ARTICLES

A Revisionist History of Indian Country

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This Article argues that tribal sovereignty is not purely a question of federal intent, but rather also requires an affirmative cession of jurisdiction by the state. The Article traces the history of the Indian country concept and concludes that the current statute was never intented to create tribal sovereignty. It urges a return to the historical two-step test: federal set-aside of land and subsequent state consent. The Article contends that the use of the Indian country statute to recognize sovereignty is recent, that it directly conflicts with other United States Supreme Court standards for defining the scope of Indian government, and that it runs afoul of principles of state sovereignty. The Article finds that under the proper test, there is no tribal sovereignty in Alaska other than in Metlakatla. It concludes that the Venetie cases are merely a symptom of a current confusion in which the Indian sovereignty doctrine is degenerating into one based solely on ancestry.

I. INTRODUCTION

During the eighteenth and nineteenth centuries, "Indian country" was coterminous with tribal sovereignty. In the late nineteenth century, however, assimilationist policies began to extinguish tribal governments across the nation. Yet at the same time, the United States Supreme Court was confronted with a set of federal protective laws that purported to apply to the "Indian country." Had the Court continued to define Indian country in jurisdic-

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tional terms, it effectively would have repealed those statutes. Instead, in a series of early twentiethcentury decisions, the Supreme Court severed the definition of Indian country from tribal sovereignty and decided that it exists wherever there is a dependent Indian community. It stopped defining Indian country in terms of the exclusion of state law. These cases were codified in the federal criminal statutes in 1948.

Recently, courts have begun applying the 1948 definition of Indian country to recognize tribal sovereignty and preempt state jurisdiction. They are using the twentieth century test, but giving it a nineteenth century meaning. General confusion about Indian law, abetted by an authoritative treatise in this area, has led the courts to overlook critical changes made to the meaning of "Indian country" at the beginning of this century.

While the initial results of this misunderstanding were unremarkable, that has begun to change. Last year, the Ninth Circuit Court of Appeals embarked on a course of recognizing land held in fee by Native corporations in Alaska as sovereign Indian country. At issue is whether the state of Alaska has the right to apply its laws to more than forty million acres within its borders. In November 1996, a three-judge panel took the first bite: the *Venetie II*[1] decision declares that 1.8 million acres held in fee by the Natives of the Village of Venetie are part of a dependent Indian community, and are thus sovereign to the exclusion of state law.

Alaska's travails have their origins in the misadventures of one Pete McGowan. In 1937, the Ninth Circuit affirmed a trial court's dismissal of a prosecution of McGowan on charges of introducing liquor into Indian country.[2] The court accepted that McGowan had brought two bottles of whiskey to the Reno Indian Colony. The court found, however, that the colony could not possibly be Indian country, because it was not "'out of the jurisdiction of any state.'"[3] Since Nevada never had ceded its sovereignty over the place, its jurisdiction remained "'complete and perfect,'"[4] and the court could not "legislate and extend the criminal laws of the United States over the farm sites under the guise that they are

1. Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Village of Venetie (*Venetie II*), 101 F.3d 1286 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2478 (1997). *See generally* Carey Goldberg, *Tiny Tribe in Remote Arctic is Jolting Alaska,* N.Y. TIMES, May 9, 1997, at A1.

2. *See* United States v. McGowan, 89 F.2d 201, 202 (9th Cir. 1937), *rev'd*, 302 U.S. 535 (1938).

3. *Id.* (quoting People v. Godfrey, 17 Johns. 225, 233 (N.Y. Sup. Ct. 1819)).

4. *Id.* (quoting United States v. Pennsylvania, 48 F. 669, 670 (E.D. Va. 1880)).

'Indian country.'"[5]

The Supreme Court reversed.[6] In doing so, however, it dismissed only the "therefore" in the court of appeals' reasoning, not the "because." *United States v. McGowan* found that since the Reno Colony was a "dependent Indian community," it qualified as "Indian country" for the purposes of federal protective legislation.[7] However, the Supreme Court rejected the notion that the Indian country designation would limit the application of state law.[8] The unanimous Court declared that its Indian country finding

> does not deprive the state of Nevada of its sovereignty over the area in question. The federal government does not assert exclusive jurisdiction within the colony. Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments.[9]

To establish its point, the *McGowan* Court cited two cases which emphasize that a state's laws apply throughout its borders unless it voluntarily has surrendered its jurisdiction.[10] The first, *Surplus Trading v. Cook*,[11] declares that absent an "affirmative cession of jurisdiction by the state, [a federal] reservation is part of her territory and within the field of operation of her laws."[12] The other, *Hallowell v. United States*,[13] holds that even when an area and its inhabitants are governed by state laws, the area can still be Indian country for purposes of federal Indian legislation.[14]

McGowan represents the culmination of more than one hundred years of efforts by the Supreme Court to draw the boundaries of Indian country. Much of the federal protective legislation for Indians applied only in "Indian country," but Congress had not defined that term since 1834.[15] Moreover, in the 1880s, the federal government began to break up tribal holdings and subject Indians to state law.[16] In response, the Supreme Court abandoned the notion that Indian country means sovereignty, no longer limiting that term to areas beyond the United States or to places where the states had ceded their jurisdiction. Instead, the Court held there is

5. *Id.*
6. *See* United States v. McGowan, 302 U.S. 535 (1938).
7. *See id.* at 538-39.
8. *See id.* at 539-40.
9. *Id.* at 539.
10. *See id.*
11. 281 U.S. 647 (1930).
12. *Id.* at 651.
13. 221 U.S. 317 (1911).
14. *See id.* at 324.
15. *See* Act of June 30, 1834, ch. 180, 6 Stat. 581.
16. *See infra* Part II.B.3.

Indian country wherever land has been set aside for Indians under federal superintendence.[17] This definition was codified in 1948 at 18 U.S.C. § 1151.

In recent years, courts across the country have begun applying 18 U.S.C. § 1151 to declare Indian communities beyond the reach of state law, even when there has been no affirmative cession of jurisdiction by the state.[18] Land outside of a reservation purchased by a tribe from private parties has been declared Indian country.[19] Even individual housing projects have been adjudicated Indian country.[20] While many of these courts were faced only with the application of federal laws, they all have assumed that the Indian country designation also works an exclusion of state law.[21]

Some courts, although seeing no alternative, have expressed reservations about preempting all state authority on the sole basis of 18 U.S.C. § 1151.[22] However, the Ninth Circuit has embraced this new misunderstanding, pressing it to its logical extreme. At issue in last November's *Venetie II* case was whether a tribal council could impose a $160,000 "Business Activities Tax" on the State of Alaska for building a schoolhouse in the village.[23] While the court remanded the tax question, it had no difficulty concluding that an area roughly the size of Delaware is a sovereign nation that

17. *See McGowan*, 302 U.S. at 539.

18. *See, e.g.*, United States v. Driver, 945 F.2d 1410 (8th Cir. 1991); United States v. Martine, 442 F.2d 1022 (10th Cir. 1971).

19. *See Martine*, 442 F.2d at 1023-24.

20. *See, e.g., Driver*, 945 F.2d at 1415; United States v. South Dakota, 665 F.2d 837, 842 (8th Cir. 1981) (affirming declaratory judgment that state had no jurisdiction over apartments); United States v. Mound, 477 F. Supp. 156, 159-60 (D.S.D. 1979) (finding federal criminal jurisdiction over housing complex because it was a "dependent Indian community").

21. *See, e.g.*, Narragansett Indian Tribe v. Narragansett Elec. Co., 89 F.3d 908, 915, 922 (1st Cir. 1996) (considering applicability of state housing code and environmental laws); Thompson v. County of Franklin, 15 F.3d 245, 250 (2d Cir. 1994) (finding no state tax authority in statutory Indian country); Indian Country U.S.A., Inc. v. Oklahoma, 829 F.2d 967, 973 (10th Cir. 1987) ("[T]he Indian country classification is the benchmark for approaching the allocation of federal, tribal and state authority with respect to Indians and Indian lands.").

22. *See, e.g., Narragansett*, 89 F.3d at 922 (hesitating to recognize tribal sovereignty "without any opportunity for involvement by the state"); Buzzard v. Oklahoma Tax Comm'n, 992 F.2d 1073, 1077 (10th Cir. 1993) (noting concern over a rule that would "remove land from state jurisdiction" without the state "having any voice in the matter").

23. *See* Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Village of Venetie (*Venetie II*), 101 F.3d 1286, 1289-90 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2478 (1997).

is beyond the reach of state law.[24]

Not only does *Venetie II* stand at odds with the fact that Congress explicitly terminated the Venetie reservation in 1971,[25] the ruling also has the potential to disrupt seriously the enforcement of state law throughout a sizeable area of Alaska. Approximately forty-four million acres in the state are held by Native corporations as a result of the Alaska Native Claims Settlement Act of 1971 ("ANCSA").[26] The Ninth Circuit's version of the "dependent Indian communities" test probably would allow almost all of this land to qualify as Indian country.

However, while the Ninth Circuit's new six-factor inquiry is more liberal than the test being applied in other circuits, it is not a radical departure. Rather, *Venetie II* represents the logical result of using 18 U.S.C. § 1151 to create jurisdictional enclaves. By reading into the Indian country statute an effect that was never intended, the courts have been able to retract Alaska's sovereignty over almost two million acres that only twenty-five years earlier were placed under its authority by a federal enactment.[27] *Venetie II* demonstrates that when the test for tribal sovereignty is uncoupled from any requirement of a federal-state agreement to cede jurisdiction, it will produce results that are totally at odds with congressional intent and that substantially interfere with states' rights.

This Article argues that 18 U.S.C. § 1151 was meant to define only the scope of federal laws that apply to Indian country. It was never intended to withdraw state authority or create zones of exclusive federal and tribal jurisdiction. Nor could it do so: the United States Constitution allows a state's authority over its land and people to be removed only with the state's consent.

Part II recreates the history of the Indian country designation. It provides an account different from that in the standard treatises, describing how changes in policy and questions of federal power have affected the way Indian country has been defined over the years. During the early period, Indian country was a bright line that meant exclusive tribal jurisdiction. As federal power over the tribes grew, the United States continued to exclude state law from Indian country for two reasons: to preserve tribal autonomy and to allow the exercise of federal police powers. Both of these needs were eliminated in the late nineteenth century. Shortly thereafter, the Supreme Court stopped defining "Indian country" in terms of

24. *See id.* at 1302-03.

25. *See infra* Part IV.A.

26. 43 U.S.C. §§ 1601-1628 (1994); *see also* FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 746 (Rennard Strickland & Charles F. Wilkinson eds., Michie 1982) [hereinafter COHEN 1982].

27. *See* ANCSA, 43 U.S.C. §§ 1601-1628.

an absence of state jurisdiction.

Part III describes how the Supreme Court has recently lost sight of the critical changes made to the definition of Indian country earlier in this century. It suggests the Court was probably misled by a leading treatise in this area, Felix Cohen's *Handbook of Federal Indian Law*. It also contends that the use of 18 U.S.C. § 1151 to establish tribal sovereignty is in direct conflict with the Supreme Court's reservation termination cases and the rule of *Montana v. United States*.[28]

Part III then urges a return to the traditional standard for defining tribal sovereignty. It argues that the current test not only misreads the statute and produces absurd results, but also violates states' rights. The Supreme Court has never repudiated the principle that Congress cannot unilaterally suspend a state's jurisdiction over its territory or create a competing sovereign within its borders. Indeed, recent decisions demonstrate the continuing vitality of these principles. Finally, Part IV applies the proper standard to the example of Alaska, and concludes there is no tribal sovereignty in that state.

II. A HISTORY OF INDIAN COUNTRY

Indian sovereignty remains a reality today. Although tribal enclaves are subject to federal regulation, they are presumptively immune from state law, except where Congress has provided otherwise.[29] Moreover, as sovereigns that pre-exist the Constitution, tribes are not subject to the Bill of Rights' limitations on governmental power.[30] Although federal laws and Supreme Court decisions have whittled away tribal authority over the years, especially with regard to non-Indians, the Court continues to uphold "'the right of reservation Indians to make their own laws and be ruled by them.'"[31] It is these powers of domestic self-government that Indian nations retain within tribal territory.[32]

28. 450 U.S. 544 (1980).

29. *See* Williams v. Lee, 358 U.S. 217, 220 (1959); *see generally* COHEN 1982, *supra* note 26, at 241-42.

30. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). *But see* 25 U.S.C. § 1302 (1968) (applying most, but not all, of the Bill of Rights to the tribes).

31. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (quoting *Williams*, 358 U.S. at 220).

32. This Article contends that the "Indian country" described by 18 U.S.C. § 1151 does not preempt state jurisdiction, but rather denotes only the area of application for those federal statutes which by their terms apply to "Indian country." To describe those zones where American Indian tribes exercise governmental authority over land and people, a different term is called for. These

A. The Original Bright Line of Sovereignty

Until the mid-nineteenth century, Indian removal was the primary feature of British and then American policy toward the tribes. White settlers would purchase Indian lands and remove tribes westward. There was no thought of integrating the tribes into Anglo-American society. They were respected, indeed feared, as separate nations whose territories defined a political border. During this early period, there was no distinction between Indian country and tribal territory.

The term "Indian country" first was officially employed in King George's Royal Proclamation of 1763, which drew a boundary line separating the lands of the Indians from those of the colonists.[33] The 1763 Proclamation was part of a general effort on the part of the Crown to centralize control over Indian affairs. Until then, each colony tended to pursue its own policy toward the tribes. Great Britain, its own foothold in the Americas far from certain, was keen on maintaining friendly relations with the natives.[34] At the time, Indians far outnumbered settlers,[35] and the French and Indian War of 1757-63 left no doubt that an alliance of tribes and foreign powers could pose a serious threat to the colonies. By demarcating Indian country and controlling land transfers, the monarchy attempted to keep avaricious settlers from antagonizing the Indians.[36] The Indian country designation also

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jurisdictional enclaves, where all state law is generally preempted, shall herein be referred to as "tribal territory." It is here that Indian nations possess the prerogatives of a sovereign. In tribal territory, tribes have the right to tax, regulate, and assess civil and criminal penalties.

33. *See* COHEN 1982, *supra* note 26, at 57 n.60 (describing Royal Proclamation of Oct. 7, 1763, of King George III); Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't, No. F87-0051 CV, 1995 WL 462232, at *2 (D. Alaska Aug. 2, 1995) (citing FRANCIS P. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 11 (1962)), *rev'd*, 101 F.3d 1286 (1996), *cert. granted*, 117 S. Ct. 2478 (1997).

34. *See* COHEN 1982, *supra* note 26, at 53-57. Cohen quotes the following statement from a mid-eighteenth century British Indian Commissioner:

> "The importance of Indians is now generally known and understood. A doubt remains not, that the prosperity of our colonies on the continent will stand or fall with our interest and favor among them. While they are our friends, they are the cheapest and strongest barrier for the protection of our settlements; when enemies, they are capable of ravaging in their method of war, in spite of all we can do, to render these possessions almost useless."

Id. at 57 n.55 (quoting HAROLD EDWARD FEY & D'ARCY MCNICKLE, INDIANS AND OTHER AMERICANS 53 (rev. ed. 1970)).

35. *See* Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 40 (1947).

36. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 10 (2d ed. 1988).

recognized the reality that areas beyond this border, though claimed by Britain, were effectively beyond its control. This territory was ruled by sovereign Indian tribes; any colonist who ventured there was on his own.

After independence, the American government retained both the Indian country concept and the centralized control that went with it. The Constitution placed relations with the tribes firmly in federal hands.[37] The early United States was weak and vulnerable and, like its British predecessor, sought to avoid warfare with the Indians.[38] Commercial intercourse, especially land transfers, were strictly regulated.[39] But the federal government made no effort to govern the internal affairs of Indians within Indian country.[40] Rather, the government continued the colonial policy of purchasing Indian real property and moving the tribes west.[41] The Indian country boundary followed the tribes.

The Indian Intercourse Act of 1796[42] included the first statutory definition of Indian country.[43] At that time, the line demarcating Indian country ran from present-day Cleveland down to and along the Ohio River to the mouth of the Tennessee River, and behind the Carolinas and through Georgia to the sea.[44] Further treaties and Indian removal soon rendered this description obsolete. In 1834, a new Indian Intercourse Act defined Indian country 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 [s]tate[,] to which the Indian title has not been extinguished.[45]

37. *See* U.S. CONST. art. I, § 8, cl. 3 (granting Congress power over Indian commerce); *id.* art. II, § 2, cl. 2 (granting the executive power to make treaties with tribes); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (affirming that treaties with tribes are contemplated by the treaty power).

38. *See* CANBY, *supra* note 36, at 10.

39. *See, e.g.*, Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730 (requiring a license to trade in Indian country, and otherwise barring land transfers); Act of Mar. 30, 1802, ch. 13, 2 Stat. 139 (establishing Indian country boundaries); Act of July 22, 1790, ch. 33, 1 Stat. 137, 138 (requiring a license to trade with Indians and a public treaty to validate sales of lands by Indians).

40. *See* Cohen, *supra* note 35, at 28.

41. *See generally* COHEN 1982, *supra* note 26, at 78-92.

42. Act of May 17, 1796, ch. 30, § 1 Stat. 469.

43. *See id.*

44. *See* Bates v. Clark, 95 U.S. 204, 206 (1877); COHEN 1982, *supra* note 26, at 29-30 n.31.

45. Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729. In *Bates*, the Supreme Court read a comma into the Act between the words "not within any State" and

Continued land cessions and the creation of new states and territories also rendered this definition obsolete. However, the 1834 Act was Congress's last attempt to define Indian country until 1948. Yet, as the Supreme Court would note, "a large body of laws" remained on the books that by their own terms were confined in their operation "to the Indian country, whatever that may be."[46] Judicial construction became a necessity. Jurisdictional boundaries slipped away from their legislative anchor as the Supreme Court began to read into the 1834 Act "an adaptability to the altered circumstances of what [must be regarded as] Indian country."[47] The 1834 statutory definition was finally repealed in 1874 when the compilers of the Revised Statutes deleted it from the U.S. Code.[48] The meaning of "Indian country" was left entirely in the hands of the courts.

While the borders of Indian country were constantly shifting during this period, the meaning of the term remained fixed. As the Supreme Court declared in the landmark *Worcester v. Georgia*[49] decision, within Indian country, Indian nations were "distinct, independent political communities."[50] Federal law contemplated "the Indian territory as completely separated from that of the states."[51] In other words, tribal affairs within Indian country were beyond the reach of any state's laws.

Furthermore, while the federal government retained legislative authority over the tribes, it rarely exercised it. Statutes pertaining to Indian country regulated interaction between the tribes and non-Indians.[52] For the most part, they applied only at the borders of tribal territory, with internal Indian affairs left to the tribes.[53] Throughout this early era, *Worcester*'s description of Indian country remained accurate: the tribes were separate sovereigns, "having territorial boundaries, within which their authority [was] exclusive."[54]

B. Toward Indian Country Without Sovereignty

Federal deference to Indian self-rule did not last. During the

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"to which the Indian title has not been extinguished." 95 U.S. at 207.

46. *Bates*, 95 U.S. at 207.

47. *Id.*

48. *See* 18 Stat. 1085, tit. 74 (1874) (deleting the definition of Indian Country from REV. STAT. § 5596 (1873)); Clairmont v. United States, 225 U.S. 551, 557 (1912).

49. 31 U.S. (6 Pet.) 515 (1832).

50. *Id.* at 559.

51. *Id.* at 557.

52. *See generally* COHEN 1982, *supra* note 26, at 67 n.53.

53. *See id*. at 67-68.

