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Employment in Indian Country: Considerations Respecting Tribal Regulation of the Employer-Employee Relationship

G. William Rice

EMPLOYMENT IN INDIAN COUNTRY: CONSIDERATIONS RESPECTING TRIBAL REGULATION OF THE EMPLOYER-EMPLOYEE RELATIONSHIP

G. WILLIAM RICE*

I. INTRODUCTION

Notwithstanding the (mis)perceptions resulting from the success of a few Tribes in the conduct of gaming enterprises, Indians retain the dubious distinction of having the lowest per capita income of any identifiable group in the United States according to the 1990 Census. The per capita income of Indians averaged $8,328.00 compared to $15,687.00 for whites according to that census.[1] The problems facing Indians, largely as a result of lack of economic opportunities within the Indian Country, do not end with lack of funds. The Indian Health Service has found that:

> In Fiscal Year 1995, the IHS service population (count of those American Indians and Alaska Natives who are eligible for IHS services) will be approximately 1.37 million. The IHS service population is increasing at a rate of about 2.2 percent per year, excluding the impact of new Tribes. The Indian population residing in the IHS service area is younger than the U.S. All Races population, based on the 1990 Census. For Indians, 34 percent of the population was younger than 15 years, and 6 percent was older than 64 years. For the U.S. All Races population, the corresponding values were 22 and 13 percent respectively. The Indian median age was 24.2 years compared with 32.9 years for U.S. All Races. According to the 1990 Census, Indians have lower incomes than the general population. In 1989, Indians residing in the current Reservation States had a median household income of $19,886 compared with $30,056 for the U.S. All Races population. During this time period, 31.6 percent of Indians lived below the poverty

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1. Census Bureau Server, World Wide Web at http://www.census.gov/cdrom/lookup/date=829124518.

level in contrast to 13.1 percent for the U.S. All Races population.[2]

The Indian Health Service further found,

> In 1989-1991, the Indian (IHS service area) age-adjusted mortality rates for the following causes were considerably higher than those for the U.S. All Races population: 1) tuberculosis - 440 percent greater, 2) alcoholism - 430 percent greater, 3) accidents - 165 percent greater, 4) diabetes mellitus - 154 percent greater, 5) homicide - 50 percent greater, 6) pneumonia and influenza - 46 percent greater, and 7) suicide - 43 percent greater.[3]

These figures, while shocking in themselves, indicate a greater problem in the Indian Country. As Congress has recognized, "Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons."[4] Indeed, for five hundred years, Indian patriots have worked tirelessly to achieve one ultimate goal—survival as a distinct people in our own homelands—in the face of a concerted course of action by the United States intended to destroy Indian Tribes and assimilate Indian people into the American mainstream. Survival requires obtaining the means to earn a living. In the world economy today, that means the investment of capital and the creation of businesses and employment opportunities. Survival *as a people*, requires that these efforts be created and regulated in a way which is consistent with the culture, values, and traditions[5] of the various Tribes. In order for this to occur, tribal government must be able to exercise governmental authority over employers and employees within the territorial jurisdiction of the Tribe, and provide a legal infrastructure which is attractive to the investment of capital and creation of business, while remaining consistent with Tribal values.

In addressing the issues regarding tribal governmental authority with respect to the regulation of the employer-employee relationship within the Indian Country of a tribe, it is imperative that certain basic parameters be first reviewed. Among these are the territorial area for the exercise of tribal self-government, the source of tribal regulatory author-

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2. U.S. DEP'T OF HEALTH AND HUMAN SERVS., TRENDS IN INDIAN HEALTH—1994 4 (1994).

3. *Id.* at 5.

4. Indian Self-Determination Act, Pub. L. 93-638 § 2, Jan. 4, 1975 (current version at 25 U.S.C. § 450(a)(2) (1994)).

5. Culture, values, and tradition are generally referred to as "the common law" in Anglo-American jurisprudence.

ity over both Indians and non-Indians within that territorial area, and the recent Commerce Clause jurisprudence of the Court. These considerations assume, necessarily, the existence of a federally recognized tribal government having recognized governmental authority over its own territorial jurisdiction.

II. INDIAN COUNTRY

The term "Indian Country" was perhaps first comprehensively defined by statute in the Act of June 30, 1834,[6] as:

> all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which Indian title has not been extinguished.[7]

The effect of the early statutes defining Indian country was summarized by the noted Indian law scholar, Felix Cohen, as follows: "Indian country in all these statutes is territory, wherever situated, within which tribal law is generally applicable, federal law is applicable only in special cases designated by statute, and state law is not applicable at all."[8]

Although the 1834 definition of Indian country was not included in the Revised Statutes of the United States, and therefore repealed during the general statutory codification and revision in 1874, it provided a useful measure for the Court to apply when interpretation of statutory laws relating to "Indian Country" and "Indian Reservations" was required.[9] In a series of now famous cases, the Court developed a definition of "Indian Country" at common law which included Indian reservations however created,[10] trust and restricted Indian allotments,[11] and areas set aside for the use and occupancy of Indians (dependent Indian communities) although not called a "reservation."[12]

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6. 4 Stat. 729 (1834).

7. *Id.*

8. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 6 (1942). The complete prohibition as to the application of state law in the Indian Country has been modified to the extent Congress has deemed proper. *See* 18 U.S.C. § 1161 (1994) (regulating liquor law); 25 U.S.C. § 231 (relating to health and education); 25 U.S.C. §§ 232-33 (granting jurisdictional rights to New York state); 18 U.S.C. § 1162 (1953) (conferring special criminal jurisdiction to enumerated states in Public Law 83-280); 28 U.S.C. § 1360 (conferring civil jurisdiction in Public Law 83-280); 25 U.S.C. § 1321 (allowing assumption and retrocession of civil or criminal jurisdiction by states which are not mandatory Public Law 83-280 states).

9. Donnelly v. United States, 228 U.S. 243, 269 (1913).

10. *Id.* at 244; Bates v. Clark, 95 U.S. 204, 206-08 (1887).

11. United States v. Ramsey, 271 U.S. 467, 470 (1926); United States v. Pelican, 232 U.S. 442, 447 (1914).

12. United States v. McGowan, 302 U.S. 535, 536-39 (1938); United States v. Sandoval, 231 U.S.

In one of the first cases in which the Court considered the continuing meaning of the term "Indian County" after the creation of the Revised Statutes of the United States, the Court stated in *Bates v. Clark*:[13]

> It follows from this that all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress.[14]

Although Indian Country status had long been tied to aboriginal ownership of the soil, the Court in *Donnelly v. United States*,[15] extended the application of the term to lands reserved for tribes carved from the public domain—in other words, lands which had been in non-Indian (federal) ownership which had thereafter been set aside for Indian use and occupancy as a tribal reservation.[16] Tribal ownership, however, remained the benchmark indicia of Indian Country status for Indian reservations as a historical consequence of the 1834 Act. In pre-1948 decisions of the federal courts, as well as those cases which rely without critical analysis upon such decisions, the ownership of title to the soil was often critical to the status of land as Indian Country or "reservation" land.

During the same era, the Court held that land which had been carved from the tribal domain and held in trust by the United States for an individual Indian as an allotment was Indian Country even though the surrounding area of the reservation had then been extinguished[17], and that land allotted to an individual Indian from a tribal domain was Indian Country though it was held in fee simple by the individual Indian subject to federal restrictions upon alienation.[18] Finally, the Court held that other lands which had been set aside for homes for Indians by the federal government were Indian Country though not called a "reservation,"[19] and that lands owned by the Pueblos in fee were Indian Country because of the federal treatment of the Pueblos as a "dependent Indian community,"[20] These pre-1948 decisions, then, clearly indicated that all reservations, all trust and restricted Indian allotments, and

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28, 37 (1913).

13. 95 U.S. 204, 209 (1887).
14. Bates v. Clark, 95 U.S. 204, 209 (1887).
15. 228 U.S. 243 (1913).
16. Donnelly v. United States, 228 U.S. 243, 269 (1913).
17. United States v. Pelican, 232 U.S. 442, 447 (1914).
18. United States v. Ramsey, 271 U.S. 467, 470 (1926).
19. United States v. Sandoval, 231 U.S. 28, 37 (1913).
20. United States v. McGowan, 302 U.S. 535, 538 (1938).

dependent Indian communities were within the common law definition of Indian Country as that term was developed by the Court after the repeal of the 1834 definition.

The foregoing decisions left open the question of whether land within the exterior boundaries of an Indian reservation which was held in fee (in other words an "open" or "assimilated" reservation) was Indian Country.[21] The practical question presented by this "open reservation" issue was whether federal and tribal jurisdiction remained exclusive in reservation areas where allotments had been taken and the surplus sold (as to those surplus lands), or where trust periods on allotments within reservations had expired, or where restrictions against alienation of such allotments had been removed.

