Tulsa Law Review

Volume 24 | Number 1

Fall 1988

Order in the Courts: Resolution of Tribal/State Criminal Jurisdictional Disputes

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ORDER IN THE COURTS: RESOLUTION OF TRIBAL/STATE CRIMINAL JURISDICTIONAL DISPUTES

I. INTRODUCTION

Although the Supreme Court articulated the basic principles of American Indian law two centuries ago, incongruous and divergent policies have developed, particularly with respect to criminal jurisdiction.[1] The issue of which entity regulates criminal matters in Indian country[2] — the Indian tribe, state government, or federal government — has prompted some to describe the situation as a "maze,"[3] "quagmire,"[4] or "crazy-quilt."[5] Legal schemes and maps have been created to aid judges, tribal members, and state law enforcement officers.[6] Federal and state courts often take inconsistent positions.[7] Moreover, the Supreme Court's

1. *See* Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976); Vollmann, *Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendants' Rights in Conflict*, 22 U. KAN. L. REV. 387 (1974); Note, *The Legal Trail of Tears: Supreme Court Removal of Tribal Court Jurisdiction Over Crimes By and Against Reservation Indians*, 20 NEW ENG. L. REV. 247 (1984-85).

2. Indian country is a confusing term in and of itself, encompassing numerous concepts. *See* D. GETCHES & C. WILKINSON, FEDERAL INDIAN LAW, 338-41 (1986) [hereinafter FEDERAL INDIAN LAW]; Clinton, *supra* note 1, at 507-13. Congress defined "Indian country" in 18 U.S.C. § 1151 (1982), a jurisdictional statute adopted in 1948:

> [T]he 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 the original or subsequently acquired territory thereof, and 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-of-way running through the same.

Id.

3. Clinton, *supra* note 1, at 504.

4. T. TAYLOR, THE BUREAU OF INDIAN AFFAIRS 92 (1984) [hereinafter BIA].

5. Vollmann, *supra* note 1, at 387.

6. *See* Clinton, *supra* note 1. *See also* Kimbrell, *Indian Land Map Confuses Sheriff, District Attorney*, Tulsa World, Dec. 10, 1987 at E1, col.1.

7. *See, e.g.*, Indian Country, U.S.A., Inc. v. Oklahoma *ex rel.* Okla. Tax Comm'n, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2870 (1988); State *ex rel.* May v. Seneca-Cayuga Tribe, 711 P.2d 77 (Okla. 1985). In *Seneca-Cayuga*, the Oklahoma Supreme Court reversed the trial court's determination that it lacked subject matter jurisdiction, holding that the state could regulate Indian bingo games if an evidentiary hearing revealed that non-Indians and Indians who are nonmembers of the tribe would be adversely affected. The supreme court remanded the case to the trial court for an evidentiary hearing on the matter. However, before the evidentiary hearing was conducted, the trial court was enjoined from conducting an evidentiary hearing by the federal district

"test"[8] for settling Indian law issues has evolved into an ad hoc balancing test of established principles and competing interests.[9] Ethical considerations linger.

A state's authority over criminal matters within Indian territory is limited,[10] so the implementation, management, and expense of law enforcement are typically left to the tribes and the federal government.[11] The state has its burden, though, for it must determine if a criminal violation involved Indians or non-Indians[12] and if the crime occurred on Indian land.[13] In Oklahoma, the quandry over which entity has jurisdiction is magnified, because allotted Indian lands are interwoven with state land.[14] Although the Bureau of Indian Affairs has recently deputized state law enforcement officers so that they may pursue crimes occurring on Indian land,[15] such measures signify no more than a temporary solution.[16] The predicament has resulted in hostilities, with many questioning the need for or doubting the existence of Indian sovereignty.[17]

Although society has changed considerably since Chief Justice John Marshall delineated the special relationship of Indian tribes to federal and state governments, the legal reality of inherent tribal sovereignty has not withered away with time.[18] For legal and ethical reasons, the right to

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court in Seneca-Cayuga Tribe v. Oklahoma, No. 85-C-639-B (consolidated with 86-C-393-B), slip op. (N.D. Okla. 1986). Oklahoma appealed the ruling, and the case is currently pending before the Tenth Circuit Court of Appeals.

8. *See infra* notes 70-112 and accompanying text. *See generally* C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW (1986).

9. *See* C. WILKINSON *supra* note 8, at 1-4, 29-52; Clinton, *State Power Over Indian Reservations: A Critical Comment on the Burger Court Doctrine*, 26 S.D.L. REV. 434 (1981). *See generally* Note, *supra* note 1.

10. For half a century, state incursions in Indian territory were barred completely. *See infra* notes 30-52 and accompanying text.

11. *See* BIA, *supra* note 4, at 84-86. *See also* FEDERAL INDIAN LAW, *supra* note 2, at 402-03 (quoting NATIONAL AMERICAN INDIAN COURT JUDGES ASS'N, INDIAN COURTS AND THE FUTURE 33-35 (D. Getches ed. 1978)).

12. Clinton, *supra* note 1, at 513-20.

13. Clinton, *supra* note 1, at 507-13; Vollmann, *supra* note 1, at 389-96. *See* Robertson, *Indian sovereignty issue has officials scratching heads*, Tulsa Tribune, Dec. 3, 1987, at A1, col. 4.

14. Kickingbird, *Oklahoma Indian Jurisdiction: A Myth Unravelled*, 9 AM. INDIAN J. 4, 4-5 (1986). The author begins by stating, "Perhaps in no other state has there been more confusion over who has jurisdiction in Indian Country than in the State of Oklahoma." *Id.* at 4. *See also* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 775-79 (1982).

15. Telephone interview with Tim Vollmann, Regional Solicitor for the United States Department of Interior (May 17, 1988).

16. *See* Brown, *Sovereignty rights defended by Indians*, Tulsa Tribune, June 4, 1988, at A8, col. 1.

17. *See, e.g.*, Kimbrell, *Area Indians Call Response To Court Decision "Dumb,"* Tulsa World, Dec. 3, 1987, at A1, col.1.

18. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (McLean, J., concurring). Justice McLean saw the manifest destiny of the Indian tribes differently. He recognized their need for

tribal self-government should be maintained. However, because court decisions have fluctuated,[19] Indian tribes in Oklahoma, to protect against further incursions upon their sovereignty, should examine the possibility of resolving some of these issues outside of the court system,[20] as tribes in other states have done.[21]

A compact between tribe and state, approved by Congress,[22] would be beneficial in Oklahoma, since recent court decisions, coupled with the muddle of allotted Indian lands, indicate troubled times ahead. An examination of the basic principles of tribal sovereignty, the evolution of criminal jurisdiction, and the inconsistencies of court decisions will demonstrate that resolving criminal jurisdiction disputes outside of the courtroom would be in the state's and the tribes' best interests.[23] Litigation is costly and time-consuming. Moreover, the courts have adjudicated criminal jurisdiction issues on an ad hoc basis, resulting in a piecemeal, narrow approach to many conflicts.

In reevaluating the need for criminal jurisdiction, a tribe may find that its goals and budget may not necessitate the policing of members and prosecution of minor crimes.[24] By reaching an agreement with the state, tribes could trade criminal jurisdiction for more useful resources, such as land,[25] particularized regulation,[26] or cash.[27] Most importantly, resolving the issue would supplant confusing, unproductive disputes with lucid policies that would quell the tension between both entities, effectuating a more productive atmosphere for all.

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sovereignty at the time, but added, "The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary." *Id.* at 593. Justice McLean perpetuated his idea of withering Indian sovereignty in decisions he made while riding circuit. FEDERAL INDIAN LAW, *supra* note 2, at 60.

19. *See generally* Clinton, *supra* note 9; Note, *supra* note 1.

20. C. WILKINSON, *supra* note 8, at 9.

21. Brodeur, *Annals of Law: Restitution*, New Yorker, 76 (Oct. 11, 1982) [hereinafter *Restitution*].

22. Kennerly v. District Court, 400 U.S. 423 (1971). Since the Indian commerce clause, U.S. CONST., art I, § 8, cl.3, and the treaty clause U.S. CONST., art II, § 2, cl.2, grant Congress exclusive power to regulate Indian tribes, there is a clear need, in dealing with tribes, for Congressional approval.