54. 31 U.S. (6 Pet.) at 557.

second half of the nineteenth century, tribal governments were reduced from unalloyed internal sovereigns to virtual nonentities. The assault came on two fronts. First, tribal relations increasingly were subjected to federal regulation. Within their domain, tribal powers were displaced by federal authority, particularly with regard to criminal matters. Second, Indian nations were enveloped by states. While tribal independence was preserved at first by excepting reservations from state jurisdiction, Congress soon came to favor forcible assimilation of Indians into American society. Indians began to find themselves governed by state law.

These two trends soon came into conflict: how could federal criminal laws apply to Indians within a state, when only states can exercise a general police power within their domain? The Supreme Court struggled for a justification for the extension of the "Indian country" statutes to state Indians. It eventually settled on the existence of a general federal police power for Indian affairs. Furthermore, in order to allow these laws to continue to apply to Indians under state law, the Court severed the definition of "Indian country" from tribal sovereignty and the exclusion of state authority.

1. *Early sources of federal power*. In 1817, Congress made an early incursion into the tribal domain. It enacted the first criminal laws that applied to Indians as well as to non-Indians within Indian country.[55] The modern descendant of this law, the Indian Country Crimes Act, [56] is still in force today. The 1817 Act provided that crimes between whites and Indians (but not intra-Indian crimes) would be governed by the laws developed for enclaves of exclusive federal jurisdiction.[57]

Such enclaves exist pursuant to Article I, section 8, clause 17 of the United States Constitution, which empowers Congress to "exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be."[58] Generally used for military purposes, these reserves are beyond the reach of state law. When states consent to their creation, they consent to a cession of jurisdiction over the area. An early exposition, which became the standard view, was made by Justice Story in a case he heard as a circuit judge. In *United States v.*

55. *See* Act of Mar. 3, 1817, ch. 92, 3 Stat. 383; FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 71 (1st ed. 1942) [hereinafter COHEN 1942].

56. 18 U.S.C. § 1152 (1994). This statute is also referred to as the General Crimes Act. *See* COHEN 1982, *supra* note 26, at 287 n.50.

57. *See* Act of Mar. 3, 1817, ch. 92, § 1, 3 Stat. 383, 383.

58. U.S. CONST. art. I, § 8, cl. 17.

Cornell,[59] Story explained that the mere purchase of land within a state by the federal government would not oust the state's jurisdiction. Rather, the state must relinquish its authority either expressly or by implication, as when the state's legislature gives its consent to the purchase.[60] When this occurs, the land "by the very terms of the constitution ipso facto falls within the exclusive legislation of [C]ongress, and the state jurisdiction is completely ousted."[61]

A concomitant of this exclusive federal jurisdiction is a general federal police power, allowing Congress to enact all laws a state might adopt.[62] Congress's authority in these areas is broad by necessity. State regulations cannot extend to them, but the need for law and order remains. And since the state has voluntarily ceded its sovereignty over the place, the exercise of a federal police power does not intrude upon states' rights.

It took little imagination to extend these principles to federal holdings beyond the United States. Areas newly added to the nation, such as the Louisiana purchase or the vast territory conquered in the Mexican-American war, also initially were outside the jurisdiction of any state. When territorial governments were established in these lands, it was done purely under federal law. These governments "owe[d] all their powers to the statutes of the United States," and their authority could be "withdrawn, modified, or repealed at any time by [C]ongress."[63] The Supreme Court accepted this exercise of federal power

> not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the [t]erritory and other property of the United States, as from the ownership of the country in which the [t]erritories are, and the right of exclusive sovereignty which must exist in the [n]ational [g]overnment, and can be found nowhere else.[64]

This same principle, that Congress can exercise general police powers in areas where no state authority exists, was employed to justify the initial application of federal criminal laws to Indian

59. 25 F. Cas. 646 (C.C.D.R.I. 1819) (No. 14,867).

60. *See id.* at 648.

61. *Id.*; *see also* Surplus Trading Co. v. Cook, 281 U.S. 647, 653-54 (1930) (quoting *Cornell*, 25 F. Cas. at 648); Fort Leavenworth R. Co. v. Lowe, 114 U.S. 525, 532, 537 (1885).

62. *See* Pacific Coast Dairy, Inc. v. California Dep't of Agric., 318 U.S. 285, 294 (1943) (stating that within federal enclaves, "Congress has the combined powers of a general and a state government").

63. United States v. Kagama, 118 U.S. 375, 379-80 (1886); *see also* Murphy v. Ramsey, 114 U.S. 15, 44 (1885) (finding federal power over territories).

64. *Kagama*, 118 U.S. at 380 (citing *Murphy*, 114 U.S. at 44).

country.[65] In *United States v. Rogers*,[66] the Supreme Court affirmed the jurisdiction of a federal court to try a white man for murder under the Indian Country Crimes Act.[67] The crime was committed "in that part of the Indian country west of the State of Arkansas."[68] The Court duly noted that the area, while "a part of the territory of the United States," was "not within the limits of any particular State."[69] *Rogers* relied on this fact to reject a challenge to federal police authority within Indian country. The court held that "where the country occupied by [Indians] is not within the limits of one of the States, Congress may by law punish any offence committed there."[70]

Rogers marks the original fount of federal authority for the Indian country criminal laws of the nineteenth century. Congress has a general police power, equivalent to that of the states, in any place of exclusive federal jurisdiction. Because Indian country was outside of the borders of the states, Congress could regulate there as it did in the territories and the federal enclaves. In the absence of competing state authority, federal power was ample.

2. *Indian reservations as federal enclaves*. This initial source of authority, exclusive federal jurisdiction, soon was threatened by the growth of the United States. When *Rogers* upheld the federal Indian Country Crimes Act in 1846, the court could still describe Indian country as "west of the state of Arkansas."[71] During the first half of the nineteenth century, federal policy had been to purchase the tribes' lands and relocate Indians west of the Mississippi and beyond the borders of existing states.[72] Indian territory continually remained outside of the jurisdiction of any state. Tribal autonomy was preserved, and federal authority remained plenary.

The Mexican-American War of 1846-48 forced a change in thinking. With California admitted to the Union and the nation's holdings now stretching all the way to the Pacific Ocean, it must have become plain to policymakers that the tribes could not be

65. *See* Act of Mar. 3, 1817, ch. 92, § 1, 3 Stat. 383, 383.

66. 45 U.S. (6 How.) 567 (1846).

67. *See id.* at 573.

68. *Id.* at 567.

69. *Id.* at 571-72.

70. *Id.* at 572.

71. *Id.* at 567.

72. *See, e.g.,* Act of May 28, 1830, ch. 148, 4 Stat. 411. Most removal, however, was accomplished through treaties. *See generally* COHEN 1982, *supra* note 26, at 78-92.

removed forever west.[73] At this time, the federal government initiated a new policy: rather than removing tribes, it began to settle Indians on reservations within newly created states.[74]

The reservation policy posed a significant challenge to both tribal autonomy and federal authority. As the Georgia Cherokee Nation's troubles in the 1830s had made clear, inclusion of a tribe within state borders would inevitably lead to conflicts with state authorities.[75] Furthermore, once the tribe was within the state's jurisdiction, federal police powers could not be justified by an absence of state authority.

Congress's solution to these problems was to make the new Indian reservations enclaves of exclusive federal jurisdiction. In 1817, the criminal laws developed for federal enclaves first were applied to Indian country.[76] Now Congress took the analogy a step further and, in order to preserve the special jurisdictional status of tribal territory, began making Indian country itself into federal enclaves. The Constitution permits creation of such jurisdictional exceptions anywhere within a state if the state consents.[77]

The usual method of obtaining state consent was to require a cession of jurisdiction over Indian lands in the enabling act authorizing the state's admission to the Union.[78] The state would include in its constitution a clause authorizing exclusive federal jurisdiction over tribal territory.[79]

State cessions of jurisdiction over Indian lands became routine after mid-century.[80] The post-1850 reservations were viewed as fixed enclaves that would remain under federal authority for the indefinite future. A focus on state cessions of jurisdiction became a regular feature of Supreme Court jurisprudence: as more tribes

73. *See, e.g.,* Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962).

74. *See* COHEN 1982, *supra* note 26, at 124, 262.

75. *See id.* at 81-84.

76. *See supra* notes 55-57 and accompanying text.

77. *See* U.S. CONST. art. I, § 8, cl. 17.

78. *See* Cramer v. United States, 261 U.S. 219, 228 (1922).

79. *See, e.g.,* S.D. CONST. art. 22 (The people of South Dakota "do agree and declare that we forever disclaim all right and title" to lands within the state "held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain . . . under the absolute jurisdiction and control of the Congress of the United States.").

80. *See, e.g.,* Alaska Statehood Act of 1958, Pub. L. No. 85-508, § 1, 72 Stat. 339, 339; Arizona Statehood Act of 1910, ch. 310, 36 Stat. 557, 569; Kansas Statehood Act of 1861, ch. 20, 12 Stat. 126, 127; Montana Statehood Act of 1889, ch. 180, 25 Stat. 676, 677; New Mexico Statehood Act of 1910, ch. 310, 36 Stat. 557, 558-59; Oklahoma Statehood Act of 1906, ch. 3335, § 1, 34 Stat. 267, 267; Utah Statehood Act of 1894, ch. 138, 28 Stat. 107, 108; *see also* IDAHO CONST. of 1890, art. 21, § 19; WYO. CONST. of 1890, art. 21, § 26.

found themselves within the borders of a state, questions of federal authority and tribal freedom from state regulation began to turn on whether the state had ceded its sovereignty over the area in question.[81]

It is notable that none of the state cession clauses describes with any particularity the territory over which jurisdiction is surrendered, but rather the clauses speak loosely of "lands held by Indians."[82] The Supreme Court, however, did not engage in a fact-based inquiry into historical occupancy to define sovereign borders. It looked instead to whether treaties and other federal action had reserved an area to Indians. In many cases, a promise had been made to a tribe that its lands never would be included within a state.[83] It is these agreements, or any guarantee to a tribe of exclusive use and occupancy of the land, that would define the scope of the state's cession of sovereignty. The Supreme Court cases defining jurisdictional borders thus look to two factors: (1) state consent to a cession of authority and (2) the existence of a previous treaty or reservation setting an area aside for Indians.[84]

A late illustration of the importance of a previous reservation of land for Indians and subsequent state cession is provided by *Metlakatla Indian Community v. Egan*[85] and *Organized Village of Kake v. Egan*.[86] In these twin cases, the Supreme Court addressed whether section 4 of the Alaska Statehood Act[87] barred the state from enforcing its law against fish traps[88] in Native areas.[89] Section 4 provides that the United States retains "absolute jurisdiction and control" over "lands or other property . . . the right or title to

81. *See, e.g.*, Dick v. United States, 208 U.S. 340, 351 (1908) (concluding that land upon which defendant purchased liquor was part of that ceded to the United States and therefore subject to federal authority).

82. *See, e.g.*, 12 Stat. at 127 ("rights of . . . property now pertaining to the Indians"); 25 Stat. at 627 ("all lands . . . owned or held by any Indian or Indian tribes"); 28 Stat. at 108 ("all lands . . . owned or held by any Indian or Indian tribes"); 34 Stat. at 267 ("rights of . . . property pertaining to the Indians"); 36 Stat. at 559 ("all lands . . . owned or held by any Indian or Indian tribes").

83. *See, e.g.*, Act of May 6, 1828, art. 2, 7 Stat. 311, 311.

84. *See, e.g.*, Clairmont v. United States, 225 U.S. 551, 555 (1912); Draper v. United States, 164 U.S. 240, 242, 244 (1896); *Ex parte* Crow Dog, 109 U.S. 556, 559 (1883); The Kansas Indians, 72 U.S. 737, 738-41 (1866).

85. 369 U.S. 45 (1962).

86. 369 U.S. 60 (1962).

87. Pub. L. No. 85-50, § 4, 72 Stat. 339, 339 (1958).

88. *See* Act of Apr. 17, 1959, § 1, 1959 Alaska Sess. Laws 103.

89. While the word "Indian" is used throughout this article, Alaska's original inhabitants are referred to as "Natives," not out of an inconsistent political correctness, but because anthropologists have traditionally distinguished between Eskimos, Aleuts, and Indians. *See* COHEN 1942, *supra* note 55, at 401 & n.2.

which may be held by any Indians, Eskimos, or Aleuts."[90] Because section 4 speaks of exclusive federal jurisdiction over Native land and property, the parties had assumed on appeal that the state's jurisdiction would turn on the existence of Native property rights.[91] The Alaska Supreme Court previously had upheld state jurisdiction for both villages.[92]

In unanimous decisions, the Supreme Court reversed in *Metlakatla* and affirmed in *Kake*.[93] It held that Alaska could enforce its laws in the latter village but not in the former.[94] The Court rejected the parties' focus on ownership.[95] Instead, it looked to whether the lands at issue had been set aside for Natives by previous federal action.[96] The Court began by noting that section 4 of the Alaska Statehood Act is substantially similar to cessions made in other states' enabling acts.[97] It concluded that the Alaska Act should be read the same way.[98]

In these cases, section 4 excluded Alaska's authority over Metlakatla but not Kake because only the former previously had been set aside as an Indian reservation.[99] Congress had created a reservation for Metlakatla in 1891, but none for Kake.[100] The Court found that the purpose of the state cession was only "to preserve the status quo," and that outside of a reservation, Indians were not exempted from state law.[101] In effect, a state concession to exclusive federal jurisdiction over "Indian lands" would be effective only in those areas that had been set aside by the federal government.[102]

The Supreme Court has also made clear that actual consent by the state to exclusive federal jurisdiction is the essential prerequisite to the recognition of tribal sovereignty. In *United States v.*

90. 72 Stat. at 339.

91. *See Kake*, 369 U.S. at 67.

92. *See* Metlakatla Indian Community v. Egan, 362 P.2d 901, 931 (Alaska 1961), *vacated*, 369 U.S. 45 (1962).

93. *Compare Metlakatla*, 369 U.S. at 59 *with Kake*, 369 U.S. at 76.

94. *See Metlakatla*, 369 U.S. at 59; *Kake*, 369 U.S. at 76.

95. *See Kake*, 369 U.S. at 67.

96. *See id.* at 67-71.

97. *See id.* at 67-68.

98. *See id.* at 67-68, 71; *see also id.* at 69-70 (Congress's intent was to not "make the Alaska situation any different from that prevailing in other States as to state jurisdiction over Indian lands") (citing S. REP. NO. 85-1163, at 15 (1957)).

99. *See id.* at 75.

100. *See Metlakatla*, 369 U.S. at 48, 52; *Kake*, 369 U.S. at 62.

101. *Kake*, 369 U.S. at 65; *accord Metlakatla*, 369 U.S. at 75.

102. *See* Fort Leavenworth R. Co. v. Lowe, 114 U.S. 525, 527 (1885) (citing 14 Op. Att'y Gen. 33 (1872)).

McBratney,[103] the Court found that the same federal Indian country criminal laws that had been applied to a white-on-white crime in *United States v. Rogers*[104] could not be applied to a similar crime on an Indian reservation in Colorado because there had been no jurisdictional cession by the state.[105]

What is striking about *McBratney* is what the Court found inadequate. The treaty at issue had promised the Ute tribe "absolute and undisturbed use and occupation" of the reservation.[106] This is the type of language generally found to exclude state law when a statehood act does make a cession. Furthermore, the Colorado Territorial Act had provided for jurisdictional cession over the Ute reservation.[107] Citing *Rogers*, the Court held that if this exception had been kept in the Statehood Act, the indictment "might doubtless have been maintained" in the federal court.[108]

However, the Colorado state enabling act makes no such exception. The Court held that the state's admission to the Union "necessarily repeals the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith."[109] In this case, the absence of an exception for the Ute Reservation effectively repealed the treaty and the territorial act's stipulation that the Ute reservation would not be made part of a state. The Court declared that in order for statehood legislation to preserve Congress's "sole and exclusive jurisdiction over [a] reservation," it must do so "by express words."[110]

McBratney emphasizes that only a state can provide the consent necessary to create a jurisdictional enclave within its borders.[111] By implication, nothing that is done before statehood remains effective if it was not reaffirmed in the statehood enabling act.[112] If a state has yet to come into existence, then it cannot have consented to a jurisdictional cession.[113] The territorial government

103. 104 U.S. 621 (1881).

104. 45 U.S. (4 How.) 567 (1846).

105. *See McBratney*, 104 U.S. at 624.

106. *Id.* at 622 (citing Treaty between the United States of America and the Tabeguache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah Bands of Ute Indians, Mar. 2, 1868, 15 Stat. 619).

107. *See id.* at 623 (citing Colorado Territorial Act of 1861, ch. 59, 12 Stat. 172, 176).

108. *Id.* (citing *Rogers*, 45 U.S. (4 How.) at 567).

109. *Id.*

110. *Id.* at 623-24.

111. *See id.* at 624.

112. *See id.* at 623.

113. *See id.*

is not the state and cannot speak for it.[114] Therefore, incipient statehood terminates jurisdictional allocations in treaties, as well as other federal territorial legislation, unless they are subsequently affirmed by the state legislature.[115] Only the consent of the state makes a transfer of sovereignty effective.[116]

The principles applied in *McBratney* were also recognized in other contexts at the time. For example, in *Van Brocklin v. Tennessee*,[117] a state tax case not involving Indians, the Court declared that "[u]pon the admission of a State into the Union, the State doubtless acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property, throughout its limits, except where it has ceded exclusive jurisdiction to the United States."[118] *Van Brocklin* also noted that a state's admission to the Union abrogates previous territorial legislation.[119]

The principle that each state automatically acquires jurisdiction over all territory within its borders upon statehood is a feature of what is generally referred to as the "equal footing doctrine." This rule guarantees new states "'all the rights of dominion and sovereignty which belonged to the original states,'"[120] thus precluding the federal government from trading away a state's prerogatives prior to its admission or otherwise compromising the state's authority.[121]

One aspect of the equal footing doctrine guarantees new states ownership of all navigable waters within their territory.[122] Control of waters that can be used for travel is understood to be a feature of sovereignty.[123] Therefore, even when the federal government has transferred the land around such waters to other parties before the state's admission, the state is presumed to own the river bed or lake bed, and thus to have authority over traffic on the

114. *See id.*

115. *See id.*

116. *See id.*

117. 117 U.S. 151 (1886).

118. *Id.* at 167-68 (citing Barney v. Keokuk, 94 U.S. 324 (1876); Doe v. Beebe, 54 U.S. (13 How.) 25 (1851); Goodtitle v. Kibbe, 50 U.S. (9 How.) 471 (1850); Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); New Orleans v. United States, 35 U.S. (10 Pet.) 662, 737 (1836)).

119. *See id.* at 159 (citing Strader v. Graham, 51 U.S. (10 How.) 82 (1850); Permoli v. Municipality of New Orleans, 44 U.S. (3 How.) 589, 610 (1845)).

120. Ward v. Race Horse, 163 U.S. 504, 513 (1896) (quoting Escanaba Co. v. City of Chicago, 107 U.S. 678, 688 (1882)).

121. *See id.* at 512-14.

122. *See id.* at 512.

