Indian mining of tribally owned minerals on trust lands).
\end{enumerate}
\end{footnotesize}
authority over the conduct of non-Indians on fee lands within its reservation when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."\textsuperscript{253}

In its 1985 \textit{Garcia v. San Antonio Metro Transit Authority}\textsuperscript{254} decision, however, the Court once again stifled the tenth amendment by overruling \textit{National League of Cities}. The rationale for the overruling was that it was difficult, if not impossible, to identify an organizing principle from \textit{National League of Cities} and its progeny.\textsuperscript{255}

The second exception of \textit{Montana} suffers from the same problem. The \textit{Montana} second exception is unworkable mainly because the Court did not articulate the basis from which it is derived. The Court left unclear whether the exception derived from some preconstitutional basis recognized in the treaty or from some statutory delegation. Without knowing the answer to this question, it is difficult, if not impossible, to articulate the scope of the exception. Thus, in \textit{Brendale},\textsuperscript{256} both the White opinion and the Blackmun dissent purport to apply the second exception, but reach starkly contrasting conclusions.\textsuperscript{257}

In \textit{Garcia}, the Court also noted that state sovereign interests are protected by procedural safeguards inherent in the structure of the federal system.\textsuperscript{258} Unlike states, however, tribes do not have two senators or direct control over electoral qualifications for federal elections. Nonetheless, tribal members are not powerless in the federal system; they can vote and participate as candidates in all federal, state, and local elections. Moreover, "Indians have learned how to lobby. Highly effective legislative campaigns have been pursued by individual tribes and by national organizations. Indians and their advocates hold a range of well-placed staff positions in Congress."\textsuperscript{259} This is evidenced by the fact that "[n]o Indian legislation has been passed over Indian opposition since the Indian Civil

\textsuperscript{253} \textit{Montana}, 450 U.S. at 565-66.
\textsuperscript{255} Id. at 540-46.
\textsuperscript{256} See discussion of \textit{Brendale}, infra, notes 275-321 and accompanying text.
\textsuperscript{257} See \textit{infra} notes 280-299 and accompanying text. The practical lesson is that the \textit{Montana} second exception essentially calls for a political, not a legal, determination. Should an unelected judiciary become involved in such business?
\textsuperscript{258} \textit{Garcia}, 469 U.S. at 552.
\textsuperscript{259} C. \textit{WILKINSON}, \textit{AMERICAN INDIANS}, \textit{supra} note 27, at 82.
Rights Act of 1968.\textsuperscript{260}

In short, current tenth amendment jurisprudence strongly suggests that the second exception of \textit{Montana} is indeed troublesome and should be reevaluated.

\textbf{C. The State Action Theory}

Although Indian tribes may not be subject to the United States Constitution, the federal government is. Moreover, a tribe can only be recognized through some action on the part of the federal government,\textsuperscript{261} be it through a treaty,\textsuperscript{262} an executive order,\textsuperscript{263} a unilateral statute,\textsuperscript{264} or recognition by the Secretary of the Interior pursuant to statutorily delegated authority.\textsuperscript{265} Indian tribes have no rights or powers recognizable and enforceable in federal courts unless and until Congress expresses its will as to what they are.\textsuperscript{266} Inherent tribal sovereignty and federal plenary power over Indian affairs is a contradiction of terms. Tribes can do very little without federal governmental approval.\textsuperscript{267} Therefore, because tribal power involves state action, a tribe's exercise of that power should be

\begin{itemize}
\item \textsuperscript{260} Id. at 83.
\item \textsuperscript{261} For a typical application of the state action doctrine see Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948); Marsh v. Alabama, 326 U.S. 501 (1946).
\item \textsuperscript{262} The applicability of the Constitution to the congressional exercise of its treaty-making power with the Indians and the constitutional difficulties in a broad grant of tribal jurisdiction over non-Indians was recognized by the Attorney General of the United States over 150 years ago. See 2 Op. Atty. Gen. 693, 694 (1834).
\item \textsuperscript{263} C. WILKINSON, AMERICAN INDIANS, supra note 27, at 8.
\item \textsuperscript{264} Id.
\item \textsuperscript{265} Id.; see also 25 C.F.R. § 83.7 (to qualify for federal benefits and services, a tribe seeking federal recognition must satisfy seven criteria).
\item \textsuperscript{266} Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (federal government not liable for taking when it, pursuant to a congressional authorization, granted right to harvest timber on land held under aboriginal title); Johnson v. McIntosh, 21 U.S. 543 (1823) (alienation of Indian title permissible only with federal approval).
\item \textsuperscript{267} For a tribe cannot lease its land without approval from the Secretary of Interior. 69 Stat. 539, ch. 615 (codified as amended at 25 U.S.C. §§ 396, 415-415d) (nonagricultural surface leasing); Comptroller Generals Report to the Senate Comm. on Interior and Insular Affairs, 94th Cong., 2d Sess., Management of Indian Natural Resources, pt. 2 (Comm. Print 1976). But there can be no doubt that, under existing law, tribes may not validly exercise any sovereign powers, over members or nonmembers, unless and until there is some state action, i.e., federal recognition. Compare the difference between federal recognition of Indian tribes with federal recognition of Cuba or North Korea or, for that matter, Red China in the 1970s. The existence of governmental power in these countries is certainly not dependent on United States recognition. But the existence of governmental power by an Indian tribe is completely dependent on such recognition. See also discussion of full sovereignty view of some commentators, supra notes 98-103 and accompanying text.
\end{itemize}
governed by equal protection and due process guarantees; under current law, it is not.

