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An Historical Analysis of the Legal Status of the North Carolina Cherokees

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AN HISTORICAL ANALYSIS OF THE LEGAL STATUS OF THE NORTH CAROLINA CHEROKEES

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The Cherokee Indians of North Carolina have fought many battles in their struggle for survival and legal recognition. They have endured constantly changing Indian policies of both the federal and the state governments. In this Article, Mr. Bridgers, Tribal Attorney for the Eastern Band of Cherokee Indians, attempts to clarify the present legal status of the Cherokees by presenting a chronological analysis of the historical and legal developments affecting this Indian tribe. Throughout a muddle of inconsistent court decisions, as well as federal and state statutes, Mr. Bridgers traces the issue of the jurisdictional authority of North Carolina over these Indians. He argues, contrary to the position of the North Carolina courts, that the federal government has preempted authority over the Cherokees and that the general principles of federal Indian law should be applied to the North Carolina Cherokees.

As this Article went to print, the Fourth Circuit accepted Mr. Bridgers' argument and held that North Carolina could not constitutionally tax the income earned on the Cherokee Reservation by members of the Band residing on the Reservation. The court also held that a county could not tax the Cherokees' personal property located on the Reservation. ‡‡

INTRODUCTION

As Chief Justice John Marshall remarked in one of his landmark opinions, "The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence."[1] The uniqueness of this relationship has not been altered significantly in the nearly 150 years since Marshall's observation.

Of all the Indian tribes encountered by the white settlers, none has been more persistent in its struggle for existence and legal recognition than the Cherokees of North Carolina. These Indians, now known as

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‡‡ Eastern Band of Cherokee Indians v. Lynch, No. 79-1588 (4th Cir., *filed* Oct. 10, 1980). Mr. Bridgers argued the case for the Eastern Band. For a complete discussion of this case and its implications, see note 290 *infra*.

1. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

the Eastern Band of Cherokee Indians, are comprised of descendants of approximately 1000 Cherokees who refused to leave their homeland in the Smoky Mountains of North Carolina during the removal in 1838 to the Indian Territory west of the Mississippi River.[2] The Cherokees who remained did so after all their land had been taken pursuant to a treaty with the federal government[3] and despite great pressure by both the federal and state governments to move them to the west.[4] Pressure for their removal did not abate until after the turn of the present century.[5] In the meantime, these Cherokees patiently sought to achieve a legal status that would enable them to live their own way of life in their aboriginal homeland.

In their attempt to gain a settled legal status, the Cherokees have been plagued by an inconsistent line of federal and state statutes and court decisions, and a vacillating Indian policy of the federal government. There has been confusion over who should control these Indians—the federal government, the state government, or the Tribe itself. In spite of a score of congressional acts and some forty court decisions specifically dealing with the North Carolina Cherokees, this important legal question remains unanswered: What is the jurisdictional authority of the State of North Carolina over the Cherokee Indians residing on the Cherokee Indian Reservation?

Surprisingly, considering the volume of litigation involving these Indians, no court or legal commentator has ever examined this question in depth. The courts have accepted earlier cases as determining jurisdictional questions for all time.[6] But close scrutiny of the cases raises serious doubts whether the courts have always reached the proper conclusions, or whether they even have used the proper legal analysis. By applying well-established principles of federal Indian law to the North Carolina Cherokees, the federal government appears to have preempted supervisory duties and jurisdiction over the Cherokees. Except for those matters specifically designated to North Carolina by Congress in special Cherokee legislation or in general Indian legislation, the State presently is without proper authority to impose its laws and regulations on these Reservation Indians and is without legal basis to enforce them against the Cherokees in state courts.

2. *See* text accompanying notes 75-80, 119-124 *infra*.
3. *See* text accompanying notes 75-77 *infra*.
4. *See* text accompanying notes 79-80, 121-122 *infra*.
5. *See* text accompanying notes 157-162 *infra*.
6. *See* text accompanying notes 344-432 *infra*.

I. THE TREATY PERIOD (1785-1835)

A. The Treaties

During the eighteenth century the Cherokees inhabited land over parts of what are now eight states.[7] These lands bordered the original colonies and were in the direct path of the western expansion of white settlers. During the colonial period between 1721 and 1783 the Cherokee nation entered into ten separate treaties with the various colonies.[8] These colonial transactions were called treaties, but really were only concessions forced upon the native Cherokees, who resisted each in turn only to finally sign under protest after being given solemn assurances that no further demands would be made.[9] This pattern was to be repeated after the colonies revolted against Great Britain.

The first treaty between the United States government and the Cherokees was the Treaty of Hopewell, executed in South Carolina in 1785.[10] This treaty fixed boundaries for the Indian country, withdrew the protection of the United States from settlers on Indian lands who would not leave within six months, made arrangements for the punishment of criminals, and declared in solemn tones, "the hatchet shall be forever buried."[11] North Carolina, however, lodged a formal protest with Congress over the treaty because it established a boundary line with the Indians without regard to the interests of the state.[12] North Carolina did not recognize the treaty, and militant frontiersmen along the lower Tennessee River encroached upon Indian territory.[13] The treaty was openly violated, leading Secretary of War Henry Knox to observe that it "amount[s] to an actual although informal war of the said white inhabitants against the said Cherokees."[14] At Knox's re-

7. Those states are North Carolina, South Carolina, Georgia, Alabama, Tennessee, Kentucky, Virginia, and West Virginia. *See* Royce, *The Cherokee Nation of Indians*, in BUREAU OF ETHNOLOGY, FIFTH ANNUAL REPORT TO THE SECRETARY OF THE SMITHSONIAN INSTITUTE 1883-84, at 140-42 (J. Powell ed. 1887) [hereinafter cited as Royce].

8. These treaties are listed and the cession described in Royce, *supra* note 7, at 130, as follows: Treaty of 1721 with South Carolina; Treaty of November 24, 1755, with South Carolina; Treaty of October 14, 1768, with the British Superintendent of Indian Affairs; Treaty of October 18, 1770, with South Carolina; Treaty of 1772 with Virginia; Treaty of June 1, 1773, with British Superintendent of Indian Affairs; Treaty of March 17, 1775, Henderson Purchase; Treaty of May 20, 1777, with South Carolina and Georgia; Treaty of July 20, 1777, with Virginia and North Carolina; Treaty of May 31, 1783, with Georgia.

9. *See generally* Royce, *supra* note 7, at 144-51.

10. Treaty of Hopewell, November 28, 1785, United States-Cherokee Nation, 7 Stat. 18.

11. *Id.* art. XIII.