123. *See id.*

water.[124] The equal footing doctrine prevents subordination of new states to existing states or the imposition of an inferior status upon citizens of new states.[125] The Constitution entitles each new state to an equal role in the Union.[126]

The Supreme Court's Indian cases have been protective of both equal footing and the federal relationship with the tribes. States' rights and the federal Indian power have been made to accommodate one another. As the court declared in *Dick v. United States*,[127] "[t]hese fundamental principles are of equal dignity, and neither must be so enforced as to nullify or substantially impair the other."[128] For the states, this had meant that when federal Indian regulations are claimed to preempt state law, they are not "construed as doing so, if, by any reasonable meaning, they can be otherwise treated."[129] In *Ward*, the Court went so far as to hold that former treaty guarantees to Indians of hunting rights on federal land were abrogated by the admission of the state to the Union.[130]

That case, however, represents the exception rather than the rule. In the Indians' favor, the Court generally has held that treaty rights survive into statehood, regardless of state consent, when the same rights could have been created by unilateral federal action after statehood. In other words, the state's admission to the Union is presumed not to abrogate the provisions of a treaty if those provisions could be reimposed without the state's consent.

As *McBratney* demonstrates, this principle will not allow a treaty to work a wholesale exclusion of state law.[131] On the other hand, federal protective regulations generally are preserved. Treaties that bar the sale of liquor to Indians or within former reservations survive into statehood.[132] So do guarantees of water rights to

124. *See* Withers v. Buckley, 61 U.S. (20 How.) 84, 93 (1857); *Permoli*, 49 U.S. (3 How.) at 610; Pollard v. Hagan, 44 U.S. (3 How.) 212, 215 (1845).

125. *See Ward*, 163 U.S. at 512-14.

126. In many cases, express "equal footing" clauses were included in statehood enabling acts; however, the Court has indicated that the doctrine does not depend on them. The clauses are "merely declaratory of the general rule." *Id.* at 511.

127. 208 U.S. 340 (1908).

128. *Id.* at 353.

129. Draper v. United States, 164 U.S. 240, 244 (1896).

130. *See Ward*, 163 U.S. at 514. *Ward* was based on the strained rationale that a state's power to regulate hunting — even on federal land — is an "essential attribute of governmental existence." *Id.* at 516.

131. *See* United States v. McBratney, 104 U.S. 621, 623-24 (1881).

132. *See* Johnson v. Gearlds, 234 U.S. 422, 435-36 (1914); Dick v. United States, 208 U.S. 340, 359 (1908); United States v. 43 Gallons of Whiskey, 93 U.S. 188, 197 (1876).

tribes.[133] And just nine years after *Ward v. Race Horse* was decided, the Supreme Court effectively overruled that case by holding that treaty fishing rights are not abrogated by statehood.[134] The Court's approach has been to view treaty stipulations as amendments to federal statutes.[135] Therefore, even after statehood, Indian treaties will survive "exclusively on the [f]ederal authority over the subject-matter."[136] In other words, the treaty is viewed as having become federal legislation, and the only question is whether the resulting law is within Congress's power.

Almost all of the above cases involved an equal footing argument, with the states contending that because there had been no reservations in their statehood acts, previous treaties were necessarily abrogated. The Court's response is best summed up in *Johnson v. Gearlds*:

> But if the making of such a treaty after the admission of the State is not inconsistent with the "equal footing" of that State with the others — as, of course, it is not — it seems to us to result that there is nothing in the effect of "equal footing" clauses to operate as an implied repeal of such a treaty when previously established.[137]

The Supreme Court's concept of Indian country went largely untouched by the rapid expansion of the United States during the first three decades following the middle of the nineteenth century. Through the creation of enclaves, the federal government was able to preserve tribal autonomy and its own police authority in Indian country.[138] That designation still drew a bright line in the early 1880s, defining both the scope of the federal Indian criminal law and the boundaries of state jurisdiction.

In 1883, the Supreme Court in *Ex parte Crow Dog* described Indian country as all lands "to which the Indian title has not been extinguished," and which were either outside "the exterior geographical limits of a state" or "excepted from its jurisdiction . . . at the time of its admission."[139] The Court surveyed the history of the

133. *See* Winters v. United States, 207 U.S. 564, 577 (1908).

134. *See* United States v. Winans, 198 U.S. 371, 382-84 (1905). Justice White, the author of *Ward*, dissented in *Winans*. *Cf.* Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962) ("Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation.") (citing Tulee v. Washington, 315 U.S. 681 (1942); *Ward*, 163 U.S. at 504).

135. *See, e.g., Gearlds*, 234 U.S. at 436.

136. *43 Gallons*, 93 U.S. at 197; *see also Dick*, 208 U.S. at 358-59.

137. 234 U.S. at 439. *Compare id. with* The Cherokee Tobacco, 78 U.S. 616, 620-21 (1870) (reasoning that "a treaty cannot change the Constitution or be held valid if it be in violation of that instrument").

138. *See, e.g., Ex parte* Crow Dog, 109 U.S. 556, 560-62 (1883).

139. *Id.* at 561.

United States's relations with the tribes since the early century and saw only continuity.[140] Moreover, it found that the overriding objective of federal policy was to preserve tribal autonomy.[141]

The question presented in *Crow Dog* was whether several statutes and treaties had extended the federal criminal laws to intra-Indian crimes in the Sioux territory.[142] The Court held that crimes among Indians within Indian country are governed solely by tribal law.[143] It made clear that its ruling was motivated by a concern not to impose on the Indians "the restraints of an external and unknown code," or allow them to be judged "by a standard made by others," rather than "by the customs of their people . . . [and] the law of their land."[144]

The *Crow Dog* Court examined the relevant Indian treaties and federal statutes, and concluded that "it was the very purpose of all these arrangements to introduce" among the Indians one of "the highest and best" arts of civilized life — "that of self government."[145] At this late date, the Supreme Court could still find that the primary goal of federal Indian policy was guaranteeing tribal sovereignty. Allowing relations between Indians "to be dealt with by each tribe for itself, according to its local customs," was "the general policy of the government . . . from the beginning to the present time."[146]

The Court spoke too soon. The fair weather of federal deference reported by *Crow Dog* turned out to be the calm before the coming storm. Not only did the court fail to foresee an impending change in federal policy, it failed to appreciate how its own ruling would partly precipitate that change. *Crow Dog* was the last decision for three-quarters of a century to uphold the right of tribal Indians to be governed by their own laws. The next two sections of this Article describe the new federal policy of forced assimilation of the 1880s and how it eventually led to fundamental changes in the Supreme Court's understanding of Indian country.

3. *Allotment and the federal wardship power.* Two federal policies had created a need to maintain Indian country as a jurisdictional concept: federal criminal laws could be applied only in areas of exclusive jurisdiction and tribal self-rule required freedom from state law. Both of these needs were eliminated in

140. *See id.* at 572.
141. *See id.* at 568-69.
142. *See id.* at 557, 571.
143. *See id.* at 572.
144. *Id.* at 571.
145. *Id.* at 568.
146. *Id.* at 572.

the 1880s.

The first change in direction was touched off by *Crow Dog* itself. Crow Dog was convicted of murdering Spotted Tail, a Brule Sioux.[147] The crime took place within the Sioux reservation, which had been excepted from the jurisdiction of Dakota territorial courts.[148] The murder had been particularly brutal, but under Sioux tribal law Crow Dog's punishment would have been limited to a requirement that he support Spotted Tail's family.[149]

While the reach of the federal criminal laws had not increased much since 1817, the public's interest in the affairs of Indians had. When the Supreme Court dismissed Crow Dog's federal conviction, a public outcry led to the passage of the Indian Major Crimes Act.[150] As its name suggests, that Act extends the federal criminal laws to several major offenses among Indians.[151] It brings prosecutions for murder, rape, kidnapping, robbery, and other serious felonies into federal court. Intra-Indian crimes within tribal territory no longer were reserved to tribal jurisdiction.

The aspect of the Major Crimes Act that proved troubling to the Supreme Court is that its reach is not restricted to areas of exclusive federal jurisdiction. The Act extends federal jurisdiction to Indian crimes on reservations, regardless of whether the reservation is under state authority; it is not limited to Indian lands over which the state has ceded its sovereignty.[152] As a result, some potential applications of the Act cannot be justified as exercises of federal police authority in areas of exclusive federal jurisdiction.

Just such an application was presented to the Court one year after the Act's passage. In *United States v. Kagama*,[153] the high court was faced with the federal prosecution of an intra-Indian murder occurring on the Hoopa Valley reservation in California.[154] The state had never ceded its jurisdiction over the area; indeed, California had never given its consent to any federal Indian enclaves.[155] The Hoopa Valley reserve had been created by executive order in 1876, twenty-six years after the state's admission to the

147. *See id.* at 557.

148. *See id.* at 559.

149. *See* COHEN 1982, *supra* note 26, at 339 n.67.

150. *Id.* at 68 n.8.

151. *See* Indian Major Crimes Act, ch. 341, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (1994)) (commonly referred to as the Major Crimes Act).

152. *See id.*

153. 118 U.S. 375 (1886).

154. *See id.* at 375.

155. *See* Donnelly v. United States, 228 U.S. 243, 246 (1913); *see also* California Statehood Act, ch. 50, 9 Stat. 452 (1850).

Union.[156] The prosecution of Kagama was an assertion of federal police power in an area under state authority.

The *Kagama* Court began by dismissing the United States's argument that the Major Crimes Act could be justified under the Indian commerce clause. The court declared that the prosecution of common-law offenses simply had no relation to the regulation of commerce with Indian tribes, and thus no basis in that clause.[157] It discussed *Rogers* and other decisions allowing the exercise of federal police authority in areas not within the jurisdiction of any state.[158] It noted that this line of authority could not accommodate the Major Crimes Act, as the Act applied even to "crimes on reservations lying within a State."[159]

The Court nevertheless upheld the Act.[160] In doing so, it effectively recognized a federal police power over Indians. *Kagama* relied on the rationale that "Indian tribes *are* the wards of the nation."[161] Specifically,

> [t]hey are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness . . . there arises [in the federal government] the duty of protection, and with it the power.[162]

The *Kagama* reasoning is not entirely divorced from the notion of exclusive jurisdiction as a basis for federal power. The opinion suggests that Indians remain outside of the political communities of their states: they owe the state "no allegiance" and receive from it "no protection."[163] Their inability to participate in the public life of their state — their "weakness and helplessness"[164] — justifies a broad federal wardship authority that fills a void left by the state.

This aspect of *Kagama* has not survived. The federal government at the time of the decision already had begun to envision the total incorporation of Indians into American society. As discussed

156. *See Donnelly*, 228 U.S. at 253.

157. *See Kagama*, 118 U.S. at 378-79.

158. *See id.* at 379-81 (citing Murphy v. Ramsey, 114 U.S. 15, 44 (1885); United States v. Rogers, 45 U.S. 567, 572 (1846); American Ins. Co. v. Canter, 26 U.S. 511, 542 (1828)).

159. *Id.* at 383.

160. *See id.* at 383-84.

161. *Id.*

162. *Id.*

163. *Id.* at 384.

164. *Id.*

below, the year after *Kagama* was decided, Congress embarked on a wholesale policy of breaking up tribal holdings and allotting land to individual Indians. After a fixed period, Indians would be subjected to state law and granted citizenship.[165] In 1924, Congress made citizens of all Indians born within the territorial limits of the United States.[166] Although these assimilationist policies were never fully implemented, and were repealed in part in the 1930s, they made it impossible for the Court to continue to assume that Indians within the state would remain outside of its jurisdiction.

Subsequent Supreme Court cases soon established that Congress's wardship power over Indians does not depend on an absence of state jurisdiction. The *Kagama* Court had been uncomfortable with the notion that the federal government could exercise broad police powers in an area where its authority was not exclusive. However, as the *Kagama* decision aged, it became its own source of authority for the powers it had upheld. The court's concerns dissipated once it had a precedent allowing federal police regulations outside an area of exclusive federal jurisdiction.

In *United States v. Thomas*,[167] the court interpreted *Kagama* as generally allowing federal protective legislation for Indians. The court found that "independently of any question of [Indian] title," whenever the United States sets land apart for Indians, "whether within a State or Territory," it may exercise broad powers.[168] The federal government can "pass such laws . . . as may be necessary to [protect] persons and property, and to punish all offenses committed against [Indians] or by them within such reservations."[169]

The *Thomas* decision still tied this federal wardship power to land, limiting its exercise to areas set apart for Indians. Predictably, even this limit soon disappeared. The eventual rule is expressed by *United States v. Ramsey*,[170] which declares that federal police authority "continue[s] after the admission of the state . . . in virtue of the long-settled rule that such Indians are wards of the nation."[171] Furthermore, "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be

165. *See* General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354 (1994)).

166. *See* Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253; *see generally* COHEN 1942, s*upra* note 55, at 151-57.

167. 151 U.S. 577 (1894).

168. *Id.* at 585.

169. *Id.*

170. 271 U.S. 467 (1926).

171. *Id.* at 469 (citing Donnelly v. United States, 228 U.S. 243, 271 (1913); United States v. Kagama, 118 U.S. 375, 384 (1886)).

within the territory of the United States."[172]

The federal power for Indian affairs was now plenary. Congress could legislate for Indians as freely as it could exercise any of its enumerated powers, without regard to state authority. Once this wardship power was firmly in place, it was no longer necessary to justify any of the federal Indian laws on grounds of an absence of state jurisdiction.

As *Kagama* and its progeny eliminated the need to define Indian country as a jurisdictional enclave, other developments threatened the very existence of such enclaves. The statute that defines the next fifty years of federal Indian policy is the General Allotment Act of 1887.[173] That law authorized the President to allot tribal lands to individual Indians in amounts of 160 acres.[174] Any land left over could be sold or opened up for white settlement.[175]

As the Supreme Court has described it, "[t]he objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into society at large."[176] Section 5 of the Allotment Act provided that title to parcels allotted to Indians would be held in trust by the United States for twenty-five years; any conveyance or encumbrance made during this period was void.[177] Section 6 provided that members of allotted tribes "shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside."[178]

In *In re Heff*,[179] the Supreme Court held that section 6 of the General Allotment Act of 1887 subjected individual Indians to plenary state jurisdiction immediately upon receipt of an allotment.[180] In response, Congress amended the Act to provide that state jurisdiction did not attach until "the expiration of the trust

172. *Id.* at 471.

173. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-354 (1994)).

174. The amount was reduced to 80 acres for agricultural lands in 1891. *See* Act of Feb. 23, 1891, ch. 383, § 2, 26 Stat. 794, 795.

175. *See* 24 Stat. at 389-90.

176. County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 254 (1992). *See generally In re* Heff, 197 U.S. 488, 499 (1905).

177. *See* General Allotment Act of 1887, § 5, 24 Stat. at 389-90. For a general discussion of the history and mechanics of the Act, see *Yakima*, 502 U.S. at 254-55; COHEN 1982, *supra* note 26, at 130-43.

178. *Yakima*, 502 U.S. at 254; *see also* General Allotment Act of 1887, § 6, 24 Stat. at 390.

179. 197 U.S. 488 (1905).

180. *See id.* at 502-03.

period . . . when the lands have been conveyed to the Indians by patent in fee."[181] The 1906 amendments also authorized the President to extend the trust period on any allotment indefinitely.[182]

The allotment policy came to be regarded as a failure and was ended by the Indian Reorganization Act of 1934 ("IRA").[183] The first three sections of that Act prohibited further allotment, extended existing trust periods indefinitely, and restored surplus lands within a reservation that were still in federal hands to tribal ownership.[184] Section 16 of the IRA authorized tribal governments to adopt constitutions for self-rule.[185] The Supreme Court eventually recognized this reversal of policy and the survival of tribal sovereignty in *Williams v. Lee*.[186] That case reaffirmed not only "the right of reservation Indians to make their own laws and be ruled by them," but also that "[s]tates have no power to regulate the affairs of Indians on a reservation."[187] Allotment was not the last word in federal Indian policy.

However, the allotment policy colored an entire era of the Supreme Court's Indian country jurisprudence. During this era, the Court came to assume that tribal governments were moribund, if not extinct. Allotment was viewed as having "inaugurated [a] policy of terminating . . . tribal existence and government."[188] Toward the end of this era, the Court no longer considered tribal governments to exist, and it no longer viewed Indian lands as having unique jurisdictional status.

This perspective is manifested in *Surplus Trading Co. v. Cook*,[189] a case that is not about Indians but discusses their status. The Court was presented with the question of whether a state could tax a transaction occurring on a military base brought under exclusive federal jurisdiction pursuant to Article I, section 8, clause 17 of the United States Constitution.[190] The opinion discusses the special jurisdictional status of federal enclaves, and is careful to distinguish federal lands that are simply "set apart and used for

181. Act of June 21, 1906, ch. 3504, 34 Stat. 325, 326 (codified as amended at 25 U.S.C. § 391 (1994)).

182. *See id.*

183. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1994)).

184. *See id.* at 984-85.

185. *See id.* at 987.

186. 358 U.S. 217 (1959).

187. *Id.* at 220.

188. *Ex parte* Webb, 225 U.S. 663, 684 (1912); *see also* United States v. Nice, 241 U.S. 591, 599 (1916); Draper v. United States, 164 U.S. 240, 246 (1896).

189. 281 U.S. 647 (1930).

190. *See id.* at 649-50.

public purposes."[191] It notes that "[s]uch ownership and use without more do not withdraw the lands from the jurisdiction of the State."[192] State laws still apply, except that they "cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal."[193]

Surplus Trading then states that "a typical illustration" of lands that are set apart but remain under state authority is "the usual Indian reservation."[194] It declares that Indian "reservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits," [195] except as preempted by federal law.

Prior to the enactment of the IRA, the Court not only saw Indian reservations as no different from other federal lands, but also saw them as a *typical example* of areas that, while set apart by the federal government, remain under state authority. The Court believed it to be settled that Indian reservations, as opposed to federal enclaves, are governed by state laws. How far the situation had evolved from *Ex parte Crow Dog*, where Indian reservations had fallen on the opposite side of this distinction.[196]

Surplus Trading's statements are only dicta, and no case of this era ever held that all tribal sovereignty had been extinguished. However, the assumption that tribal governments were no longer in operation had an important influence on the Supreme Court's construction of "Indian country." *Kagama* began to allow federal police powers over Indians to be exercised outside of jurisdictional enclaves at the same time that such enclaves were disappearing.[197] Yet there remained a series of federal protective laws whose application was tied to Indian country. The next section of this Article details how the Supreme Court prevented these laws from being swept away in a rising tide of state jurisdiction by disconnecting the Indian country concept from tribal sovereignty.

4. *The creation of non-sovereign Indian country*. The meaning of "Indian country" did not change immediately after allotment began. As early as 1896, the Supreme Court recognized that the allotment policy "contemplated the gradual extinction of Indian reservations and Indian titles."[198] Yet for some years, the

191. *Id.* at 650.
192. *Id.*
193. *Id.*
194. *Id.* at 651.
195. *Id.*
196. *See Ex parte* Crow Dog, 109 U.S. 556, 572 (1883).
197. *See* United States v. Kagama, 118 U.S. 375, 384-85 (1886).
198. Draper v. United States, 164 U.S. 240, 246 (1896).

Court continued to insist that Indian country only existed in the gaps in the state's jurisdiction.

In 1908, the Court ventured that land that had come under state authority could not be Indian country. *Dick v. United States*[199] notes in dicta that the federal liquor statute "did not intend by the words 'Indian country' to embrace any body of territory in which . . . the jurisdiction of the [s]tate, for all purposes of government, was full and complete."[200] *Dick* upheld the federal liquor prosecution at issue despite the presence of state jurisdiction.[201] The Court based its ruling on a treaty with the tribe that had extended the federal liquor laws to the lands in question.[202]

Similar scenarios were encountered a year later in *United States v. Celestine*[203] and *United States v. Sutton*.[204] In both cases, the Court did not challenge the assumption that allotments subjected to state law are not Indian country.[205] However, the Court held that so long as the trust period for an allotment has not expired, state jurisdiction does not attach to Indian lands.[206] *Celestine* and *Sutton* establish an important precedent that gave effect to the 1906 amendments to the General Allotment Act of 1887: that state law does not apply to allotments while they remain inalienable.[207] In both of these cases, the allotments were still held in trust.[208] The court thus was able to enforce the federal Indian country laws without abandoning the notion that state jurisdiction and Indian country are incompatible.