In a nation founded upon principles of representative democracy, it is unclear why the Supreme Court would consider countenancing tribal assertions of governmental power over nonmembers who are denied fundamental rights of representation that are guaranteed by the Constitution. For example, nonmembers are denied the right to vote in tribal elections, the right to participate as candidates for tribal office, and the right to organize and meaningfully participate in the tribal political process. Outside the domain of Indian affairs, the denial of such fundamental rights is subject to strict judicial scrutiny and struck down as an unconstitutional violation of the equal protection clause. Why should many nonmember reservation residents who own land on reservations pursuant to congressional invitation be denied voice in or accountability from local governments that seek to assert judicial and legislative powers over them?

To be sure, congressionally created preferences for Indians have been upheld in the face of equal protection challenges. In Morton v. Mancari, the Supreme Court upheld a provision in the Wheeler-Howard Act granting an employment preference to Indians for positions in the Bureau of Indian Affairs. "The Court, reconciling Indian law and equal protection principles, adopted a rational basis test." The statute was upheld because it was "tied rationally to the fulfillment of Congress’s unique obligation toward the Indians."

There is a distinction, however, between granting preferences and denying constitutional rights. In this context, the preferences are granted from a higher sovereign—the United States government. Moreover, the preferences stem from a unique obligation rooted in notions of pre-constitutional and extra-constitutional sovereignty. The denial of constitutional rights, however, comes not from a higher sovereign, but rather

273. C. Wilkinson, American Indians, supra note 27, at 79. The Court has also applied a rational basis test in at least one other Indian law case. E.g., Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84-85 (1977) settlement (act benefiting Oklahoma Delawares and excluding Kansas Delawares upheld because tied rationally to Congress' trust responsibility to Indian tribes).
from a sovereign that has no direct accountability to nonmembers. Because this result contradicts established state action precedents, a different analysis should be applied. Tribal assertions of governmental authority over nonmembers fall within the rubric of external relations. Because only internal relations of the tribe are preconstitutional (and extra-constitutional), external relations should be subject to the Constitution. Thus, the due process and equal protection clauses should govern tribal attempts to assert governmental power over nonmembers.

This approach offers several advantages. First, it recognizes the inherent state action principles involved in modern Indian affairs. Second, it is consistent with traditional constitutional analysis. Third, it allows for a balancing of tribal, federal, and state interests. Finally, and perhaps most importantly, it provides lower courts with a method of analysis with which they are familiar and eliminates much of the confusion and uncertainty surrounding litigation of Indian law issues. As illustrated in the next section of this Article, the Court is already moving in this direction.

D. Brendale v. Confederated Tribes & Bands of the Yakima Nation

In its 1989 term, the Brendale case presented the Court with an opportunity to define precisely the scope of tribal civil authority. Brendale presented the question of whether the Yakima Indian tribe, on the one hand, or the County of Yakima, on the other, possesses the exclusive authority to control, through comprehensive zoning, the use of land owned by nonmembers but located within the exterior boundaries of the Yakima reservation.

The Court consolidated two cases: one involving the "open area" of the reservation; the other involving the "closed area" of the reservation. Although a decision by the BIA

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274. Cf. supra notes 9 and 261.
276. The "open area" is so called because anyone can travel freely within it. Id. at 3000. It consists of 350,000 acres located within Yakima County. The primary activity in the open area is agriculture. Tribal members farm only about 12,300 of the 143,000 irrigated acres. Moreover, 80 percent of the 25,000 open area residents were nonmembers of the tribe. Id.
277. The "closed area" is so called because of the 1954 decision of the Tribe to restrict access to only tribal members and permittees. Id. at 3000. The BIA, however, invalidated this decision just months prior to the oral argument before the Supreme
had obliterated the legal distinction between the open and closed areas by the time of oral argument, for convenience's sake the Court continued to refer to them as such, and the two "swing" justices\(^{278}\) followed the district court in treating them differently. This distinction is based upon the factual findings of the district court concerning the respective threats posed by a holding of exclusive county authority to the tribe's "political integrity, economic security, health and welfare."\(^{279}\) Three separate views of tribal governmental power, two of them bright line and the third quite fuzzy, emerged from the three opinions.