23. Interview with Tim Vollmann, Regional Solicitor, United States Dept. of the Interior, in Tulsa, Okla. (Feb. 16, 1988); Interview with Ross Swimmer, Assistant Secretary of the Interior for Indian Affairs, in Tulsa, Okla. (Feb. 26, 1988). *See also* FEDERAL INDIAN LAW, *supra* note 2, at 547; BIA, *supra* note 4, at 89.

24. Interview, Swimmer, *supra* note 23.

25. *See* Maine Indian Claims Settlement Act of 1980, ME. REV. STAT. ANN. tit. 30, § 6202 (1982). *See generally* BIA, *supra* note 4, at 107-16; *Restitution*, *supra* note 21.

26. *See* FEDERAL INDIAN LAW, *supra* note 2, at 729-30.

27. *See Washington State Tribes Receive $1.8 Million*, 9 AM. INDIAN J. 21 (1987).

II. TRIBAL SOVEREIGNTY: SOURCES OF POWER AND LIMITATIONS ON SELF-GOVERNMENT

A. *The Foundation of Indian Law Principles: The Marshall Trilogy*

A trilogy of cases decided between 1823 and 1832 fashioned the basic framework of American Indian law and fixed legal concepts which continue to bind court decisions. The most important principles are inherent tribal sovereignty, broad federal powers over Indian affairs, and limited state power. Inherent tribal sovereignty means that a tribe, by virtue of its status as such, has the inherent right to govern itself.[28] The United States Constitution grants to the federal government exclusive power to deal with Indian tribes, which results in broad federal powers over tribal affairs. Plenary federal power, coupled with inherent tribal sovereignty, constitutes an arduous barrier to the infringement of state power on tribal affairs.[29]

1. *Johnson v. McIntosh* and the Doctrine of Discovery

In *Johnson v. McIntosh*,[30] an 1823 land claim dispute between two non-Indians, Chief Justice Marshall determined the status of Indian title to land with respect to the federal government. Employing a concept that European nations used to recognize title to newly found land, Marshall streamlined the "doctrine of discovery"[31] and contended that discovery and possession consummated title in the nation that first came upon the land.[32] The claim obstructed intrusions by other nations.[33]

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28. *See infra* notes 39-47 and accompanying text.

29. *See infra* notes 58-69 and accompanying text.

30. 21 U.S. (8 Wheat.) 543 (1823). For a discussion of the impact of the doctrine of discovery as a basis of Congress' plenary power in dealing with Indian tribes, see Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 207-11 (1984).

31. Justice Marshall summarized the doctrine of discovery as follows:

> But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which by others, all assented. Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

Johnson, 21 U.S. (8 Wheat.) at 573.

32. *Id.*

33. *Id.* at 584-85.

Furthermore, as long as the Indian tribe occupied the land, it retained the possessory right to the land. Only the discovering nation, with exclusive title to the land, could extinguish the Indian tribe's right of occupancy. Impaired title meant that the tribe could not convey the land. After winning its war with England, the United States took exclusive title to the land and the exclusive right to deal with the Indian tribes.[34]

Justice Marshall's opinion in *Johnson v. McIntosh* thus formulated the relationship between the Indian tribes and the federal government. By addressing the doctrine of discovery, basically noblesse oblige for European pioneers, Marshall recognized the political status of Indian tribes. Although the discovering nation gained exclusive title of the land through principles based mostly on conquest, the Indians retained the right of occupancy.

2. *Cherokee Nation v. Georgia*

In the second case of the the Marshall Trilogy, *Cherokee Nation v. Georgia*,[35] Marshall formulated the idea that a trust relationship exists between the tribes and the federal government. Marshall dispelled the idea that the tribe constituted a foreign state; instead, he determined that the tribes are "domestic dependent nations," while the federal government acts as their trustee or guardian. Marshall reasoned that the relationship was a result of the United States' claim to exclusive title of tribal land. Relying on the language of Article I of the Constitution,[36] Marshall ascertained that the framers purposely distinguished Indian tribes from foreign nations and the states.[37] Stating that this situation was unique, he characterized the tribes as wards, with the United States as their guardian.[38]

3. *Worcester v. Georgia*

In *Worcester v. Georgia*,[39] Marshall refined and completed the earlier principles of Indian law he had developed. The outcome in *Worcester* turned on whether the state had jurisdiction over a criminal matter

34. *Id.* at 591.
35. 30 U.S. (5 Pet.) 1 (1831).
36. U.S. CONST. art. I, § 8, cl. 3. This clause gives Congress the power to "regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." *Id.*
37. *Cherokee Nation*, 30 U.S. (5 Pet.) at 16.
38. *Id.* at 17.
39. 31 U.S. (6 Pet.) 515 (1832).

occurring on Indian land. In holding that Georgia was absolutely barred from asserting jurisdiction on Indian land, Marshall delineated the basic principles of Indian law that still exist today: broad federal powers over Indian affairs, tribal self-government, the guardian-ward relationship, and limited state power.

First, Marshall recognized that the Constitution granted Congress broad powers over Indian affairs. The key provisions of the Constitution that Marshall cited were the treaty power[40] and the Indian commerce clause.[41] The states had no constitutional power to manage, regulate, or deal with the tribes, because the plenary power doctrine makes federal law supreme.[42]

Second, the Constitution, through the treaty making power and the Indian commerce clause, acknowledges inherent tribal sovereignty. Marshall noted that the tribes, though they had surrendered external governmental power to the United States, had retained their right to self-government.[43] By making treaties with the tribes, Congress had recognized the tribes' inherent sovereignty.[44]

Third, Marshall reasoned that principles of international law recognize that a weaker nation may govern its own affairs though it remains under the dominion of the stronger nation. Marshall argued as well-settled among nations that a discovery and conquest do not abolish the independence of a weaker nation.[45] Rather, the stronger nation protects the weaker nation and becomes its guardian.[46] Hence, the guardian-ward relationship is formed.

Finally, Marshall found that the states had no power over Indian affairs. The bar on state incursions in Indian territory was absolute. To hold otherwise, Marshall reasoned, would be inconsistent with federal law and inherent tribal sovereignty.[47]

Worcester brought to fruition the basic principles of Indian law developed by Justice Marshall; however, another perspective about Indian law also surfaced in the opinion. In his concurrence, Justice McLean

40. U.S. CONST. art II, § 2, cl. 2.

41. *Id.* art. I, § 8, cl. 3.

42. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557-62 (1832). *See* Newton, *supra* note 30, at 199-205.

43. *Worcester*, 31 U.S. (6 Pet.) at 559.

44. *Id.*

45. *Id.* at 560-61.

46. *Id.*

47. *Id.* at 561-62.

took a less permanent view of Indian affairs,[48] stating that "[t]he exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary."[49] Justice McLean predicted that the Indians would eventually be assimilated into white society and that their need for self-government would wither away as they became "amalgamated in our political communities."[50] At that point, he reasoned, state government would take over. Although Chief Justice Marshall's vision of tribal sovereignty continues to be viable,[51] Justice McLean's predictions have proven to be substantial as the courts now balance legitimate state interests against tribal interests.[52]

B. *The Roles of Tribes, States, and the Federal Government*

1. The Guardian-Ward Relationship

In the trilogy, Justice Marshall established that the Indian tribes and the federal government maintain a guardian-ward relationship. From this relationship stemmed the idea of a trust relationship between the government and the tribe;[53] in other words, the government has a duty to act in the best interest of the tribe.[54]

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48. *Id.* at 563 (McLean, J., concurring).

49. *Id.* at 593.

50. *Id.*

51. *See* F. COHEN, *supra* note 14, at 231-42.

52. A line of cases follows the McLean approach of recognizing and allowing the denigration of tribal sovereignty when it collides with the interests of mainstream society. *See* C. WILKINSON, *supra* note 8, at 33-35.

The Supreme Court, noting that the assimilation of Indians into the general community had turned tribal sovereignty into a floundering basis for analysis, turned to a modified approach in examining Indian law issues in Williams v. Lee, 358 U.S. 217 (1959). In *Williams*, the Court pronounced that the test has always been "whether a state action infringed on" tribal affairs. *Id.* at 220. In Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978), the Court allowed further state incursions by recognizing that "Indian tribes are prohibited from exercising . . . those powers '*inconsistent with their status.*' " (emphasis added)(quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)). For a discussion of the *Oliphant* Court's departure from precedent by implying the "doctrine of implicit departure," see Note, *supra* note 1, at 267-77.