Indian country finally was divorced from the requirement of an absence of state jurisdiction in *Hallowell v. United States*.[209] That case involved the federal prohibition on importation of liquor into Indian country.[210] Although the trust period on the allotment in question had not expired, the Court assumed that the Indian allottee was "entitled to the benefit of the laws, civil and criminal, of

199. 208 U.S. 340 (1908).

200. *Id.* at 352 (citing *Crow Dog*, 109 U.S. at 561; Bates v. Clark, 95 U.S. 204, 207-08 (1877)).

201. *See id.* at 359.

202. *See id.* at 352-53, 359.

203. 215 U.S. 278 (1909).

204. 215 U.S. 291 (1909).

205. *See Celestine*, 215 U.S. at 278; *Sutton*, 215 U.S. at 291.

206. *See Celestine*, 215 U.S. at 290-91; *Sutton*, 215 U.S. at 294-95.

207. *See also* United States v. Ramsey, 271 U.S. 467, 471 (1926) (jurisdictional impact of both trust ownership and restrictions on alienation is the same); United States v. Nice, 241 U.S. 591, 599 (1916) (no "dissolution of the tribal relation" while allotments are still in trust).

208. *See Celestine*, 215 U.S. at 284; *Sutton*, 215 U.S. at 292.

209. 221 U.S. 317 (1911).

210. *See id.* at 318.

the State of Nebraska."[211] *Hallowell* thus is contrary to *Celestine*'s ruling of two years earlier that state law does not attach to allotments before their trust period expires.

But despite its finding of state jurisdiction, *Hallowell* held that the area in question was Indian country.[212] The opinion focused only on the question of federal power, and did not draw attention to the change it brought to the Indian country definition. However, in subsequent years, the court would cite *Hallowell* for the proposition that "Indian country" does not require an absence of state jurisdiction.[213]

Hallowell's construction was reaffirmed in *Donnelly v. United States*.[214] That case held that the federal criminal laws for Indian country extend to a murder on an Indian reservation even if it is under state jurisdiction.[215] *Donnelly* made clear that there is no requirement that the United States "have sole and exclusive jurisdiction over the Indian country."[216] The Court acknowledged that it was modifying the meaning of that term, which was still employed in the criminal and liquor laws, but had not been redefined by Congress in eighty years.[217] Sovereign tribal territory was quickly disappearing as reservations across the nation were allotted and subjected to state law. Had the Court continued to define Indian country in jurisdictional terms, it effectively would have repealed these statutes. There soon would have been no such "Indian country."

The need to disconnect Indian country from sovereignty was presented by the facts of *Donnelly*. The murder at issue had occurred on an extension that had been added to the Hoopa Valley Reservation in California by an executive order in 1891.[218] This is the same reservation examined in *Kagama*, where the Court had struggled with a rationale for federal police authority in the absence of exclusive federal jurisdiction.[219] California never had made a jurisdictional cession over Indian lands, and in any event it was beyond dispute that an executive order setting aside land within a state did not divest the state of its jurisdiction.

In *Kagama*, federal criminal jurisdiction had been upheld under the Major Crimes Act, which applies to all crimes by Indians

211. *Id.* at 322.
212. *See id.* at 324.
213. *See* United States v. McGowan, 302 U.S. 535, 539 & n.14 (1938).
214. 228 U.S. 243 (1913).
215. *See id.* at 253-54.
216. *Id.* at 268.
217. *See id.* at 269.
218. *See id.* at 253.
219. *See* United States v. Kagama, 118 U.S. 375, 375 (1886).

on reservations, regardless of state jurisdiction.[220] However, in *Donnelly*, although the victim was an Indian, the murder had been committed by a white.[221] The only possible basis for federal jurisdiction was the Indian Country Crimes Act, which since 1817 had extended federal laws to all offenses in Indian country. Had the Court continued to define Indian country as outside of any state's jurisdiction, the federal government would have been unable to punish a white for murdering an Indian on a federal Indian reservation.

The Court opted to update the definition of Indian country. It decided to consider "the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes."[222] *Donnelly* explicitly severed Indian country from original Indian sovereignty. The Court declared that "the term cannot now be confined to land formerly held by the Indians, and to which their title remains unextinguished."[223]

Donnelly considered which Indians Congress intended to bring within its laws, and what areas should fall within the protective sweep of Indian country. In a first step towards a new definition, the opinion determined that "nothing can more appropriately be deemed 'Indian country' . . . than a tract of land that . . . is lawfully set apart as an Indian reservation."[224] Today, *Donnelly* forms the basis of subsection (a) of 18 U.S.C. § 1151.

The Court's next two Indian country decisions were also codified in 18 U.S.C. § 1151, but they are less interesting because they only involved areas that remained under exclusive federal jurisdiction. *United States v. Pelican*[225] applied the Indian Country Crimes Act to trust allotments. Reaffirming *Celestine* and *Sutton*, the Court found it was "not open to controversy" that restricted allotments continue "under the jurisdiction and control of Congress for all governmental purposes relating to . . . Indians."[226] *Pelican* noted that federal authority to legislate for Indians is ample even within a state's jurisdiction.[227] In other words, even if state law had attached, Congress could still apply its criminal laws to the area. "The present question then is not one of power, but whether it can be said that the descriptive term 'Indian country' . . . is inadequate

220. *See id.* at 383-84.
221. *See Donnelly*, 228 U.S. at 252.
222. *Id.* at 269 (citing *Ex parte* Crow Dog, 109 U.S. 556, 561 (1883)).
223. *Id.*
224. *Id.*
225. 232 U.S. 442 (1914).
226. *Id.* at 447; *see also id.* at 451.
227. *See id.* at 448 (citing Hallowell v. United States, 221 U.S. 317, 324 (1911)).

to embrace these allotments."[228] *Pelican* only raised an issue of statutory construction: does "Indian country" include allotments?

The Court decided that restricted allotments are still Indian country; they "retain during the trust period a distinctively Indian character."[229] *Pelican* thus adopted a definition of Indian country that is coextensive with tribal territory. While they remain inalienable, allotments are also beyond the reach of state law.[230] Therefore, restrictions on alienation determine both whether an allotment is sovereign and whether it is "Indian country." The only real issue in *Pelican* was whether the court should allow a checkerboard federal criminal jurisdiction over various allotments within a former reservation. The Court decided that as impractical as this may be, it is what Congress intended.[231] So long as an allotment is in trust or its alienability remains restricted, it is Indian country.[232] *Pelican* forms the basis of subsection (c) of 18 U.S.C. § 1151.

The other codified case from this period is *United States v. Sandoval*.[233] Here again, the Court was dealing only with land that was outside of any state's jurisdiction. It noted that the Santa Clara pueblo expressly had been set aside by the federal government, and that the New Mexico Statehood Act accepts that Indian lands will be under the "'absolute jurisdiction and control of the Congress.'"[234]

The Court's opinion focused on whether the legal status of the pueblo Indians had become too close to that of other citizens to allow Congress to legislate for them as Indians. The Court determined that Congress "'has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease.'"[235] In its most significant passage, *Sandoval* declared that the federal government has power to legislate for all "dependent Indian communities" in the United States.[236]

The "dependent Indian communities" test again was employed in *United States v. McGowan*,[237] which together with *Sandoval* forms the basis of 18 U.S.C. § 1151(b). As discussed in the introduction to this Article, *McGowan* involved a federal

228. *Id.* at 449.
229. *Id.*
230. *See id.* at 450-51.
231. *See id.* at 449-50.
232. *See id.* at 450-51.
233. 231 U.S. 28 (1913).
234. *Id.* at 36-37 n.1 (quoting Act of June 20, 1910, ch. 310, 36 Stat. 557, 559).
235. *Id.* at 46 (quoting Tiger v. Western Inv. Co., 221 U.S. 286, 315 (1911)).
236. *Id.*
237. 302 U.S. 535 (1938).

prosecution for the importation of liquor into Nevada's Reno Indian Colony. The colony consisted of twenty-eight acres that Congress had purchased for needy Indians in 1917.[238] Obviously, this tiny plot could not stand as its own nation. No one expected that it would carry out its own civil and criminal administration, or that state laws would be ineffective within its borders.

The court of appeals thus concluded that the Reno Indian Colony could not be Indian country.[239] It assumed that an Indian country designation would mean the area was outside the reach of state law.[240] The panel looked to a series of federal cases establishing that land can be removed from a state's jurisdiction only with the state's consent.[241] One of the cases it quoted was the Supreme Court's decision in *Surplus Trading*, which reaffirmed that state consent is a prerequisite to the creation of a jurisdictional enclave. Because Nevada had never ceded its authority over the colony, the court determined that it could not be Indian country.[242]

The Supreme Court reversed, finding that the Reno Colony was indeed Indian country.[243] The Court made clear that it was modifying the definition of that term so that it would apply to an area where the state retained jurisdiction. *McGowan* noted that the words "Indian country" had been employed in the federal laws for many years without a new statutory delineation.[244] Once again, the Court declared that the term must be defined in light of "'the changes which have taken place in our situation.'"[245]

In this case, the Court emphasized that Congress had made the Reno Colony the equivalent of a reservation, as the land had been "'validly set apart for the use of the Indians as such, under the superintendence of the federal government.'"[246] The Court thus found that the colony fell within the scope of the Indian country statutes as a "'dependent Indian communit[y].'"[247]

The *McGowan* opinion left no doubt that an Indian country finding does not retract the state's jurisdiction. The Court affirmed that "the federal government does not assert exclusive ju-

238. *See id.* at 537.

239. United States v. McGowan, 89 F.2d 201, 202 (9th Cir. 1937).

240. *See id.*

241. *See id.* (citing Surplus Trading Co. v. Cook, 281 U.S. 647, 651 (1930); United States v. Penn, 48 F. 669, 670 (C.C.E.D. Va. 1880); United States v. Cornell, 25 F. Cas. 646 (C.C.D.R.I. 1819) (No. 14,867)).

242. *See id.*

243. *See McGowan*, 302 U.S. at 535.

244. *See id.* at 537.

245. *Id.* at 537-38 (quoting *Ex parte* Crow Dog, 109 U.S. 556, 561 (1883)).

246. *Id.* at 539 (quoting United States v. Pelican, 232 U.S. 442, 449 (1914)).

247. *Id.* at 538 (quoting United States v. Sandoval, 231 U.S. 28, 46 (1913)).

risdiction within the colony. Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments."[248]

The *McGowan* Court based this conclusion on two prior decisions: *Hallowell v. United States*, [249] the first Supreme Court decision to apply the Indian country label to an area under state law, and *Surplus Trading Co. v. Cook*,[250] the same case which the Ninth Circuit had relied on for the proposition that a state's authority over its land and people can be taken away only with its consent.[251]

The rest is legislative history. In 1948, the compilers of the revised statutes codified the *Donnelly*, *Pelican*, *Sandoval*, and *McGowan* decisions as the definition of Indian country:

> 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 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.[252]

Donnelly became subsection (a), which brings all federal Indian reservations within the scope of Indian country. *Pelican* is the source of subsection (c), which makes restricted allotments Indian country, and *Sandoval* and *McGowan* form the basis of subsection (b), which declares that Indian country exists wherever there is a "dependent Indian community." It is to these cases that courts must look to determine what the statutory definition of Indian country was intended to import.

III. INDIAN COUNTRY TODAY

The courts have forgotten all that went into the making of the Indian country statute. In the mid-1970s, the Supreme Court began to conflate 18 U.S.C. § 1151 with sovereignty. It started to assume that whenever the statutory criteria for Indian country are met, all state law is preempted. Although most of these new 18 U.S.C. § 1151 cases still reach the correct result, and their mistake is not firmly rooted in the high court's jurisprudence, the signals

248. *Id.* at 539.
249. 221 U.S. 317 (1911).
250. 281 U.S. 647 (1930).
251. *See McGowan*, 302 U.S. at 288 n.14.
252. 18 U.S.C. § 1151 (1994).

they send have steered the lower courts in the wrong direction, where more serious consequences have arisen.

A. A Wrong Turn

The first post-1948 Supreme Court decision to address questions of Indian country and tribal territory continued to apply the proper standard. Three cases from 1962 demonstrate that Court's appreciation for the distinction between 18 U.S.C. § 1151 and the test for tribal sovereignty.

In *Seymour v. Superintendent*,[253] a unanimous Court held that 18 U.S.C. § 1151 extends the Major Crimes Act over an entire reservation. The burglary at issue had occurred on a parcel of land held in fee by a non-Indian.[254] The Court dismissed the argument that the lot constituted an exception to the reservation for purposes of 18 U.S.C. § 1151, as subsection (a) specifically states that it applies throughout the reservation, "'notwithstanding the issuance of any patent.'"[255] *Seymour* found that subsection (a) was intended to avoid a checkerboard pattern of jurisdiction.[256] All of the land within a reservation remains Indian country for federal criminal purposes, even individual parcels that have been transferred to outsiders.

Two months after *Seymour* was decided, the Supreme Court addressed the issue of what makes an Indian area immune from state law. *Organized Village of Kake v. Egan*[257] and its companion case, *Metlakatla Indian Community v. Egan*,[258] review an Alaska Supreme Court ruling that the state could apply its fishing regulations to the two Indian villages.[259] To define the reach of state law, the Court did not look to 18 U.S.C. § 1151. Rather, it inquired into whether there had been a federal set aside of land and subsequent cession of jurisdiction by the state. It found that the state had disclaimed jurisdiction, and that a reservation had been created in Metlakatla,[260] but not in Kake.[261]

253. 368 U.S. 351 (1962).

254. *See id.*

255. *Id.* at 357-58 (quoting 18 U.S.C. § 1151).

256. *See id*.

257. 369 U.S. 60 (1962).

258. 369 U.S. 45 (1962). Both cases are discussed in Part II.B.2.

259. *See supra* notes 85-102 and accompanying text.

260. *See Metlakatla*, 369 U.S. at 57-59. In *Metlakatla*, the United States Supreme Court vacated the Alaska Supreme Court's decision and remanded with instructions to consider the Secretary of the Interior's authority to enact the salmon trap regulations under the Act of March 3, 1891, ch. 543, 26 Stat. 989, which created the Metlakatla reservation. *See id.* at 59.

261. *See Kake*, 369 U.S. at 62.

Kake, *Metlakatla*, and *Seymour* adhered to the founding cases of the Supreme Court's Indian law jurisprudence. They recognized the distinction, developed at the beginning of the century, between Indian country and tribal territory. *Seymour* relied on 18 U.S.C. § 1151 to define the scope of the federal criminal laws, while *Kake* and *Metlakatla* looked for an affirmative cession of jurisdiction by the state to define sovereignty. These decisions were a modern anchor for all that had occurred in the last century and a half. Had the Court continued to follow their lead, we would not be facing the present unsatisfactory state of affairs.

Unfortunately, the coming years saw a heavy turnover in the Supreme Court's membership. By the mid-1970s, only three of the Justices who had participated in *Kake* and *Seymour* remained on the Court. Justice Frankfurter retired the year after he wrote for the Court in *Kake* and *Metlakatla*. Justice Black, the author of *Seymour*, left the Court in 1972. Black had also written *Williams v. Lee*,[262] the modern Court's reaffirmation of tribal self-government. Together, these two Justices were the Supreme Court's institutional memory of Indian law. When they left, the Court's understanding of the new Indian country statute and the principles of tribal sovereignty went with them.

The Court first began to conflate 18 U.S.C. § 1151 with tribal sovereignty in 1975 in *DeCoteau v. District County Court*.[263] That case addressed whether the Sisseton-Wahpeton Tribe retained jurisdiction over those portions of its reservation that had been opened to white settlement in the late nineteenth century.[264] The Court held that language providing that the tribes would "cede, sell, relinquish, and convey . . . all their claim, right, title, and interest"[265] in unallotted lands had diminished the reservation.[266] The tribe had sovereign authority only over the few restricted allotments that had been excepted from this cession.[267]

While *DeCoteau*'s result is unremarkable, its analysis is troubling. The Court accepted without investigation the parties' agreement that "state courts [would] not have jurisdiction if these lands are 'Indian country,' as defined in 18 U.S.C. § 1151."[268] Throughout the opinion, the Court assumes that the boundaries of tribal sovereignty are defined by Indian country.

The second footnote in *DeCoteau* cites 18 U.S.C. § 1151(a) for

262. 358 U.S. 217 (1959).
263. 420 U.S. 425 (1975).
264. *See id.* at 426-27.
265. Act of Mar. 3, 1891, ch. 543, § 26, 26 Stat. 989, 1036.
266. *See DeCoteau*, 420 U.S. at 445.
267. *See id.* at 445-46.
268. *Id.* at 427.

the proposition that if the area in question is a continuing reservation, "jurisdiction is in the tribe and the [f]ederal [g]overnment."[269] 18 U.S.C. § 1151(a) is the codification of *Donnelly v. United States*.[270] In that very case, the Court had made clear that the Indian country law it was applying did "not mean that the United States must have sole and exclusive jurisdiction over the Indian country."[271] However, *DeCoteau* assumed that the opposite is generally true.[272] Had the court found that the area in question fell within the scope of 18 U.S.C. § 1151(a), it would have held that state jurisdiction was excluded.

Since *DeCoteau* found that the reservation had been diminished,[273] its misunderstanding of the Indian country statute did not affect the outcome in that case. In subsequent years, lower courts would criticize the high court's interpretation of the statute.[274] One jurisdiction has dismissed *DeCoteau*'s statement that 18 U.S.C. § 1151 preempts state civil jurisdiction, finding that "the authority for this proposition cited by the Court does not support it."[275] However, for the most part, lower courts have felt bound by *DeCoteau*, assuming that it requires them to apply 18 U.S.C. § 1151 to preempt all state law.[276]

The Supreme Court itself relied on *DeCoteau* twelve years later in *California v. Cabazon Band of Mission Indians*.[277] Of the several high court decisions to interpret 18 U.S.C. § 1151 as establishing sovereignty, this is the only one where the mistake led to an improper result. In *Cabazon*, the Court addressed whether the Cabazon and Morongo Bands of Indians could conduct high stakes bingo games on their reservation in disregard of California law.[278] The Court assumed that the reservation's status as Indian country

269. *Id.* at 427 n.2.

270. 228 U.S. 243 (1913).

271. *Id.* at 268.

272. *See DeCoteau*, 420 U.S. at 427.

273. *See id.* at 445.

274. *See, e.g.,* People of South Naknek v. Bristol Bay Borough, 466 F. Supp. 870 (D. Alaska 1979); General Motors Acceptance Corp. v. Chischilly, 628 P.2d 683 (N.M. 1981).

275. *People of South Naknek*, 466 F. Supp. at 877 n.11.

276. *See, e.g.,* Mustang Prod. Co. v. Harrison, 94 F.3d 1382, 1385 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1288 (1997); Narragansett Indian Tribe v. Narragansett Elec. Co., 89 F.3d 908, 915 (1st Cir. 1996); Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1540 n.10 (10th Cir. 1995); Indian Country, U.S.A., Inc. v. Oklahoma *ex rel.* Oklahoma Tax Comm'n, 829 F.2d 967, 973 (10th Cir. 1987).

277. 480 U.S. 202 (1987).