1. Justice White's View: No Inherent or Reserved Power Over Nonmembers

First, Justice White, writing for himself and three other justices, opined that the tribe enjoys no treaty-reserved or inherent powers to regulate land held in fee by nonmembers. Congress abrogated the treaty promise of "exclusive use and benefit" when it opened the reservation pursuant to the federal allotment policy.\(^{280}\) Thus, the tribe had been divested of its treaty power to exclude, and its lesser power to regulate, fee owners within the boundaries of the reservation.\(^{281}\) Justice White also states that the tribes' inherent or preconstitutional powers are limited to internal affairs. To the extent that these powers are inconsistent with their dependent status, tribes no longer retain any inherent power over external relations,\(^{282}\) which include the "regulation of the relations between an Indian tribe and nonmembers of the tribe."\(^{283}\) Moreover, the opinion expressly provides that a tribe's inherent sovereignty is not the equivalent of a local government's police power. Thus, "[t]he governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal

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\(^{278}\) Justices Stevens and O'Connor.


\(^{280}\) Brendale, 109 S.Ct. at 3003-3004.

\(^{281}\) Id. at 3004.

\(^{282}\) Id. at 3005.

\(^{283}\) Id.
courts, to regulate the use of [nonmembers'] fee lands.”

Justice White's opinion, however, does not suggest that tribes are left with no recourse to protect themselves. Indeed, the Supremacy Clause requires state and local governments to recognize and respect tribal interests in the course of their activities. Through a nuisance-type theory grounded in treaties or federal statutes, tribes can enjoin activities occurring on fee lands that have "demonstrably serious impacts that imperil their political integrity, economic security, or health and welfare."285

2. Justice Blackmun's View: Full Inherent Sovereignty Over Nonmembers

The dissent (Justice Blackmun, writing for himself and two other justices) also supports the establishment of a bright-line rule, but one cutting the other way.286 Justice Blackmun maintains that the Montana decision was an anomaly: a long line of Indian law decisions establish a governing principle at odds with the principle articulated by Justice White—"a principle according to which tribes retain their inherent sovereign powers over non-Indians on reservation lands unless the exercise of that sovereignty would be inconsistent with the overriding interests of the National Government.”287 Justice Blackmun refers to Cohen's Powers of Indian Tribes as "the definitive administrative interpretation of inherent Indian sovereignty"288 and cites the following passage therefrom: "[b]ut over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside thereon, and to do business."289 The dissent fails, however, to quote Cohen's immediate qualification of that passage: "provided

284. Id. at 3008.
285. Id.
286. In a footnote, however, Justice Blackmun qualifies his opinion and thus blurs the brightness of the line he would draw: "[i]t may be that on some reservations, including the Yakima reservation, there are essentially self-contained, definable, areas in which non-Indian fee lands so predominate that the tribe has no significant interest in controlling land use." Id. at 3027 n.9.
287. Id. at 3018 (quoting Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 153 (1980)).
288. Id. at 3020 n.4.
only such determination is consistent with applicable Federal
laws and does not infringe any vested rights of persons now
occupying reservation lands under lawful authority."  

Ironically, Justice Blackmun then commits the basic error
that Cohen himself warned against, stating that "tribal sover-
eignty is in large part geographically determined." Justice
Blackmun also relies upon Merrion v. Jicarilla Apache
Tribe, a decision upholding a tribe's authority to impose a
severance tax on non-Indian oil and gas producers who had
entered into long-term lease contracts with a tribe concerning
tribal trust lands—an issue clearly distinguishable from the
open-area facts involving no contract and only reservation
lands held in fee simple by non-Indian owners. Justice
Blackmun's reliance on Merrion is evidence that the compet-
ing theories of tribal governmental power discussed earlier
are of more than mere academic concern. Indeed, these con-
fl icting theories form the basis for the diverging opinions and
results.

Justice Blackmun is most persuasive when he states that
"the general inability of a tribe to control land use on numer-
ous tracts of land interspersed across its reservation . . . inher-
ently threaten[s] the political integrity, economic security, or
health or welfare of the tribe." In essence, this was the
rationale of the Ninth Circuit opinion when it reversed the dis-
trict court's holding that the county possessed exclusive jurisdic-
dition in the open area. But this rationale is based

290. Powers of Indian Tribes, 1 Op. Solic. Gen., at 467 (emphasis supplied),
discussed supra notes 119-209 and accompanying text. At the time the opinion was
issued, applicable federal laws included section 6 of the general Allotment Act of 1887
(allotees of fee land "shall have the benefit of and be subject to the laws, both civil and
criminal, of the State or Territory in which they may reside"); Bates v. Clark, 95 U.S.
204, 208 (1877) (land ceases to be Indian country whenever tribes lose title); United
States v. Chavez, 290 U.S. 357, 364 (1933). Of course, for purposes of federal criminal
jurisdiction, the definition of Indian country is much broader. See 18 U.S.C. § 1151.

291. But see supra note 219 and accompanying text (tribal sovereignty is primarily
a personal rather than a territorial sovereignty); Duro v. Reina, 110 S.Ct. 2053, 2060
(1990) (Justice Blackmun joined majority opinion relying on theory of personal
sovereignty).


293. Because it involved a contract entered into with the tribe, the Merrion
decision more properly belongs within the realm of the first exception of Montana, the
so-called "consensual relations" exception.