53. Seminole Nation v. United States, 316 U.S. 286, 295-97 (1942). The Court held the federal government to its fiduciary duty as trustee of Indian affairs. Justice Murphy, writing the opinion, stated:

> [T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Id. at 296-97 (footnotes and citations omitted).

54. The Court has interpreted congressional intent to impose a legal duty on the Executive Branch. *See* Morton v. Ruiz, 415 U.S. 199 (1974); Pyramid Lake Paiute Tribe of Indians v. Morton,

From the trust duty emerged the canons of construction, rules of construction that directed the courts to interpret treaties in favor of the tribes.[55] Because treaty negotiation more frequently tilted in favor of the United States government, the courts, recognizing the guardian-ward relationship, read the ambiguous language in these bargains to favor the tribes.[56] The canons of construction encompass three rules:[57] (1) All ambiguities are resolved in the tribe's favor; (2) The language of the treaties or agreements is interpreted as the tribe would have understood it; and (3) The courts construe the treaty liberally in the tribe's favor.

2. The Plenary Power of Congress

The Constitution grants Congress broad plenary powers to regulate Indian tribes.[58] Congress derives power from the trust relationship also, because of its fiduciary duty to Indian tribes.[59] With this plenary power arises the power to abrogate treaties[60] and take tribal land.[61] Courts, in accordance with the canons of construction, seek to determine congressional intent by examining the language of the statute or its legislative

354 F. Supp. 252 (D.D.C. 1972), *rev'd*, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). *Cf.* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). In *Lone Wolf* the Court stated that Congress has "a moral obligation . . . to act in good faith in performing the stipulations entered into on its behalf." *Id.* at 566.

55. *See* F. COHEN, *supra* note 14, at 222. *See also* FEDERAL INDIAN LAW, *supra* note 2, at 214-17.

56. Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows or Grass Grows Upon the Earth'—How Long a Time Is That?*, 63 CALIF. L. REV. 601, 608-19 (1975).

57. *Id.*

58. *See* Newton, *supra* note 30, at 195-98. The Indian commerce clause grants Congress the exclusive power to regulate commerce with the Indian tribes. U.S. CONST. art. I, § 8, cl. 3. The treaty clause grants the federal government exclusive power to enter into treaties. U.S. CONST. art. II, § 2, cl. 2. However, Congress ended treaty-making with Indian tribes by statute in 1871. The property clause grants to Congress the power to regulate and dispose of public lands. U.S. CONST. art. IV, § 3, cl. 2. The supremacy clause makes federal treaties and statutes the supreme law of the land. U.S. CONST. art. VI, cl. 2. The necessary and proper clause grants Congress broad authority to enumerate its powers. U.S. CONST. art. I, § 8, cl. 18. Finally, although no longer relevant in this area, the war powers clause grants power to Congress. U.S. CONST. art. I, § 8, cl. 11.

59. United States v. Kagama, 118 U.S. 375 (1886); United States v. Sandoval, 231 U.S. 28 (1913). The trust relationship has not been cited by the Court as a separate source of power since 1926. *See generally* Newton, *supra* note 30.

60. *See* Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968); United States v. Winnebago Tribe of Nebraska, 542 F.2d 1002, 1004 (8th Cir. 1976). *But see* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) and Seneca Nation of Indians v. Brucker, 262 F.2d 27 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 909 (1959). In *Lone Wolf* the Court articulated the plenary authority of Congress to abrogate treaties, but it found that Congress' duty to the Indians was no different than that extended to other nations. *Lone Wolf*, 187 U.S. at 566. *See generally* Wilkinson & Volkman, *supra* note 56.

61. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); Shoshone Tribe v. United States, 299 U.S. 476 (1937).

history.[62] When congressional intent is not apparent, courts generally resolve ambiguities in favor of the tribe, as prescribed by the canons of construction.[63]

Congress can limit a tribe's governmental powers to the point of termination, but, unless congressional intent to do so is certain, a presumption exists that the tribe maintains governing ability by virtue of its inherent sovereignty.[64] Felix Cohen, the eminent Indian law scholar,[65] identified many characteristics of self-government, including the power to choose a form of government, set membership rules and obligations, delineate the conditions of inheritance, regulate property, levy taxes, and administer justice.[66] When determining the extent of tribal sovereignty, courts should, according to Cohen, start with the presumption that the tribe "possesses . . . all the powers of any sovereign state."[67] Courts must then search for "express legislation" to determine the scope of the tribe's right of self-government.[68] Therefore, Cohen maintained that, unless Congress expressly qualified certain tribal rights, the full power of internal sovereignty "vested in the Indian tribes and in their duly constituted organs of government."[69]

3. State Interests: Formation of the Balancing Test

Worcester v. Georgia[70] established the principle that states could not assert their powers in Indian territory;[71] however, a crack in the "*Worcester* wall,"[72] imposed fifty-one years after the decision, evolved into a balancing test. In *United States v. McBratney*,[73] the Supreme Court upheld state prosecution of a white defendant who had murdered

62. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 241, *reh'g denied*, 471 U.S. 1062 (1985). *See generally* F. COHEN, *supra* note 14, at 221-25.

63. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). *Cf.* DeCoteau v. District County Court, 420 U.S. 425, 444, *reh'g denied*, 421 U.S. 939 (1975).

64. *See* Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-23 (1942).

65. *See* FEDERAL INDIAN LAW, *supra* note 2 at xxx.

66. FEDERAL INDIAN LAW, *supra* note 2, at 276-77.

67. FEDERAL INDIAN LAW, *supra* note 2, at 277.

68. FEDERAL INDIAN LAW, *supra* note 2, at 278. *See* Kennerly v. District Court, 400 U.S. 423 (1971). The Court held, per curiam, that, even though the tribe consented to state jurisdiction through tribal agreement, "[t]he unilateral action of the Tribal Council was insufficient to vest Montana with jurisdiction over Indian country . . . ." *Id.* at 427.

69. F. COHEN, *supra* note 64, at 123.

70. 31 U.S. (6 Pet.) 515 (1832).

71. *Id.* at 537-42.

72. *See* Comment, *The Developing Test for State Regulatory Jurisdiction in Indian Country: Application in the Context of Environmental Law*, 61 OR. L. REV. 561, 565 (1982).

73. 104 U.S. 621 (1881).

another white within the Ute Reservation in Colorado. The Court reasoned that, once Colorado was admitted into the Union, the state acquired exclusive criminal jurisdiction over the entire territory and its citizens—including the Ute Reservation.[74]

The decision diverged from the reasoning of *Worcester*. In his opinion in *McBratney*, Justice Gray concluded that federal jurisdiction applied only to the enforcement of treaty provisions.[75] He found "no stipulation for the punishment of offences committed by white men against white men" in the provisions.[76] However, as one scholar insists, the *McBratney* decision and its progeny[77] departed entirely from federal law.[78]

The seminal case which acknowledged, at least the possibility of state incursions into Indian country was *Williams v. Lee*.[79] In *Williams*, a non-Indian who owned a store on an Indian reservation sought to sue an Indian couple in state court for money they owed him.[80] The Supreme Court determined that state jurisdiction would undermine tribal authority to adjudicate reservation affairs, thus infringing on tribal self-government.[81] The Court formulated a test for determining whether

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74. *Id.* at 624.

75. *Id. See also* Clinton, *supra* note 1, at 525.

76. *McBratney*, 104 U.S. at 624.

77. The *McBratney* trilogy also includes Draper v. United States, 164 U.S. 240 (1896) and New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946). In *Draper*, the Supreme Court decided, despite Montana's Enabling Act disclaiming any right to criminal jurisdiction, that statehood gave the state authority to prosecute a crime involving two non-Indians on Indian land. In *Martin*, the Supreme Court upheld New York's conviction of a non-Indian for the murder of a non-Indian within Indian land.