278. *See id.* at 205.

retracted the state's civil and criminal jurisdiction.[279]

The Cabazon reservation had been established by executive order in 1876.[280] California never had ceded jurisdiction over the area. This is the same year that the California Hoopa Valley reservation at issue in *Kagama* and *Donnelly* had been created.[281] In both of those cases, it was taken as given that the creation of a reservation after statehood, without any subsequent cession of authority by the state, did not divest the state of its jurisdiction.

In *Cabazon*, however, the Court assumed that "Indian country" means sovereignty. It concluded that the tribe's activities were beyond the reach of state law, since "[s]tate regulation would impermissibly infringe on tribal government."[282] The Cabazon tribe therefore was a sovereign nation. The high court's willingness to recognize such a fiefdom, with powers of self-rule and immunity from the state law, is particularly jarring in light of the fact that the tribe had only twenty-five members.[283]

The notion that 18 U.S.C. § 1151 creates tribal territory has been reaffirmed in three 1990s cases, all of which involve the Oklahoma Tax Commission.[284] The first decision, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*,[285] demonstrates just how deep the Supreme Court's misunderstanding of Indian country has become. *Potawatomi*'s construction of 18 U.S.C. § 1151 looks to the 1938 *McGowan* case and a more recent decision, *United States v. John*.[286] The *John* Court had addressed only the reach of the federal criminal statutes.[287] It did not assume that its "Indian country" finding would repeal all state jurisdiction.[288] Rather, the Court held that 18 U.S.C. § 1151 defines the scope of the Major Crimes Act, and that when the Act applies, it

279. *See id.* at 207 n.5.

280. *See id.* at 204 n.1.

281. *See* Donnelly v. United States, 228 U.S. 243, 253 (1913); United States v. Kagama, 118 U.S. 375, 375 (1886).

282. *Cabazon*, 480 U.S. at 222.

283. *See id.* at 226 (Stevens, J., dissenting).

284. A further coincidence is that two of the three cases involve tribes that had been removed to Oklahoma from the Great Lakes region. *See* Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 116 (1993); Brief for Respondent, 1990 WL 508092, at *7-8, Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) (No. 89-1322).

285. 498 U.S. 505 (1991) (holding that states may not tax sales of goods to tribal Indians in Indian country but may tax sales to non-members of the tribe).

286. *See id.* at 511 (citing United States v. John, 437 U.S. 634 (1978); United States v. McGowan, 302 U.S. 535, 539 (1938)).

287. *See John*, 437 U.S. at 647.

288. *See id.* at 649.

preempts state criminal laws.[289]

Potawatomi's reliance on *McGowan* is even more remarkable. It cites that case for the proposition that an area is beyond the reach of state law whenever it has been "'validly set apart for the use of the Indians as such, under the superintendence of the [federal government].'"[290] Of course, it is *McGowan* that had made explicit that the Indian country label "only affect[s] the operation . . . of such state laws as conflict with the federal enactments."[291] In other words, *McGowan*'s "Indian country" remains under the state's presumptive authority. Local law is only displaced under the same circumstances in which it would be displaced anywhere: when it conflicts with the application of a federal law.[292]

The *Potawatomi* opinion indicates that today the Court is completely unaware of the changes that were made to the "Indian country" concept earlier in the century. It is relying on the codified cases to define the scope of Indian country without regard to how those decisions altered the meaning of that term.

Potawatomi is cited by *Oklahoma Tax Commission v. Sac & Fox Nation*,[293] a case which declares that 18 U.S.C. § 1151 Indian country lies outside of the state's taxing jurisdiction.[294] *Sac & Fox Nation* defines Indian country as including "formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States."[295] *Sac & Fox Nation* was recently cited in *Oklahoma Tax Commission v. Chickasaw Nation*,[296] which also holds that 18 U.S.C. § 1151 defines the state's tax authority.[297]

It bears mention that in all of the Oklahoma Tax Commission cases, the lands at issue were in fact tribal territory. The first section of the Oklahoma Statehood Act preserves all Indian treaties, guaranteeing they will continue to have the same effect as if "this Act had never been passed."[298] Furthermore, the areas in question in each of these cases had been set aside for the tribes by the federal government.[299] Under *Organized Village of Kake v. Egan*[300]

289. *See id.* at 649, 651 (citing Seymour v. Superintendent, 368 U.S. 351 (1962)).

290. *Potawatomi*, 498 U.S. at 511 (quoting *McGowan*, 302 U.S. at 539).

291. *McGowan*, 302 U.S. at 539.

292. *See id.*

293. 508 U.S. 114 (1993).

294. *See id.* at 124-25.

295. *Id.* at 123 (citing 18 U.S.C. § 1151 (1994)).

296. 515 U.S. 450, 453 n.2 (1995).

297. *See id.* at 453.

298. Pub. L. No. 234, 34 Stat. 267-68 (1906).

299. *See Chickasaw Nation*, 515 U.S. at 453-55; Oklahoma Tax Comm'n v. Sac

and the founding cases, all of these lands are beyond the reach of state law.

The Supreme Court's misinterpretation of 18 U.S.C. § 1151 has not much affected its own decisions. The only beneficiary of the confusion has been the tiny Cabazon Nation, which won an exemption from state regulation of its bingo operations.[301] However, the circuits continue to rely on *DeCoteau* and its progeny to dismiss arguments for state jurisdiction where they could make a difference.

In a 1996 First Circuit case, the state of Rhode Island had contended that 18 U.S.C. § 1151 should not preempt its regulatory authority over an Indian housing project.[302] The state's attorney questioned the logic of applying 18 U.S.C. § 1151 in this way, and noted that one circuit had refused to do so.[303] The panel acknowledged that the statute on its face applies only to criminal jurisdiction.[304] However, it concluded that it "need not address these arguments in detail,"[305] since the previous year in *Chickasaw Nation* the Supreme Court had reiterated that 18 U.S.C. § 1151 preempts all state jurisdiction.[306]

The Ninth Circuit relied on *Cabazon* and *Potawatomi* when it withdrew the state of Alaska's jurisdiction over 1.8 million acres of its territory in *Venetie II*.[307] The Alaska cases point to a conflict in

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& Fox Nation, 508 U.S. 114, 117 (1993); Brief for Respondent, 1990 WL 508092, at *8-11, Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991) (No. 89-1322). All three tribes had been subjected to allotment, but the areas over which they asserted sovereignty had been reserved to them and were still held in trust by the United States. *See Chickasaw Nation*, 515 U.S. at 453; *Potawatomi*, 498 U.S. at 507-09; Respondent's Brief at *8-14 & n.11, *Potawatomi*, 1990 WL 508092; *Sac & Fox*, 508 U.S. at 116-19; Sac & Fox Nation v. Oklahoma Tax Comm'n, 967 F.2d 1425, 1427 & n.2 (10th Cir. 1992).

300. 369 U.S. 60 (1962).

301. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221-22 (1987).

302. *See* Narragansett Indian Tribe v. Narragansett Elec. Co., 89 F.3d 908, 915-16 (1st Cir. 1996).

303. *See id.* at 916 (discussing Confederated Tribes & Bands of the Yakima Nation v. County of Yakima, 903 F.2d 1207 (9th Cir. 1990), *aff'd*, 502 U.S. 251 (1992)).

304. *See id.* at 915.

305. *Id.* at 916.

306. *See id.* at 915-16 (citing Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 453 n.2 (1995)); *see also* Thompson v. County of Franklin, 15 F.3d 245, 250 (2d Cir. 1994) (relying on *Sac & Fox* to find that 18 U.S.C. § 1151 preempts state taxing jurisdiction).

307. *See* Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't (*Venetie II*), 101 F.3d 1286, 1291-93 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2478 (1997).

the Supreme Court's Indian law jurisprudence. Under one line of recent decisions, there would be no question that the Venetie reservation had been terminated and all tribal sovereignty extinguished. This tension is also apparent in some of the recent circuit cases. The lower courts have applied 18 U.S.C. § 1151 to recognize sovereignty in some of the same areas where the Supreme Court had recently found sovereignty to be terminated. Before these conflicts are examined, however, the next section explores why the Supreme Court has lost its bearings in Indian country.

B. Scholarly Misguidance

In a footnote to his opinion in the first of the *Venetie* decisions, Judge Kleinfeld of Fairbanks compares the various editions of Felix Cohen's *Handbook of Federal Indian Law*. He points out that only the first version was actually written by Cohen. The 1982 edition, he contends, fell under the sway of its era; it appropriates the prestige of Cohen's name to promote a view of Indian law skewed in favor of tribal sovereignty.[308]

Judge Kleinfeld is only half right. While the 1982 edition exhibits a pluralist bias, the first *Handbook* also is not the product of a pre-ideological era. Felix Cohen was a staff attorney at the Department of Interior during the New Deal. He was one of the principal drafters of the Indian Reorganization Act of 1934.[309] The strong preference for tribal sovereignty expressed in that legislation also colors the first *Handbook*'s presentation of basic principles of Indian law.

While the 1942 edition is quite comprehensive, it overlooks critical changes made to the definition of Indian country in preceding decades. The section devoted to the topic begins by declaring that Indian country "may perhaps be most usefully defined as country within which Indian laws and customs and federal laws relating to Indians are generally applicable."[310] Only the second half of that statement is an accurate description of the law. The early twentieth century cases had created a new definition of Indian country that was no longer coextensive with tribal sovereignty.[311] The new test was not meant to describe the area where state law is excluded.

The 1942 *Handbook* readily adopts the modern boundaries of Indian country but ignores key statements about what those boundaries mean. Nowhere is this plainer than in the treatment of

308. *See* Native Village of Venetie I.R.A. Council v. Alaska, 687 F. Supp. 1380, 1390 n.2 (D. Alaska 1988), *aff'd in part, rev'd in part*, 944 F.2d 548 (9th Cir. 1991).

309. *See* COHEN 1982, *supra* note 26, at vii.

310. *See* COHEN 1942, *supra* note 55, at 5.

311. *See supra* Part II.B.4.

United States v. McGowan.[312] There the U.S. Supreme Court had drawn the broadest definition of Indian country yet, declaring that it exists wherever land has been set aside for Indians under federal superintendence.[313] The *Handbook* quotes from this portion of *McGowan* generously.[314] However, that decision also explicitly states that Indian country is not a marker of sovereignty and does not preempt state law.[315] This part of *McGowan* was not included in the 1942 *Handbook*.

The first edition largely ignores the principles of state cession of jurisdiction that had been developed over the last century. It acknowledges their existence, but finds that a discussion of these doctrines would be a "digression."[316] The *Handbook* does make a passing reference to the creation of federal enclaves. It notes that jurisdictional disclaimers in statehood acts are a "persuasive justification" for what it describes as "the incapacity of the states to legislate on Indian affairs."[317]

This last statement is revealing of Felix Cohen's general approach to Indian law. The peculiar understanding of Indian-state relations he presents is one in which the states presumptively lack jurisdiction over their resident Indians. He argues that the old doctrine that a state is sovereign within its borders must yield to "a sense of realism." When it comes to Indians, Cohen contends, states lack authority unless it has either been expressly delegated by Congress or non-Indians are involved.[318]

Cohen's vision bears a striking resemblance to the Supreme Court's early reasoning in *United States v. Kagama*,[319] where it had assumed that Indians would never become a part of the state's polity.[320] The *Kagama* court had been uncomfortable with the exercise of federal police authority over Indians within a state. It tried to rationalize the federal criminal laws, which had always been tied to an absence of state jurisdiction, by imagining a continuing gap in the states' legal relationship with the Indians.[321] As mentioned previously, this aspect of *Kagama* did not survive. New federal policies forcibly incorporated Indians into their states, and the Supreme Court accepted the notion that Congress has a ple-

312. 302 U.S. 535 (1938).
313. *See id.* at 537-39.
314. *See* COHEN 1942, *supra* note 55, at 8.
315. *See McGowan*, 302 U.S. at 539.
316. COHEN 1942, *supra* note 55, at 117.
317. *Id.* at 116.
318. *See id.* at 117-19.
319. 118 U.S. 375 (1886).
320. *See id.* at 384.
321. *See id.* at 382-84.

nary "wardship" power over Indians.[322]

However, *Kagama*'s suggestion that Indians would remain jurisdictional gypsies, with no state to call their own, contained considerable appeal for Cohen. The first *Handbook* quotes heavily from the relevant portion of *Kagama*, although it expresses reservations about the decision's description of the condition of Indians.[323] Cohen argues *Kagama*'s approach can be justified on the basis of treaties, but no treaties were at issue in that case.

In the end, Cohen's unique vision of Indian affairs must be attributed to his era. Like many of the New Dealers, he saw the states as an anachronism, a barrier to the progress to be achieved by centralized administration. Despite the prestige of his *Handbook*, Cohen's ambitions for the field of Indian law do not represent its past and did not predict its future.

With all its shortcomings, however, the first edition is a model of disclosure when compared to the 1982 *Handbook*. This latest version flatly asserts that state law is displaced by tribal law throughout 18 U.S.C. § 1151 Indian country.[324] It discusses the codified cases without mentioning the changes they brought to the meaning of that label. It then declares that "the intent of Congress, as elucidated by these decisions, was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection."[325] The *Handbook* even suggests that individual plots granted to Indians outside of any reservation are sovereign Indian country.[326]

The 1982 edition does not ignore the foundation cases; instead, it quarrels with them in the footnotes. It mentions the rules for establishing federal enclaves, but then argues that while state consent is usually required for exclusive federal jurisdiction, this is not the case with Indian country.[327] The only support the *Handbook* cites for this proposition is its own chapter on Indian country.

The 1982 edition mentions that most territorial and statehood legislation of the mid-nineteenth century included express disclaimers of jurisdiction over Indian lands. As discussed in Part II.B.2 of this Article, this was perhaps the most important feature of federal Indian law during this era. It allowed the United States to continue to exercise general police powers in Indian areas, and it created the freedom from state law that made independent tribal government possible. The *Handbook* dismisses the entire devel-

322. *See supra* notes 167-72 and accompanying text.
323. *See* COHEN 1942, *supra* note 55, at 116-17.
324. *See* COHEN 1982, *supra* note 26, at 27-28, 270.
325. *Id.* at 34.
326. *See id.* at 40-41.
327. *See id.* at 260 n.8.

opment in one sentence. It finds that "[a]s a general matter these [statehood act] clauses were not necessary, since the Supreme Court has sustained the same federal and tribal authority in states admitted without such clauses."[328]

Needless to say, the cases the *Handbook* cites for this proposition do not support it. The authors rely on *Worcester v. Georgia*[329] and *The New York Indians*.[330] Obviously, both New York and Georgia do not have cession clauses in their statehood acts; none of the states that formed the original union was admitted pursuant to a statehood act.

More fundamentally, there is no suggestion in either of these cases that Congress may unilaterally withdraw a state's jurisdiction over its territory. In both cases, Congress had entered into treaties guaranteeing the tribes' use and occupancy of the lands well before the boundaries of the states had been settled.[331] Georgia's borders were determined by a resolution of competing claims with South Carolina in 1787 and a final cession of western claims to the United States in 1802. In both instances, it accepted the lands at issue subject to Indian title.[332] The lands in question in *The New York Indians* had been claimed by Massachusetts; when they were finally made a part of New York, that state also acknowledged existing Indian rights.[333]

In the case of the original thirteen colonies, it can also be argued that any treaty entered into before the United States came into being effectively was consented to by the existing states. Under the Articles of Confederation, it was uncertain whether the

328. *Id.* at 268.

329. 31 U.S. (6 Pet.) 515 (1832).

330. 72 U.S. (5 Wall.) 761 (1866).

331. *See* Treaty of Fort Stanwix, Oct. 22, 1784, 7 Stat. 15; Treaty of Fort Harmar, Jan. 9, 1788, 7 Stat. 33 (cited in *The New York Indians*, 72 U.S. (5 Wall.) at 762 n.1); Treaty of Hopewell, Nov. 28, 1785, U.S.-Cherokee Nation, art. IV, 1 Laws U.S. 322 (discussed in *Worcester*, 31 U.S. (6 Pet.) at 551-53); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 60-61, 66-67 (1831) (Thompson, J., dissenting).

332. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139, 141-43 (1810) (1787 agreement); *Worcester*, 31 U.S. (6 Pet.) at 559-60; *id.* at 583-84 (M'Lean, J., concurring); *Cherokee Nation*, 30 U.S. (5 Pet.) at 76 (Thompson, J., dissenting) (1802 cession).

Any remaining ambiguity as to prior state acquiescence to Indian autonomy in *Worcester* had been resolved by subsequent acts of the Georgia legislature in 1796 and 1819. *See Worcester*, 31 U.S. (6 Pet.) at 585-86 (M'Lean, J., concurring).

333. *See* 72 U.S. (5 Wall.) at 762; *see also* COHEN 1982, *supra* note 26, at 417 n.9 (citing Department of Justice Memorandum noting that in colonial times, Iroquois Confederacy territory was "definitely set apart" from lands of colony of New York).

states or the national government had primary authority in Indian affairs.[334] The decentralized nature of the confederacy was such that agreements of that era can be regarded as the action of the states, rather than those of a separate sovereign.[335]

In any event, nothing in *Worcester* or *The New York Indians* supports the existence of an "Indian exception" to states' rights. The other cases cited by the 1982 *Handbook* support only the existence of federal authority to legislate for Indians or to guarantee them privileges. Some of these cases stand for the rule, discussed in Part II.B.2, that previous treaties are regarded as legislation upon statehood. One of the cases the *Handbook* relies on is *United States v. McGowan*, which has been sufficiently discussed at this point to make unnecessary any further explanation that it does not recognize a unilateral federal power to create enclaves.[336]

Many of the 1982 *Handbook*'s supporting examples for the proposition that consent is not needed for a federal Indian enclave are from a period when the Supreme Court repeatedly affirmed foundation principles. For instance, *The New York Indians* was decided during the same term as *The Kansas Indians*,[337] and it cites to that case. Yet *The Kansas Indians* opinion makes clear that the jurisdictional exemption it upholds is the product of a state cession of sovereignty.[338]

The case that poses the greatest challenge to the *Handbook*'s version of the law is *United States v. McBratney*.[339] As discussed earlier, there the Supreme Court had found that the absence of an exception in the Colorado Statehood Act "necessarily repeals the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith."[340] As a result, the state had jurisdiction over the Ute Indian reservation. Here is what the 1982 *Handbook* has to say about the case:

> The *McBratney* opinion was brief and far from clear. It purported to be based on statutory interpretation, but it is difficult

334. *See Cherokee Nation*, 30 U.S. (5 Pet.) at 63-65 (Thompson, J., dissenting); *see also id.* at 17 (majority opinion) (noting that under the "unsettled construction of the confederation," New York negotiated directly with tribes).

335. *See generally* William G. Rice, Jr., *The Position of the American Indian in the Law of the United States*, 16 J. COMP. LEG. 78, 80-81 (1934) (noting that the original states largely dealt with Indians on their own and that Indian lands therein "are probably subject to a different legal regime").

336. *See supra* Parts I, II.B.4.

337. 72 U.S. 737 (1866).

338. *See id.* at 740, 753, 756 ("[T]he rights of the Indians . . . and the stipulations of the treaties, were fully preserved . . . both in the organic act and the act for the admission of Kansas.").

339. 104 U.S. 621 (1881).

340. *Id.* at 623; *see also supra* Part II.B.2.