In 1948, Congress resolved this issue in favor of federal and tribal jurisdiction over trust or fee patented lands within reservations, and codified the Supreme Court's existing common law classifications of Indian Country by the Act of June 25, 1948,[22] which states:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-or-way running through the same.[23]

The original impact of this Congressional action was to render obsolete Court decisions which tied the Indian Country status of Indian reservations and dependent Indian communities to issues of land title, and to define by statute the territorial area for the operation of tribal government.[24] In *Seymour v. Superintendent of Washington State Penitentiary*,[25] the Court held that the phrase "notwithstanding the issuance of any patent" contained in the Indian Country statute[26] included patents to both Indians and non-Indians, and Indian conduct

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21. COHEN, *supra* note 8, at 8.
22. Act of June 25, 1948, ch. 645, 62 Stat. 757 (current version at 18 U.S.C. § 1151 (1994)).
23. *Id.*
24. *See* United States v. Mazurie 419 U.S. 544, 547 (1975); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 358 (1962).
25. 368 U.S. 351 (1962).
26. 18 U.S.C. §1151.

on property owned in fee by non-Indians but within reservation boundaries was therefore Indian conduct within the Indian Country.[27] Further, in *United States v. Mazurie*,[28] the Court held that non-Indian conduct on non-Indian owned fee lands within a continuing reservation was conduct within the Indian Country for the purpose of federal laws regulating the introduction of liquor into the Indian Country.[29] In response to the claim that non-Indians could not be subjected to rules of law adopted by an Indian tribe in whose governmental affairs the non-Indian could not participate,[30] the Court through then Justice Rehnquist stated:

> Cases such as *Worcester*, supra, and *Kagama*, supra, surely establish the proposition that Indian tribes within "Indian country" are a good deal more than "private, voluntary organizations," and they thus undermine the rationale of the Court of Appeals' decision. . . .
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> The fact that the Mazuries could not become members of the tribe, and therefore could not participate in the tribal government, does not alter our conclusion. This claim, that because respondents are non-Indians Congress could not subject them to the authority of the Tribal Council with respect to the sale of liquor, is answered by this Court's opinion in *Williams v. Lee*.[31]

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27. Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 358 (1962).
28. 419 U.S. 544 (1975).
29. United States v. Mazurie, 419 U.S. 544, 557-58 (1975).
30. *Id.* at 556. The *Mazurie* Court rejected the Court of Appeals reasoning, which stated:

> The tribal members are citizens of the United States. It is difficult to see how such an association of citizens could exercise any degree of governmental authority or sovereignty over other citizens who do not belong, and who cannot participate in any way in the tribal organization. The situation is in no way comparable to a city, county, or special district under state laws. There cannot be such a separate 'nation' of United States citizens within the boundaries of the United States which has any authority, other than as landowners, over individuals who are excluded as members.

Id. (quoting Mazurie v. United States, 487 F.2d 14, 19 (10th Cir. 1973)).
31. *Id.* at 557-58 (citations omitted).

The Court then, while often speaking in terms of "reservation"[32] or "allotment" or "dependent Indian community" as relevant in a particular circumstance clearly held that "Indian country" is the legally recognized term of art defining the territorial area for the exercise of tribal self-government.[33]

In response to this Congressional definition of the term "Indian Country," the Court adopted new rules to determine whether the Indian Country status of reservation areas had been terminated.[34] These cases teach that once an area of land has been set apart as an Indian reservation, all tracts within that area remain Indian country until the reservation is extinguished by Congress. The corollary to this rule is that the statute or treaty extinguishing the reservation must be clear on its face, or, if the statutory language could be interpreted to extinguish the reservation but is ambiguous, the legislative history and tribal understanding must clearly indicate an intent to terminate reservation status.[35] Anything less than this clear language or showing of intent and

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32. *See* DeCoteau v. District County Ct, 420 U.S. 425, 427 n.2 (1975). The *DeCoteau* Court stated:

> If the lands in question are within a continuing "reservation," jurisdiction is in the tribe and the Federal Government "notwithstanding the issuance of any patent . . . . On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are "Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." While § 1151 is concerned on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction.

Id. (citations omitted). After concluding that the Sisseton-Wahpeton reservation had been disestablished, the *DeCoteau* Court concluded that "[i]n such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments." *Id.* at 446-47 (citing 18 U.S.C. § 1151(c)).

33. United States v. John, 437 U.S. 634, 648 (1978). The *John* Court stated that "[w]ith certain exceptions not pertinent here, § 1151 includes within the term 'Indian country' three categories of land. The first, with which we are here concerned, is [Indian reservations]." *Id.* Noting further, the Court stated that "[i]nasmuch as we find in the first category a sufficient basis for the exercise of federal jurisdiction in the case, we need not consider the second and third categories [of Indian country]." *Id.* at 648 n.17. *See also* Solem v. Bartlett, 465 U.S. 463, 467 n.8 (1984). The *Solem Court* noted that:

> Regardless of whether the original reservation was diminished, Federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments. In addition, opened lands that have been restored to reservation status by subsequent act of congress fall within the exclusive criminal jurisdiction of federal and tribal courts.

Id. (citations omitted).

34. *See Solem*, 465 U.S. at 481 (determining that neither the Cheyenne River Act nor surrounding circumstances showed clear intent to diminish the reservation); *DeCoteau*, 420 U.S. at 448-49 (determining that the 1891 Act, and surrounding circumstances indicated an intent to terminate the Lake Traverse Indian Reservation); Mattz v. Arnett, 412 U.S. 481, 506 (1973) (determining that "the Klamath River Reservation was not terminated by the Act of June 17, 1892, and that the land within ... is still Indian country within the meaning of 18 U.S.C. § 1151"); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 357 (1962) (determining that the Colville Indian Reservation still existed since the 1906 Act did not expressly dissolve it).

35. *DeCoteau*, 420 U.S. at 448-49.

understanding, may result in a finding that the reservation continues as Indian Country due to the traditional rules that ambiguities are to be resolved to the benefit of the Indians, and that Indian treaties and agreements must be interpreted as the Indians would have understood them[36].

The question of continuing land ownership appeared to remain relevant only in the context of Indian allotments outside Indian reservations, and not within continuing reservations and dependent Indian communities. The Court has, however, recently decided that tribal jurisdiction does not exist for some purposes over some non-Indian owned fee lands within reservation boundaries nothwithstanding the plain terms of 18 U.S.C. § 1151[37] and its former decision in *Seymour*.[38] On the other hand, the Court has also expansively described the term Indian Country to include all tribally held trust properties, as

36. *See Solem*, 465 U.S. at 475-76; *Mattz*, 412 U.S. at 504-05.

37. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 425-26 (1989) (holding that Indian tribes did not have authority to zone fee lands in reservation's "open" area); Montana v. United States, 450 U.S. 544, 557 (1981) (holding that the Crow Tribe of Montana had no power to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe). These cases ignore the obvious intention of Congress, as it framed 18 U.S.C. § 1151(a), to avoid deciding issues of jurisdiction within Indian reservations by reference to a tract ownership book, making these decisions difficult to harmonize with the statute and prior decisions. *South Dakota v. Bourland* provided less difficulty because the Court found a specific Congressional statute which vested the regulatory authority claimed in a federal governmental entity rather than the tribe. 113 S.Ct. 2309, 2316 (1993).

38. 368 U.S. at 357. *Brendale* and *Montana* may simply be the result of the Court attempting to protect what it perceives as the "inalienable" private property rights desired by non-Indians who own real property within Indian Country from claimed infringement by the tribe. Regretfully, the Court has never come to terms with its recently developed discriminatory rules which require Indians to be subject to state law while outside Indian Country. *See, e.g.*, Puyallup Tribe v. Department of Game, 391 U.S. 392, 397-401 (1968) (determining that Indians were subject to state fishing regulations when on state waters); *accord* Organized Village of Kake v. Eagan, 369 U.S. 60 (1962); Tulee v. Washington, 315 U.S. 681, (1942); Shaw v. Gibson-Zahniser Oil Corp., 276 U.S. 575 (1928); Ward v. Race Horse, 163 U.S. 504 (1896), although the Court has refused to subject non-Indians to tribal jurisdiction in some circumstances when they enter the Indian Country. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (finding that absent express authority from Congress, Indian tribes have no authority to exercise criminal jurisdiction over non-Indians); *see also* discussion *supra* note 37.

well as "informal Indian reservations"[39] in upholding Indian's immunity from state laws.[40]

III. TRIBAL POWERS OF SELF-GOVERNMENT

> The most basic principle of Indian Law, supported by a host of decisions, 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 have never been extinguished. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content.[41]

Most tribal governmental powers, then, do not emanate as a grant from any other authority than the tribe's inherent sovereignty,[42] and this source of tribal authority has been repeatedly confirmed in various circumstances, including tribal powers of taxation,[43] civil regulatory

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39. Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 128 (1993). The Court's description of the Sac and Fox reservation in Oklahoma as an "informal" Indian reservation is perhaps in response to the many recent statutes in which Congress has defined the term "reservation" as including "former" reservations in Oklahoma, or has treated those areas in Oklahoma in the same manner as other Indian reservations for various purposes. The question asked of the Court was simply this, how many times does Congress have to call it a reservation before it is one? A partial list of such statutory references include: 7 U.S.C. § 2007c(c)(3)(B)(ii) (1994) (Establishment of Investment Fund); 12 U.S.C. § 4702(11) (Community Development Banking and Financial Institutions); 16 U.S.C. § 1722(6) (Youth Conservation Corps and Public Lands); 25 U.S.C. § 1452 (Financing Economic Development of Indians and Indian Organizations); 25 U.S.C. § 2024(b)(3) (Tribal Departments of Education); 25 U.S.C. § 3103(12) (National Indian Forest Resources Management); 25 U.S.C. § 3202(9) (Indian Child Protection and Family Violence Prevention); 25 U.S.C. § 3501(2) (Indian Energy Resources); 29 U.S.C. § 750(c) (Vocational Rehabilitation and Other Rehabilitation Services); 33 U.S.C. § 1377(c) (Water Pollution Prevention And Control); 40 U.S.C. § 483(2) (Management and Disposal of Government Property); 42 U.S.C. § 682(i)(6) (Grants To States for Aid and Services to Needy Families with Children and for Child-welfare Services); 42 U.S.C. § 2992c(2) (Economic Opportunity Program); 42 U.S.C. § 5318(n) (Community Development).