294. See supra notes 41-103 and accompanying text.


296. Confederated Tribes & Bands of the Yakima Indian Nation v. Whiteside, 828
F.2d 529, 534-35 (9th Cir. 1987) (denying the tribe the right to zone non-Indian fee land
essentially on the concept of efficiency in local land use control. What constitutes efficient land use control, however, is essentially a policy question. In the face of possible impairment of constitutional rights and congressional intent to the contrary, a government interest in enjoying the most efficient form of land use control seems less than compelling.

Given the full sovereignty result advocated by Justice Blackmun, it is interesting that he would suggest that the "Indian policies to which we are heir" can be discerned by directing one's attention to the intent of the Congress that enacted the Wheeler-Howard Act. Clearly, Justice Blackmun perceives the Wheeler-Howard Act as a full repudiation of the second promise (the allotment acts) and a full restoration of the first promise. But, as discussed earlier in this Article, the Wheeler-Howard Act only partially repudiated the second promise and only partially restored the first; no further lands would be allotted or sold, and, as to those lands already held in fee by nonmembers, the tribes simply no longer possessed the power to exclude. That is, the allotment acts are still good law. Justice Stevens recognizes as much, but adds an interesting twist.

3. Justice Stevens’s View: Guess Now, Litigate Later

The key votes in Brendale were provided in the opinion by Justices Stevens and O'Connor. In Justice Stevens's words, "the proper resolution of these cases depends on the extent to which the tribe's virtually absolute power to exclude has been either diminished by federal statute or voluntarily surrendered by the Tribe itself." Justice Stevens first notes that:

the power to zone closely parallels the common law of nuisance and finds guidance in the maxim . . . use your own

"would effectively destroy their capacity to engage in comprehensive planning, so fundamental to a zoning scheme.") In contrast, the district court had found that there was no evidence that checkerboard land use authority would be a per se threat to the tribe's political integrity, economic security or health and welfare.

297. Brendale, 109 S.Ct. at 3025 (Blackmun, J., dissenting). If Blackmun himself were to study the legislative history of the Wheeler-Howard Act of 1934, he might be forced to reach a result contrary to the one he preferred in Brendale.

298. Id. at 3025 (Blackmun, J., dissenting).

299. Id. at 3011 (the allotment acts reworked fundamental notions of Indian sovereignty); see also Confederated Tribes & Bands of the Yakima Indian Nation v. County of Yakima, 903 F.2d 1207, 1216 (9th Cir. 1990).

300. Brendale, 109 S.Ct. at 3009. Query: is the concept of voluntary surrender parallel to that of a nonuser?
property in such a manner as not to injure that of another . . . . As in nuisance law, the issue is ultimately one of whether the proposed land use is like a pig in the parlor instead of the barnyard.\footnote{301}

The Yakima Tribe’s preconstitutional power to exclude was expressly confirmed in the treaty promise to the tribe of “exclusive use and benefit” of reservation lands.\footnote{302} Justice Stevens argues that the allotment acts did not expressly transfer regulatory power from the tribe to any state or local governmental authority; “[n]onetheless,” the acts “in some respects diminished tribal authority.”\footnote{303} To resolve the conflict, Justice Stevens then attempts to discern the intent of Congress:

Although it is inconceivable that Congress would have intended that the sale of a few lots would divest the Tribe of the power to determine the character of the tribal community, it is equally improbable that Congress envisioned that the Tribe would retain its interest in regulating the use of vast ranges of land sold in fee to nonmembers who lack any voice in setting tribal policy.\footnote{304}

Guided by this theory of congressional intent, Justice Stevens decides that the closed area should be treated differently from the open area. While he eschews the importance of such labels, Justice Stevens states that “[w]hat is important is that [in the closed area] the Tribe has maintained a defined area in which only a very small percentage of the land is held in fee,” while in the open area “approximately half of the land is held in fee.”\footnote{305} “[I]t is unlikely that Congress intended to give the Tribe the power to determine the character of [the open area, which] is predominantly owned and populated by nonmembers, who represent 80 percent of the population yet lack a voice in tribal governance.”\footnote{306}

\footnote{301. Id.}
\footnote{302. Treaty with the Yakima Indian Nation, 12 Stat. 951, art. II (1859).}
\footnote{303. Brendale, 109 S.Ct. at 3011. “A statute that authorizes the sale of a parcel of land in a reservation must implicitly grant the purchaser access to that property. In addition, to the extent that large portions of reservation land were sold in fee, such that the Tribe could no longer determine the essential character of the region by setting conditions on entry to those parcels, the Tribe’s legitimate interest in land use regulation [is] also diminished.” Id.}
\footnote{304. Id.}
\footnote{305. Id. at 3012 n.2.}
\footnote{306. Id. at 3016. A doctoral dissertation tested the following hypothesis: in Indian jurisdiction cases before the Supreme Court, if non-Indians constitute a majority of the persons who will be affected, the Court will rule against the tribe (and vice versa).}
Justice Stevens also acknowledges the equal protection problems inherent in a finding of exclusive tribal jurisdiction rather than exclusive county jurisdiction:

Indians and non-Indians alike are eligible to vote in County elections. Only enrolled members of the Tribe, however, are entitled to participate in Tribal elections. Similarly, while the county provides police protection, public education, and other social services to both Indians and non-Indians [citations omitted], government services provided by the Tribe—although theoretically available to all residents—are in practice generally used only by members of the Tribe.  