> to arrive at the Court's result by any ordinary approach to statutory construction. One possibility is that the Court simply misread the laws. Another is that concerns about constitutional limits on federal power influenced the decision. The decision was likely influenced by the fact that federal Indian laws at the time were mostly focused on interracial problems. Whatever the basis, it is unlikely that the same result would be reached today in a case of first impression.[341]

Prior to *McBratney*, *United States v. Rogers*[342] had upheld federal jurisdiction over a crime between two whites in Indian country. *McBratney* cites to that case and states that it would uphold federal jurisdiction in Colorado if the state had made a cession of authority.[343] To say that today Congress could regulate crimes between whites on a reservation under state authority begs the question. *McBratney* came only a few years before *Kagama* recognized a federal police power for Indian affairs. *McBratney* avoids passing on the validity of treaties that promised crimes involving Indians would go to federal court.[344]

The only treaty or statute that could have authorized federal jurisdiction over the white-on-white murder in *McBratney* was the Indian Country Crimes Act.[345] But *McBratney* came at a time when Indian country was still defined as being outside of any state's jurisdiction. Because Colorado had not surrendered its sovereignty over the area, there was no Indian country in *McBratney*, and thus no federal law that could apply. Contrary to the 1982 *Handbook*'s assertions, *McBratney* makes it very clear that Indian lands are beyond the reach of state law only when there has been an affirmative cession of jurisdiction by the state.

The discussion of Indian country in Felix Cohen's *Handbook of Federal Indian Law* is unsatisfactory. Unfortunately, this treatise has played a guiding role in modern jurisprudence. Since it was first issued in 1942, the *Handbook* has frequently been relied on by the Supreme Court.[346] It has also served as a template for subsequent treatises in this area; no other source challenges its

341. COHEN 1982, *supra* note 26, at 264-66. The 1982 *Handbook* explores every possibility other than that *McBratney* means what it says, devoting three successive footnotes — more than a page — to attacking the case. *See id*. at 264-65 nn.44-46.

342. 45 U.S. (4 How.) 567 (1846).

343. See *McBratney*, 104 U.S. at 623.

344. *See id.* at 624.

345. Act of Mar. 3, 1817, ch. 92, § 1, 3 Stat. 383.

346. *See, e.g.,* Hagen v. Utah, 510 U.S. 399, 402 (1994), *reh'g denied*, 511 U.S. 1047 (1994); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151 n.6 (1973); Organized Village of Kake v. Egan, 369 U.S. 60, 73 (1962); Williams v. Lee, 358 U.S. 217, 219 n.4 (1959); Squire v. Capoeman, 351 U.S. 1, 8-9 & n.15 (1956).

conclusions about Indian country.

The *Handbook*'s prestige probably helped to steer the courts' understanding of 18 U.S.C. § 1151 in the wrong direction in the 1970s. In 1958, the *Handbook* was revised by the Department of Interior and was thereafter referred to as a government publication.[347] A work attributed to those who implemented the assimilationist policies of the 1950s could hardly have been suspected of a pluralist bias.

The *Handbook*'s continuing influence is evident in the recent *Oklahoma Tax Commission* trilogy. In *Sac & Fox Nation*, the Supreme Court adopted the 1982 edition's definition of Indian country as its own standard for determining when a state's jurisdiction is preempted.[348] The *Handbook*'s failure to explain the principles underlying the founding cases, or the changes made by the codified cases, has undoubtedly contributed to the current confusion over Indian country. The next section argues that this state of affairs is untenable.

C. A Conflict of Authority

The contradictions in using 18 U.S.C. § 1151 as a jurisdictional marker are brought into relief by the Court's reservation termination cases. These decisions hold that particular language in federal statutes will be regarded as extinguishing tribal sovereignty and introducing state jurisdiction. However, land that is within a state's domain under the termination test can at the same time qualify as 18 U.S.C. § 1151 Indian country.

The first of the recent termination cases is *DeCoteau v. District County Court*.[349] That decision found that language requiring the Sisseton-Wahpeton tribe to "'cede, sell, relinquish, and convey'" its "'claim, right, title and interest'"[350] in particular territory extinguished its sovereignty over the area.[351] Two years later, *Rosebud Sioux Tribe v. Kneip*[352] also discovered an intent to terminate in an act providing that the tribe would "cede, surrender, grant, and convey" all its "claim, right, title and interest" to a part of its reservation.[353] Recently, *Hagen v. Utah*[354] announced that the court will find an intent to terminate whenever the language in a

347. *See, e.g., Williams*, 358 U.S. at 219; *Mescalero*, 411 U.S. at 151 n.6.

348. *See* Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 125 (1993).

349. 420 U.S. 425 (1975).

350. *Id.* at 439 n. 22 (quoting Act of Mar. 3, 1891, ch. 543, 26 Stat. 1036, 1036).

351. *See id.* at 445.

352. 430 U.S. 584 (1977).

353. *Id.* at 591 n.8.

354. 510 U.S. 399 (1994).

statute declares that reservation land is restored to the public domain.[355]

In all of these cases, it was understood that termination led to state jurisdiction.[356] When the special status of Indian lands has ended, state law applies to the Indians who live there. However, even an express statement of termination does not preclude the possibility that the Indians in the area will remain dependent on the federal government. While the *DeCoteau* line of cases looks for congressional intent to extinguish sovereignty,[357] the 18 U.S.C. § 1151 test is fact dependent.

But if 18 U.S.C. § 1151 is jurisdictional, then the same area can both remain tribal territory under the Indian country statute and no longer be tribal territory under the termination cases. 18 U.S.C. § 1151 and the termination test are capable of producing opposite results. Even a reservation that has been extinguished by Congress can revert to a jurisdictional enclave if the 1948 Indian country statute applies.

This is exactly what has happened to the reservation at issue in *DeCoteau*. Six years after the Supreme Court had declared that South Dakota had civil and criminal jurisdiction over the area and its residents, the Eighth Circuit held that it did not. In *United States v. South Dakota*,[358] the Eighth Circuit applied 18 U.S.C. § 1151 to land within the former reservation and found that it was Indian country.[359] The parcel in question had been restored to the public domain and sold.[360] It was ultimately conveyed to a church, which transferred the land back to the federal government under the condition that it be used for a low-rent housing project.[361] The court applied *United States v. McGowan*, found that the housing project was a dependent Indian community, and entered a judgment restraining the state from asserting jurisdiction over the area.[362] Land that had been placed under the state's authority just a few years earlier by the Supreme Court was once again beyond

355. *See id*. at 414. For a general discussion of the reservation termination cases, see Richard W. Hughes, *Indian Law*, 18 N.M. L. REV. 403, 455-58 (1988) (suggesting the extent of non-Indian ownership guides the court's determination of whether surplus lands remain tribal territory).

356. *See Hagen*, 510 U.S. at 409; *Rosebud Sioux Tribe*, 430 U.S. at 598; *DeCoteau*, 420 U.S. at 442.

357. *See Rosebud Sioux Tribe*, 430 U.S. at 586 ("The underlying premise is that Congressional intent will control."); *DeCoteau*, 420 U.S. at 444.

358. 665 F.2d 837 (8th Cir. 1981).

359. *See id*. at 841-43.

360. *See id*. at 839.

361. *See id*.

362. *See id*. at 841-43.

its reach as a result of the application of 18 U.S.C. § 1151.

The Eighth Circuit has done the same thing to land whose reservation status was terminated in *Rosebud Sioux Tribe v. Kneip*.[363] In *United States v. Driver*,[364] the court of appeals noted that the Supreme Court had held that the area in question was no longer part of the Rosebud Sioux reservation, but it also found that the area "nevertheless" qualified as Indian country under 18 U.S.C. § 1151(b).[365]

Driver also involved an Indian housing project. The court's conclusion that its residents remained dependent on the federal government is a reasonable application of 18 U.S.C. § 1151, particularly in light of *United States v. McGowan*, which itself involved an Indian housing project. However, if 18 U.S.C. § 1151 demarcates tribal sovereignty, then state jurisdiction will turn solely on which test is being applied at the moment. In *Driver*, nothing had changed since the Supreme Court had determined that aboriginal rights to the area had been extinguished. Yet the Eighth Circuit could determine that tribal rights survived. Once again, land that had been placed under the state's jurisdiction by the Supreme Court was removed from it by a lower court through the application of the 1948 Indian country statute.

The contradictions in reading sovereignty into 18 U.S.C. § 1151 are compounded by *Montana v. United States*.[366] That case introduced the rule that tribes generally lack authority over lands within a reservation that have been transferred to outsiders.[367] Such persons can be regulated only if they enter into commercial agreements with the tribe, or if their activities threaten the "political integrity, the economic security, or the health or welfare of the tribe."[368] Because these *Montana* lands are enclaves within a reservation, the tribe is allowed some authority over them. Any other rule would disrupt the tribe's ability to govern its territory. The scope of the tribe's retained powers in these areas has never been fully spelled out. Presumably, though, the tribe could still arrest tribal members who ventured there, or prevent the owners from engaging in nuisance activities such as selling alcohol.

The irony of *Montana* is that it ignores the current understanding that 18 U.S.C. § 1151 defines tribal sovereignty. The court found an absence of tribal power over lands that it assumed would qualify as Indian country. The opinion explains that "[i]f

363. 430 U.S. 584, 591 n.8 (1977).
364. 945 F.2d 1410 (8th Cir. 1991).
365. *See id.* at 1415.
366. 450 U.S. 544 (1981).
367. *See id.* at 557-67.
368. *Id.* at 566.

Congress had wished to extend tribal jurisdiction to lands owned by non-Indians, it could easily have done so by incorporating . . . the definition of 'Indian country' in 18 U.S.C. § 1151."[369] The *Montana* court then quotes the portion of the statute that declares that all land within a reservation is Indian country, notwithstanding "'any patent, and including rights-of-way running through the reservation.'"[370] In *Seymour v. Superintendent*,[371] the Court had found this language to mean that non-Indian lots within a reservation are still Indian country.[372] *Montana* is consistent with *Seymour*'s interpretation of 18 U.S.C. § 1151's scope. However, *Montana* departs from the recent understanding that Indian country means sovereignty; instead, it holds that tribes lack authority over 18 U.S.C. § 1151 lands held by non-Indians.

Had *Montana* not been followed in subsequent years, the prevailing rule today still would be that 18 U.S.C. § 1151 defines sovereignty. Two cases from the mid-1980s appeared to displace *Montana*. *National Farmers Union Insurance Cos. v. Crow Tribe*[373] and *Iowa Mutual Insurance Co. v. LaPlante*[374] both held that tribal courts must be allowed to make the initial determination of whether they have jurisdiction over disputes arising on *Montana* lands.[375] *Iowa Mutual* even declares that "[c]ivil jurisdiction over [the activities of non-members] presumptively lies in tribal courts."[376] These decisions left it far from certain that tribes would lack jurisdiction over non-member lands within a reservation.[377]

However, *Montana* was reaffirmed strongly in 1993 by *South Dakota v. Bourland*.[378] That case held that a tribe no longer had the power to regulate the use of land within its reservation that had been taken by the United States for a flood control project.[379] More significantly, in 1997, the Supreme Court effectively overruled *National Farmers* and *Iowa Mutual*.

In *Strate v. A-1 Contractors*,[380] the Court held that only the state court had jurisdiction over an auto accident occurring on a

369. *Id.* at 562.

370. *Id.* (quoting 18 U.S.C. § 1151(a) (1994)).

371. 368 U.S. 351 (1962).

372. *See id.* at 426-28.

373. 471 U.S. 845 (1985).

374. 480 U.S. 9 (1987).

375. *National Farmers*, 471 U.S. at 853-57; *Iowa Mutual*, 480 U.S. at 16-18.

376. *Iowa Mutual*, 480 U.S. at 18.

377. *See, e.g.*, Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 455 n.5 (1989) (Blackmun, J., dissenting) (finding *Iowa Mutual* supports tribal civil jurisdiction over non-Indians).

378. 508 U.S. 679 (1993).

379. *Id.* at 688-89.

380. 117 S. Ct. 1404 (1997).

state right-of-way running through a reservation.[381] The most important part of the opinion is the footnote attached to the last paragraph. It declares that now that it is clear that tribal courts lack even civil jurisdiction over disputes arising from non-member conduct on *Montana* lands, the tribal-court exhaustion requirement "must give way."[382] *Strate* erases any doubt that tribes presumptively lack authority over non-member lands within a reservation. The court's opinion in that case was unanimous.

The current Supreme Court thus is firmly committed to the *Montana* rule: tribes lack sovereignty over outsiders' patents and rights-of-way. However, 18 U.S.C. § 1151 expressly brings these lands within its definition of Indian country. Subsection (a) declares that Indian country encompasses "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent [or] rights of way."[383] This language would include the homesteader lots at issue in *Montana*, as that opinion acknowledged.[384] It would also include the state right-of-way at issue in *Strate*. The decision in *Seymour v. Superintendent*[385] affirms this view. Its holding that non-Indian lands within a reservation are still Indian country has never been repudiated. Indeed, the Supreme Court has repeatedly reaffirmed that case.[386]

There is a direct conflict between the Supreme Court's current understanding of 18 U.S.C. § 1151 and the termination cases and *Montana*. As subsequent events in both *DeCoteau* and *Rosebud* demonstrate, an area that has been brought under state jurisdiction by the termination test can be removed from it by the Indian country test. Even if Congress has explicitly terminated a reservation, it may still qualify as a dependent Indian community. Furthermore, reservation rights-of-way and non-Indian lots are expressly included within the 18 U.S.C. § 1151 Indian country definition. A court applying *Seymour v. Superintendent* to define sovereignty would find state authority is excluded, but a court applying the *Montana* rule would find that tribal authority is excluded. The Su-

381. *See id.* at 1414.

382. *Id.* at 1415 n.14.

383. 18 U.S.C. § 1151(a) (1994).

384. *See* Montana v. United States, 450 U.S. 544, 561-62 (1981).

385. 368 U.S. 351, 357-59 (1962).

386. *See* Hagen v. Utah, 510 U.S. 399, 410, 414 (1994); Negonsott v. Samuels, 507 U.S. 99, 103 (1993); Yakima County v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 260 (1992); Solem v. Bartlett, 465 U.S. 463, 469 & n.10, 470 (1984); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 478 (1976); DeCoteau v. District County Court, 420 U.S. 425, 444, 448-49 (1975); United States v. Mazurie, 419 U.S. 544, 555 (1975).

preme Court's interpretation of the Indian country statute and these other cases cannot coexist. The next section suggests which of these precedents ought to be abandoned.

D. The Proper Test

The Supreme Court should return to the principles set forth in the founding cases. Indian tribes should be recognized as sovereigns only in those areas where the state has ceded its authority. No state should be subjected to a wholesale withdrawal of its jurisdiction without its consent.

While Congress's laws are superior to state law, the Constitution binds both. The current construction of 18 U.S.C. § 1151 is a substantial intrusion upon states' rights. Congress must acquire the state's consent in order to establish a competing sovereign within its borders. Outside of a federal enclave, the state has presumptive jurisdiction. The federal government cannot delegate its sovereign powers to a private entity or authorize a separate government within a state.

Nor has Congress ever sought to do so. This section argues that no federal law purports to create tribal sovereignty outside of the federal enclaves. It also contends that the Supreme Court's more recent decisions from other contexts point to the continuing vitality of the principles underlying the original cases: except where the state has ceded its authority, the state alone may exercise a general police power. The Supreme Court has never recognized an Indian exception to states' rights.

1. *A matter of statutory interpretation*. Apart from any constitutional concerns, the federal laws themselves should not be construed to displace state jurisdiction. The Indian country statute only codifies the early twentieth century cases.[387] As discussed in Part II.B.4, these decisions separated the Indian country concept from tribal sovereignty and the absence of state authority.

The Supreme Court has recognized that 18 U.S.C. § 1151 does not alter the original cases.[388] Recent opinions even depart from

387. 18 U.S.C. § 1151 was enacted in 1948. *See* Act of June 15, 1948, ch. 625, 62 Stat. 683, 757.

388. *See, e.g.*, United States v. John, 437 U.S. 634, 648-49 (1978) ("This language [of 18 U.S.C. § 1151 defining 'Indian Country'] first appeared in the Code in 1948 as a part of the general revision of Title 18. The Reviser's notes indicate that this definition was based on several decisions of the Court interpreting the term as it was used in various criminal statutes relating to Indians."); *see also* Sisseton-Wahpeton Sioux Tribe v. Max, 11 Ind. Rptr. 6038, 6041 (Siss.-Wahptn. Sioux Tribal Ct. 1984) ("Congress merely codified existing case law when it included off-reservation 'dependent Indian communities' as part of Indian country

the language of the statute and adopt standards that exist only in those cases. The 1991 *Potawatomi* decision follows *McGowan* and asks whether an area has been "set apart for the use of the Indians as such, under the superintendence of the [g]overnment."[389] Two years later, *Sac & Fox Nation* added a new wrinkle to the common law, asking whether Indian lands are an "informal reservation."[390] The Indian country statute is simply an adaptation of the Supreme Court's precedents. It draws its meaning from decisions that hold that Indian country does not displace state jurisdiction.

Nor does any other federal statute seek to do so. The Indian Reorganization Act of 1934 authorizes tribal sovereignty only where it is allowed under prior law. Section 16, which pertains to tribal government, provides the following:

> In addition to all power vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the [f]ederal, [s]tate and local [g]overnments.[391]

The only functions the IRA authorizes in the absence of preexisting tribal sovereignty are those of a private corporation. A tribe that is not located in a continuing jurisdictional enclave does not take on governmental authority under section 16.[392] The IRA's drafters at one point considered giving tribes the powers of a municipality, but in the end declined to do so.[393]

Furthermore, the Supreme Court has consistently defined tribal sovereignty in terms of territory, not the IRA. In *Organized Village of Kake v. Egan*,[394] the Court noted that the village of Kake was chartered under the IRA. It nevertheless found that the Indians were subject to state law, since they did not reside on a reservation.[395] *Mescalero Apache Tribe v. Jones*[396] addresses whether

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in the statute.").

389. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991).

390. Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993).

391. Act of June 18, 1934, ch. 576, § 16, 48 Stat. 984, 987.

392. *See id.*

393. *See* H.R. 7902, title 1, *reprinted in Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong. 1-7 (1934); *see also* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 n.9 (1973).

394. 369 U.S. 60, 61, 62 (1962).

395. *See id.*; *see also* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 183 (1989) (IRA, Indian Financing Act of 1974, and Indian Self-Determination and Educational Assistance Act of 1975 not intended to preempt state taxing jurisdic-

IRA councils are within the states' tax jurisdiction.[397] Again, the determinative factor in the Court's analysis was whether the tribe was operating within a continuing reservation.[398] *Mescalero* rejected the view that IRA tribes are federal instrumentalities.[399] The Court also held that outside of a reservation, the tribe is subject to state law, regardless of whether it conducts its activities under the IRA section 17 business activities provision or the section 16 governmental functions provision.[400]

Even if states were not constitutionally protected against wholesale retractions of their jurisdiction, there would be no reason to read such a result into the relevant federal laws. Neither the Indian country statute nor the IRA, Congress's vehicle for Indian self-government, is intended to authorize the exercise of sovereign tribal powers outside of a continuing jurisdictional enclave.

2. *States' rights and other limits on federal power.* The most disturbing aspect of the Supreme Court's current interpretation of 18 U.S.C. § 1151 is its subsumed holding that Congress may create jurisdictional enclaves within a state in disregard of the Constitution's express limitations on the exercise of that power. Clause 17 of Article I, section 8 predicates the suspension of a state's sovereignty over its territory on the consent of the state.[401] However, the *McGowan* dependent Indian communities test does not require state consent. As Part II of this Article suggests, consent is not required because the modern Indian country statute was never intended to displace state authority in the first place. By reading a wholesale jurisdictional preemption into 18 U.S.C. § 1151, the courts have attributed an unconstitutional motive to a Congress that did not have one.