40. *See Sac & Fox Nation*, 508 U.S. at 128 (finding formal or informal reservation lands are not subject to state's taxing jurisdiction); Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 511 (1991) (finding validly set aside trust land qualifies as reservation for state tax immunity purposes).

41. COHEN, *supra* note 8, at 122.

42. Within Indian country, state jurisdiction is usually preempted both by the general federal protection of tribal self-government—*Worcester* doctrine—and by specific federal statutes relating to civil and criminal jurisdiction within Indian country. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 168-69 (1973). *See* Kennerly v. District Court, 400 U.S. 423, 429 (1971) (finding tribal consent a prerequisite to state jurisdiction under Title VII of the Civil Rights Act); State v. Littlechief, 573 P.2d 263, 265 (Okla. Crim. App. 1978) (noting that federal jurisdiction governed, and the consent of the Tribe involved is required before a state may assume jurisdiction in Indian Country). *See also* F. Browning Piepestem, *The Journey from Ex Parte Crow Dog to Littlechief: A Survey of Tribal Civil and Criminal Jurisdiction in Western Oklahoma*, 6 AM. INDIAN L. REV. 1, 8-12 (1979). There have been, however, some notable exceptions. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (stating that states and tribes have concurrent jurisdiction relating to some commercial transaction in the Indian Country).

43. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 140-42 (1982) (confirming tribes' inherent

authority,[44] criminal justice,[45] determinations of tribal citizenship,[46] inheritance determinations,[47] control of domestic relations,[48] the admittance or exclusion of non-members to their territory,[49] and other sovereign powers and immunities.[50]

As separate sovereigns pre-existing the United States, the United States Constitution has repeatedly been held not to apply to, or limit, the Tribe's powers of self-government.[51] Indian tribes then, as distinct political communities, retain their original natural rights of self-government, and remain a separate people with the power of regulating both their members and other persons or entities within their territory when the non-Indians have some impact on the tribe or its members.[52]

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power to tax, regulate, and exclude non-Indians); Washington v. Confederated Tribes, 447 U.S. 134, 152 (1980) (recognizing tribes' inherent power to tax).

44. Montana v. United States, 450 U.S. 544, 565 (1981) (recognizing tribes' inherent power to exercise civil jurisdiction and regulate non-Indian activities on Indian lands, including leases).

45. United States v. Wheeler, 435 U.S. 313, 322 (1978) (recognizing tribes' power to exercise criminal jurisdiction over Indians); Talton v. Mayes, 163 U.S. 376, 381 (1896) (recognizing tribes' jurisdiction to punish members for violations of tribal statutes).

46. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51-52 (1978) (finding Congress did not provide federal court review of tribal citizenship decisions); Roff v. Burney, 168 U.S. 218, 222 (1897) (recognizing tribes' power to determine tribal citizenship).

47. Jones v. Meehan, 175 U.S. 1, 29 (1899) (recognizing inheritance of tribal land governed by the tribe).

48. United States v. Quiver, 241 U.S. 602, 605-06 (1916) (recognizing tribes' control of domestic relations).

49. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561-62 (1832) (recognizing tribes' power to exclude nonmembers).

50. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978) (recognizing tribes' immunity from suit by reason of sovereign immunity).

51. *Santa Clara Pueblo*, 426 U.S. at 54-55 (finding that the Indian Civil Rights Act does not create a federal claim for relief to allow a federal court to control interpretation of tribal citizenship statute); Talton v. Mayes, 163 U.S. 376, 381 (1876) (finding that the U.S. Constitution does not control tribe's jurisdiction over members); Groundhog v. Keeler, 442 F.2d 674, 678 (10th Cir. 1971) (concluding the Due Process Clause of the Fifth Amendment does not apply to Indian tribes without the express authority of Congress); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 533 (8th Cir. 1967) (finding the Due Process Clause of the Fourteenth Amendment does not apply to actions of Indian Nations); Native American Church v. Navajo Tribal Council 272 F.2d 131, 135 (10th Cir. 1959) (finding the First Amendment does not apply to Indian nations); Martinez v. Southern Ute Tribe, 249 F.2d 915, 919 (10th Cir. 1957) *cert. denied*, 356 U.S. 960 (1958) (finding the Due Process Clause of the Fifth Amendment does not apply to Indian tribes).

52. *See* cases cited *supra* notes 39-51. *See also* United States v. Mazurie 419 U.S. 544, 558 (1975) (holding authority of tribal courts extended to non-Indians); United States v. Kagama 118 U.S. 375 (1886) (finding Congress and the Tribes have exclusive jurisdiction over crimes committed on Indian lands); COHEN, *supra* note 8, at 122-23.

It follows, that Indian Tribes have the authority to enforce their own laws in their own forums as to both Indians and non-Indians.[53] The inherent power to tax, regulate, and exclude non-Indians has been consistently upheld, and the widely held understanding of the federal government has always been that federal laws have not worked a divestiture of such powers.[54] Therefore, a tribe may regulate, through taxation, licensing, or other means, the activities of Indians or non-Indians who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements and clearly may do so where the conduct of the non-Indian threatens or has direct effect on the Tribe or its members.[55]

IV. THE INDIAN COMMERCE CLAUSE

The Indian Commerce Clause[56] jurisprudence of the United States Supreme Court will impact the issue of labor or employment laws within the Indian Country primarily in those circumstances in which non-Indian employers operate businesses within the Indian Country, and when Indians (whether a tribe or individual) operate businesses within the Indian Country which employ non-Indian employees. While the Court has largely, and perhaps rightly, viewed the Indian Commerce Clause during the majority of this period as a stable shield of the rights of Indian people within the United States, it has not been immune from the political winds of Indian policy. The Court's view of the "Indian" Commerce Clause has changed significantly over the last three decades, and seems to currently be in a state of flux.[57]

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53. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 325 (1983) (holding that federal law recognizing Indians' authority to regulate hunting and fishing preempted New Mexico law); Merrion v. Jicarilla Apache Tribe, 445 U.S. 130, 152 (1982) (holding that the federal government had not divested the tribe of its inherent authority to tax mining activities on its land); *Santa Clara Pueblo*, 436 U.S. at 65 (finding that Tribal courts have repeatedly been recognized as appropriate forums for deciding disputes involving interest of both Indians and non-Indians); Fisher v. District Court, 424 U.S. 382, 389 (1976) (holding Tribal court had exclusive jurisdiction over an adoption proceeding arising on the reservation where all parties were members of the tribe); Williams v. Lee, 358 U.S. 217, 223 (1959) (finding that exercise of state jurisdiction would infringe on rights of Indians to govern themselves); Cardin v. De La Cruz, 671 F.2d 363, 366 (9th Cir. 1982) (holding that tribe retained inherent power to impose its health and safety regulation on non-Indian grocery store business on the reservation).

54. *See Merrion*, 455 U.S. at 152 (holding that the tribe had not been divested of the authority to impose a severance tax); Montana v. United States, 450 U.S. 544, 565-66 (1981) (noting that a tribe maintains jurisdiction over non-Indians on their reservations, and can regulate through taxing and licensing requirements); Washington v. Consolidated Tribes, 447 U.S. 134, 152-53 (1980) (noting that Indian tribes have exclusive jurisdiction over the activities of non-Indians on reservation lands where the tribes have significant interest, including the power to tax).

55. *See* cases cited *supra* notes 51-54 (recognizing tribal authority for self-government).

56. U.S. CONST. art. I, § 8, cl. 3. This clause provides: "The Congress shall have power . . . [t]o regulate commerce with foreign Nations, and among the several States, and with the Indian tribes."