78. *See* Clinton, *supra* note 1, at 526 n.103. Highly critical of the *McBratney* approach, Clinton argues:

> *McBratney* and its progeny, in ignoring the language of [18 U.S.C § 1152] and its predecessors which purport to grant exclusive federal jurisdiction over crimes committed between non-Indians on Indian lands, circumvents the constitutional supremacy clause and preemption issues raised by the simultaneous exercise of section 1152 jurisdiction and the exercise of state jurisdiction. Even if state sovereignty vests the states with some jurisdiction over non-Indian crimes committed on Indian lands, it is a derogation of federal authority to hold that the federal courts do not even have concurrent jurisdiction over such crimes despite the clear language of section 1152. The Court sub silentio suggests that Congress has no power to create either exclusive or concurrent federal jurisdiction over non-Indian crimes occurring on Indian lands which, at best, is a questionable proposition.

Id. Section 1152, designated the Indian Country Crimes Act, (also called the General Crimes Act, the Interracial Crime Provision, and the Federal Enclave Statute) addressed federal jurisdiction solely, not state jurisdiction. It originated with the Trade and Intercourse Act of 1790. *See* FEDERAL INDIAN LAW, *supra* note 2, at 397.

79. 358 U.S. 217 (1959).

80. *Id.* at 217-18.

81. *Id.* at 220.

a state incursion into tribal sovereignty is barred, the *Williams* infringement test. This examination provides: "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."[82]

Although it reaffirmed the *Worcester* doctrine[83] and set a tone of resistance to state intrusion into Indian affairs,[84] the *Williams* infringement test nonetheless conceded that states can have legitimate interests in regulating certain matters — in this case, matters involving non-Indians within Indian country.[85] The *Williams* infringement test left many questions tentative.[86] Consequently, subsequent court decisions have applied the test inconsistently.[87]

In the early seventies, the Supreme Court adopted a new phase of Indian law analysis. The Court noted the "considerable evolution" of the *Worcester* doctrine in *McClanahan v. Arizona State Tax Commission*.[88] In an opinion reminiscent of Justice McClean's predictions, Justice Thurgood Marshall noted that Indian sovereignty had been "adjusted" to accommodate the state's "legitimate interests in regulating the affairs of non-Indians."[89] Assuming that the importance of the barrier of Indian sovereignty to state incursions had eroded, Justice Marshall identified a "modern" basis for limiting state power: federal preemption.[90]

While avowing that a state may have a legitimate interest in regulation, the *McClanahan* Court shifted from the traditional focus on tribal sovereignty to the doctrine of preemption.[91] In other words, the Supreme Court determined that the counterbalancing of state and tribal interests rests on federal law instead of "platonic notions of Indian sovereignty."[92] Therefore, if a court ascertains federal involvement or regulation, state incursions are prohibited.

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82. *Id.*
83. *Id.* at 221.
84. *Id.* at 221-22.
85. *Id.* at 220-21.
86. *See* Clinton, *supra* note 9, at 438-39; Comment, *supra* note 72, at 566-68.
87. Decisions which have allowed a greater degree of state power over Indian affairs off-reservation include Organized Village of Kake v. Egan, 369 U.S. 60 (1962). Decisions which have more closely adhered to the traditional preemption approach toward state incursions include Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965).
88. 411 U.S. 164, 171 (1973).
89. *Id.* at 171.
90. *Id.* at 172.
91. *Id.*
92. *Id.*

In *McClanahan*, the Supreme Court reduced tribal sovereignty to a "backdrop" weighted by the canons of construction.[93] Justice Marshall reasoned that lower courts had placed less emphasis on inherent sovereignty, which signified a conceived decrease in tribal sovereignty. Nonetheless, because the Court turned the analysis to federal preemption, tribal self-government would not be undermined so readily. *McClanahan* and its companion case, *Mescalero Apache Tribe v. Jones*,[94] clearly established that "absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation . . . ."[95] This principle was reiterated later by the Supreme Court in *Moe v. Confederated Salish & Kootenai Tribes*.[96]

However, the "test" lacks precision because, unlike the absolute bar to state incursions established in *Worcester*, it requires the weighing of interests. For example, following *McClanahan*, the Court held, in *Washington v. Confederated Tribes of the Colville Indian Reservation*,[97] that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States."[98] Nevertheless, the court allowed state taxation of Indians who were not enrolled tribal members.[99] Moreover, consistent with *Moe v. Confederated Salish & Kootenai Tribes*,[100] the Court upheld state record-keeping requirements imposed on the tribe. Justice White contended, "We recognized in *Moe* that if a State's tax is valid, the State may impose at least minimal burdens on Indian businesses to aid in collecting and enforcing that tax."[101]

The Court delineated a two-prong test in *White Mountain Apache Tribe v. Bracker*[102] for determining whether state power is barred in Indian Country. The test, which focuses on federal preemption and infringement on tribal sovereignty,[103] prompts "a particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . ."[104]

While these cases have not proven deleterious to the core of tribal

93. *Id.* at 174.
94. 411 U.S. 145 (1973).
95. *Id.* at 148.
96. 425 U.S. 463, 475-76 (1976).
97. 447 U.S. 134, *reh'g denied*, 448 U.S. 911 (1980).
98. *Id.* at 154.
99. *Id.* at 159.
100. 425 U.S. 463 (1976).
101. *Washington*, 447 U.S. at 159.
102. 448 U.S. 136 (1980).
103. *Id.* at 142.
104. *Id.* at 145.

self-government established in the Marshall trilogy, the fact that the test now requires a balancing of competing interests, leaves room for inconsistent results. Perhaps the most extreme example is *Rice v. Rehner*,[105] in which the Supreme Court fashioned a different approach to balancing the interests of tribes and states.

The *Rice* Court based its decision on the fact that tribes had not traditionally regulated liquor sales.[106] The Court rejected the argument that " 'independent [tribal] authority *is itself* sufficient for the tribes to impose' their own liquor regulations."[107] Moreover, the Court determined that the *McClanahan* "backdrop of tribal sovereignty" analysis was inappropriate when applied to the facts in *Rice*.[108] Justice O'Connor, writing for the Court, stated, "If, however, we do not find such a tradition, or if we determine that the balance of state, federal, and tribal interests so requires, our pre-emption analysis may accord less weight to the 'backdrop' of tribal sovereignty."[109]

In a recent decision, *California v. Cabazon Band of Mission Indians*,[110] the Supreme Court gave little credence to the "traditional activity" analysis. The Court focused instead on federal intent to promote tribal sovereignty.[111] In weighing legitimate state interests "in light of the compelling federal and tribal interests," the Court determined that state regulation of tribal bingo games, even though traditionally not a tribal activity, "would impermissibly infringe on tribal self-government."[112]

III. CRIMINAL JURISDICTION IN INDIAN COUNTRY

A clear formula for resolving criminal jurisdictional issues on Indian land does not exist. Many factors affect it: the type of crime, the defendant's race, and the victim's race. Basically, federal courts have jurisdiction over major crimes, while the tribes maintain jurisdiction over other areas, mainly misdemeanors and civil regulatory crimes. Omnipresent is

105. 463 U.S. 713, *reh'g denied*, 464 U.S. 874 (1983).

106. *Id.* at 723-25.

107. *Id.* at 722 (emphasis added) (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)).

108. *Id.* at 725.

109. *Id.* at 720.

110. 480 U.S. 202, 107 S. Ct. 1083 (1987).

111. *Id.* at —, 107 S. Ct. at 1094-95.

112. *Id.* at —, 107 S. Ct. at 1093-95. *See* Indian Country, U.S.A., Inc. v. Oklahoma *ex rel.* Okla. Tax Comm'n, 829 F.2d 967, 982 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2870 (1988), which relies on *Cabazon* in preempting state regulation of a Creek bingo enterprise.

Congress' power to completely abolish tribal courts and grant jurisdiction to the states. However, criminal jurisdiction in Indian country has proceeded along a spectrum, beginning with exclusive tribal jurisdiction.