The principle that a state cannot be unilaterally divested of its local sovereignty continues to be recognized in Supreme Court cases outside of the Indian law context. In *Kleppe v. New Mexico*,[402] the court affirmed that federal ownership of lands within a state does not withdraw the state's authority over them.[403] Absent

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tion).

396. 411 U.S. 145 (1973).

397. *See id.* at 146.

398. *See id.* at 148-50.

399. *See id.* at 148, 151, 153 & n.9.

400. *See id.* at 157-58 & n.13; *see also* Comment, *Alaskan Native Indian Villages: The Question of Sovereign Rights*, 28 SANTA CLARA L. REV. 875, 884 (1988) (noting that "only those 'bands or tribes' of Indians living on reservations shall be . . . afforded applicable sovereign powers" under IRA section 16).

401. *See* U.S. CONST. art. I, § 8, cl. 17.

402. 426 U.S. 529 (1976).

403. *See id.* at 544 (citing Surplus Trading Co. v. Cook, 281 U.S. 647, 650

"consent or cession, the [f]ederal [g]overnment [does] not acquire exclusive jurisdiction."[404] At issue in *Kleppe* was a federal statute that protected wild horses and burros on federal property. The court held that although federal laws for federal lands preempt state law to their extent, the state remains "free to enforce its criminal and civil laws on those lands."[405]

The evolution of the Court's enclaves jurisprudence has paralleled the development of principles of tribal sovereignty. Reservation Indians' immunity from state law has diminished considerably since the days of *Worcester v. Georgia*.[406] Similarly, as one Justice has observed, "[t]he so-called exclusive jurisdiction" in federal enclaves "has, as a matter of historical fact, become increasingly less and less exclusive."[407]

The most striking resemblance between the two areas of law is in their rules for determining when the exclusion of state law has ended. In *S.R.A., Inc. v. Minnesota*,[408] a non-Indian case, the court found that state jurisdiction re-attaches to land within an enclave when it is sold to private parties.[409] The federal government's "unrestricted transfer of property to non-federal hands is a relinquishment of the exclusive legislative power."[410] *S.R.A.*'s holding mirrors the rule of *Montana v. United States*,[411] that tribal jurisdiction over lands within a reservation terminates when they are transferred to outsiders.[412]

The capacity of enclaves law to define the reach of state law in tribal territory is limited, though. First, enclaves jurisprudence has proved no more precise than Indian law. The court has remarked that "[t]he course of the construction of [the enclaves] provision cannot be said to have run smooth."[413] Furthermore, guarding "the

(1930)).

404. *Id.* (citing Wilson v. Cook, 327 U.S. 474, 487-88 (1946)).

405. *Id*. at 543; *see also* Humble Pipe Line Co. v. Waggonner, 376 U.S. 369, 372 (1964) (stating that the "crucial question" for defining reach of state law is whether state has "ceded exclusive jurisdiction").

406. 31 U.S. (6 Pet.) 515 (1832); *see* McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 171-72 (1973) (stating that the Court has relaxed the *Worcester* principle to allow state courts to hear cases "where essential tribal relations were not involved . . . ."); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973) (noting that *Worcester* "has given way to more individualized treatment of particular treaties and specific federal statutes") (citations omitted).

407. Pacific Coast Dairy v. Cal. Dep't of Agric., 318 U.S. 285, 299 (1943) (Frankfurter, J., dissenting).

408. 327 U.S. 558, 564 (1946).

409. *See id.*

410. *Id.*

411. 450 U.S. 544 (1981).

412. *See id.* at 570.

413. Offutt Housing Co. v. County of Sarpy, 351 U.S. 253, 256 (1956).

right of reservation Indians to make their own laws and be ruled by them"[414] inevitably raises unique considerations. For example, application of state laws governing relations between private persons is unlikely to interfere with the federal government's objectives within an enclave. But state private law is just the type of regulation that tribal governments would be most anxious to exclude from their territory.

However, enclaves principles should continue to be applied by the Supreme Court to define the initial creation of tribal territory. The states have a strong interest in controlling when their jurisdiction over land within their borders is taken away. When an area becomes sovereign Indian country, states lose almost all ability to raise revenue there. Yet they remain responsible for providing public services in tribal territory.[415] The Supreme Court has repeatedly affirmed that states are separate sovereigns, with rights and powers that cannot be taken away by the federal government.[416] But if Congress can unilaterally retract all state authority over an area, and allocate it to another entity, then the states become little more than administrative agencies of the national government. A minimum respect for their independent prerogatives would demand that a wholesale suspension of the states' jurisdiction cannot be effected without their having some say in the matter.

When it comes to state sovereignty, the Supreme Court consistently has refused to recognize an "Indian exception" to the Constitution's protections. The Court has held, for example, that while states are amenable to suits between each other, they retain their traditional sovereign immunity against a suit by an Indian tribe.[417] Also, while Congress's Indian commerce power is broader than its general commerce power, the Court has found that neither provision allows the federal government to abrogate the states' Eleventh Amendment privileges.[418]

A recent case has even found that states have an overriding interest in maintaining their jurisdiction over their territory. A lawsuit against a state for declaratory or injunctive relief may normally be brought in federal court. However, in *Idaho v. Coeur*

414. Williams v. Lee, 358 U.S. 217, 220 (1959).

415. *See, e.g.*, Arizona *ex rel.* Ariz. State Bd. of Pub. Welfare v. Hobby, 221 F.2d 498 (D.C. Cir. 1954) (welfare); Natonabah v. Board of Educ., 355 F. Supp. 716 (D.N.M. 1973) (public education).

416. *See, e.g.*, Printz v. United States, 117 S. Ct. 2365, 2367 (1997); New York v. United States, 505 U.S. 144 (1992).

417. Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991).

418. *See* Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996).

d'Alene Tribe,[419] the Supreme Court held that suits to establish tribal jurisdiction over an area implicate state sovereignty to such a degree that they may be brought only in state court.[420] In another case decided a few days later, the Court also remarked that the Constitution's guarantee against an involuntary reduction in a state's territory is an "inviolable" aspect of state sovereignty.[421]

The general course of the Supreme Court's Indian jurisprudence has been that Congress's power over Indians, while plenary, is limited by states' rights. This principle distinguishes *United States v. McBratney*[422] and *United States v. Kagama*,[423] two key Indian cases from the 1880s. In *Kagama*, the court upheld federal jurisdiction over a crime on an Indian reservation,[424] but in *McBratney*, such jurisdiction was denied.[425] The difference between the two cases is that in *McBratney*, the prosecution could have been sustained only if the area in question was Indian country, which at the time was defined as an absence of state authority.[426] Since there had been no state consent, there could be no suspension of state jurisdiction, any treaty to the contrary notwithstanding.[427] *Kagama* confirmed that Congress has broad powers for Indian affairs, but *McBratney* demonstrates that those powers remain limited by state sovereignty.

Aspects of the equal footing doctrine have also been enforced in the Supreme Court's recent Indian cases. In *Montana v. United States*,[428] in addition to the issue of homesteader lands, the court addressed whether the tribe or the state had authority over a navigable river within the Crow reservation. The Court applied the equal footing doctrine to find jurisdiction in the state. The fact that a treaty with the tribe had set the area aside for exclusive Indian use, and that Montana had ceded jurisdiction over Indian lands, was not enough to overcome the presumption that a state acquires ownership of navigable rivers within its borders at statehood.[429]

419. 117 S. Ct. 2028 (1997).

420. *See id.* at 2040; *see also id.* at 2044 (O'Connor, J., concurring).

421. *Printz*, 117 S. Ct. at 2376 (citing THE FEDERALIST NO. 39 (James Madison)).

422. 104 U.S. 621 (1881).

423. 118 U.S. 375 (1886).

424. *See id.* at 384-85.

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

426. *See id.*

427. *See id.*

428. 450 U.S. 544 (1980).

429. *See id.* at 551-54. In *Menominee Tribe v. United States*, 391 U.S. 404 (1968), the Court was also presented with a state's equal footing challenge to the exclusion of its authority over Indian lands. In that case, however, it was able to

Some of the Court's modern cases even continue to look to statehood enabling legislation to define the scope of tribal sovereignty. In *Mescalero Apache Tribe v. Jones*,[430] a tribe challenged state taxation of its activities on IRA lands that were outside of its reservation. Treaties with the federal government had provided that tribal lands would remain "exclusively under the laws, jurisdiction, and government of the United States."[431] However, the New Mexico Statehood Act[432] allowed the state to tax in any area outside of a reservation.[433] The court upheld the application of the state's business tax on non-reservation lands.[434] It found that the treaty and its tax guarantees "'do[] not alter the obvious effect of the State's admission legislation.'"[435]

Other cases from the 1970s also relied on statehood enabling legislation to define state jurisdiction.[436] In more recent years, however, the court's approach has been that announced in the *Oklahoma Tax Commission* trilogy[437]: the boundary between state and tribal sovereignty is set by 18 U.S.C. § 1151. These decisions did not require the court to grapple with the troubling issues posed by the use of "Indian country" to displace state authority. All of them involved lands that had been properly set aside and excepted out of the state's jurisdiction. So far, no case before the high court has presented a situation where a finding of 18 U.S.C. § 1151 Indian country would recreate a reservation that had been explicitly terminated by Congress, or would unilaterally withdraw a state's sovereignty over an enormous expanse of its territory. But all this is about to change with Alaska. No example better demonstrates the unsoundness of the Supreme Court's current Indian country jurisprudence.

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find that the state's legislature had consented to the reestablishment of tribal sovereignty over the area in question. *See id.* at 411 n.12.

430. 411 U.S. 145 (1973).

431. *Id.* at 150 n.5.

432. The Enabling Act for New Mexico, ch. 310, 36 Stat. 557 (1910).

433. *See Mescalero*, 411 U.S. at 149.

434. *See id.* at 157-58.

435. *Id.* at 150 n.5 (quoting Treaty with the Apaches, July 1, 1852, U.S.-Apache 10 Stat. 979). The court found, however, that state taxation of the land itself or permanent improvements thereon was specifically preempted by the IRA. *See id.* at 158.

436. *See* Washington v. Yakima Indian Nation, 439 U.S. 463, 479-82 (1978); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 167 (1973).

437. *See* Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993); Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505 (1990).

IV. THERE IS NO "INDIAN COUNTRY" IN ALASKA

All tribal sovereignty in Alaska other than in Metlakatla was extinguished by the Alaska Native Claims Settlement Act of 1971 ("ANCSA").[438] The reservations created during territorial days had been excepted out of the state's jurisdiction when Alaska was admitted to the Union in 1959.[439] But with the exception of the Annette Island Reserve in Metlakatla, ANCSA terminated them all.

As its name suggests, ANCSA was intended to settle the aboriginal claims of Alaskan Natives. It made the Natives shareholders in a series of state-chartered corporations, and gave the corporations $962.5 million in cash and forty-four million acres of land.[440] ANCSA also extinguished all bases of tribal sovereignty. Sections 1603(b) and (c) abrogate Indian title and statutory and treaty rights. They provide that

> (b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, . . . including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.
>
> (c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, . . . are hereby extinguished.[441]

ANCSA section 1618(a) terminates all of the reservations in Alaska except for Metlakatla. It provides that "the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs . . . are hereby revoked. This section shall not apply to the Annette Island Reserve."[442]

The effect of these provisions is unambiguous. Their language is indistinguishable from that of statutes that the Supreme Court has found to express a clear intent to extinguish tribal sovereignty. Consider, for example, *DeCoteau v. District County Court*,[443] which held that state law had attached to parts of the Lake Traverse reservation in South Dakota.[444] The court relied on language provid-

438. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629 (1994)).

439. *See* COHEN 1982, *supra* note 26, at 743-44; Organized Village of Kake v. Egan, 369 U.S. 60 (1962).

440. *See* 43 U.S.C. §§ 1605-1607.

441. *Id.* § 1603(b)-(c).

442. *Id.* § 1618(a).

443. 420 U.S. 425 (1975).

444. *See id.* at 449.

ing that the tribe surrendered its "claim, right, title and interest" to the area in question.[445] Compare this with ANCSA section 1603(c), which extinguishes Native claims based on "aboriginal right, title, use, or occupancy."[446]

ANCSA took the lands occupied by Natives in Alaska, revoked any aboriginal claim to them, and reconveyed them to Natives as private owners in fee simple absolute. The language employed by ANCSA is a term of art that has been understood to extinguish tribal sovereignty since John Marshall's time. Aboriginal government is displaced by state authority when the federal government "'extinguish[es] . . . the Indian title to [the] lands.'"[447]

The inescapability of the conclusion that ANCSA terminates Indian government is brought into relief by the opinions of those Supreme Court Justices who have been more hesitant to extinguish tribal sovereignty. In *Hagen v. Utah*,[448] a majority held that state jurisdiction had attached to the Uintah reservation in Utah.[449] Justice Blackmun dissented, arguing that the legislation at issue was too weak for the Court to infer an intent to diminish.[450]

What is interesting is the type of statutory language that Justice Blackmun held up in contrast. He cited as "express language of geographical termination" past federal statutes providing that a reservation was "discontinued" or that its lines were "hereby abolished."[451] Justice Blackmun thus implied that such language would supply the necessary expression of clear federal intent to terminate Indian government.[452] Absent a legally cognizable distinction between "discontinued" or "abolished" and ANCSA section 1618(a)'s statement that all reservations are "revoked," it is

445. *Id.* at 445-46; *see also* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 591 n.8 (1977) (finding intent to terminate in conveyance of all "claim, right, title and interest").

446. 43 U.S.C. § 1603(c).

447. Worcester v. Georgia, 31 U.S. 515, 583 (1832) (M'Lean, J., concurring) (quoting the Georgia Compact of 1802); *see also* Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 729, 729 (defining Indian country as all land outside of any state "to which the Indian title has not been extinguished"); The New York Indians, 72 U.S. (5 Wall.) 761, 769 (1866) (finding that the state has no tax jurisdiction until "the Indian title should be extinguished"); Bates v. Clark, 95 U.S. 204, 209 (1877) (stating that land "ceases to be Indian country when [the Indians] lose [their] title").

448. 510 U.S. 399 (1994).

449. *See id.* at 421-22.

450. *See id.* at 423-24.

451. *Id.* at 427 n.7 (citing Act of July 27, 1868, ch. 248, 15 Stat. 198, 221 ("the . . . reservation is hereby discontinued"); Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 218).

452. *See id.*

fair to infer that even former Justice Blackmun would agree that ANCSA extinguishes tribal sovereignty in Alaska.

The architects of ANCSA were not insensitive to the need for local government in rural Native areas of Alaska. Section 1613(c)(3) of the Act provides that each village corporation will convey a parcel of land either to an existing municipal government, or to the State of Alaska in trust for a future municipality.[453] Congress intended that rural Alaskan Natives would govern themselves, but within the confines of state law.

Other aspects of ANCSA confirm its terminationist bent. The corporate model it adopts was also employed in some of the termination acts of the 1950s.[454] ANCSA even reflects the Supreme Court's construction of the termination acts. In *Menominee Tribe v. United States*,[455] which was decided three years before ANCSA was enacted, the Court interpreted the Menominee Termination Act of 1954. That statute provides that state laws will apply to the Menominee Indians "in the same manner as they apply to other citizens or persons" within the state's jurisdiction.[456] The Supreme Court found this language insufficient to allow Wisconsin to regulate Indian hunting and fishing.[457] The ANCSA drafters, undoubtedly aware of *Menominee*, were careful to avoid such a result for Alaska. They specifically extinguished all aboriginal rights, "including any aboriginal hunting or fishing rights that may exist."[458]

But it is not necessary to look to the structure of ANCSA or parallel legislation to discern its effect. Its termination provisions leave nothing to the imagination. ANCSA employs language which, from the beginning of the Supreme Court's Indian jurisprudence, has been understood to extinguish tribal sovereignty and invite state jurisdiction.[459] ANCSA definitively answers the

453. *See* 43 U.S.C. § 1613(c)(3) (1994).

454. *See, e.g.*, Affiliated Ute Citizens v. United States, 406 U.S. 128, 132-40 (1972); Menominee Tribe v. United States, 391 U.S. 404, 408-10 (1968).

455. 391 U.S. 404 (1968).

456. *Id.* at 410.

457. *See id.* at 412-13.

458. 43 U.S.C. § 1603(b).

459. Not every authority to consider this subject concurs in this conclusion. Two recent law review articles take the position that Alaskan Native villages are separate sovereigns. *See* David M. Blurton, *ANCSA Corporation Lands and the Dependent Indian Community Category of Indian Country*, 13 ALASKA L. REV. 211 (1996); Gretchen G. Biggs, Comment, *Is There Indian Country in Alaska? Forty-four Million Acres in Legal Limbo*, 64 U. COLO. L. REV. 849 (1993). Both authors contend that because ANCSA is very complex, its effect on tribal sovereignty is ambiguous, and this ambiguity should be resolved in favor of tribal sovereignty. *See also* COHEN 1982, *supra* note 26, at 766.

"Indian country" question for Alaska.[460] Subsequent federal enactments and executive orders do not alter this result. Once Alaska acquired full jurisdiction over its former Indian enclaves, that jurisdiction could not be retracted without the state's consent, and no such consent has been granted.

A. *Venetie II*'s Relaxed Standard

Yet in *Venetie II*, the Ninth Circuit was able to find that the same reservation ANCSA had discontinued in 1971 is still an island of exclusive federal and tribal jurisdiction.[461] Relying on 18 U.S.C. § 1151, the court effectively reversed Congress's previous decision to terminate the reservation.[462] *Venetie II* represents a deviation from the approach followed by other circuits. The test it crafts recognizes tribal sovereignty more readily than would any other court's standard. Nevertheless, it remains a colorable construction of the federal Indian country statute. The Ninth Circuit merely reinterpreted a test that has never been spelled out in detail by the Supreme Court.[463] While some aspects of the decision are questionable, these are matters on which reasonable minds could disagree. *Venetie II* cannot be dismissed as one court's folly. Rather, the decision is a wake-up call to the contradictions of relying on "Indian country" to define sovereignty.

Another commentator argues that Alaska Natives have never been sovereign. *See* Paul A. Matteoni, Comment, *Alaskan Native Indian Villages: The Question of Sovereign Rights*, 28 SANTA CLARA L. REV. 875 (1988). The author bases this conclusion on a finding that Alaska Natives do not meet the traditional historical and legal criteria for tribal status. *See id.* at 891. This conclusion is implausible in light of the sovereignty that *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), recognized to exist before ANCSA, not to mention before Columbus. *See id.* at 67-68.

460. "Indian country" as defined in this Article could still exist within a state in the absence of tribal sovereignty, since the term only implies federal criminal and liquor jurisdiction. However, this jurisdiction was transferred to some of the states by Public Law 280. *See* Act of Aug. 15, 1953, Pub. L. No. 83-280, § 4, 67 Stat. 588, 589. This law was extended to Alaska in 1958. *See* Act of Aug. 8, 1958, Pub. L. No. 85-615, § 2, 72 Stat. 545, 545 (codified as amended at 18 U.S.C. § 1162 (1994), 28 U.S.C. § 1360 (1994)); *see also* Rice v. Rehner, 463 U.S. 713, 730, 733 & n.17 (1983) (liquor jurisdiction); Bryan v. Itasca County, 426 U.S. 373, 380 & n.6 (1976) (criminal jurisdiction).

461. *See* Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't (*Venetie II*), 101 F.3d 1286, 1302 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2478 (1997).

462. *See id.* at 1293.