57. *Compare* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 175 (1989) (stating that "tax

The Court traditionally viewed the field of Indian law, and jurisdiction over persons and property in the Indian Country, as generally exclusive to the Federal government and the Tribal government, absent a particular act of Congress authorizing state action.[58] Yet, in the modern era, it appears that the Court has lost its traditional moorings in the field of Federal Indian Law. The result has been a rash of conflicting decisions and litigation as the States press onward through the fog of case by case jurisdictional determinations of the Supreme Court in the States' continuing quest to extend state jurisdiction into the Indian Country at the expense of tribal governmental authority.

A. THE FORMATIVE YEARS

During the founding days of the Republic, the relation between the fledgling States and the Indian Tribes was very important for the success of the rebellion, and the safety of the new Republic, as the Indian nations on the frontiers of the colonies held the balance of power between the British and the colonists in their hands.[59] While the leaders of the rebellion struggled to organize the initial resistance to the British, it became apparent that both the non-Indians desire for land and the trade between Indians and non-Indians had to be controlled.[60] Accordingly, the Continental Congress organized three "Indian Departments" and appointed respected patriots such as Benjamin Franklin, Patrick Henry, James Wilson, and George Morgan to act as Indian commissioners for the advancement of negotiations with the Indian nations independent of the British before the issuance of the Declaration of Independence.[61]

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immunity extends to Indian Tribes for whose benefit the United States holds reservations lands in trust." However, "a state can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or the tribe"); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331 (1983) (determining that a state may assert authority over a reservation only in certain situations. However, in most instances, Indian Tribes are considered unique aggregations possessing "attributes of sovereignty over both their members and their territory"); and Mescalero Apache Tribe v. Jones, 411 U.S. 145, 147 (1973) *with* Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993) (recognizing a "deeply rooted" policy in United States history of "leaving Indians free from state jurisdiction and control"); and County of Oneida v. Oneida Indian Nation of NY, 470 U.S. 226, 235-36 (1985) (stating that "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law").

58. Kennerly v. District Ct of Mont., 400 U.S. 423, 427 (1971) (affirming exclusive federal and tribal jurisdiction over persons and property in Indian Country unless explicitly given to states); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (noting that Indian nations are completely separate from states).

59. For an excellent history of the attempts of the Continental Congress to persuade the Indian nations to remain neutral or join in the rebellion on the side of the colonies, see GREGORY SCHAAF, WAMPUM BELTS & PEACE TREES (1990).

60. *Id.* at 5-6.

61. *Id.* at 6.

Throughout the war, the Congress vacillated between diplomacy, attempting to keep the Tribes neutral, and diplomacy attempting to enlist their aid.[62] The net result was that the more powerful Tribal confederations[63] splintered into various factions, and the success of the revolution followed. In the adoption of the Articles of Confederation, Indian issues again challenged the fledgling union of the newly independent colonial States. The Indian trade was important economically, prevention of Indian wars a political and economic necessity, and the acquisition of Indian land a much sought after goal.[64] Two clauses of the Articles of Confederation, the precursor to the current United States Constitution, addressed these issues as follows:

> Article IX(1). The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war . . . .
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> . . . .
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> Article IX(4). The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States provided that the legislative right of any State within its own limits be not infringed or violated.[65]

Both Congress and the States promptly began negotiations with the various frontier tribes for the acquisition of land and control of the trade between those tribes and the new United States. This "exclusive right and power," which was limited by two ambiguous clauses, proved to be unworkable as state authorities attempted to acquire Indian lands promised to Tribes via solemn treaty with the United States. Two hundred years later, the meaning of these provisions of the Articles of Confederation crystallized for one Court of Appeals in *Oneida Indian Nation of New York v. New York*.[66] The Second Circuit concluded that:

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62. *Id.*

63. *Id.* Principally the Iroquois (Six Nations), Muscogee (Creek), Cherokee, and Wabash northwest of the Ohio River to the Great Lakes. *Id.*

64. The "legislative history" of the various drafts of this clause of the Articles of Confederation is set out in Oneida Indian Nation of NY v. New York, 860 F.2d 1145, 1157 (2nd Cir. 1988). The discussion in that case shows that language much more akin to the Indian Commerce Clause of the Constitution was first proposed by Benjamin Franklin. *Id.* (citing 2 JOURNALS OF THE CONTINENTAL CONGRESS 195-199 (July 21, 1775)). The exclusive federal authority over Indian affairs proposed by Franklin was revised in the draft presented to Congress by John Dickinson. *Id.* at 1156. The language adopted in the Articles of Confederation came from further modification of the Dickinson draft. *Id.*

65. Articles of Confederation, art. IX(1), (4) (1777).

66. 860 F.2d 1145 (2d Cir. 1988).

> Once it is understood that the allocation of power respecting all Indian affairs is governed solely by Article IX(4), there can be little doubt, . . . that clause 4 confirmed the right of the states to purchase Indian lands within their borders without the consent of Congress, *at least under circumstances that did not interfere with the war and peace powers of the Congress*.[67]

It is difficult to comprehend how the State negotiating a purchase of Tribal land, guaranteed to the Tribe by treaty with the United States, perhaps from a different set of tribal leaders or under less than honorable circumstances, would not risk an Indian war. Perhaps some doubt remains even about whether States could negotiate land acquisitions from the Tribes under the Articles of Confederation. The difficulty was that neither the Congress nor the States clearly had exclusive authority to legislate in the field of Indian affairs when the Tribe or its land was within an area then claimed by the State. Likewise, the determination of which Indians were "members of any States" defied rational definition.[68] Simply stated, no clear answers existed, and the resulting confusion played havoc with relations between the Tribes and the fledgling United States, the Tribes and the States, and the state and federal governments.[69]

The problem became so acute that the author of the Federalist could dispose of the need to consolidate federal authority over Indian commerce to the exclusion of the States in a paragraph:

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the states, and is not to violate or infringe the legislative right of any state within its own limits. What description of Indians are to be deemed members of a state, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with

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67. Oneida Indian Nation of N.Y. v. New York, 860 F.2d 1145, 1157 (2d Cir. 1988) (emphasis added).

68. Did it include, in 1780, the Sioux, Navajo and other Tribes west of the Mississippi who lived within areas claimed by the original thirteen States but who had perhaps never seen an American? Did it include noncitizen Indians who lived within the claimed boundaries but nearer to settled areas? Those noncitizen Indians living within "frontier" areas reserved to them by federal treaty, but also populated in part by non-Indian squatters? Was it to include those who had severed their tribal relations and become citizens? How was anyone to know where to draw the line which described those Indians who were "not members" of the state?

69. *See* Robert N. Clinton, BOOK REVIEW, 47 U. CHI. L. REV. 846, 851-57 (1980).

> Indians, though not members of a state, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles of confederation have inconsiderately endeavoured to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.[70]

Thus was born the Indian Commerce Clause of the United States Constitution that states in pertinent part that: "The Congress shall have power . . . [t]o regulate commerce with foreign Nations, and among the several States, and with the Indian tribes."[71] The original purpose of the Indian Commerce clause then—to extrapolate from *The Federalist* —was to consolidate exclusive power in the federal government vis-a-vis the States to regulate commerce, in its Constitutional sense, with the Indian tribes regardless of whether the Indians involved were citizens of a State or within the political boundaries of a State. This purpose was recognized in now famous decisions of the Supreme Court penned by Chief Justice John Marshall in the first three "Indian cases" to reach the high Court.[72]

In *Johnson v. McIntosh*,[73] the Court faced a situation in which the plaintiffs claimed land pursuant to purchases that they had made directly from the Piankeshaw and Illinois Nations of Indians in 1773 and 1775.[74] These Indian Nations had afterwards conveyed the same land to the United States by treaty without providing for the reservation of titles to land individually held pursuant to tribal law, and the United States had patented it to others.[75] While no Indian was a party to this action between the title holders from the United States patent and those holding title pursuant to the tribal law, it is recognized as the first "Indian" case coming before the Court.[76] This case is remarkable in the different perspectives from which the Court approaches the issues. However, the important point for our purposes is that this is apparently the first time

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70. THE FEDERALIST No. 42, at 275 (James Madison) (Sherman F. Mittle ed., 1938). *See also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (characterizing the terms of clause four of Article IX of the Articles of Confederation as "ambiguous").

71. U. S. CONST., art. I, § 8, cl. 3.

72. Worcester v. Georgia, 31 U.S. (6 Pet) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

73. 21 U.S. (8 Wheat.) 543 (1823).

74. *Johnson*, 21 U.S. (8 Wheat) at 554.

75. *Id.* at 558.

76. *See id.* at 572.

the high Court acknowledged that tribal law could well grant property rights to both Indians and non-Indians within a tribal legal system.[77] While this recognition was only one of several alternative reasons given for the result, the idea that Tribes could grant or withdraw property and other legal rights, although not necessarily recognized in the federal courts, or subject to the rules of the American legal system, became a part of federal law.