In Justice Stevens's view, "the Tribe’s power to zone is like an equitable servitude; the burden of complying with the Tribe’s zoning rules runs with the land without regard to how a particular estate was transferred." Arguing that "equitable servitudes fall within the same family as easements," Justice Stevens concludes that if fee owners enjoy the benefits of an implied easement, they also must accept the burdens of an implied servitude. The resolution of the case, therefore, must be determined by a factual inquiry into the degree of control that the tribe maintains to define the essential character of the region. Invoking the change-of-neighborhood doctrine, Justice Stevens says that "the open area has lost its character as an exclusive tribal resource, and has become, as a practical matter, an integrated portion of the county, and has also lost any claim to an interest analogous to an equitable servitude." Therefore, Justice Stevens concludes that in the open area the county possessed exclusive jurisdiction.

In the closed area, however, he concludes that the tribe
has not "surrendered its historic right to regulate land use." 313 He distinguishes the open area from the closed area, which has maintained its "pristine, wilderness-like character." 314 "By maintaining the power to exclude nonmembers from entering all but a small portion of the closed area, the Tribe has preserved the power to define the essential character of that region." 315 Thus, Justice Stevens concludes that in the closed area the tribe still possesses exclusive jurisdiction.

As pointed out by Justice Blackmun, Justice Stevens's approach fails to offer an organizing principle for lower courts to follow. "Justice Stevens's opinion not only would establish a . . . regime of 'checkerboard' zoning authority in 'open' areas of every reservation, but it would require an intrinsically standardless threshold determination as to when a section of a reservation contains sufficient non-Indian land holdings to warrant an 'open' classification." 316 Moreover, if tribes wish to maintain their exclusive authority, the Stevens approach implicitly denies tribes the opportunity to modernize their organizations and economically develop their reservations. Such actions would risk being labeled "integration" and a "voluntary surrender" of historic tribal rights. 317

4. The Law After Brendale

Justice White's opinion and Justice Blackmun's dissent illustrate the fundamental division in the Court with respect to tribal governmental power. In such a situation, one cannot help being drawn towards vote counting. Since Brendale was decided, one of the three subscribers to the full sovereignty view has left the Court. 318 Furthermore, Justice Blackmun himself joined the majority in Duro, a subsequent case denying tribes criminal jurisdiction over nonmember Indians. 319

313. See id. at 3013.
314. Id. at 3016.
315. Id. at 3013.
316. Id. at 3025-26.
317. Arguably, however, the Supreme Court's decision in Rice v. Rehner already subjects tribes to such a risk. In Rice v. Rehner, 463 U.S. 713 (1983), the Court upheld concurrent tribal and state regulation of on-reservation sales of alcoholic beverages. In so doing, the Court stated that tradition simply has not recognized inherent tribal authority in favor of exclusive liquor regulation by Indians.
318. Justice Brennan's seat was taken over by David Souter in 1990. Souter's views on Indian law remain unknown at this point.
319. See Duro v. Reina, 110 S.Ct. 2053 (1990). Congress recently passed a rider to the 1990 Defense Appropriations Bill that limits the holding of Duro until September 30, 1991, by which time more comprehensive legislation will be developed to clarify the
Although *Duro* involved criminal, not civil, jurisdiction, the rationales for the holding arguably apply equally in both areas.\(^2\)\(^3\)\(^2\)\(^0\) First, the governmental power of tribes cannot be described as full territorial sovereignty. Rather it is a sovereignty based on consent—a sovereignty merely over certain persons and their property. Second, one does not consent to be governed by all tribes merely because one consents to be governed by one tribe; the nonmember thus stands in the same shoes as the non-Indian.

It appears that Justice Marshall is now the Court’s only true believer in the view generally accepted in academic journals—the full territorial sovereignty view. With one new Justice on the Court, the White view may now command a majority, which, in light of the legislative history articulated above, coincides with historical congressional intent. Moreover, Justice White’s view fits within the state action argument discussed above, which, the Court implicitly recognized in *Duro*.\(^3\)\(^2\)\(^1\)

The lessons emanating from *Brendale* may be summarized as follows: (1) The allotment acts diminished the territorial sovereignty of tribes such that tribes now essentially enjoy only a form of personal sovereignty; (2) tribes have no inherent power to govern nonmembers on fee lands, their sole basis for regulating nonmembers is the property power to exclude; (3) the *Montana* second exception is now narrower in that tribes can no longer seek to regulate nonmembers conduct by merely showing that such conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe;” rather, they must now show a “demonstrably serious impact” that “imperils” such interests; (4) even when a serious impact imperilling such tribal interests is shown, tribes are entitled only to go to court to challenge the nonmember conduct, not to regulate generally the conduct with respect to tribal land.