463. *See* Sisseton-Wahpeton Sioux Tribe v. Max, 11 Ind. Rptr. 6038, 6041 (Siss.-Wahptn. Sioux Tribal Ct. 1984) (noting "sparse case law exists which lends only vague guidance as to the meaning of the phrase ['dependent Indian community']").

The federal Indian country statute, particularly its "dependent Indian communities"[464] test, has had a tortured history in the lower courts.[465] That standard has not been clarified by the Supreme Court since it was first established in *Sandoval* and *McGowan*. Today, there are fifteen federal court of appeals opinions that apply the dependent communities test, mostly from the Eighth and Tenth Circuits. The first effort at judicial construction came in 1971, in *United States v. Martine*.[466] The Tenth Circuit held that whether an area is dependent community Indian country will turn on three factors: the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area.[467]

Ten years later, the Eighth Circuit took all three factors in the *Martine* inquiry and made them into the second element of its own four-part test. *United States v. South Dakota*[468] looks to (1) whether the United States has retained title to the lands and authority over the area; (2) the *Martine* test; (3) whether there is cohesiveness among the inhabitants of the area; and (4) whether the lands have been set apart for the use, occupancy, and protection of Indians.[469] The Tenth Circuit subsequently traded *Martine* for *South Dakota*'s four-part test.[470] The First Circuit has created its own hybrid of the *Martine* and *South Dakota* inquiries.[471] The Second Circuit has adopted the *Martine* test.[472] Several state courts, meanwhile, have developed entirely different tests.[473]

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464. *See* 18 U.S.C. § 1151 (1994).

465. *See Sisseton-Wahpeton Sioux Tribe*, 11 Ind. Rptr. at 6040 (noting that courts have "not [been] able to agree on a consistent construction of Indian country").

466. 442 F.2d 1022 (10th Cir. 1971).

467. *See id.* at 1023.

468. 665 F.2d 837 (8th Cir. 1981).

469. *See id.* at 839.

470. *See* Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1545 (10th Cir. 1995).

471. *See* Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co., 89 F.3d 908, 917, 921-22 (1st Cir. 1996) (relying on *South Dakota* but emphasizing federal ownership).

472. *See* United States v. Cook, 922 F.2d 1026 (2d Cir. 1991) (adopting *Martine*); United States v. Levesque, 681 F.2d 75 (1st Cir. 1982) (applying *Martine*).

473. *See, e.g.*, Schaghticoke Indians of Kent, Conn., Inc. v. Potter, 587 A.2d 139, 144 (Conn. 1991); State v. St. Francis, 563 A.2d 249 (Vt. 1989); Maryland v. Dana, 404 A.2d 551, 562 (Me. 1979); *see also* Seminole Nation v. Harjo, 790 P.2d 1098, 1100-01 (Okla. 1990) (following *South Dakota* and *Martine*).

Tribal courts generally have followed the test employed in their local federal circuit. *See, e.g.* Sisseton-Wahpeton Sioux Tribe v. Feather, 15 Ind. Rptr.

The Ninth Circuit has also followed its own course. On its face, *Venetie II*'s six-part inquiry is no more than a combination of *South Dakota* and *Martine*. The test looks at (1) the nature of the area; (2) the relationship of the area inhabitants to Indian tribes and the federal government; (3) the established practice of government agencies to the area; (4) the degree of federal ownership and control over the area; (5) the degree of cohesiveness of the area inhabitants; and (6) the extent to which the area was set aside for the use, occupancy, and protection of dependent Indians.[474] Stated as such, the Ninth Circuit's standard appears little different from *South Dakota*. The real proof of the test, however, is in the way it has been applied.

In the *Venetie II* decision, the only meaningful element of the entire six-part test proved to be the first factor. The court asked whether the Natives have a special use and occupancy relationship with a reasonably definable area.[475] The Ninth Circuit found this requirement to be satisfied if the Natives are the dominant population in an area and if they live off the land to some extent.[476]

The second and third elements of the test would appear to be important requirements. They focus on the federal government's relationship with the area and its inhabitants.[477] However, the evidence relied on in *Venetie II* indicates this inquiry is not a meaningful threshold. The court first looked to the fact that the federal Bureau of Indian Affairs at one time ran the schools in Venetie.[478] After ANCSA's termination of the reservation, however, school administration eventually reverted to the State of Alaska. The panel's main evidence of federal superintendence was a federal program that no longer exists.

The court also relied on the fact that the federal government has provided grants for various projects and public works in Venetie.[479] While these programs were not affected by ANCSA, it is difficult to see how they distinguish Venetie from many non-Indian communities in America. The only other evidence cited by the panel is that Venetie is registered as an Indian tribe under the 1936 amendments to the IRA.[480] The *Venetie II* opinion concedes that

6027, 6028 (Intertrb. Ct. App. 1988) (applying *South Dakota*).

474. Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't (*Venetie II*), 101 F.3d 1286, 1294 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2478 (1997). Factors (1)-(3) are the *Martine* test and (4)-(6) are the additional *South Dakota* factors.

475. *See id.* at 1300.

476. *See id.*

477. *See id.* at 1294.

478. *See id.* at 1300.

479. *See id.* at 1301.

480. *See id.* at 1300.

after ANCSA was enacted, "[i]n many respects, the federal government has been replaced by the State or the Tribe itself as the direct provider of services."[481] The court nevertheless concluded that there was adequate federal superintendence to establish tribal sovereignty in Venetie.[482]

The Ninth Circuit's fourth Indian country factor looks to the degree of federal ownership and control over the area in question.[483] The Venetie Natives' land is not owned by the federal government and there are no restrictions on its sale.[484] The panel nevertheless decided this element of the test had been met.[485] It relied on the same evidence that satisfied the second and third elements.[486] The fifth element, cohesiveness, was satisfied by the lower court's finding of a history of collective action among the Natives of Venetie.[487] The sixth element, whether the land is set aside for the use and occupancy of Natives, was automatically satisfied by ANCSA.[488] The court found that ANCSA corporations, "while business entities, maintain a distinctly Native identity."[489]

Venetie II divorces the test for tribal sovereignty from any requirement that Congress intended to recognize the tribe as a sovereign. Federal legislation that deals with Indians as private parties can establish "Indian country" under this standard simply because it deals with Natives as such. The *Venetie II* test primarily turns on Indian ancestry. Most areas with a predominantly Native population could qualify as a separate jurisdiction under its six-part inquiry. Only minimal evidence of federal involvement is required, there is no need for federal ownership or control of the land, and even a terminationist statute can help prove the land has been set aside for Natives. The fact that Congress has specifically revoked an Indian reservation is irrelevant. Probably any tribe that occupies a definable area could secede from its state under *Venetie II*.

B. *Venetie IRA*: Toward Personal Sovereignty?

The nature of the courts' emerging approach to Indian sovereignty is best exemplified by another decision in the ongoing Ve-

481. *Id.* at 1301.
482. *See id.* at 1302.
483. *See id.* at 1294.
484. *See id.* at 1301.
485. *See id.*
486. *See id.* at 1300-01.
487. *See id.* at 1301.
488. *See id.* at 1301-02.
489. *Id.* at 1302.

netie litigation, *Venetie IRA*.[490] *Venetie II* had addressed whether the tribal council could tax the State of Alaska's contractor for building a schoolhouse in the village.[491] *Venetie IRA* involves adoptions and welfare.[492] The tribe claimed it had the authority to issue adoption decrees that determine how the state allocates welfare payments.[493] The federal courts agreed. [494]

The most surprising aspect of *Venetie IRA* is its holding that all tribes have inherent powers that displace state authority, regardless of whether the tribe is located in Indian country.[495] *Venetie IRA* specifically declares that "tribal sovereignty is not coterminous with Indian country."[496] Even if no borders exist that would define jurisdiction, a tribe retains powers that are "manifested primarily over the tribe's members."[497] As the court's decision demonstrates, this residual authority may even bind the state. The principal question for Indian sovereignty thus becomes whether a group of Indians constitutes a tribe.

Venetie IRA's standard for tribal status is minimal. An association of Indians is a tribe if it has "some connection beyond total assimilation" to an entity that "historically acted as [a] bod[y] politic, particularly in periods prior to subjugation by non-natives."[498] Basically, any identifiable remnant of an Indian tribe can meet this test. On remand from *Venetie IRA*, the district court found that the Venetie Natives are a tribe because their ancestors came together to build fences to trap caribou.[499] The court noted that "the cooperation and effort of the men, women, and children from many families was required to construct, use, and maintain the fences."[500] On this basis, the courts found that the village council has sovereign powers that displace state authority.[501]

There is no Supreme Court authority that supports *Venetie IRA*'s approach to tribal sovereignty. The Court has never recog-

490. *See* Native Village of Venetie I.R.A. Council v. Alaska (*Venetie IRA*), 944 F.2d 548 (9th Cir. 1991).

491. *See Venetie II*, 101 F.3d at 1289.

492. *See Venetie IRA*, 944 F.2d at 551.

493. *See id.*

494. *See id.* at 562.

495. *See id.* at 556 (citing Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980); Montana v. United States, 450 U.S. 544, 564 (1981)).

496. *Id.* at 558 n.12.

497. *Id.*

498. *Id.* at 557.

499. *See* Native Village of Venetie v. State, Nos. F86-0075 CIV (HRH), F87-0051 CIV (HRH), 1994 WL 730893, at *15 (D. Alaska Dec. 23, 1994).

500. *Id.*

501. *See id.* at *22.

nized independent Indian government in the absence of some geographical base. Indeed, it has even held that when a tribe does have jurisdiction over a particular area, Indian sovereignty does not extend beyond that area.[502] The "membership sovereignty" envisioned by *Venetie IRA*, in which Natives carry their sovereignty with them wherever they go, simply has no basis in federal Indian law.

To the extent the Supreme Court has focused on tribal membership to define tribal powers, it has done so within tribal territory. Thus it has held that tribal criminal jurisdiction on the reservation is restricted to tribal members,[503] that states may tax reservation sales to non-members,[504] and that members have immunity from state-imposed taxes on the reservation.[505] In these cases, membership was a prerequisite to Indian sovereignty, *in addition to the existence of tribal territory*. Every single decision *Venetie IRA* cites for its principle of membership sovereignty is a case that involved activities within a continuing Indian reservation.[506] In no way do these precedents suggest that a tribe may displace state authority outside of tribal territory.

Two of the cases quoted in *Venetie IRA* involve *Montana* lands.[507] As discussed in Part III.C, these are parcels within a reservation that have been transferred to outsiders. In *Montana v. United States*, the Supreme Court decided that these lands are no longer subject to full tribal authority.[508] However, the Court made a concession to the practical need of tribal governments to control

502. *See* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state.").

503. *See* Duro v. Reina, 495 U.S. 676 (1990).

504. *See* Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995).

505. *See* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976).

506. The panel relied on Duro v. Reina, 495 U.S. 676 (1990) (addressing the Salt River Indian Reservation); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (addressing the Yakima Indian Reservation); Montana v. United States, 450 U.S. 544 (1981) (addressing the Crow Indian Reservation); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (addressing the Fort Apache Indian Reservation); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (addressing the Colville Indian Reservation); United States v. Wheeler, 435 U.S. 313 (1978) (addressing the Navajo Indian Reservation). *See* Native Village of Venetie I.R.A. Council v. Alaska (*Venetie IRA*), 944 F.2d 548, 556 n.9, 558 n.12 (9th Cir. 1991).

507. *See Venetie IRA*, 944 F.2d at 556, 558 n.12 (quoting *Brendale* and *Montana* for the standard for retained tribal power over non-Indian lands within a reservation).

508. *See Montana*, 450 U.S. at 564-65.

some activities on these pockets within their territory.[509] As suggested by *Montana* and subsequent cases, this retained authority includes jurisdiction over tribal members who venture into these areas.[510] Within the boundaries of a continuing reservation, the tribe has power over its members, regardless of non-Indian ownership of particular parcels.[511] *Venetie IRA* apparently interpreted these statements to mean that tribes always have power over their members, regardless of any jurisdictional borders. The Ninth Circuit took the rule applicable to non-Indian lots within a reservation and extended its application to the entire United States.

Venetie IRA presents an administrative nightmare for the state of Alaska. There are no geographical borders to the tribal authority it recognizes and no case law that defines the nature of "membership sovereignty." The decision requires the state to compete with potentially hundreds of independent entities for governmental authority within Alaska. It strips local officials of their presumptive jurisdiction, not just within a fixed geographical area, but in any case involving tribal Indians. Tribal regulation can preempt state law and may even bind state decisionmakers. The precise allocation of authority can be known only through further litigation. In many ways, the *Venetie IRA* decision is more troubling than *Venetie II*.

Unfortunately, the state of Alaska did not appeal *Venetie IRA* It may have believed that only the finding of tribal status could be challenged, not the ruling that sovereign powers flow from such status. While the state was preparing its case, a new administration in Washington, D.C. appointed Indian sovereignty advocates to the helm of the Bureau of Indian Affairs ("BIA").[512] In October 1993, the BIA published a notice in the Federal Register designating all of Alaska's tribes as federally recognized Indian tribes. The state apparently concluded it no longer had a case and abandoned its appeal.

The BIA's 1993 notice does not recognize Alaska's tribes simply for purposes of distributing federal aid. Rather, it claims to afford them "status as Indian tribes with a government-to-government relationship with the United States."[513] They are to "have the right, subject to general principles of [f]ederal Indian law, to exercise the same inherent and delegated authorities avail-

509. *See id.* at 565.

510. *See id.* at 563-65.

511. *See id.*

512. *See, e.g., Nomination of Ada Deer: Hearing on the Nomination of Ada Deer to be Assistant Secretary for Indian Affairs Before the Senate Comm. on Indian Affairs*, 103d Cong. 9 (1993).

513. Tribal Recognition Notice, 58 Fed. Reg. 54,364, 54,366 (1993).

able to other tribes."[514] In short, the BIA notice designates Alaska's tribes as "political entities exercising governmental authority."[515] A list appended to the end of the notice extends this sovereign status to 224 Native entities in Alaska.[516] Some of these groups are located in villages with a population of fewer than ten.[517]

The BIA's actions are truly remarkable. The agency purports, by sheer administrative edict, to make independent nations of literally hundreds of Native organizations in Alaska. The BIA would vest each of these groups with the same governmental power and immunity from state law enjoyed by a tribe on a continuing Indian reservation. The notice even hints that the tribes can exercise jurisdiction over non-Natives.[518] In effect, the BIA claims the sovereign authority appropriated to the state of Alaska and reallocates it to other entities.

The BIA's actions would clearly exceed its delegated authority had not Congress retroactively validated those actions in the Federally Recognized Indian Tribe List Act of 1994.[519] That legislation mirrors the language of the BIA notice, announcing that the United States "maintains a government to government relationship with [the recognized] tribes, and recognizes [their] sovereignty."[520]

Nothing in the tribal sovereignty doctrine authorizes such a decree. The Supreme Court has indicated that even Congress cannot simply assign sovereignty to a separate organization within a state. The Court has upheld transfers of federal power to Indians, but only where the tribe already possesses "independent authority over the subject matter."[521] The tribe must be a pre-existing sovereign, one of the "Indian tribes within 'Indian country.'"[522] The Supreme Court has never held that a tribe within a state is automatically sovereign by virtue of its members' common descent from a

514. *Id.*

515. *Id.* at 54,365.

516. *See id.* at 54,366-68.

517. The village of Telida has a population of nine; Council, eight; Portage Creek, six; Ugashik, five. *See* THE ALASKA ALMANAC 174, 179, 180 (1996 ed.). Many other villages on the BIA's list have populations of less than 50. These figures include non-Natives.

518. *See* Tribal Recognition Notice, 58 Fed. Reg. at 54,366 n.1. By contrast, *Venetie IRA* only allows a tribe outside of Indian country to exercise governmental authority over its own members. *See* Native Village of Venetie I.R.A. Council v. Alaska (*Venetie IRA*), 944 F.2d 548, 558 n.12 (9th Cir. 1991).

519. *See* 25 U.S.C. § 479 (1994).

520. *Id.*

521. United States v. Mazurie, 419 U.S. 544, 557 (1975) (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-322 (1936)).

522. *Id.*

historical tribe.[523] Sovereignty always has turned on the existence of a jurisdictional enclave, on the residency of the tribe within "Indian country." No principle of Indian law allows the federal government to delegate general police powers that Congress itself does not possess, or to otherwise confer sovereign authority on state Indians.

Neither *Venetie IRA* nor the BIA's actions can claim legitimation in the Supreme Court's Indian jurisprudence. The current doctrine does not acknowledge the concept of "membership sovereignty." Nevertheless, a family resemblance cannot be denied. Once the 1975 *DeCoteau* decision held that Indian sovereignty could exist without an affirmative cession of authority by the state, the rules for tribal government lost their connection to general principles of jurisdiction and federalism. Today, the *Oklahoma Tax Commission* trilogy continues to insist on some degree of federal involvement for tribal sovereignty. Normally, though, federal aid to a group of people will not make them a separate nation. Some other factor must be at work here. But if constitutional rules of state sovereignty and exclusive jurisdiction do not operate, then the special governmental status of Indians must arise solely from the fact that they are Indians. The only irreducible component of the current test for tribal sovereignty is Indian ancestry.

Venetie IRA and *Venetie II* are exceptional only in that they set a low threshold for the degree of federal involvement necessary to find tribal sovereignty. Many tribes are recognized under the IRA for purposes of receiving federal assistance. This recognition alone probably would satisfy the Ninth Circuit's test. As untenable as this approach may seem, nothing in the Supreme Court's recent decisions bars the courts from creating Indian sovereigns on the basis of such minimal federal participation. Since the Constitution's limits on the reallocation of state jurisdiction do not seem to apply, only the fact of a tribe's existence is an absolute requirement for it to secede from a state. In the *Venetie* cases, Felix Cohen's vision for federal Indian law has finally arrived. American Indians have become personal sovereigns.

V. CONCLUSION

The Supreme Court has always recognized a power in Congress to legislate for Indians as such. But until recently, this power was limited by principles of state sovereignty. The federal government could not unilaterally extinguish a state's jurisdiction or

523. Indeed, it has indicated that tribes entirely within a state's jurisdiction are little more than "'private, voluntary organizations.'" Bryan v. Itasca County, 426 U.S. 373, 388 (1976) (quoting *Mazurie*, 419 U.S. at 557).

otherwise ignore states' rights. Today, these limitations have been forgotten. In the mispursuit of congressional intent, the courts have construed the federal Indian country statute to appropriate state authority and to reallocate it to tribal entities.

Eventually, the Supreme Court must confront the contradictions in its jurisprudence. It will have to decide whether 18 U.S.C. § 1151 reverses the work of subsequent termination statutes, and if Indian housing projects really are sovereign nations. More immediately, it must decide whether Alaska is to lose control of forty-four million acres of territory.

The Supreme Court should realign its Indian country decisions with the Constitution's limits on federal power. This does not require abandoning the federal trust relationship with the tribes. Protective legislation for Indian country remains within Congress's broad authority. The current statute should be read to apply wherever the federal government has set aside land for Indians and replaces the state as public superintendent. However, "Indian country" should not be understood to preempt all state law or establish a separate nation. This should occur only where the state has affirmatively ceded its jurisdiction.

The creation of tribal sovereignty on the sole basis of 18 U.S.C. § 1151 is neither intended by that statute nor consistent with the Constitution. The unique history of Indians within the nation entitles them to the special consideration of the United States. But it does not replace the Constitution's framework of government. Where current conditions prefer such a result, the tribes that were excepted out of the American polity should continue as independent nations. But the courts should never presume, on the sole basis of their ancestry, that American Indians must always be regarded as separate sovereigns within our nation.