12. Royce, *supra* note 7, at 155.

13. F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 148 (1962).

14. XXXIV JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, 342 (1937 ed.)

quest, Congress issued a proclamation directing the Secretary of War to have troops ready to disperse the intruders.[15] But since North Carolina had not ratified the Constitution, Knox and the President felt it politically expedient to await ratification by the state before enforcing the treaty.[16] By the time North Carolina ratified the Constitution and then ceded her western lands to the United States, the white settlers were too entrenched to be peaceably removed.[17] Therefore, the federal government asked the Senate for permission to negotiate with the Cherokees for a new boundary that would include the settlers who had violated the Hopewell treaty.[18]

In July 1791 the Treaty of Holston[19] was signed, and the Cherokee boundary was moved westward. The treaty provided that "[t]he United States solemnly guarantee to the Cherokee nation, all their lands not hereby ceded."[20] It also declared that "[i]f any citizen of the United States, or other person not being an Indian, shall settle on any of the Cherokees' lands, such person shall forfeit the protection of the United States, and the Cherokees may punish him or not, as they please."[21]

But even with the new treaty, encroachments by white settlers continued. In an effort to control the situation, Congress passed an act in 1796 that prohibited settlement of lands beyond the boundary established by the Holston Treaty.[22] The Act withdrew all support of claims to land made by unauthorized settlers and authorized the use of military force to remove these settlers.[23] The Act infuriated the political leaders of Tennessee, who considered it a direct attack on the State.[24] The Tennessee Legislature protested to Congress, attacking both the Treaty of Holston and the 1796 Act.[25] They denied that the Cherokees even had a right to the land. Governor John Sevier declared the 1796 Act to be an "infamous act," which had "given more umbrage to the people of this State than any other act ever passed since the indepen-

15. F. PRUCHA, *supra* note 13, at 148.
16. *Id.* at 149.
17. *Id.*
18. *Id.*
19. July 2, 1791, United States-Cherokee Nation, 7 Stat. 39.
20. *Id.* art. VII.
21. *Id.* art. VIII.
22. Intercourse Act of May 19, 1796, ch. 30, § 1, 1 Stat. 469.
23. *Id.* § 5.
24. F. PRUCHA, *supra* note 13, at 152.
25. *See* 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 624-25 (1797); F. PRUCHA, *supra* note 13, at 152-53.

dency of America."[26] As a result of the continuing protests of Tennessee, President Adams recommended to Congress that still another treaty be negotiated with the Cherokees.[27]

The Cherokees were not willing to surrender more land, and it was only after a great deal of negotiating that the Treaty of Tellico was signed in 1798.[28] This treaty obtained another cession of land from the Cherokees to cover the illegal settlers.[29] The State of Tennessee was enthusiastic about this treaty because it not only obtained the land sought by the state, but also forced the federal government to surrender to its wishes.[30] This satisfaction, however, was short lived. The ultimate goal of Tennessee was to remove all Indians from the state.[31] When the Louisiana Purchase added land to the nation in 1803, Tennessee suggested to Congress that it was possible to move all Indians west of the Mississippi.[32]

The Cherokees, once again, were pressured for another large cession of land and road privileges.[33] Despite strenuous objections by the Cherokees, who sent a delegation of prominent chiefs to Washington to protest further sales of land,[34] pressure was brought through the Indian agent, Colonel Return J. Meigs, until three separate treaties were negotiated in 1804 and 1805.[35]

The first of these treaties sold land in Georgia that had been settled some years before under the impression that it was outside the boundaries of the Hopewell Treaty.[36] In the other treaties, the United States purchased a large tract of land in central Tennessee and Kentucky and obtained permission for two mail roads through the Cherokee country into Georgia and Alabama.[37] The Cherokees received a

26. Letter from Governor Sevier to Tennessee Congressmen (Jan. 22, 1798), *reprinted in* 1 R. WHITE, MESSAGES OF THE GOVERNORS OF TENNESSEE 53 (1952).

27. F. PRUCHA, *supra* note 13, at 154; Royce, *supra* note 7, at 176.

28. Treaty of Tellico, October 2, 1798; United States-Cherokee Indians, 7 Stat. 62.

29. *Id.* art. IV.

30. F. PRUCHA, *supra* note 13, at 155.

31. *Id.*

32. *See* 1 R. WHITE, MESSAGE OF THE GOVERNORS OF TENNESSEE 70, 153-54 (1952).

33. *See* Royce, *supra* note 7, at 184.

34. *Id.* at 185.

35. *Id.* at 187.

36. Treaty for Cession of Land in Georgia, October 24, 1804, United States-Cherokee Indians, 7 Stat. 228.

37. Treaty for Cession of Land and Road Privileges, October 27, 1805, United States-Cherokee Indians, 7 Stat. 95; Treaty for Cession of Land and Road Privileges, October 25, 1805, United States-Cherokee Indians, 7 Stat. 93.

total of $24,600 in exchange for these benefits.[38] In spite of these concessions, new immigrants continued to invade Indian lands. In less than three months a convention was concluded in Washington in which the Cherokees ceded another 7000 square miles in Tennessee and Alabama.[39] The Cherokees were promised compensation of $10,000, a grist mill, a cotton gin, and a life annuity for their aged chief.[40] Because of some "misunderstandings," these boundaries were extended still further in a supplementary treaty the following year.[41] The treaty stated that the compensation was $2,000, but the Indian agent secretly agreed to a "silent consideration" of $1,000 and two rifles for the chiefs who had signed the treaty.[42]

Because of the outbreak of hostility with Great Britain and the Creek Indian War, more than eight years elapsed before another treaty was entered with the Cherokees. During the Spring of 1816 two treaties were negotiated on the same day in Washington. In the first, the Cherokees ceded their remaining lands in South Carolina,[43] and in the second they agreed to a new boundary line in Alabama in order to settle the uncertainty caused by the surrender of lands by the Creek Indians following their uprising against the federal government.[44] The second agreement also granted free and unrestricted road privileges throughout the remaining Cherokee country.[45] The Cherokees were pressured during these negotiations to cede more land on either side of the Tennessee River, but they refused every offer made by the government.[46] As soon as these treaties were consumated, pressure was at once begun to bring about a cession in Alabama, with the result that

38. Treaty for Cession of Land and Road Privileges, October 27, 1805, *supra* note 37, at art. III; Treaty for Cession of Land and Road Privileges, October 25, 1805, *supra* note 37, at art. III; Treaty for Cession of Land in Georgia, *supra* note 36, at art. 2.

39. Convention on Cession of Lands, January 7, 1806, United States-Cherokee Indians, 7 Stat. 101.

40. *Id.* art. II.