The first direct Supreme Court interpretation of the Indian Commerce Clause occurred in *Cherokee Nation v. Georgia*.[78] Georgia, as had several other original states, passed a series of laws designed to extend the laws of Georgia to the Indians within the newly recognized borders of the State, and to annul the laws of the Cherokee Nation.[79] If *Oneida Indian Nation of New York v. New York*[80] is correct, this would have been within the power of the State of Georgia under the Articles of Confederation, since the Cherokee involved were within the claimed legislative jurisdiction of Georgia. However, the Cherokee Nation brought a constitutional challenge to those laws by bringing an original action for injunctive relief in the Supreme Court of the United States as a foreign nation under the Constitution. In *Cherokee Nation v. Georgia*,[81] the Court, through Chief Justice Marshall, distinguished the Indian Tribes from both foreign nations and States by relying in part on the wording of the Commerce Clause listing foreign nations, states, and Indian tribes as separate subjects of federal authority.[82] Finding that Indian Tribes were neither States nor foreign nations as those phrases are used in the Constitution, the Court dismissed the suit.[83]

The *Cherokee Nation* case was promptly followed by another challenge to the authority of Georgia to extend its laws into the Cherokee country.[84] Samuel Worcester, a non-Indian citizen of Vermont and missionary to the Cherokee, refused to obey the Georgia law requiring, among other things, that he obtain the permission of the Georgia governor to reside in the Cherokee country.[85] He was convicted and sentenced to four years in the Georgia penitentiary pursuant to state law, and appealed that conviction to the United States Supreme Court.[86] Acknowledging the ambiguity of the Fourth Clause of Article IX of the

77. *Id.* at 582.
78. 30 U.S. (5 Pet.) 1 (1831).
79. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2-3 (1831).
80. 860 F.2d 1145 (2d Cir. 1988).
81. *Cherokee Nation*, 30 U.S. (5 Pet.) at 2-3.
82. *Id.* at 14-15.
83. *Id.*
84. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
85. *Id.* at 536-37.
86. *Id.*

Articles of Confederation, Justice Marshall interpreted the Indian Commerce Clause as excluding state authority over non-Indians who were engaged in commerce with Indians in the Indian country:

> The correct exposition of this article [of the Articles of Confederation] is rendered unnecessary by the adoption of our existing constitution. That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes*. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.
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> . . . .
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> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.[87]

The Court then found the Georgia laws unconstitutional and void.[88] *Worcester*, then, clearly stands for the proposition that lacking a contrary treaty stipulation or act of Congress, state law has no application to "commerce" between non-Indians and Indians within the Indian country.[89] The decision of the Court in *Worcester*, however, was not to be the final word as other political forces were at work. The President, at the time of the *Worcester* decision, was Andrew Jackson. Jackson was an ardent supporter of the "Indian removal policy" designed to remove Tribes from east of the Mississippi river to other lands in the west, and bluntly informed the Cherokee that they could expect no help from the federal government in retaining their lands in Georgia while procedural technicalities probably prevented the Court from entering an order directing the release of Samuel Worcester.[90] One net result of the

87. *Id.* at 559, 561.

88. *Id.* at 596.

89. In this case, "commerce" was the preaching of the gospel by a non-Indian to Indians. In its broadest sense, commerce with the Indian tribes could be considered any interaction between a non-Indian and an Indian person or property in the Indian Country.

90. *See* Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN.

removal policy was the Trail of Tears in which the Five Civilized Tribes were forcibly removed from their homes in the east to other lands in what is now the State of Oklahoma. Throughout the removal era, and during the reservation era of the middle portion of the Nineteenth Century,[91] the decisions of the Court remained relatively true to the underlying theme of the *Worcester* decision.

B. THE ALLOTMENT ERA

With the coming of the allotment era in the late 1880's, the influx of non-Indians into the Indian Country as a result of the sale of "excess" lands to homesteaders and the sale and leasing of allotted lands significantly changed the face of the Indian Country.[92] The official policy, and widely held belief, was that once the Indian person was given a tract of land to call his own, he would become, or could be turned into, a brown white farmer who would reject the tribal way of life and simply disappear into the American melting pot. The policy was intended to destroy tribalism and tribal governments. When combined with direct frontal attacks on the institutions of some tribal governments,[93] this policy and the resulting expectation that with time the Indian Tribes would cease to exist, lead the Court to accept increasing amounts of state authority in the Indian Country by attenuating Indian interests in "commerce" within the Indian Country. The Court thereby allowed some limited state jurisdiction over non-Indian activities and property, and simultaneously attempted to protect Indians and their property until the Tribes no longer existed as recognized entities.

For instance, in *United States v. McBratney*[94] and *Draper v. United States*,[95] the Court held that State court jurisdiction was proper in instances where a non-Indian committed a criminal offense against

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L. REV. 500, 525-26 (1969) (discussing the procedural problems in these cases).

91. After the generalized removal, the government entered into a series of treaties in the middle 1800's in which Tribes were required to cede vast tracts of their original lands in return for specific recognition and protection of the lands retained or exchanged for the land ceded. The lands reserved to the Tribe in such agreements became known as the "reservation" of the Tribe, and was intended as a land base for the exercise of tribal self-government separate from the non-Indians. Additional reservations were created by executive order or congressional act.

92. *See* General Allotment Act of 1887 (current version at 25 U.S.C. § 331 (1994)).

93. *See generally* ANGIE DEBO, AND STILL THE WATERS RUN (1940) (describing treatment of the Five Civilized Tribes of Oklahoma under the allotment policy). *See also* F. Browning Pipestem & G. William Rice, *The Mythology of the Oklahoma Indians: A Survey of the Legal Status of Indian Tribes in Oklahoma*, 6 AMER. IND. L. REV. 259, 315 (1979) (discussing the allotment era's effect on the Indian tribes in Oklahoma).

94. 104 U.S. 621 (1881).

95. 164 U.S. 240 (1896).

another non-Indian.[96] The Court also allowed territorial, and presumptively State, taxation of the property of the Utah and Northern Railway located within the Indian Country in *Utah & Northern Railway v. Fisher*,[97] and a tax on cattle grazed by non-Indians leasing land from the Osage Nation in Oklahoma was upheld in *Thomas v. Gay*[98] in part because:

> [Although] it is urged that the Indians are directly and vitally interested in the property sought to be taxed, and that their rights of property and person are seriously affected by the legislation complained of; that the money contracted to be paid for the privilege of grazing is paid to the Indians as a tribe, and is used and expended by them for their own purposes, and that if, by reason of this taxation, the conditions existing at the time the leases were executed were changed, or could be changed by the legislature of Oklahoma at its pleasure, the value of the lands for such purposes would fluctuate or be destroyed altogether according to such conditions. But it is obvious that a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians.[99]

On the other hand, cases such as *The Kansas Indians*[100] and *The New York Indians*[101] held that states had no authority to tax Indians, though they had taken allotments and ceded their land to the United States, while their political organization remained intact and continued its governmental relationship with the United States.[102] Other nineteenth

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96. Draper v. United States, 164 U.S. 240, 243 (1896); United States v. McBratney, 104 U.S. 621, 624 (1881).

97. 116 U.S. 28 (1885).

98. 169 U.S. 264 (1898).

99. Thomas v. Gay, 169 U.S. 264, 273 (1898). The Court went on to state that the "unlimited power" of Congress to deal with the Indian Tribes under the Commerce Clause, "so long as they keep up their tribal organizations," could be conceded without such state taxes running afoul of the Constitution. *Id.* at 274-75. There are, perhaps, two reasons for such a statement in the wake of *Worcester*. First, Indian tribes no longer constituted a serious threat to the security of the United States. Second, the underlying assumption that the Tribes would shortly cease to exist made the idea that Tribes might exercise continuing governmental regulatory and tax authority seem far-fetched. Be that as it may, such State action is precisely the type of local regulation of commerce between Indians and non-Indians that the Indian Commerce Clause was intended to prevent.

100. 72 U.S. (5 Wall.) 737 (1866).

101. 72 U.S. (5 Wall.) 761 (1866).

102. The Kansas Indians, 72 U.S. (5 Wall.) 737, 761 (1866); The New York Indians, 72 U.S. (5 Wall.) 761, 772 (1866). The Court went so far as to limit the rights of Oklahoma to tax non-Indians engaged in commerce within the Indian Country into the Twentieth Century, even when federal statutes authorized such taxation, by resort to the federal instrumentality doctrine. *See generally* Gillespie v. Oklahoma, 257 U.S. 501 (1922) (discussing state income tax on non-Indian mineral lessee's income from restricted Indian allotments); Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U.S. 522 (1916) (discussing state property taxes on non-Indian mineral lease of restricted Indian

century cases of note in this regard include *Ex Parte Crow Dog*[103] holding that the Lakota (Sioux) Nation retained the authority to try and punish the murder of an Indian by another Indian in their Indian Country and that no federal offense had been committed;[104] *United States v. Kagama*[105] stating that the Indian Commerce Clause is not a source of authority for the federal government to punish crimes committed by one Indian against another Indian in the Indian Country;[106] and *Talton v. Mayes*[107] holding that the powers of the Cherokee Nation to punish criminal offenses came from the inherent powers of the Cherokee Nation existing prior to European arrival on this continent, and not from any delegation of authority from the United States.[108]

C. THE "MODERN" ERA

The allotment policy was repudiated when, in 1934, Congress passed the Wheeler-Howard Bill known as the Indian Reorganization Act[109] and its companion, the Thomas-Rodgers Oklahoma Indian Welfare Act[110] which was adopted in 1936. This legislation ended the allotment of tribal lands, provided for the reorganization of tribal government and acknowledgment of tribal governmental authority, and authorized tribal control of some federal Indian programs intended for Indians, among other provisions.[111] While it seemed that a new day had dawned in the Indian Country, it was not to be. Those Tribes that accepted the provisions of the Indian Reorganization Act pursuant to its

land); Choctaw & G.R.R. v. Harrison, 235 U.S. 292 (1914) (discussing gross sales of coal mined on Choctaw lands). While the federal instrumentality doctrine was laid to rest regarding Indian Country in Indian Territory Illuminating Oil Co. v. Board of Equalization, 288 U.S. 325 (1933), it must be remembered that the progeny of that case result from the unique laws governing the Five Civilized Tribes and the Osage in which the federal government repeatedly gave its consent to direct state taxation of certain property held by the members of the Five Civilized Tribes rendering such cases *sui generis*. *See* Oklahoma Tax Comm'n v. United States, 319 U.S. 598, 607 (1943) (finding that exemption from state taxation depends on the plainly expressed intention of Congress).