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\(^{320}\) intent of Congress on the issue of tribal power to exercise criminal misdemeanor jurisdiction over non-member Indians. Pub. L. 100-511 § 8070(b)-(d).

\(^{321}\) Compare Justice Stevens’s dissent in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159-160 (1982) with Justice Kennedy’s opinion in *Duro*. Justice Kennedy follows Justice Stevens’s approach in *Merrion* by basing tribal authority upon consent. *Merrion*, 455 U.S. at 173 (citing Nevada v. Hall, 440 U.S. 410 (1978) (“In this Nation each sovereign governs only with the consent of the governed.”)) Why Justice Stevens diverged from this approach in *Brendale* is an interesting question beyond the scope of this Article.

\(^{321}\) *Duro*, 110 S.Ct. at 2064 (citing Reid v. Covert, 354 U.S. 1 (1957)).
E. A Unified Theory: Two Promises, Two Propositions

The current civil war over the extent of tribal governmental power over nonmembers arose out of inconsistent federal promises to Indian tribes and to nonmember citizens residing and doing business within the exterior boundaries of Indian reservations. During a time of complete separation and nonintercourse between Indians and non-Indians, the federal government signed treaties with the tribes promising land reserved for their exclusive use and benefit. But when the federal government invited non-Indians to purchase land inside the reservations, exclusive tribal use ended. And over the lands allotted in fee simple, the federal government promised non-Indians that states, not tribes, would exercise civil and criminal jurisdiction.

Congress, not the Supreme Court, holds plenary power over Indian affairs. Therefore, rather than attempting to fashion some sort of federal common law of Indian tribal sovereignty through an exegesis of case law, the Court should limit itself to an analysis of the relevant treaties and statutes. The two major acts giving rise to the current tension are the General Allotment Act of 1887 and the Wheeler-Howard Act of 1934. From the legislative history of these two major pieces of legislation, one may discern two general propositions that lead toward a just and efficient judicial resolution of the tension.

First, Indian tribes maintain exclusive jurisdiction over tribal members, tribal land and tribal resources on the reservations. Second, state and local governments maintain exclusive jurisdiction over nonmembers, and their lands and resources on the reservations. Notice that, to a large extent, the respective interests of tribes, local governments, and states are based on personal rather than territorial sovereignty.

Accepting these two propositions as a starting point, one may fit Indian law into familiar constitutional jurisprudence.


In Duro, as we have seen, the Court held that tribal criminal jurisdiction over nonmember Indians was no greater than that over non-Indians. The question remains, however, whether that same rule will apply in civil cases. If the issue is "representative democracy" or "consent of the governed," then the rule should apply in civil cases as well. This rule is also preferable as a practical matter. Otherwise, the Court would have to delineate a great number of imperceptible distinctions.
Under strict scrutiny analysis, if a government impairs a fundamental individual right or interest, then, to withstand constitutional attack, the government must show that the governmental action is necessary to the achievement of a compelling government interest. Under rational basis analysis, if a government does not impair a fundamental individual right or interest but merely impairs some right or interest, then, to withstand constitutional attack, all the government need show is (1) that the governmental action is plausibly related to (2) some legitimate governmental interest. Because nonmembers are foreclosed from the right to participate in a government to which rule they are subject—a fundamental right—tribal assertions of jurisdiction over nonmembers should be subject to strict scrutiny.

Indian tribes have a compelling interest in self-government. Because self-government connotes a sovereignty primarily over persons, tribal self-government means effective control over tribal members, tribal land, and tribal resources on the reservations.

There is Court precedent for constitutional-type analysis in Indian law decisions. For example, in *Montana v. United States* the Court implicitly employed a kind of strict scrutiny analysis: "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes." This sentence also identifies the tribal interest involved, that is, a tribe's power to govern its own members, and recognizes that under some circumstances, albeit very limited, preservation of that power may require the exercise of tribal power over nonmembers as well.

Before examining what such circumstances might be, note that the Court has faced and resolved a parallel problem in Indian law, i.e., the extent to which a state may exercise its powers over tribal members even with the reservation. For example, in *Colville* and *Puyallup*, the State of Washington—

324. *Id.* at 565-66 (emphasis supplied).
325. See supra notes 268-270 and accompanying text. In *Duro*, the court invoked the equal protection and due process clauses to strike down criminal jurisdiction over nonmember Indians. And, as discussed earlier, the rational basis test has been employed at least twice for Indian law issues.
ton rebutted the general presumption of a tribe’s exclusive authority over its members by showing that state regulatory control over tribal members, even on trust land, is necessary to maintain effective control over its non-Indian citizens\textsuperscript{328} or its resources.\textsuperscript{329}

Indeed, the essence of the “mirror image” theory is simply this: The conditions and criteria for determining the scope of exceptions to the general propositions concerning exclusive jurisdiction, respectively, of state and local governments over non-members, and tribes over members, should be parallel. Thus, tribal, state, and local governments are all protected by what this Article terms a “mirror image safety valve.”