A. *Early Decisions*

Worcester, which denied the intrusion of state criminal jurisdiction in Indian territory, formed the basis of tribal self-government that lasted for half a century. Although the *McBratney* decision marked the beginning of the end for the *Worcester* wall with respect to non-Indians in Indian Country, other decisions upheld tribal sovereignty, sometimes to the dismay of Congress.[113]

The Supreme Court held in *Ex Parte Crow Dog*,[114] an 1883 decision, that Indian tribes have exclusive jurisdiction over the prosecution of an Indian for the murder of another Indian on Indian land.[115] The Court predicated its opinion on the principle established by the Marshall trilogy that the tribes had inherent sovereignty to govern their own affairs. Thus, the Court, looking to several congressional acts, reasoned that Congress intended for the tribes to regulate, maintain, and administer their own affairs.[116]

B. *Congressional Enactments Limiting Tribal Criminal Jurisdiction*

In response to the *Crow Dog* decision, Congress enacted the Major Crimes Act of 1885,[117] which limited tribal criminal jurisdiction by granting exclusive federal jurisdiction over certain crimes.[118] From the

113. *See infra* note 117 and accompanying text.
114. 109 U.S. 556 (1883).
115. *Id.* at 571-72.
116. *Id.* at 570-72.
117. 18 U.S.C. § 1153 (1982).
118. The Act has since been amended. The revised statute states:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, rape, involuntary sodomy, felonious sexual molestation of a minor, carnal knowledge of any female not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.
>
> (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

18 U.S.C. § 1153 (1982), *as amended by* Pub. L. 99-646 § 87(c)(5), 100 Stat. 3623 (1986).

Major Crimes Act precipitated many other statutes delineating provisions and conditions directed at criminal jurisdiction on Indian land.[119]

The more salient of these enactments include the Indian Country Crimes Act,[120] which established exclusive federal jurisdiction in Indian country. It thus preempted states from asserting jurisdiction over criminal matters on Indian land. The Assimilative Crimes Act[121] transcribed state criminal violations into federal law, filling gaps that the more general Indian Country Crimes Act left.[122] Public Law 280, adopted during an era of federal policy promoting the termination of tribal self-government,[123] implemented state criminal jurisdiction on Indian reservations in six states.[124] Ten states opted for jurisdiction,[125] but with the rise of civil rights throughout the United States in the 1960's, so came changes in Indian policy. The Indian Civil Rights Act of 1968 amended Public Law 280 by requiring tribal consent to state jurisdiction.[126] Moreover, many states retroceded jurisdiction to the federal government.[127]

C. *Current Policies*

From a starting point of absolute Indian jurisdiction over criminal

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119. *See* FEDERAL INDIAN LAW, *supra* note 2, at 396-97.

120. 18 U.S.C. § 1152 (1982). The statute states:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Id.

121. 18 U.S.C. § 13 (1982).

122. F. COHEN, *supra* note 14, at 290.

123. *See* FEDERAL INDIAN LAW, *supra* note 2, at 130-51.

124. Initially, PL-280, adopted in 1953, granted jurisdiction to five states: California, Minnesota, Nebraska, Oregon, and Wisconsin. Jurisdiction was later conferred on Alaska. The statute provided:

> Each of the States or Territories . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

18 U.S.C. § 1162(a) (1982). *See* F. COHEN, *supra* note 14, at 362-80; Clinton, *supra* note 1, at 548-52; Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975).

125. *See* F. COHEN, *supra* note 14, at 362-63 n.125.

126. F. COHEN, *supra* note 14, at 363 n.126.

127. F. COHEN, *supra* note 14, at 363 n.129.

matters within Indian country, criminal jurisdiction in Indian matters has evolved into a complicated scheme.[128] Generally, several established concepts apply:[129] (1) States cannot assume jurisdiction if a crime between an Indian defendant and an Indian victim occurs in Indian Country;[130] (2) Indian courts have jurisdiction over non-major crimes between Indians and over victimless crimes by Indians;[131] (3) States do not have jurisdiction over interracial crimes in Indian country;[132] (4) Tribal courts have concurrent jurisdiction over non-major crimes and crimes committed by an Indian against a non-Indian; otherwise, federal courts have exclusive jurisidiction;[133] and (5) States have jurisdiction, according to the *McBratney* doctrine, for crimes in Indian country between non-Indians.[134] Jurisdictional authority over areas involving victimless and consensual crimes, whether committed by Indians or non-Indians, is still questionable.[135]

D. *Criminal Jurisdiction in Oklahoma*

For many years courts assumed that provisions in the Allotment Act[136] and the special status of Oklahoma as Indian Territory before

128. For more complete and exhaustive studies of criminal jurisdiction, see F. COHEN, *supra* note 14, at ch. 6; FEDERAL INDIAN LAW, *supra* note 2, at 412-13. The authors of FEDERAL INDIAN LAW provide a "map" through the maze. The questions suggested by the authors for initial analysis are:

1. Was the Locus of the Crime in Indian country?
2. Does "Public Law 280" or a Specific Jurisdictional Statute Apply?
3. Was the Crime Committed by or Against an Indian?
4. Which Defendant-Victim Category Applies?
   a. Crime by an Indian against an Indian
   b. Crime by an Indian against a non-Indian
   c. Crime by a non-Indian against an Indian
   d. Crime by a non-Indian against a non-Indian
   e. "Victimless" and "consensual" crimes by an Indian
   f. "Victimless" and "consensual" crimes by a non-Indian.

Id. at 412-13. *See also* Clinton, *supra* note 1; Vollmann, *supra* note 23.

129. FEDERAL INDIAN LAW, *supra* note 2, at 414-15. *See generally* W. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL ch. 7 (1988).

130. FEDERAL INDIAN LAW, *supra* note 2, at 414.

131. FEDERAL INDIAN LAW, *supra* note 2, at 414.

132. FEDERAL INDIAN LAW, *supra* note 2, at 414.

133. FEDERAL INDIAN LAW, *supra* note 2, at 414.

134. FEDERAL INDIAN LAW, *supra* note 2, at 415.

135. FEDERAL INDIAN LAW, *supra* note 2, at 415.

136. For a thorough account of criminal jurisdiction of the Five Civilized Tribes in Oklahoma, see Harjo v. Kleppe, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom*, Harjo v. Andrus, 581 F.2d 949 (D.C. Cir. 1978). *See generally* FEDERAL INDIAN LAW, *supra* note 2, at 111-20; A. DEBO, AND STILL THE WATERS RUN (1984); F. COHEN, *supra* note 14, at 770-97.

statehood in 1907[137] gave Oklahoma jurisdiction over Indian lands. Interpretations by the state attorney general and the justice department concluding that the statutes and Oklahoma Enabling Act[138] conferred jurisdiction upon Oklahoma have been rejected by both federal and state courts. The courts, sometimes relying on the canons of construction, have found nothing in the statutes indicating that Congress clearly intended to transfer criminal jurisdiction to the state.

1. The Evolution of Indian Jurisdiction in Oklahoma

While the Marshall trilogy established that Indian tribes retained the right of occupancy to the lands on which they lived, the consensus among those debating Indian policy supported the view that the Indians should move west.[139] Upon the passage of several treaties beginning in 1830,[140] tribes occupying the southeastern states began their hegira to unoccupied land, which now constitutes Oklahoma, Kansas, and Arkansas.[141] The first tribes removed were called the Five Civilized Tribes, and they occupied much of what is now Oklahoma.[142] Although removal treaties provided that the land would always belong to the tribes, settlers gradually consumed the mass of acreage.[143]

One of the greatest reductions in Indian land holdings occurred after the Civil War. Congress punished the Five Civilized Tribes, many members of which had supported the Confederacy, by forcing them to cede their western holdings.[144] The Oklahoma Territory Organic Act,[145] passed in 1890, created Oklahoma Territory in the western part of the state, pushing the Five Civilized Tribes and the Quapaw Agency Tribes into the eastern portion of their territory.[146] Despite the changes in land possession, tribal authority and federal jurisdiction in both territories

137. Kickingbird, *supra* note 14, at 4-5.

138. Act of June 16, 1906, ch. 3335, 34 Stat. 267, 267-278.

139. The land-hungry wanted Indian tribes to leave for obvious reasons; however, the "friends" of the Indians felt that Indian culture and well-being would be best served if the tribes were insulated from Anglo culture. Even some tribal leaders conceded that, to avoid annihilation, pressing on was the best option. DEBO, *supra* note 136, at 31-91.

140. F. COHEN, *supra* note 14, at 771 nn.6-8.

141. F. COHEN, *supra* note 14, at 771.

142. Referred to as the the Five Civilized Tribes, the Choctaws, Chickasaws, Creeks, Cherokees, and Seminoles, were the first tribes to inhabit Oklahoma. F. COHEN, *supra* note 14, at 771. For a history of these tribes, see DEBO, *supra* note 136 and R. STRICKLAND, THE INDIANS IN OKLAHOMA (1980).