103. 109 U.S. 556 (1883).

104. *Ex Parte* Crow Dog, 109 U.S. 559, 572 (1883).

105. 118 U.S. 375 (1886).

106. United States v. Kagama, 118 U.S. 375, 383 (1886). The Court further held that the statute establishing federal jurisdiction over certain "major crimes" in Indian Country, even when the perpetrator and victim were both Indians, proper because the power to punish such offenses "must exist in [the federal government] because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." *Id.* However, the constitutional underpinning for this statute has never been adequately identified, particularly in light of *Ex Parte Crow Dog*, 109 U.S. at 572 (determining that the Lakota had jurisdiction over such offenses).

107. 163 U.S. 376 (1896).

108. Talton v. Mayes, 163 U.S. 376, 385 (1896).

109. 25 U.S.C. § 461 (1994) (containing the current version of the Indian Reorganization Act).

110. 25 U.S.C. § 501 (1994) (containing the current version of the Oklahoma Indian Welfare Act).

111. *Id.*

"opt-in/opt-out" provisions did not generally complete the adoption of Constitutions and Charters until after 1936. For the Indian Tribes in Oklahoma, whom Congress had initially excluded from the Indian Reorganization Act, Constitutions and Charters were not widely adopted until the later part of the decade.[112] Within five years, the American participation in the Second World War diverted resources and attention from the Indian Country, and little progress was made generally in implementing the promise of those Acts though some Tribes made major progress due mainly to Tribal assumption of the process of exploiting Tribal resources such as timber.

By the early 1950's, Congressional policy had again changed. Beginning as early as 1940, the Indian Reorganization Act had come under additional Congressional debate.[113] Again, the assimilationists in Congress determined to destroy tribal government and require all Indians to be "brown white people." Almost without debate, House Concurrent Resolution 108 was passed on August 1, 1953, which provided:

> Whereas it is the policy of Congress, as rapidly as possible to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, and to grant them all the rights and prerogatives pertaining to American citizenship; and
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> Resolved by the House of Representatives (the Senate Concurring), That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all the following named Indian Tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians: [Flathead, Montana; Klamath, Oregon; Menominee, Wisconsin; Potowatomie, Kansas & Nebraska; Turtle Mountain Chippewa, North Dakota] . . . .

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112. Some Tribes did not adopt a Constitution until much later. Examples include the United Keetoowah Band of Cherokee Indians in Oklahoma who adopted their initial Constitution and Charter in 1951. The Otoe-Missouria Tribe of Indians of Oklahoma and the Kaw Tribe of Oklahoma adopted their initial Constitutions under these Acts after 1980.

113. *Hearings on S. 2103 Before the Committee on Indian Affairs*, H.R. 76th Cong., 3d Sess. (1940).

Again, Indian land and Tribal government came under legislative attack.[114] In furtherance of this policy, and again expecting Indian tribes to be relegated to the historical dustbin, Congress passed further legislation on August 15, 1953, popularly known as Public Law 83-280.[115] In the civil context, this statute extended state civil court jurisdiction and state civil laws of general application to certain named Indian Country in five States.[116] Congress further authorized any other state to assume civil jurisdiction and extend state law into the Indian country. This permission allowed the States to act unilaterally until 1968 when the consent of the affected Tribe was required by amendment to the original act.[117] Termination remained the express policy of Congress from 1953 through 1973.

President Nixon, in 1970, presented a message to Congress in which he strongly recommended that Indian tribes be allowed to exercise control, and at their option to operate federal programs and services intended for Indian people.[118] This message ushered in perhaps the most productive decade of Indian legislation since the creation of the government. Beginning in 1973 with the passage of the Indian Self-Determination Act,[119] Congress repudiated the assimilationist policy of termination, and introduced the policy of Self-Determination to Indian affairs. Most of the Tribes that had been terminated were restored to federal recognition, the Alaska Native land claims were finally resolved with the consent of those affected, the Indian Self-Determination Act,[120]

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114. Approximately 109 Tribes were terminated. Termination did not mean so much the extension of the "rights and privileges" of American citizenship which had been extended to Indians in 1924, but the abrogation of all federal responsibility to protect Indian resources and Tribal self-government. It has been estimated that over 1,360,000 acres of Indian land were stripped of federal protection, a good deal of which was lost to Indian people. The termination policy, as was assimilation and allotment before it, was designed to destroy the Indian land base and tribal self-government. *See generally* Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. IND. L. REV. 139 (1977).

115. 67 Stat. 588 (1953).

116. *Id.* With certain exceptions thereafter enumerated, the operative language of this section states:

> Each of the States listed in the following table [California, Minnesota, Nebraska, Oregon, and Wisconsin] shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

28 U.S.C. §1360 (1994). *But see* Bryan v. Itasca County, 426 U.S. 373, 390 (1976) (determining that state jurisdiction did not extend to the taxing of Indian property within a reservation in a "280" state).

117. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341 (1994).

118. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. EXEC. DOC. NO. 363, 91st Cong., 2d Sess. (1970).

119. 25 U.S.C. § 450 (1994).

120. Pub. L. No. 93-638, 88 Stat. 2203 (1978).

Indian Child Welfare Act of 1978,[121] and other legislation dealing with economic and health care issues in the Indian Country was passed. Self-Determination is the current policy of the Congress, which has expanded this policy with the next logical step known as "Self-Governance." These policies are intended to transfer control over federal services, programs, and functions to Indian tribes, along with the money and resources necessary to carry them out.

The first "modern" jurisdictional case after the establishment of the termination policy was *Williams v. Lee*[122] in which a non-Indian who operated a general store on the Navajo Reservation brought a state court action to collect a debt allegedly owed to his store by a member of the Navajo Tribe.[123] In rejecting state court jurisdiction in favor of the Navajo Courts of Indian Offenses, the Court established what was to become known as the "infringement" test: "Essentially, absent governing Acts of congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[124]

The Court went on to hold that because state court jurisdiction over such cases might undermine the authority of the tribal court, the exercise of state court jurisdiction would infringe on the tribe's right to self-government and could not be allowed.[125] Perhaps the major problem with the Court's stated test, other than its possible "negative implications,"[126] was that for preemption purposes, there was a "governing Act of Congress" at the time the decision was made—Public Law 83-280.[127] The Court in *Kennerly v. District Court of Montana*[128] recognized the preemptive effect of Public Law 280 when it rejected the assumption of state court jurisdiction over suits involving tribal members arising in the Indian Country even where the Tribal Council had consented to such jurisdiction because the requirements of the Act had not been satisfied.[129] Further, as in *Williams*, the Court mentioned the failure of the state to comply with the requirements of Public Law 280 as a reason to reject the extension of state law into the Indian country.[130] It therefore appeared that Congress, in the exercise of its Constitutional

121. 25 U.S.C. § 1901 (1994).
122. 358 U.S. 217 (1959).
123. Williams v. Lee, 358 U.S. 217, 217-18 (1959).
124. *Id.* at 220.
125. *Id.* at 223.
126. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).
127. *See* Pub. L. No. 83-280.
128. 400 U.S. 423 (1971).
129. Kennerly v. District Court of Mont., 400 U.S. 423, 429 (1971).
130. *Id.* at 427. In Fisher v. District Court, the Court applied the same preemption/infringement standard in a case involving only Indians. 424 U.S. 382, 388-89 (1976).

authority to regulate commerce with the Indian tribes, had provided an exclusive mechanism for the extension of state civil laws of general application to the Indian country.[131]

Three years later, however, the Court decided *Bryan v. Itasca County*,[132] in which it ruled that a mobile home owned by an Indian within Indian country in a Public Law 280 state was not taxable by the State.[133] In deciding that case, the Court reasoned away the express language of Public Law 280 that stated: "Those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State,"[134] and the express exemption from state taxation of 28 U.S.C. § 1360(b) which states in pertinent part that "[n]othing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States."[135] Instead, the Court created a prohibitory-regulatory distinction, again in the face of explicit congressional language stating the extent to which tribal law would remain enforceable in the state courts,[136] to find that the statute did not extend the general laws of the State into the Indian country.[137]

The result has been a series of cases which generally reached correct constitutional results consistent with the *Worcester* rule,[138] but which created a new balancing test that has ultimately lead the Court into new and untested ground. In *White Mountain Apache Tribe v. Bracker*,[139] the Court found federal pre-emption of state taxes assessed against a non-Indian logging company doing business on the White Mountain

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131. *Kennerly*, 400 U.S. at 430. This general authority, obviously, would not have impacted specific grants of authority to states over certain situations or tribes which were granted by special statute.