41. Elucidation to Convention on Cession of Land, September 11, 1807, United States-Cherokee Indians, 7 Stat. 103.

42. Royce, *supra* note 7, at 197 & n.2.

43. Treaty for Cession of Land in South Carolina, March 22, 1816, United States-Cherokee Nation, 7 Stat. 138.

44. Convention to Settle Boundary Lines, March 22, 1816, United States-Cherokee Nation, 7 Stat. 139.

45. *Id.* art. II.

46. *See* Mooney, *Myths of the Cherokee*, in BUREAU OF ETHNOLOGY, NINETEENTH ANNUAL REPORT TO THE SECRETARY OF THE SMITHSONIAN INSTITUTE, 1897-98, at 98 (J. Powell ed. 1900) [hereinafter cited as Mooney].

another treaty was concluded in the fall of 1816.[47] For $60,000, plus $5,000 for abandoned improvements, the Cherokees ceded 3500 square miles in Alabama, south of the Tennessee River.[48]

As a result of these various treaties, some Cherokees left their ceded lands and moved across the Mississippi into what is now Arkansas, becoming known as the Arkansas or Western Cherokees.[49] But they came into conflict with the Osage and Quapaw Tribes, who were native to that region.[50] When these Western Cherokees complained to the federal government, they were told that they originally had been permitted to remove only if a portion of their eastern territory was ceded to the government, and "that nothing could be done to protect them in their new western home until [this] cession had been carried out."[51] Another treaty then was negotiated in Tennessee whereby the Cherokee nation ceded large tracts in Georgia and Tennessee in exchange for a tract assigned to those who had already removed to Arkansas or who would do so in the future.[52] After the treaty, a large number of Cherokee emigrated to the west, with the total estimated at 6000 by 1819.[53]

The government continued to bring strong pressure upon the Cherokees in the east to get them to remove to the west.[54] Negotiations failed, and another delegation was taken to Washington by Indian Agent Meigs.[55] There the persuasion continued until the chiefs, tired and discouraged, agreed "to a large cession, which was represented as necessary . . . to compensate in area for the tract assigned to the emigrant Cherokee[s] in Arkansas in accordance with the previous treaty."[56] This new convention[57] recited that the majority of the Eastern Cherokees desired to remain in the east, and that in order to take "necessary measures for the civilization and preservation of their nation, and to settle the differences arising out of the treaty of 1817," they

47. Treaty with the Cherokees, September 14, 1816, United States-Cherokee Nation, 7 Stat. 148.

48. *Id.* art. III.

49. *See* Mooney, *supra* note 46, at 102; Royce, *supra* note 7, at 216.

50. *See* Mooney, *supra* note 46, at 102; Royce, *supra* note 7, at 216.

51. Mooney, *supra* note 46, at 102.

52. Treaty for Cession of Land in Georgia and Tennessee, July 8, 1817, United States-Cherokee Indians, 7 Stat. 156.

53. Royce, *supra* note 7, at 225.

54. *See* Mooney, *supra* note 46, at 106; Royce, *supra* note 7, at 224-27.

55. *See* Mooney, *supra* note 46, at 106; Royce, *supra* note 7, at 224-27.

56. Mooney, *supra* note 46, at 106.

57. Convention on Cession of Land, Feb. 27, 1819, United States-Cherokee Indians, 7 Stat. 195.

"offered to cede to the United States a tract . . . 'at least as extensive' as that to which the Government [was] entitled under the last treaty."[58] Individual reservations "were allowed to a number of families who decided to remain among the whites rather than abandon their homes."[59] The treaty was "declared to be a final adjustment to all claims and differences arising [out of] the treaty of 1817."[60]

By the 1820's the Cherokee nation was centered in Georgia where the Cherokee people had made great political and cultural progress.[61] Following the invention of a syllabary for the Cherokee language by Sequoyah, the Cherokees set up a printing press and published their own newspaper.[62] A constitution and a republican form of government, both patterned after that of the United States, were adopted.[63] The Cherokee nation was divided into eight districts, with each district furnishing four representatives to the legislature in New Echota.[64] Their principal leader was entitled the President of the National Council.[65] The legislature made it "treason, punishable [by] death, for any individual to negotiate the sale of [Indian] lands to the whites without the consent of the national council."[66]

But the prosperity of the Cherokees vanished when gold was discovered on the Cherokee lands in Georgia.[67] The Georgia Legislature passed a law that annexed all Cherokee lands within the state, declared all Cherokee laws and customs null and void, and prohibited anyone of Indian blood from being a witness in a lawsuit if the defendant was white.[68] The Cherokee land was mapped off and sold at public lottery to white citizens.[69] "[T]he Cherokees were forbidden to hold councils, to assemble for any public purpose, or to dig for gold upon their own lands."[70] All contracts between an Indian and a white were voided unless witnessed by two white men.[71]

58. Mooney, *supra* note 46, at 106; Convention, *supra* note 57, preamble.
59. Mooney, *supra* note 46, at 106; Convention, *supra* note 57, art. 3.
60. Mooney, *supra* note 46, at 106; Convention, *supra* note 57, preamble.
61. *See generally* Mooney, *supra* note 46, at 106-12.
62. *Id.* at 111.
63. *Id.* at 106, 112.
64. *Id.* at 106-07.
65. *Id.* at 107.
66. *Id.*
67. *See generally id.* at 116.
68. *See id.* at 117; Royce, *supra* note 7, at 260-61.
69. *See* Mooney, *supra* note 46, at 117.
70. *Id.*
71. *Id.*

The Georgia legislation was designed "to render life . . . intolerable [for] the Cherokee[s] by depriving them of all legal protection. Bands of armed men invaded the Cherokee country, forcibly seizing horses and cattle, [ejecting families from their homes], and assaulting the owners who dared [resist]."[72] Upon appeal to President Jackson, the Cherokees were told that the federal government would not protect them.[73] Legal and political redress denied them,[74] the Cherokees were easy prey for a final treaty.

In December 1835 the Reverend J.F. Schermerhorn, the commissioner appointed to arrange a treaty, met in New Echota with representatives of the Cherokees.[75] The resulting Treaty of New Echota ceded to the United States all of the remaining Cherokee territory east of the Mississippi in exchange for $5,000,000 and a common interest in the land already occupied by the Western Cherokees beyond the Mississippi.[76] The Cherokees were to be removed from the ceded territory at government expense within two years of ratification of the treaty.[77] "Every Cherokee was thus made a landless alien in his original country."[78]

After the treaty was executed, the pressure to remove the Cherokees included a declaration from the Governor of Georgia that "if trouble came from any protection afforded by the government troops to the Cherokee[s], a direct collision [would occur] between the . . . state and [federal] government."[79] Thus, the final removal of the Cherokees and the validity of the Treaty of New Echota—a document not signed by any officer of the Cherokee nation's government—were "considered not simply . . . Indian question[s], but [rather] issue[s] between state rights on the one hand and federal jurisdiction and the Constitution on

72. *Id.* at 118.