143. F. COHEN, *supra* note 14, at 772-73.

144. *See* State *ex rel.* May v. Seneca-Cayuga Tribe, 711 P.2d 77, 81 n.16 (Okla. 1985).

145. Act of May 2, 1890, ch. 182, 26 Stat. 81.

146. F. COHEN, *supra* note 14, at 773.

were retained.[147]

Meanwhile, the arguments that Indian lands should be opened up to settlers and that the Indians should be assimilated into white culture gained considerable momentum in Congress.[148] The General Allotment Act of 1887[149] initiated the breakup of tribal lands, but the Five Civilized Tribes were exempted from implementation, at least temporarily.[150] The Curtis Act of June 28, 1898[151] compelled the tribes to participate in the allotment process.[152] As a result of the allotment acts, nearly 90 million acres nationwide of tribal land were lost.[153] The Curtis Act also abolished tribal court systems, but not the tribes' governments.[154]

2. A Matter of Interpretation

The jurisdictional disputes that have confronted state and federal courts center on whether Congress transferred federal criminal jurisdiction to Oklahoma upon statehood in 1907. Three acts passed between 1897 and 1907 pertain to allotted Indian land. The federal courts have taken a different view as to the effect of the acts than that held by the Oklahoma Attorney General.[155] Meanwhile, the United States Department of Justice has supported the state's position.[156]

Basically, the state maintains that three congressional enactments, when taken together, abolished the tribal status of the Five Civilized Tribes. As a result, Oklahoma assumed criminal jurisdiction over nonfederal crimes when it became a state. These statutes are the Appropriations Act of June 7, 1897, the Curtis Act of 1898, and the Amendment to the Oklahoma Enabling Act of 1907.[157]

The attorney general based his reasoning in part on a 1936 Oklahoma Criminal Court of Appeals opinion, *Ex parte Nowabbi*.[158] In *Nowabbi*, the court determined that the state had jurisdiction over the

147. F. COHEN, *supra* note 14, at 773.
148. *See* R. STRICKLAND, *supra* note 142, at 36-39.
149. Act of February 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 (1982)). This act was also referred to as "The Dawes Act."
150. *Id.* § 8, 24 Stat. 391 § 1 (codified as amended 25 U.S.C. § 339 (1982)).
151. Act of June 28, 1898, ch. 517, 30 Stat. 495.
152. F. COHEN, *supra* note 14, at 774.
153. C. WILKINSON, *supra* note 8, at 8.
154. *See* Kickingbird, *supra* note 14, at 16-17.
155. 79 Op. Att'y Gen. 216 (1979).
156. *See* Amicus Curiae Brief of the United States Dept. of Justice, Oklahoma v. Brooks, No. S-85-117 (Okla. Crim. App. Oct. 14, 1988).
157. Tyner v. Okla., No. 87-C-29-E, slip op. at 12 (N.D. Okla. Oct. 29, 1987).
158. 60 Okla. Crim. 111, 61 P.2d 1139 (1936).

prosecution of one Indian for the murder of another Indian on a restricted allotment.[159] Both the defendant and the victim were members of the Choctaw Tribe.[160] At the time of the opinion, the Indian Country Crimes Act granted exclusive federal jurisdiction over interracial crimes. In addition, the Indian Territory Major Crimes Act granted exclusive federal jurisdiction over Indians accused of murder on a reservation. The court, in determining whether the restricted allotment was tantamount to a diminished reservation, decided that it was not.[161] In reaching its holding, the criminal court of appeals focused on an amendment to the General Allotment Act of 1906 which precluded Indian country jurisdiction in what is now eastern Oklahoma.[162] Thus, the court concluded that federal jurisdiction was precluded in Indian territory.[163]

In 1948, Congress revised the Indian Country Crimes Act, expressly extending federal jurisdiction to restricted allotments.[164] *Nowabbi* has since been criticized for having unsound and dubious reasoning[165] and has been rejected by the federal courts and the Oklahoma Supreme Court.[166] However, Cohen noted that "the issue will remain uncertain until resolved by an authoritative judicial decision or congressional action."[167]

In addition to the opinion by the Oklahoma Attorney General, a 1942 administrative opinion[168] has also been relied on by those arguing

159. *Id.*

160. *Id.* at 1143.

161. *Id.* at 1154.

162. *Id.* at 1147.

163. *Id.*

164. 18 U.S.C. §§ 1151-53, 3242 (1982).

165. *See* F. COHEN, *supra* note 14, at 777-79.

166. *See, e.g.*, Indian Country, U.S.A., Inc. v. Oklahoma *ex rel.* Okla. Tax Comm'n, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2870 (1988). In State *ex rel.* May v. Seneca-Cayuga Tribe, 711 P.2d 77, 81 n.17 (Okla. 1985), the Oklahoma Supreme Court notes:

> *Ex parte Nowabbi*. . . holding that Oklahoma could take jurisdiction over crimes committed by Indians in Indian Country, on which the Attorney's General Opinion relies, is based on pre-1948 law. The 1948 revised United States Code includes revisions found at 18 U.S.C. § 1151 (defining Indian Country) and § 1153 (The Major Crimes Act vesting jurisdiction in the United States for major crimes. . . .). Since enactment of the 1948 code, courts have been reluctant to exclude the lands of eastern Oklahoma tribes from application of federal law.

Id.

167. F. COHEN, *supra* note 14, at 779.

168. Letter from Ass't Secretary of the Interior to the Attorney General of Oklahoma, "Jurisdiction—State and Federal Courts—Restricted Allotments in Former Oklahoma Territory" (Aug. 17, 1942), cited in F. COHEN, *supra* note 14, at 779 n.85.

that the state assumed jurisdiction over its eastern territory upon statehood. The author of the 1942 opinion maintained that the Appropriations Act of June 7, 1897 "implicitly superseded" the Indian country statutes in Indian territory by mandating the application of federal and Arkansas laws in Indian Territory "regardless of race."[169] The Indian country statutes expressly addressed race. As a result of the difference in language, the reasoning goes, the Indian country laws were implicitly superseded by the Appropriations Act. Therefore, Oklahoma assumed jurisdiction over those matters reached by Arkansas law.[170] Nonetheless, the opinion suggested that Congress should resolve this "uncertain" dilemma.[171]

The state has argued that the Appropriations Act dissolved the governments of the Five Civilized Tribes. Hence, the state assumed jurisdiction over Indian lands. The administrative opinion relies, then, on the idea that the Five Civilized Tribes were extinguished. Even though the Enabling Act expressly reserved federal authority over Indian lands, the five tribes were not included, according to the state's argument. Instead, the state maintains that a section of its Enabling Act indicates "congressional intent to grant Oklahoma broad jurisdiction over Indian lands."[172]

Dissolution was never realized. The Five Tribes Act of 1906 provided that "the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law."[173] The Tenth Circuit recently ascertained that section one of the Enabling Act dispelled the state's notion that it gained jurisdictional interests. In *Indian Country, U.S.A. v. Oklahoma ex rel. Oklahoma Tax Commission*,[174] the court indicated that the state had "completely ignore[d]" a section of the Oklahoma Enabling Act,[175] which expressly retained federal jurisdiction.[176] The court concluded that the Act's

169. F. COHEN, *supra* note 14, at 779 n.85.

170. F. COHEN, *supra* note 14, at 779.

171. F. COHEN, *supra* note 14, at 779 n.85.

172. Indian Country, U.S.A., Inc. v. Oklahoma *ex rel.* Okla. Tax Comm'n, 829 F.2d 967, 979 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2870 (1988).

173. The Five Tribes Act of 1906, ch. 1876, § 28, 34 Stat. 137, 148.

174. 829 F.2d 967, 978 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2870 (1988).

175. Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906).

176. *See Indian Country, U.S.A.*, 829 F.2d at 979. Section one of the act, which the court cites, provides:

> [N]othing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property,

language showed a congressional intent to retain "jurisdiction and authority over Indians and their lands in the new State of Oklahoma until it accomplished the eventual goal of terminating the tribal governments, assimilating the Indians, and dissolving completely the tribally-owned land base—events that never occurred and goals that Congress later expressly repudiated."[177]

The validity of the state's position is further shaken by federal acts extolling tribal self-determination.[178] The 1948 revision of the Indian country statutes expressly favored federal jurisdiction. As one author has noted, recent Supreme Court decisions, when taken together, contain a message of permanency when addressing tribalism.[179] In other words, regardless of federal recognition, tribal members determine the existence of tribal government. Finally, judicial precedent has always rung clear: dissolution does not occur absent clear congressional intent.[180] Therefore, an "implicit" superseding of federal statutes with state law and the abolishment of the tribal governments in eastern Oklahoma are unlikely.