132. 426 U.S. 373 (1976).

133. Bryan v. Itasca County, 426 U.S. 373, 375, 391 (1976).

134. *Id.* at 377-78 (quoting Pub. L. No. 83-280).

135. *Id.* at 378 (quoting 28 U.S. C. § 1360).

136. *Id.* at 386-87 (citing 28 U.S.C. § 1360). Section 1360 provides that:

> [a]ny tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

28 U.S.C. § 1360(c) (1994).

137. *Bryan*, 426 U.S. at 389.

138. Until Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989), the result in each of these cases—although not always the reasoning—could be explained through the following rule: In the absence of an Act of Congress authorizing state action, states have no authority in matters arising within the Indian Country when Indian property, rights, or persons are involved in the transaction at issue.

139. 448 U.S. 136 (1980).

Apache Reservation on the basis of the extensive federal regulation governing the harvesting and sale of tribal timber.[140] As in the *Williams* case, the Court in *Central Machinery v. Arizona Tax Commission*[141] found preemption based on the Indian trader statutes and regulations, although the non-Indian company was not a licensed Indian trader.[142] However, the Court in *Cotton Petroleum Corp. v. New Mexico*[143] found no preemption although the federal statutes and regulations applicable to oil and gas mining on Indian land are more extensive and pervasive than either the Indian trader or Indian timber statutes.[144]

Even the original "Indian smokeshop cases"[145] could each be explained as correct for reason that the taxes being imposed on the cigarettes at issue were being sold to non-Indians or members of "foreign" tribes in the sense of Indians from another reservation,[146] and

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140. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 149-54 (1980). These regulations included provisions which restricted clear-cutting, 25 C.F.R. § 141.5; established comprehensive guidelines for the sale of timber, § 141.7; regulated the advertising of timber sales, §§ 141.8-.9; specified the manner in which bids may be accepted and rejected, § 141.11; described the circumstances into which contracts may be entered, §§ 141.12-.13; required approval of all contracts by the Secretary, § 141.13; called for Secretary approval of timber-cutting permits, § 141.19; specified fire protective measures, § 141.21; and provided a board of administrative appeals, § 141.23. Tribes are expressly authorized to establish commercial enterprises for the harvesting and logging of tribal timber under § 141.6. *Bracker*, 448 U.S. at 147.

141. 448 U.S. 160 (1980).

142. Central Mach. v. Arizona Tax Comm'n, 448 U.S. 160, 165 (1980) (citing 25 U.S.C. §§ 261-264).

143. 490 U.S. 163 (1989).

144. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 179-81 (1989) (citing Act of Feb. 28, 1891, § 3, 26 Stat. 795, 25 U.S.C. § 397 (1891); Indian Oil Leasing Act of 1924, 43 Stat. 244, 25 U.S.C. §398 (1924); Indian Oil Act of 1927, 44 Stat. (part 2) 1347, 25 U.S.C. § 398a (1927)). The *Cotton Petroleum* Court recognized the extensive regulations, noting:

> *inter alia*, that tribal leases may only be offered for sale pursuant to specified standards governing notice and bidding, 25 CFR § 211.3(a) (1988), that the Secretary reserves "the right to reject all bids when in his judgment the interests of the Indians will be best served by so doing," § 211.3(b), that corporate bidders must submit detailed information concerning their officers, directors, shareholders, and finances, § 211.5, that no single lease for oil and gas may exceed 2,560 acres, § 211.9, and that a primary lease may not exceed 10 years, §211.10. The regulations also address the manner of payment and amount of rents and royalties, §§ 211.12, 211.13(a), and provide for Interior Department inspection of lessees' premises and records, § 211.18. Other federal regulations address the spacing, drilling, and plugging of wells and impose reporting requirements concerning production and environmental protection. See 43 CFR §§ 3160.0-1-3186.4 (1987).

Id. at 186 n.16.

145. *See generally* California State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9 (1985) (finding that the board had a right to require the tribe to collect taxes on cigarette purchases by non-Indian consumers on behalf of the board); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (finding that the state cigarette and sales tax in on-reservation purchases by non-members was valid); Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976) (finding that the state requiring the tribal cigarette seller to collect a tax on non-Indian purchasers valid).

146. It should be noted that Congress has rejected the Court's attempt to distinguish between Indians of the local tribe, and other Indians for jurisdictional purposes. *See* 25 U.S.C. § 1301(2) (recognizing and affirming Tribal criminal jurisdiction over all "Indians"); 25 U.S.C. § 1301(4) (defining "Indian" as "any person who would be subject to the jurisdiction of the United States as an

Public Law 280 could be read to extend the state tax laws to persons who were not members of the Tribe(s) local to the reservation, notwithstanding *Bryan v. Itasca County*, which involved a member of the resident Tribe. Such reasoning would have provided the logical foundation for the Court's otherwise "bootstrap" statement in *Washington v. Confederated Tribes of the Colville Indian Reservation*[147] that these were "otherwise valid state taxes."[148] The Tenth Circuit, looking for a critical and logical method of analysis in these cases, held in *Citizen Band of Potawatomi Indian Tribe v. Oklahoma Tax Commission*,[149] that Oklahoma's failure to comply with the requirements of Public Law 280 was fatal to the extension of state civil authority into the Indian country in a case in which state taxation of sales by a tribal smokeship to Indians and non-Indians was at issue.[150] The Supreme Court, however, reversed.[151] In doing so, it rejected the notion that Public Law 280 could be considered a guide to those decisions,[152] and continued the line of cases based on *Moe* and *Colville*, which in essence state that if an Indian or Indian tribe import an item of manufactured goods into the Indian country for resale it will be taxable by the State.[153] However, in *California v. Cabazon Band of Mission Indians*[154] the Court struck down California's attempt to impose taxes on a Tribal gaming operation because the federal government was encouraging economic

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Indian under section 1153 of Title 18 if that person were to commit an offense listed in that section in Indian country to which that section applies"). These provisions were enacted for the purpose of reversing the court decision in Duro v. Reina, 495 U.S. 676 (1990), wherein the Court had extinguished, by judicial implications, the inherent tribal power to exercise criminal jurisdiction over Indians *not* of the local tribe. The ruling in *Duro* is the pentultimate result of the attempt to distinguish between members of the local tribe and other Indians first announced in *Moe* and *Colville*, and the Congressional rejection of this distinction should also be acknowledged in future civil actions.

147. 447 U.S. 134 (1980).

148. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 158 (1980).

149. 888 F.2d 1303 (10th Cir. 1989).

150. Citizen Band of Potawatomi Indian Tribe v. Oklahoma Tax Comm'n, 888 F.2d 1303, 1304 (10th Cir. 1989).

151. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 513 (1991).

152. *Id.*

153. *Id.* at 514.

154. 480 U.S. 202 (1986).

development, including gaming, in the Indian country, and because the games were "created" by the Tribe.[155]

To put the problem in a nutshell, it is difficult to ascertain a reliable rule by which practitioners can adequately advise their clients as to the ramifications of doing business in the Indian country, or to advise Indian tribes and Indian people as to the extent of tribal and state authority over commercial transactions occurring within the Indian country. The net result is that Indian economic development is being limited to direct Tribal development without significant active participation by the private sector. For non-Indians, the question is always what regulations apply to my business, and what taxes must I pay. The answer is that outside the Indian country, federal and state laws and taxes apply. Within Indian country, at least where Indian property or persons are affected, federal law and tribal law apply, and state law may or may not apply. There is no way to determine the applicability of state law in a particular case until a claim by the state is litigated. If the state prevails, then the business gets to pay three taxes and comply with three sets of regulations instead of two. Where tribes are located far from centers of economic activity, and have underdeveloped legal and physical business infrastructures, the benefits of locating in the Indian Country must be extensive indeed for a businessperson to volunteer to pay three sets of taxes and comply with three, perhaps conflicting, regulations instead of two sets of taxes and regulations. Notwithstanding the Court's regular protestations to the contrary, only such non-Indian businesses which exist to exploit a Tribe's natural resources or have no other place in which to operate, will be willing to locate in the Indian country or comply with Tribal tax and regulatory laws.