73. *Id.* at 119.

74. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). *See also* Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1968-69).

75. *See* Mooney, *supra* note 46, at 123.

76. Treaty of New Echota, December 29, 1835, United States-Cherokee Indians, arts. 1, 2, 7 Stat. 478.

77. *Id.* art. 8. One provision of the treaty allowed a limited number of Cherokees, "qualified or calculated to become useful citizens," to remain in North Carolina, Tennessee, and Alabama. *Id.* art. 12. This provision, however, was stricken from the treaty at the direction of President Jackson. Supplementary Articles to Treaty of New Echota, March 1, 1836, United States-Cherokee Indians, 7 Stat. 488.

78. Mooney, *supra* note 46; at 159.

79. Mooney, *supra* note 46, at 129; Royce, *supra* note 7, at 290.

the other."[80]

The accumulative effect of this series of treaties was the complete surrender of all the land occupied by the Cherokees east of the Mississippi River. The Cherokees were physically removed to the west where they would be out of harm's way. No provision was made for those who refused to leave and who hid out in the coves and mountains of western North Carolina.

B. Case Law During The Treaty Period

During this period the courts were presented with two major problems: they were called upon to decide title disputes over Indian land settled by whites and to determine the authority of the state over Indians living within their boundaries.

The land cases[81] arose when settlers and speculators competed for the valuable lands opened for settlement. The courts generally determined superior title by construing the appropriate Indian treaties and state statutes dealing with settlement of Indian lands.[82] The cases recognized the right of the Indians to be on their land and to sell or cede it to the white man. The courts also acknowledged that because of the Constitution, only the federal government could make treaties with the Indians and obtain title to their lands.

The right of Indians to hold land within North Carolina by virtue of a federal treaty was recognized in *Eu-che-la v. Welsh*.[83] In *Eu-che-la* a Cherokee claimed title to 640 acres reserved for the Cherokee nation under the treaties of 1817 and 1819.[84] The court discussed Indian policy in colonial times in detail and described the nature of Indian title under the doctrine of "discovery," explaining that "the ultimate dominion of newly discovered countries not known to christian people, be-

80. Mooney, *supra* note 46, at 129.

81. *See* Preston v. Browder, 14 U.S. (1 Wheat.) 115 (1816); Belk v. Love, 18 N.C. (1 Dev. & Bat. Eq.) 65 (1834); Eu-che-la v. Welsh, 10 N.C. (3 Hawks) 155 (1824); Strother v. Cathey, 5 N.C. (1 Mur.) 162 (1807).

82. In Strouther v. Cathey, 5 N.C. (1 Mur.) 162 (1807), the court determined superior title in an ejectment action by construing a 1783 legislative act together with a 1791 treaty. In the process, the court recognized that Indians had a right to their lands until they were extinguished by a treaty with the federal government. *See id.* at 167-68.

In Preston v. Browder, 14 U.S. (1 Wheat.) 115 (1816), the Supreme Court used this same type of analysis to settle a dispute over land within an area ceded to the U.S. in 1789. One party claimed title through a 1793 grant from North Carolina while the other party claimed through an 1810 grant from Tennessee. The Court ruled that the earlier entry and grant from North Carolina was invalid because entry had then been prohibited by a North Carolina statute. *Id.* at 123.

83. 10 N.C. (3 Hawks) 155 (1824).

84. *Id.* at 155.

long to the discoverer."[85] The Indians were considered to have only a "temporary right of occupancy"[86] so that "[t]he only obligation which justice imposes upon other nations, is, that they leave the natives a sufficiency of land."[87] In these early land cases the courts generally traced the appropriate statutes and treaties in detail and interpreted them in light of the nature of this original Indian title—less than a fee and limited to a mere "occupancy." In *Eu-che-la* the court reached the rare conclusion that even though the Indian held no specific grant from the State, his title derived from a treaty that provided for a "reservation," and the inferior Indian title was thus converted to a fee ownership by a 1783 North Carolina statute.[88]

These land cases were decided by applying general principles of Anglo-American property law. As a by-product, the language of these decisions tended to support the alienability of Indian lands, whether it was by state grant or by mesne conveyance from individual Indian "reservations" claimed under specific treaties.[89]

When the courts turned their attention to the jurisdiction of a state to impose its authority upon Indians living within its borders, philosophical problems arose that still have not been resolved completely. The federal courts, guided by the constitutional theories of Chief Justice Marshall, espoused the position that the federal government had sole authority over the Indians.[90] State courts, as exemplified by the Tennessee court in *State v. Foreman*,[91] assumed a political position contrary to Marshall—that a state had full sovereignty and authority over all people within its borders, including Indians.[92]

The question of state jurisdiction over the Cherokees first arose in *Cherokee Nation v. Georgia*.[93] In this famous case the Cherokees petitioned the Supreme Court for an injunction prohibiting Georgia from imposing its laws in Cherokee territory. The Cherokees claimed to be

85. *Id.* at 159.

86. *Id.*

87. *Id.* at 161.

88. *See id.* at 163, 165.

89. For example in Belk v. Love, 18 N.C. (3 & 4 Dev. & Bat.) 65 (1834), the court ruled in favor of a speculator who obtained land from a Cherokee. The Indian had claimed land under a treaty "reservation," and the court ruled that he had obtained a fee. *Id.* at 73. The treaty was interpreted as not requiring perpetual residence by the Indians on the reserved lands, and the lands were held alienable by the Indians in spite of North Carolina statutes prohibiting the purchase of reserved lands. *Id.* at 74-75.

90. *See* text accompanying notes 97-105 *infra*.

91. 16 Tenn. (8 Yer.) 256 (1835).

92. *See* text accompanying notes 97-105 *infra*.

93. 30 U.S. (5 Pet.) 1 (1831).