How does this “mirror image” theory fit with recent Court decisions involving the scope of civil tribal power over non-members? It fits Montana quite well, because the Court there rejected the tribal claim. But in dicta the Court formulated two exceptions to the general proposition that tribal governmental powers do not extend to the activities of nonmembers of the tribe. First, “[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.”\textsuperscript{330} Second, a tribe may be able to civilly regulate nonmember conduct when such conduct imposes a “demonstrably serious impact imperilling tribal political integrity, economic security, or health and welfare.”\textsuperscript{331} The Second exception is troublesome with its vague contours. The Brendale case provided the Court with the opportunity to sharpen those contours.

Implicitly, at least, the plurality joining in Justice White’s opinion employed the mirror image theory in Brendale. The

tax stamps to cigarettes in order to assist the state in collecting and enforcing its sales and excise taxes imposed in reservation sales of cigarettes by tribes to nonmembers of the tribe. The Court said this was a minimal burden upon Indian retailers.

327. Puyallup Tribe, Inc. v. Game Dept. of Washington, 433 U.S. 165 (1977). In Puyallup, the Court upheld the state’s authority to regulate the tribe’s on-reservation treaty fishing rights when such regulations are reasonable and necessary for the conservation of natural resources, \textit{e.g.}, steelhead game fish.


Court reversed with respect to the open area. Among the grounds stated by the plurality for doing so was that the Ninth Circuit Court of Appeals erroneously applied a rational basis test when it should have applied a strict scrutiny test. Accordingly, because the district court found that the tribe failed to rebut the general presumption by showing a compelling interest, the Court ruled in favor of the county. Had the court explicitly employed the mirror image theory, it probably would have reached the same result.

However, the mirror image theory is not consistent with the reasoning of all recent cases. For example, the mirror image theory would undermine Justice Marshall's reasoning in

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333. The following discussion illustrates how Brendale could have been decided had the Court explicitly employed the mirror image theory. The dispute in the open area involved a nonmember on nonmember land. Thus, to rebut the presumption of county jurisdiction, the tribe should have the burden of showing that tribal land use jurisdiction was necessary to the achievement of some compelling interest. The tribe might argue that the most efficient form of land use control would be exclusive tribal jurisdiction. But this argument should fail because while efficiency is a legitimate governmental interest, it is not a compelling one. Moreover, because over 80 percent of the population are nonmembers, the most efficient land use system is probably exclusive county jurisdiction. Alternatively, the tribe might argue that exclusive tribal jurisdiction is necessary to protect its compelling interest in self-government. A fact militating against such a finding is that before the tribe brought suit in Brendale, the county had exercised exclusive zoning jurisdiction for 35 years; indeed, it was the county which originally denied Mr. Brendale's development approval. Given the population and fee ownership characteristics, the tribe would simply be hard pressed to show that exclusive county jurisdiction over nonmembers in the open area threatens its compelling interest in maintaining effective control over its members, its land or its resources.

Suppose the county approved the development of a tacky theme park; would the tribe then prevail? Probably not. In this situation the tribe would probably hurdle the compelling interest test. But because other means exist whereby the tribe could protect its interest, e.g., a nuisance suit grounded upon the treaty promise or federal law, the tribe would probably fail to prove that tribal jurisdiction was necessary.

In the closed area, however, the tribe would stand a significantly better chance of prevailing. As in the open area, the dispute involves a nonmember on nonmember land. Thus, the tribe would have the burden of rebutting the presumption in favor of county jurisdiction. But, because the tribe still has the power to exclude nonmembers from 97 percent of the land in the closed area, the tribe will more easily be able to prove a compelling interest in maintaining the character of the closed area. This is buttressed by the fact that the tribe severely restricts permissible uses of land in the closed area. The difficult question is whether exclusive tribal jurisdiction is a least restrictive means to protect the tribe's compelling interest. The equities in favor of the tribe are far greater in the closed area than in the open area. For that reason, exclusive tribal jurisdiction seems more reasonable. And it is likely that the Court would find exclusive tribal jurisdiction a sufficiently tailored means to protect tribal interests.
**Merrion v. Jicarilla Apache Tribe.** In **Merrion**, the Court upheld the imposition of an oil and gas severance tax on tribal lands leased to nonmembers, despite the fact that the tribe had lost the power to exclude nonmembers until the term of lease expired. Justice Marshall's majority opinion cites **Gibbons v. Ogden** in support of the proposition that tribal power to tax does not derive solely from the property power to exclude but also from the sovereign power to control economic activity within its jurisdiction. Thus, the tribe may contract away its proprietary interest in land, and then come back later and extract more from the contract pursuant to its sovereign power to tax, zone, or even condemn the land.