3. Application of the Balancing Test

Even though the federal courts and the Oklahoma Supreme Court have upheld the position that the Indian allotments in eastern Oklahoma constitute Indian country, the state supreme court took an interesting approach recently in finding that the state could regulate a bingo operation on Indian land to the extent that it affected non-members of the tribe. In *State ex rel. May v. Seneca-Cayuga Tribe*,[181] the court, after determining that an Indian allotment fell within the meaning of Indian

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or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed.

Id.

Oklahoma relies on section three of the act, which provides

[t]hat the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

Id.

177. *Id.*

178. *See e.g.*, Oklahoma Indian Welfare Act, Act of June 26, 1936, ch. 831, 49 Stat. 1967 (codified as amended at 25 U.S.C. §§ 501-09 (1982)); Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970), *reprinted in* FEDERAL INDIAN LAW, *supra* note 2, at 151-53. *See also* Kickingbird, *supra* note 14, at 17.

179. C. WILKINSON, *supra* note 8, at 77.

180. *See supra* notes 70-112 and accompanying text.

181. 711 P.2d 77 (Okla. 1985).

country under 18 U.S.C. section 1151(c), found that nothing barred it from conducting a test balancing the interests involved.[182] It remanded the case to the district court to conduct an evidentiary hearing on the extent to which the activity would affect non-members of the self-governing unit.[183]

Ultimately, however, the federal district court enjoined the state district court from proceeding, holding that the decision was contrary to federal policy, which encourages tribal self-government and economic growth.[184] The federal district court criticized the state's highest court for conducting a one-sided balancing test.[185] Although Supreme Court decisions have recognized that a state may have an interest in regulating tribal activity, tribal interests in self-government are not lightly considered.[186] The Court critically scrutinizes state incursions into Indian affairs, but the opportunity to perform a balancing test of interests invites time-consuming and expensive litigation.

4. Jurisdiction as a Result of Public Pressure

Governmental policies are a barometer of public temperament. The very reason that Indians were coerced into leaving their homelands for Oklahoma was to appease the land-greedy. The allotment era placated those who thought that the Indian people must be assimilated into white culture. When the allotment process proved disasterous, policy changed. The termination era followed World War II, when a policy of conformity acted as a bellwether.[187] Then, the American Civil Rights movement propelled a shift in policy once again. President Nixon pronounced in a

182. The court found that Public Law 83-280, a 1953 congressional enactment that permitted states to invoke certain civil and criminal jurisdiction, did not preclude the state from assuming jurisdiction over a civil regulatory matter even though Oklahoma had never adopted the statute. *Id.* at 85-88.

PL 83-280 allowed states to rescind constitutional provisions disclaiming title to Indian lands to Indian tribes; to be admitted to the United States, territories had to include these provisions in their constitutions. PL 83-280 transferred federal civil and criminal jurisdiction to the state, and assumption of PL 83-280 required affirmative legislative action and removal of the disclaimer. In 1968, Congress amended the statute to require tribal consent. Unless the statute has been adopted, congressional authority to assert jurisdiction is absent. *See* Seneca-Cayuga Tribe of Okla., v. Oklahoma, No. 85-C-639-B (consolidated with 86-C-393-B) slip op. at 7-13 (N.D. Okla. June 5, 1987).

183. *May*, 711 P.2d at 92.

184. Seneca-Cayuga Tribe of Okla. v. Oklahoma, No. 85-C-639 (consolidated with 86-C-393-B) slip op. at 21 (N.D. Okla. June 5, 1987).

185. *Id.*

186. *See, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); Mescalaro Apache Tribe v. Jones, 411 U.S. 145 (1973); Indian Country, U.S.A., Inc. v. Oklahoma *ex rel.* Okla. Tax Comm'n, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2870 (1988).

187. *See* FEDERAL INDIAN LAW, *supra* note 2, at 130-51.

message to Congress that "[t]he time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."[188]

Recently, a federal district court held that Oklahoma could not exercise criminal jurisdiction over a restricted Indian allotment on which a bingo hall was operated.[189] The Tulsa County District Attorney interpreted the ruling as prohibiting all state law enforcement on Indian lands.[190] Approximately 200 tracts of Indian land lie in Tulsa County,[191] and law enforcement officials have been nonplussed over these admonitions and allotment maps.[192] Indian citizens have obviously been concerned.[193]

IV. PROPOSED CHANGES: THE USE OF AGREEMENTS IN RESOLVING CRIMINAL JURISDICTION DISPUTES

Confronted with the loss of time, money, and court battles, some states and tribes have turned to negotiated agreements which, after approval by Congress, have developed into lucrative and amicable ventures. The Maine Indian Claims Settlement Act is one example. Many authorities have expressed the view that present criminal jurisdiction disputes in Oklahoma would be best resolved in a similar manner.[194]

A. *Maine Indian Claims Settlement Act*

In 1976, a federal district court decision cleared the way for the unrecognized tribes to pursue their claims to as much as two hundred thousand acres of land, ten million dollars, and federal benefits.[195] Reactions to the opinion ranged from enthusiasm to confusion to hatred. On one hand, the Passamaquoddy and Penobscot tribes were realizing their

188. *See* FEDERAL INDIAN LAW, *supra* note 2, at 152.

189. Tyner v. Oklahoma, No. 87-C-29-E, slip op. (N.D. Okla. Oct. 29, 1987).

190. Kimbrell, *Sheriff to Ignore Calls From Indian Land*, Tulsa World, Dec. 2, 1987, at A1, col. 1.

191. Robertson, *Indian sovereignty issue has officials scratching heads*, Tulsa Tribune, Dec. 3, 1987, at A4, col. 3.

192. Kimbrell, *Indian Land Map Confuses Sheriff, District Attorney*, Tulsa World, Dec. 10, 1987, at E1, col. 1.

193. Kimbrell, *Area Indians Call Response To Court Decision "Dumb,"* Tulsa World, Dec. 3, 1987, at A1, col. 3. Nelson Johnson, the owner of Creek Nation Bingo hall, summarized the situation, as he saw it: "[The district attorney] isn't dealing with us as a sovereign [nation], he's dealing with us as opponents." *Id.*

194. *See infra* notes 210-21 and accompanying text.

195. *Restitution*, *supra* note 21, at 99.

existence as self-governing entities with cognizable rights;[196] on the other hand, some citizens, corporations, and politicians in Maine were shocked by what they viewed as Indian blackmail.[197] With violence threatened and political upheaval expected, the parties soon recognized that a negotiated agreement was the best alternative.[198]

The crux of the agreement was that each party gave up certain rights and retained others. For example, the tribes agreed to the state exercising criminal and regulatory jurisdiction on their reservations.[199] They dropped all of their land claims (to approximately twelve and a half million acres) in return for appropriations from the state and the federal government.[200] Three hundred thousand acres of average quality timberland was restored to the reservation with an option to buy two hundred thousand acres at fair market value. The tribes also agreed that individual members who lived and worked on the reservations would pay state income tax.[201] The state conceded the right to regulate most hunting and fishing to the tribes,[202] and it left the tribes with the right to prosecute misdemeanors in tribal courts.[203] The tribes also received full recognition by Congress and 81.5 million dollars in appropriations.[204] The final stage of the agreement, the Maine Implementing Act,[205] was passed by the Maine legislature and senate after two days of debate.[206] The act was

196. In noting that many tribes across the nation were being revitalized through the court system during the 1970's, Thomas Tureen, attorney for the Passamaquoddies, explained the scenario as follows:

> The point is that all this legal activity served to make jurisdiction a central issue for Indians across the nation, so that by the time negotiations began in the Maine Indian-land-claim case, in the spring of 1978, the leaders of the Passamaquoddies and the Penobscots were determined to obtain full federal status for their tribes. The trouble was that this placed them on a collision course with the State of Maine, which, for a hundred and sixty years, had felt that the Passamaquoddy Tribe and the Penobscot Nation had no inherent sovereign powers, and that Indians could exercise only those powers which the state saw fit to grant them.