" 'a foreign state, not owing allegiance to the United States, nor to any state of this union, nor to any prince, potentate or state, other than our own.' "[94] The Court denied relief to the Cherokees, saying it was without jurisdiction to hear the case.[95] Chief Justice Marshall found that the Cherokees were not a foreign nation, but could "more correctly, perhaps, be denominated domestic dependent nations."[96]

The following year, however, the Court reached the merits of this issue in *Worcester v. Georgia*.[97] In his opinion Chief Justice Marshall discussed the doctrine of "discovery."[98] Marshall not only stated and applied the doctrine, but he also analyzed it and described its limitations. The doctrine itself was " 'that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession.' "[99] According to Marshall, the doctrine did not establish particular rights over the Indians.[100] He thought it ridiculous that mere discovery would convey rights over the natives and observed that the authority derived by the various colonies from their original Crown grants was superior only to those of other European white men.[101] Marshall recognized that tribes "had always been considered as distinct, independent political communities,"[102] and that "the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection."[103] The result of this philosophical analysis of the political and legal powers of the white man over the Indian was Marshall's holding that the states did not have jurisdiction over the Indian people and their own government.[104] He noted:

> The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.

94. *Id.* at 3.
95. *Id.* at 20.
96. *Id.* at 17.
97. 31 U.S. (6 Pet.) 515 (1832).
98. *Id.* at 542-46.
99. *Id.* at 543-44 (*quoting* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573 (1823)).
100. *Id.* at 544.
101. "[T]hese grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned." *Id.* at 546.
102. *Id.* at 559.
103. *Id.* at 560-61.
104. *See id.* at 560-62.

> The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.[105]

In contrast to this holding, the Tennessee Supreme Court three years later, in *State v. Foreman*,[106] thumbed its judicial nose at Marshall and the federal courts. In 1833 Tennessee had extended a part of her criminal laws over Indian lands. Foreman argued that the state law violated the Constitution, but the court held otherwise.[107] In an exhausting opinion of 81 pages, Judge Catron represented the archetypical state court, raging against federalism. With great prolixity, Judge Catron reviewed "our rights" under the doctrine of "discovery."[108] The land could not belong to the Indian, he reasoned, because he was not using all of it.[109] The "laws of nature" justified denying the Indian dominion over the American continent.[110] The subjugation of the Indian was foretold and inevitable,[111] and the practical nature of the frontier provided the court with its basis for the decision.[112]

In a concurring opinion, Judge Green pointed out that some lands had been "acquired by conquest" from Indian tribes, but that this was not true with the Cherokees.[113] He found that state authority over the Cherokees was derived not from the law of conquest, but rather from the law of necessity.[114]

Only the dissenting opinion of Judge Peck adopted the Marshall view. He deemed the matter foreclosed because the federal government had spoken for the Cherokees in various treaties, and the state was without power to violate these solemn guarantees.[115] Treaties, after all, were the supreme law of the land with regard to Indians.[116] Judge Peck regarded the arguments of the majority as "rather political than legal"[117] and replied in ringing words:

> The first obligation of every man is to observe and regard the Constitution; with the judge it is emphatically so. The tyrant's plea, that of

105. *Id.* at 561.
106. 16 Tenn. (8 Yer.) 256 (1835).
107. *Id.* at 336.
108. *Id.* at 264.
109. *Id.* at 266-67.
110. *Id.* at 266.
111. *See id.* at 270-71.
112. *See id.* at 319.
113. *Id.* at 344.
114. *See id.* at 348-49.
115. *See id.* at 354-70 (Peck, J., dissenting).
116. *See id.* at 357, 362 (Peck, J., dissenting).
117. *Id.* at 364 (Peck, J., dissenting).

> necessity, wherever advanced, should be watched with caution. If I ever knew the fact of existing necessity, to which of the mandates shall I confine myself? It is said, to the act of [the] assembly. My answer is that between conflicting mandates the treaty is the highest, and the act, being subordinate, must yield; and certainly it becomes the stronger when consistent with the fact.
>
> The example of other states are quoted to me. It is urged that Alabama, Georgia, and North Carolina have severally passed such laws, and the judges of those states will enforce them. My answer is that I will not sin if others do.[118]

II. THE REMOVAL PERIOD (1836-1840)

After the Senate ratified the Treaty of New Echota, the Cherokee leaders continued to oppose it and tried to change its terms.[119] "Councils were held in opposition all over the Cherokee nation," and resolutions were prepared and submitted to Washington "denouncing the methods used [in negotiating the treaty] and declaring [it] null and void."[120] But President Jackson declared that he was determined to carry out the treaty without modification as quickly as possible and ordered that he hear no more, verbally or in writing, about the treaty.[121] He also directed the Cherokees not to assemble in council to discuss the treaty further.[122] Nevertheless, the Cherokees still hoped to stop the implementation of the treaty. Speeches in Congress were bitter, with Henry Clay, Daniel Webster, Edward Everett, and Davey Crockett adamantly opposing the President.[123] But in spite of all their endeavors to secure a modification of the terms of the treaty, it was carried out.

The last emigrant Cherokees left for the west in December of 1838, leaving behind perhaps a thousand or so hiding in the coves and mountains of western North Carolina.[124] General Winfield Scott found it impractical to capture these straggling groups, so he agreed to let them remain until their case could be handled by the government.[125]

It was at this point that the Eastern Cherokees began their struggle for existence and recognition. They were able to survive and ultimately

118. *Id.* at 365 (Peck, J., dissenting).
119. *See generally* Mooney, *supra* note 46, at 125-26; Royce, *supra* note 7, at 288-91.
120. Mooney, *supra* note 46, at 126.
121. *Id.*
122. *Id.*
123. *See* Mooney, *supra* note 46, at 128-29; Royce, *supra* note 7, at 287-91.
124. *See* Mooney, *supra* note 46, at 157, 159.
125. *Id.*

persevere largely due to the efforts of one white man, William Holland Thomas.[126] Between 1836 and 1842 Thomas worked on behalf of the Cherokees who remained in North Carolina. During visits to Washington he sought official permission for the Cherokees to remain in North Carolina and for them to receive their share of money due from improvements and confiscated reservations under the treaties.[127] He also petitioned the North Carolina General Assembly in 1836 for passage of an act protecting the Cherokees and recognizing their right to remain in the state.[128]

With the remaining North Carolina Indian lands now open, white settlers rushed into every part of the new territory, taking out grants and building houses. In the westernmost part of the state, where the remaining Cherokee lands had been ceded, a new county, Cherokee County, was formed in 1839.[129] A trading post grew on the site of Fort Butler, which had been erected for the Cherokee removal, and the first court was held at Fort Butler on March 19, 1839.[130] Within two years a permanent courthouse was built.[131]

III. THE POST-REMOVAL PERIOD (1840-1865)

After removal of the Cherokees and settlement of their former lands, the pressures of the anti-Indian policies of the 1830's subsided. With the continued efforts of William Thomas, the North Carolina Cherokees obtained slight concessions from the state and federal governments and managed to avoid removal to the west with the other Cherokees.[132] Thomas also bought land from whites in his own name for the Cherokees until 1861.[133] During this period he was recognized as the agent for the Cherokee people, and he used money from individ-

126. Thomas, who was born near Waynesville, North Carolina, in 1805, had been adopted by the Cherokee Chief, Yonaguska (Drowning Bear). Thomas was a student of law and, having grown up with the Cherokees, he spoke the Cherokee language fluently and had earned their trust and respect. *See generally* Mooney, *supra* note 46, at 160.