The Court's reliance on **Gibbons**, however, is both telling and misplaced. It is telling because it reveals the extent to which Marshall subscribes to the full territorial sovereignty view of tribal governmental power. It is misplaced because **Gibbons** is the famous 1824 case in which Chief Justice Marshall held that where a state statute concerning interstate commerce conflicts with a federal statute, the federal statute will control; but it is disingenuous to analogize tribal sovereignty to the sovereignty of the United States for, as discussed earlier in this Article, the sovereignty of an Indian tribe is much more limited than, and is subject to complete defeasance by, the sovereignty of the United States. In so far as it recognizes tribal powers as primarily personal—not territorial—in nature, the mirror image theory undermines Justice Marshall's broad view of territorial sovereignty over all lands (whether owned by nonmembers or not) located within the exterior boundaries of reservations.

Changing the facts of **Merrion** slightly will illustrate how Justice Marshall's approach differs from the mirror image approach. Suppose that the plaintiffs in **Merrion** had owned their land in fee simple, rather than leasing it from the tribe. Under Justice Marshall's **Merrion** approach, this change in facts would not alter the reasoning. Under the mirror image approach, however, the fact that the land could be traced to the allotment promise to non-Indians would fundamentally alter the reasoning. Because the case would concern nonmem-

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335. 22 U.S. 1 (1824).
336. **Merrion**, 455 U.S. at 137.
337. See supra notes 27-39 and accompanying text.
bers on nonmember-owned land, the mirror image analysis would begin with the general proposition of exclusive state and county jurisdiction. To rebut this proposition, the tribe might show that the nonmembers had consented to tribal taxation by entering into some sort of commercial dealings with the tribe in connection with the oil and gas production.\(^{338}\) If the tribe were unable to show such consent, then the tribe would need to show that the severance of oil and gas on this nonmember-owned land imposed a demonstrably serious impact imperilling tribal political integrity, economic security, or health and welfare.\(^{339}\) Depending upon the circumstances, it is not unlikely that the tribe could enjoin the oil and gas production on any of those bases. The oil and gas production may be "like a pig in the parlour," denigrating the political integrity of the tribe. Alternatively, the tribe may show that the cost of governmental services provided by the tribe and used by the nonmember oil producers is such that the tribe should be reimbursed. Finally, the tribe may show that oil and gas production imposes significant health risks to tribal members resident nearby. Of course, if the tribe were able to succeed in obtaining an injunction, it could also later negotiate with the nonmember oil producers to exact economic concessions as great as could be obtained through the imposition of a severance tax.\(^{340}\)

The invocation of mirror-image strict scrutiny, therefore, will not necessarily be fatal to a governmental action. While the general propositions state the rule to be applied in most cases, the safety valve is a real one. That is, the mirror image theory recognizes some remaining tension between the two propositions and provides a means of resolving it.

In mirror image circumstances to those illustrated above, Indian tribes would likewise be able to rebut the general presumption of exclusive state authority over nonmembers. For example, in *New Mexico v. Mescalero Apache Tribe*,\(^{341}\) the Court upheld exclusive tribal regulatory jurisdiction over hunting and fishing by members and nonmembers within the

\(^{338}\) The *Merrion* decision should be thought of as falling into this "consensual relations" exception to the general proposition that tribes maintain no governmental authority over nonmembers.

\(^{339}\) See *Brendale* discussion, supra notes 275-321 and accompanying text.

\(^{340}\) This may well lead to most economically efficient use of the lands. See Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

reservation. Conversely, the presumptions are not easily rebutted. Thus, in California v. Cabazon Band of Mission Indians, the Court denied California from regulating bingo operations on tribal land where the state could show no compelling interest.

In addition to the mirror image safety valve, tribes enjoy other means of protecting themselves. First, because the tribes' protectable interests arise under federal law, state and local governments are required to recognize and respect tribal interests in the course of their activities. Second, tribes may seek explicit congressional action, as has been done in the area of environmental regulation. Third, tribes can exercise political checks through exercise of their rights to vote and run for political office, which operate on the federal, state, and local levels.

V. CONCLUSION

This Article suggests that the Supreme Court has implicitly adopted, and should explicitly adopt, an Indian law jurisdictional theory based on two general propositions establishing the mirror-image, compelling interests of state and tribal governments over their respective citizens and members, and their lands and resources. Explicit adoption of this theory would internally unify the various and widely divergent concepts currently employed by courts in resolving difficult issues concerning the relations between Indians and non-Indians on reservations. Moreover, it would externally unify Indian law with traditional constitutional principles.

Justice Black once wrote that "[g]reat nations, like great


343. The Court recognized that the state had legitimate interest in tribal gambling operations; but given the fact that the state allowed controlled gambling, the Court said the state's interest was not "compelling". Id. at 220-21. Moreover, the Court found that the tribe had a compelling (economic) interest in continuing to run their bingo and gambling operations. Id. at 222.

men, should keep their word."\textsuperscript{345} Recognizing that two promises were made by the federal government with respect to reservation lands, i.e., the promises made to Indians in the treaties and the promises made to non-Indians in the allotment acts, the two propositions provide a means whereby the federal government may keep its word to both Indians and non-Indians. Finally, and perhaps most importantly, the two propositions are consistent with the congressional reconciliation of the two promises as embodied in the Wheeler-Howard Act of 1934.