Restitution, supra note 21, at 127.

197. *Restitution, supra* note 21, at 106.

198. *Restitution, supra* note 21, at 110-37.

199. *Restitution, supra* note 21, at 139.

200. *Restitution, supra* note 21, at 113. Under the terms of the agreement, Maine appropriated $1,700,000 a year for fifteen years. *Id.* The federal government appropriated $81,500,000 which was deposited in a trust on Dec. 12, 1980. *Id.* at 144.

201. *Restitution, supra* note 21, at 144.

202. *Restitution, supra* note 21, at 144.

203. *Restitution, supra* note 21, at 144.

204. *Restitution, supra* note 21, at 144.

205. ME. REV. STAT. ANN. tit. 30, §§ 6201-02 (Supp. 1987).

206. *Restitution, supra* note 21, at 140. Even though the agreement was touted as "a good compromise that will make a new era in which the Indians of this state can live in dignity," it nevertheless prompted scowls from a few. One editorial admonished lawmakers to "not allow themselves to

then sent to Congress, which ratified it about six months later.[207] The tribes have since flourished, increasing their land holdings and building business enterprises. For example, the Passamaquoddies now own the largest independent blueberry operation in the state.[208] Congress has ratified similar claims settlement acts with other tribes.[209]

B. *Agreements Solving Criminal Jurisdiction Disputes in Eastern Oklahoma*

Agreements between the state and tribes, authorized by Congress, are a plausible and sensible means of resolving the criminal jurisdiction disputes in Oklahoma. Criminal cases are generally narrow in scope, so court decisions continue to leave many issues unanswered. Consequently, a simple answer to criminal jurisdictional problems seems very remote.

The predicament has prompted some Indian law experts to encourage negotiated agreements as a solution to the tribal/state dispute over criminal jurisdiction. Tim Vollmann, Regional Solicitor for the United States Department of the Interior, participated in the Maine Indian Claims Settlement negotiations.[210] Emphasizing that the land claims disputes are not tantamount to the criminal jurisdictional controversy in Oklahoma, Vollmann suggests that Oklahoma tribes consider a similar approach to resolving the belabored, yet unresolved, issues of criminal jurisdiction.[211] In other words, Oklahoma tribes "have a real interest in jurisdictional clarity and favorable enterprises."[212] Tribes could transfer criminal jurisdiction to the state in return for state concessions that would benefit them and their enterprises.[213]

The most appealing bargaining area for Oklahoma tribes is state tax

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be deluded or intimidated by the arrogance and audactiy of the Indians' lawyer, Tom Tureen." *Id.* (quoting the Bangor Daily News).

207. 25 U.S.C. § 1724 (1982).

208. *Restitution*, *supra* note 21, at 145.

209. *See* Florida Indian (Miccosukee): Land Claims Settlement, 25 U.S.C.A. § 1741 (West Supp. 1988); Connecticut Indian Land Claims Settlement, 25 U.S.C.A. § 1751 (West Supp. 1988). The Commission on State-Tribal Relations negotiates cooperative agreements between states and tribes, ranging from tax collection procedures to child adoption provisions. *See* FEDERAL INDIAN LAW, *supra* note 2, at 547. In central Oklahoma, several tribes have entered into agreements with counties to solve criminal jurisdiction problems. *See* Pearson, *Cooperation Urged on Tribal Sovereignty*, Tulsa World, Dec. 13, 1987, at A1, col.1.

210. Interview with Tim Vollmann, Regional Solicitor for the United States Dept. of the Interior (Feb. 16, 1988).

211. *Id.*

212. *Id.*

213. *Id.*

exemption involving non-tribal businesses on Indian land. In numerous decisions, the Supreme Court has allowed states to impose taxes and regulatory authority over non-tribal enterprises.[214] State impositions on Indian governments depend, absent congressional enactments, on legitimate state interests. As the state interests become more acute, the balance may tilt against the tribe. A tribe could trade its criminal jurisdiction for a statutory enactment that exempts these enterprises from state taxation. The exemption would be most beneficial to the tribes, and it would attract new business to the state.

Agreements have also been supported by Assistant Secretary of the Interior for Indian Affairs Ross Swimmer, formerly the Chief of the Cherokee tribe.[215] Swimmer expressed great concern over the negative attitudes that many companies have about leasing Indian land. He said that these concerns result mainly from the uncertainties about which law applies—state, federal, or tribal. Congressional enactments would provide clarity in this area. If written accordingly, a statute could also benefit nontribal ventures on tribal land. For example, Oklahoma might concede to allowing tax exemptions for nontribal corporations conducting business on Indian land. Alternatively, the state, in acquiring criminal jurisdiction over tribal land, could relinquish certain incorporation requirements as long as the principal place of business exists on tribal land.

Interests will vary among the tribes, so each tribe should negotiate its own agreement[216] after evaluating its goals and activities.[217] While a bingo operation may work for one tribe, it may not necessarily be in the best interest of another. For example, the Cherokees have turned a struggling government into a profitable one by investing in such enterprises as a landscape business and nursery.[218]

Undoubtedly this process would not achieve instant results. The Maine Indian Claims Settlement Act took two years to reach completion.[219] Such a final resolution of criminal jurisdiction, however, would

214. *See, e.g.*, Rice v. Rehner, 463 U.S. 713, *reh'g denied*, 464 U.S. 874 (1983); Washington v. Confederated Tribes, 447 U.S. 134, *reh'g denied*, 448 U.S. 911 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

215. Interview with Ross Swimmer, Assistant Secretary of the Interior for Indian Affairs (Feb. 26, 1988).

216. Telephone interview with Tim Vollmann, Regional Solicitor for the United States Dept. of the Interior (May 18, 1988).

217. *Id.*

218. Interview, Swimmer, *supra* note 215.

219. *See Restitution, supra* note 21.

certainly prove more expedient and less costly than decades of litigation. There would be no more interests to weigh; congressional mandates would set the parameters.

Finally, inextricably meshed in the legal principles of Indian law linger the ethical concerns for maintaining tribal sovereignty. Although tribal sovereignty has at times languished to virtual extermination, it has nevertheless endured, "deeply engrained in our jurisprudence."[220] Perhaps the life left is attributable to the constancy of legal principles established by Chief Justice Marshall two centuries ago, or to the will of the Indian people,[221] or to the constitutional rights that we as a nation have vowed to protect. At least for these reasons, the centuries of treaties, agreements, and statutes should serve those for whom they were intended.

V. CONCLUSION

In 1883 the Supreme Court held that Indian tribes maintained exclusive jurisdiction over criminal matters within their territory. Angered by the decision, Congress enacted laws which limited criminal jurisdiction in Indian Territory, but which did not entirely abrogate Indian authority to adjudicate such matters. However, unpredictable court decisions, clashing political interests, and volatile public attitudes have left the issue far from settled. As a result, great tension has existed among the states, tribes, and federal government with regard to regulation of crime in Indian country.

Recent court decisions have concluded that the state does not have criminal jurisdiction over Indian country in Oklahoma. Due to the amount of time and money involved, though, disputes could be problematic if they are left completely to the courts for resolution. Moreover, some tribes may find the immense responsibilities of law enforcement cumbersome and difficult to assume, especially over the checkerboard

220. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980).

221. Charles Wilkinson, a leading Indian law scholar, concluded:

> These old laws emanate a kind of morality profoundly rare in our jurisprudence. It is far more complicated than a sense of guilt or obligation, emotions frequently associated with Indian policy. Somehow, those old negotiations — typically conducted in but a few days on hot, dry plains between midlevel federal bureaucrats and seemingly ragtag Indian leaders — are tremendously evocative. Real promises were made on those plains, and the Senate of the United States approved them, making them real laws. My sense is that most judges cannot shake that. Their training, experience, and, finally, their humanity — all of the things that blend into the rule of law — brought them up short when it came to signing opinions that would have obliterated those promises.

C. WILKINSON, *supra* note 8, at 121-22.

configuration of Indian land in Oklahoma. Therefore, negotiated agreements between the state and tribes, approved by Congress, would ameliorate many of the problems. In the long run, they would be much more satisfactory than a perpetual string of court battles.

K. Bliss Adams