127. *See id.* at 159.

128. *Id.* In 1837 the General Assembly did pass an act creating a special Cherokee statute of frauds. The Act provided that all contracts and agreements with any Cherokee Indian shall be null and void unless signed in writing by the Indian and witnessed by two other persons. Act of Jan. 21, 1837, ch. 8, 1836-37 N.C. Pub. Laws 30. This Act is now codified as N.C. GEN. STAT. § 22-3 (1965).

129. O. BLACKMUN, WESTERN NORTH CAROLINA: ITS MOUNTAINS AND ITS PEOPLE TO 1880, at 265 (1977).

130. *Id.* at 274-75.

131. *Id.* at 275.

132. *See* Mooney, *supra* note 46, at 157-59.

133. *Id.* at 159.

ual Cherokees, along with such of their funds as he could obtain from Washington, to purchase various tracts of land.[134] These tracts now constitute the Cherokee Indian Reservation.[135]

In 1848 Congress passed an act "for the purpose of paying the current and contingent expenses of the Indian department, and fulfilling treaty stipulations with the various Indian tribes."[136] The Act directed the Secretary of War to ascertain "the number and names of such individuals and families . . . that remained in the State of North Carolina at the time of the ratification of the treaty of New Echota" in order that the sum of $53.33 might be set aside by the Secretary of the Treasury for each individual.[137] This money was to be held and distributed to the individuals when they removed to join the tribe west of the Mississippi.[138] But when the North Carolina Cherokees again refused to emigrate, Congress, in 1855, authorized payment to them of the money appropriated in 1848, provided "the State of North Carolina ha[d] . . . by some appropriate act, agreed that said Cherokees may remain permanently in that State, anything in the treaty of [1835] to the contrary notwithstanding."[139] Further action by either the federal or state governments awaited the end of the Civil War, during which the Cherokees actively supported the Confederate cause.[140]

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134. *Id.*

135. During this period the Cherokees lived by themselves and were content with reestablishing their own settlement. In the spring of 1848 the author Lanman visited the Cherokees, staying several days with Thomas. *See* C. LANMAN, LETTERS FROM THE ALLEGHANY MOUNTAINS 85 (1849). He was very impressed with what he saw, and wrote:

> They have their own courts and try their criminals by a regular jury. Their judges and lawyers are choosen from among themselves. They keep in order the public roads leading through their settlement. By a law of the State they have a right to vote, but seldom exercise that right, as they do not like the idea of being identified with any of the political parties.

Id. at 95.

136. Act of July 29, 1848, ch. 118, 9 Stat. 252.

137. *Id.* § 4.

138. *Id.* § 5.

139. Act of March 3, 1855, ch. 204, § 3, 10 Stat. 1686.

140. *See* Royce, *supra* note 7, at 328. During this period the North Carolina courts again were involved in deciding land disputes over former Indian lands. *See* Welch v. Trotter, 53 N.C. (8 Jones) 197 (1860); Harshaw v. Taylor, 48 N.C. (3 Jones) 513 (1856); Lovinggood v. Burgess, 44 N.C. (Busb.) 407 (1853); Stanmire v. Powell, 35 N.C. (13 Ired.) 312 (1852); Sutton v. Moore, 25 N.C. (3 Ired.) 66 (1842); Deaver v. Parker, 37 N.C. (2 Ired. Eq.) 40 (1841). See also Lattimer v. Poteet, 39 U.S. (14 Pet.) 4 (1840), in which the United States Supreme Court followed the North Carolina federal district court in ruling on the propriety of settlement by whites and in construing two treaties and the location of the Indian boundary line.

In Lovingood v. Smith, 52 N.C. (7 Jones) 601 (1860), the court permitted the use of the 1837 Cherokee statute of frauds, *see* note 128 *supra*, as a defense in a suit brought by one Cherokee against another over a promissory note. The court found nothing in the statute to limit its applica-

IV. GROWING RECOGNITION OF THE NORTH CAROLINA CHEROKEES

A. Federal Indian Policy and Legal Developments from 1866-1924

To understand and appreciate the evolution of the legal status of the North Carolina Cherokees during this period, it is necessary to consider legal developments affecting Indians throughout the United States. Just as the removal of the Cherokees in the 1830's was a result of the Indian policy of the federal and state governments at that time, the actions of the federal government affecting the Cherokees in the late nineteenth century also were influenced by the general Indian policy of the United States. After the 1830's removal, there was no "Indian problem" in the eastern states. But as the frontier gradually followed the Indians west, the attitude towards Indians hardened again, and a policy similar to that of the 1830's returned. After the Civil War, "[t]he East was indifferent to the Indian," and "[t]he West, as a rule, was openly hostile."[141]

During the 1850's the federal government experimented in California with creating "reservations" for various Indian tribes.[142] This approach appeared to provide a successful method for separating Indians from the growing white settler population. The concept of concentrating Indians within well-defined geographical areas became an extremely popular Indian policy. As settlement of the West increased following the Civil War, this "concentration" policy became the accepted method of dealing with the Indians.[143]

Meanwhile, the federal government continued its legal negotiations with Indian tribes through the treaty process.[144] Treaties had provided a solemn and satisfactory method of negotiating with Indian tribes in the early colonial years, when the negotiating parties were of comparable strength. But as the strength of the white civilization increased and as dwindling Indian tribes were pushed further west, the justification for the cumbersome treaty process disappeared. Nevertheless, the federal government continued negotiating treaties after the

tion to contracts between whites and Indians. 52 N.C. (7 Jones) at 602-03. This statute proved to be the first legal indication of any paternalistic feeling toward the Cherokees by North Carolina.

141. L. SCHMECKERBIER, THE OFFICE OF INDIAN AFFAIRS 48 (1927).

142. *See generally* H. FRITZ, THE MOVEMENT FOR INDIAN ASSIMILATION, 1860-1890 (1963); L. PRIEST, UNCLE SAM'S STEPCHILDREN 121-31 (1942); S. TYLER, A HISTORY OF INDIAN POLICY 70-94 (1973).