For the individual Indian, the problems are much the same. While the individual can probably achieve some protections by requiring state authorities to proceed in tribal court pursuant to *Williams* and related cases, most Indian entrepreneurs must maintain bank accounts or other property outside the Indian country, or rely on suppliers or purchasers from outside the Indian country to support their business. While the state may not be able to directly enter the Indian country to enforce their

155. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216-22 (1986). It is indeed difficult to perceive a rationale way to differentiate between cigarettes imported into the Indian Country and sold to non-Indians and pull tabs, concession items, and other "bingo" paraphernalia which are imported into the Indian Country and then sold to non-Indians. Likewise, it is difficult to perceive how the creation of a "gaming business" is conceptually different from the creation of a "retail business." Perhaps one must conclude that the difference lies simply in the individual perceptions and prejudices of the Justices as to who Indians are—a conclusion which would be lamentable. However, there is no way to avoid the conclusion that both circumstances involve "commerce" in its Constitutional sense between Indians and non-Indians in the Indian Country, and that Congress has not authorized state taxation or regulation of such activities.

claims,[156] the Court has left the door open for seizure of such off-reservation property or actions against the wholesalers. As a practical matter, most small Indian businesses do not have the resources to withstand such challenges, and if they sell to anyone other than tribal members, they run the same risks of responding to three levels of government as do non-Indians.

The Tribes, then, remain as the practical sole source of economic development in the Indian country.[157] Because the Tribe is a government immune from suit,[158] the state cannot directly sue the Tribe for taxes claimed to be due. The future of economic development in the Indian country, then, will remain dependent upon direct federal assistance, or the physical resources and personnel of the Tribe in its governmental capacity.[159] No other jurisdiction within the United States suffers such practical judicially made restrictions. If the Tribal governments continue the success that they have attained to date in their various economic endeavors, they will constitute the only governmental entities that operate economically successful businesses in the country without support from taxes, pure resource exploitation, or a monopoly on the product or service offered.

The Court will shortly be faced with a further dilemma. With the arrival of the Self-Governance program,[160] Tribes are moving toward administering their own programs, providing their own services, and exercising the functions formerly the provence of the Secretary of the

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156. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 512 (1991).

157. It is almost unfathomable that the Court would construct a scheme which would impose a socialistic economy within the Indian Country, yet this is precisely the net effect of its Indian Commerce Clause rulings.

158. *Potawatomi Tribe*, 498 U.S. at 514.

159. As late as 1942, Felix Cohen wrote that Indian Country was "the territorial area for tribal self-government within which federal law applied to the extent intended by Congress, tribal law applied to all persons and property not inconsistent with specific federal laws and treaties, and state law did not apply at all unless a specific treaty or act of congress authorized state authority." COHEN, *supra* note 8, at 122. In *Colville*, the Court stated that "[i]t can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes." Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 157 (1979) (citing Moe v. Salish & Tootenai Tribes, 425 U.S. 463, 468 n.17 (1976). The Court also stated that the "[c]lause may have a more limited role to play in preventing undue discrimination against, or burdens on, Indian commerce." *Id.* Simply stated, state imposition of taxation and regulatory authority concerning persons, property, or events within the Indian Country, by definition, burdens Indian commerce, and no amount of legal ledgerdomain will change the fact that it is cheaper to pay two taxes than two plus one, or to comply with two regulatory schemes instead of three. Further, the lack of clearly defined rules to determine whether state law applies in the Indian country has fostered litigation and reduced cooperative tribal and state efforts to resolve their disputes since each party can reasonably expect to prevail if their advocate can persuade the Court in a given case that the balance of interests favors their client—a "rule" which is always a jump ball and encourages litigation.

160. *See, e.g.*, 25 U.S.C. § 458 aa-gg (1994).

Interior. What becomes of federal preemption, when the federal administration is no longer in the loop other than as a source of funds which the Tribes can program to meet their own needs? What will happen, for instance, when the Tribes contract for the authority to issue Indian traders' licenses, and then adopt their own internal regulations on the subject? Without the "negative implications" of the Indian Commerce clause, it is conceivable that Indian traders licensed by the Secretary could be tax exempt, while the same trader with another store in the same state on a reservation licensed by a Tribe in the Self-Governance program could find that there is no federal preemption because the Secretary is no longer actively overseeing the activities of the trader on the Self-Governance reservation. Such a result cannot be the intent of the Self-Governance statutes.

V. CONCLUSION

Why is all this important in the area of labor and employment law? There are two reasons. First, business needs certainty in order to attract investment and create jobs at which individuals can find employment. Just as business needs a physical infrastructure-roads, power, utilities, raw materials, and a labor force-to survive, it needs a legal infrastructure providing certainty with respect to taxation, regulation, and enforcement of business obligations. The Court has done little in the last three decades to further tribal attempts to provide such legal infrastructure in tune with Congress' attempts to assist the Tribes to attain economic self-sufficiency[161] and tribal values.

Secondly, the inherent authority of the Tribes to control the employment relationship and conditions of labor within the Indian Country of the Tribe should be respected and acknowledged if the Tribe is to be able to provide either the legal infrastructure for business within

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161. *See* Alaska Chapter, Associated Gen. Contractors of Am., Inc. v. Pierce, 694 F.2d 1162, 1170 (9th Cir. 1981). The *Alaska* court noted:

> Congress has clearly expressed its desire to further Indian-owned businesses:
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> "One of the most serious problems on the Indian reservations is the inadequate availability of financial resources to permit the Indian people to develop their own resources and potential. All the traditional indicators of economic levels place Indians and Indian reservations at the bottom of the scale. On every reservation today, there is almost a total lack of an economic community. If the long-sought goal of Indian self-sufficiency is to be reached, such financial assistance must be provided or facilitated.
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> ....
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> Income generated through Federal, tribal, or other kinds of activity on the reservation does not stay on the reservation, pursuant to the classic economic theory of the "multiplier effect," because of this lack of an economic community. With the absence of Indian-owned small businesses on the reservation, this income immediately flows off the reservation enriching the off-reservation, non-Indian communities."

Id. (quoting H.R. REP. No. 93-907, 93d Cong. 2d Sess. *reprinted in* 1974 U.S.C.C.A.N. 2874).

its Indian Country (which, after all, was reserved to the Tribes for their homeland and as a place for them to earn a living) or the regulation of activities within its Indian Country which directly impact on the health, safety, economic security, and general welfare of its citizens.[162] In fact, the few cases which consider tribal ordinances which begin the process of regulating employment relations within the Indian Country, recognize that ordinances requiring Indian Country businesses to employ tribal members and other Indians are legitimate exercises of Tribal authority.[163] These cases hold, for instance, that payment of Tribally required benefits do not necessarily excuse an employers' failure to abide by contractual requirements to pay benefits for employees, and that Tribal Employments Rights Ordinances[164] are applicable to non-Indian employers doing business on fee lands within a reservation when the employer had extensive contacts with the Tribe.[165]

The Tribes, however, should not be limited, or limit themselves, to employment rights in the sense of requiring employers to employ a certain percentage of tribal members. As gaming and other economic opportunities develop within the Indian Country, Tribes will be faced with development of a legal infrastructure necessary to provide not only a chance to obtain a job, but greater regulation of the safety and health aspects of the workplace, the employer-employee relationship, and the full cornucopia of issues which flow from that relationship. Circumstances which immediately come to mind include workers' compensation issues for injuries received during the course of employment and related occupational health and safety questions, labor organizations and whether the Tribe's Indian Country will have "right to work" provisions, requirements for insurance coverage of the

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162. Montana v. United States, 450 U.S. 544, 565-66 (1980).

163. *See* Cree v. Waterbury, 873 F. Supp. 404, 427-28 (E.D. Wash. 1994) (finding that its tribal ordinance "is consistent with federal law and has been endorsed by the United States Congress based on the grounds that it is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians").

> The employee must demonstrate a reasonable expectation [of continued employment] based upon some external source such as state law. In this case, Beebe points to the provisions of the TERO [Tribal Employment Right Ordinance], which provides him, as an Indian, with preferential treatment regarding continued employment and promotion. This Tribal ordinance clearly provides him with the requisite entitlement necessary to implicate due process [for purposes of a federal claim for denial of civil rights.]

Id. at 430 (citations omitted).

164. These ordinances generally require on reservation employers to employ a certain percentage of tribal members or other Indians at their businesses or face fines or shutdown of their businesses. However, there is no reason to believe that Tribes could not use their taxing authority to accomplish the same purpose by simply levying taxes upon the employer as a percentage of wages, salaries, or other renumeration paid to non-Indians employed by the employer within the Indian Country of the Tribe.

165. FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314-15 (9th Cir. 1990).

workplace, tribal chartering and recognition of business organizations such as corporations, partnerships, and the like, and similar infrastructure issues. It should be recognized that on occasion the Tribes will chose to regulate in a manner different from either the state or federal government, or to not regulate by statute but allow the issues to be determined within the Tribal Courts. In order for the Tribes to assert their full rights to self-governance, and in furtherance of the federal policy aimed at the economic self-sufficiency of the Indian Tribes while maintaining their Tribe customs, traditions, and values, non-Indian Courts and the Congress should "tread lightly" in attempting to impose non-Indian values and requirements within the Indian Country.