143. H. FRITZ, *supra* note 142; L. PRIEST, *supra*, note 142 at 121-131; S. TYLER, *supra* note 142, at 70-94.

144. *See* PRIEST, *supra* note 142, at 95-105.

Civil War because of serious doubts whether Congress could constitutionally deal with Indian tribes through alternative methods.[145] But when the Supreme Court ruled in the *Cherokee Tobacco Case*[146] that acts of Congress might supersede prior treaties,[147] these congressional doubts were set to rest.

At this time, however, Congress was sharply divided over the method of determining Indian policy. Ratification of Indian treaties required only Senate approval.[148] The House of Representatives, however, was responsible for appropriation measures effectuating Indian policy.[149] After a serious impasse, in which the House refused to pass Indian appropriations for an entire term,[150] a rider was inserted in the Indian Appropriation Act of 1871 prohibiting further treaties with Indian tribes.[151] Henceforth, dealing with the Indians would be accomplished solely through legislation requiring approval of both Houses.[152]

Following the Civil War, the federal government sought to retain control over Indian affairs and not surrender it to the states. After an 1875 recommendation by the Commissioner of Indian Affairs that Indians be placed under state control,[153] a measure was presented to the House of Representatives in 1877 authorizing negotiations with several states, including North Carolina, for the transfer of guardianship over the Indians.[154] The proposal was defeated, partly because federal officials realized that once a state assumed responsibility for Indians, the federal government would lose its power in that area.[155] Consequently, federal officials opposed state control and often took the issue to court, where federal authority over Indians was upheld.[156]

By the 1880's the "concentration" or "reservation" policy had

145. *See* authorities cited at note 142 *infra*.

146. 78 U.S. (11 Wall.) 616 (1870).

147. *Id.* at 621.

148. U.S. CONST. art. 2, § 2, cl. 2.

149. *See id.* art. I, § 7, cl. 1.

150. *See* PRIEST, *supra* note 142, at 97-98.

151. Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544 (codified at 25 U.S.C. § 71 (1976)).

152. Adding to this debate was a parallel dispute, which extended from 1867 to 1879, over whether to transfer control of Indian affairs from the Interior Department to the War Department. The balance finally was tipped in favor of the Interior Department, where responsibility has remained to the present. *See* PRIEST, *supra* note 142, at 95-105.

153. COMMISSIONER OF INDIAN AFFAIRS, ANNUAL REPORT 17 (1875); BOARD OF INDIAN COMMISSIONERS REPORT 15-16 (1875).

154. *See* H.R. 3593, 44th Cong., 2d Sess., 5 CONG. REC. 1303 (1877); H.R. EXEC. DOC. No. 106, 44th Cong., 1st Sess. (1876).

155. *See* PRIEST, *supra* note 142, at 213-16.

156. For example, the Supreme Court upheld federal control of Indian trade. *See* United

failed, and Congress replaced it in 1887 with an "allotment" policy.[157] With the General Allotment Act Congress hoped to solve the "Indian problem" by turning the Indians into farmers. The Act provided for the division of tribally owned lands into 160 acre "allotments" for each family head, with the "surplus" available for later sale to non-Indian settlers.[158] The basic characteristics of an allotment under the Act were as follows: (1) it was an individual's share of the tribal land; (2) there were restrictions against alienation to protect the Indian against loss of his land; and (3) it was a vehicle for the government to educate the Indian to become a productive citizen.[159]

During the allotment period, which extended to 1934, emphasis was placed on the Indians as individuals rather than upon the tribes. An individual Indian allotted land would become a citizen, thereafter possessing all the rights, privileges, and responsibilities of white citizens.[160] While in the treaty period the federal government had distributed supplies, provisions, and "annuities" to the tribal leaders,[161] after the Allotment Act supplies and payments were made directly to the individual Indians.[162] The purpose of the Allotment Act was thus "ultimately to dissolve all tribal relations and to place each adult Indian upon the broad platform of American citizenship."[163] The effect of the Act, quite naturally, was to destroy traditional Indian tribal government. The "government" of most Indian tribes from 1887 to 1934 consisted of the Indian agent and his staff. Thus, the objective of the Bureau of Indian Affairs was generally to support and civilize the Indians.[164]

States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876); United States v. Holliday, 70 U.S. (3 Wall.) 407 (1865).

It was also settled during this period that the admission of new states into the Union did not divest the federal government of authority over the Indians. *See* Utah & N. R. v. Fisher, 116 U.S. 28, 29-30 (1885); United States v. McBratney, 104 U.S. 621, 623-24 (1881); Langford v. Monteith, 102 U.S. 145, 146-47 (1880); Harkness v. Hyde, 98 U.S. 476, 477-78 (1878); The N.Y. Indians, 72 U.S. (5 Wall.) 761, 767-70 (1866); The Kansas Indians, 72 U.S. (5 Wall.) 737, 754-57 (1866).

157. Act of February 8, 1887, ch. 119, §§ 1-11, 24 Stat. 388 (current version at 25 U.S.C. §§ 331 to 358 (1976)).

158. *Id.* §§ 1, 5 (current version at 25 U.S.C. § 331 (1976)).

159. *See* DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW 773-84 (1958) [hereinafter cited as FEDERAL INDIAN LAW].

160. Act of February 8, 1887; ch. 119; § 6, 24 Stat. 388, (current version at 25 U.S.C. § 349 (1976)).

161. *See, e.g.*, Act of March 3, 1875, ch. 132, 18 Stat. 420.

162. *See* text accompanying notes 223-258 *infra*.

163. COMMISSIONER OF INDIAN AFFAIRS, *supra* note 153, at viii.

164. *See, e.g.*, Synder Act, ch. 115, 42 Stat. 208 (1921) (current version at 25 U.S.C. § 13 (1976)).

The goal of "civilizing" the Indian also was illustrated in congressional reaction to a controversial Supreme Court decision, *Ex parte Crow Dog*.[165] An Indian named Crow Dog killed a popular Sioux chief and was punished according to tribal custom. His punishment, restitution payments to the family of the victim, outraged non-Indians, and he was tried and convicted in federal court for murder. On appeal the Supreme Court ruled that his punishment was in accordance with tribal custom, and that the federal courts were without jurisdiction to impose further penalty on him.[166] As a result of the public outcry to this decision, Congress attached a section to an appropriations act that set forth seven major crimes over which the federal courts thereafter would exercise jurisdiction in Indian affairs.[167] In *United States v. Kagama*[168] the Supreme Court upheld this legislation as a valid exercise of federal regulation of Indian behavior,[169] and in the process established what has become known as the "plenary power" doctrine.[170] The Court noted that

> [t]he power of the General Goverment over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that goverment, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.[171]

Also during this period the Supreme Court reaffirmed a rule of construction for cases involving Indians that is still followed. In *Alaska Pacific Fisheries v. United States*[172] the Court observed that "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed doubtful expressions being resolved in favor of the Indians."[173] The plenary powers doctrine, together with this rule of construction, form the strongest links in the chain of Indian cases stretching from *Worcester* to the present.

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165. 109 U.S. 556 (1883).

166. *Id.* at 568-72.

167. Act of March 3, 1885, ch. 341, § 9, 23 Stat. 362 (current version at 18 U.S.C. § 1153 (1976)).

168. 118 U.S. 375 (1886).

169. *Id.* at 383-85.

170. *Id.* at 379-80, 383-85.

171. *Id.* at 384-85.

172. 248 U.S. 78 (1918). *See also* Choate v. Trapp, 224 U.S. 665, 675 (1912).

173. 248 U.S. at 89.

B. Cherokee Legislation and Case Law from 1866-1924

After the Civil War the problem of the Cherokees again was addressed by the governments. In 1866 the North Carolina General Assembly, in response to an 1855 Congressional request,[174] legislated that the Cherokees had the legal right, insofar as the state was concerned, to continue residing in North Carolina.[175] Shortly thereafter, in 1868, Congress recognized the North Carolina Cherokees for the first time as legitimate remnants of the Cherokee nation and by statute directed the Secretary of the Interior "to take the same supervisory charge . . . [of them] as of other tribes of Indians."[176] Nevertheless, no Indian agent was assigned by the Commissioner of Indian Affairs because Congress had not appropriated funds for this purpose.[177]

The next year, the North Carolina Supreme Court ruled there was "nothing in the Constitution or laws of North Carolina, which forbids Cherokee Indians [sic] residents from taking and holding land."[178] And in 1870 the court extended the application of North Carolina criminal laws to Cherokees in *State v. Ta-cha-na-tah*.[179] The question of jurisdiction of the state over the Indian defendant was not seriously questioned.[180]

By this time William Thomas was compelled by age and poor health to "retire from further active participation in the affairs of the East Cherokee."[181] With his retirement, and "in the absence of any active governmental supervision" through an Indian agent, the Cherokees recognized a need for "some central authority."[182] In 1868 they met in Graham County, North Carolina to adopt a constitutional gov-

174. *See* text accompanying notes 139 *supra*.

175. Act of Feb. 9, 1866, ch. 54, § 1, 1866 N.C. Pub. Laws, Special Sess., 120.

176. Act of July 27, 1868, ch. 259, § 3, 15 Stat. 228.

177. Mooney, *supra* note 46, at 172.

178. Colvord v. Monroe, 63 N.C. 288, 288-89 (1869).

179. 64 N.C. 614 (1870).

180. *Id.* at 615 (objection not urged by counsel). *See also* State v. Wolf, 145 N.C. 440, 59 S.E. 40 (1907), in which a Cherokee Indian was convicted of violating a state compulsory school attendance law for not sending his child to the Indian school. The state legislature had enacted a special bill applying compulsory attendance to the Cherokee Indian school. *See id.* at 441-42, 59 S.E. at 41. Two dissenting justices questioned the appropriateness of the law. *Id.* at 447-449, 59 S.E. at 43-44 (Connor, J., dissenting). It should be noted that Congress previously had authorized the Commissioner of Indian Affairs to establish regulations to enforce attendance of Indian children at schools established for their benefit. Act of July 13, 1892, ch. 164, § 1, 27 Stat. 120, 143 (current version at 25 U.S.C. § 282 (1976)). *See also* 25 U.S.C. § 231 (1976).

181. Mooney, *supra* note 46, at 172.

182. *Id.* at 173.

ernment for the tribe.[183] This tribal government was inaugurated on December 1, 1870.[184] The new government "provided for a first and second chief to serve for two year terms", with one representative from each Cherokee community to serve at an annual council.[185] In 1875 a new constitution was adopted, fixing the term of the chief at four years.[186]

By 1870 the status of the lands bought for the Cherokees by Thomas was in a state of confusion. Following the war, creditors attacked Thomas' personal finances.[187] Because the Cherokee lands were technically a part of his estate, Thomas having taken title to these lands in his own name, they passed into the hands of his creditors.[188] In order to secure the title and retain possession of the land for the Cherokees, Congress authorized a suit to be brought in their name.[189] A suit was filed in 1873, and the next year the dispute was given to three arbitrators, whose decision was confirmed in 1874.[190] As a result, the Cherokees made additional payments to some of the creditors in return for deeds to the lands purchased for them by Thomas.[191] To enable the Cherokees to pay off this lien, "Congress in 1875 directed that as much as remained of the 'removal and subsistence fund' set apart for their benefit in 1848 should be used 'in perfecting titles to [their] lands' " and paying the costs of the litigation.[192] Congress also appropriated $15,000 to defray the cost of surveying the Cherokee lands.[193] After the land was surveyed and deeded, "the Indian Office assumed regular supervision of . . . Cherokee affairs and . . . the first agent since the retirement of Thomas was sent" from Washington in June 1875.[194] The following year Congress authorized the Commissioner of Indian Affairs to take the lands in satisfaction of the judgment in the law suits with the land later to be conveyed to the Eastern Band in fee simple.[195]

183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. Act of July 15, 1870, ch. 296, § 11, 16 Stat. 335.
190. For award of arbitrators and court confirmation, see H.R. EXEC. DOC. No. 128, 53d Cong., 2d Sess. 7-22 (1894).
191. *Id.*
192. Mooney, *supra* note 46, at 174. Act of March 3, 1875, ch. 132, 18 Stat. 420.
193. Act of June 23, 1874, ch. 455, 18 Stat. 204.
194. Mooney, *supra* note 46, at 174.
195. Act of August 14, 1876, ch. 268, 19 Stat. 139.

During this period, transferring guardianship and control of the North Carolina Cherokees from the federal to the state government was seriously considered. In 1876 a bill was referred to the Congressional Committee on Indian Affairs that would transfer responsibility from the federal government to the states of New York, North Carolina, Michigan, Wisconsin, Minnesota, and Iowa.[196] The rationale for the proposed transfer was that tribes in those states, including the Eastern Cherokees, had "attained to such a degree of civilization as to become self-supporting, and in all other respects fitted to mingle with the citizens of the States, to be subject to the same municipal control, and enjoy the same rights and privileges."[197] The bill would have transferred "control and guardianship" of the several tribes to the states, including all funds held in trust by the federal government as well as title to the lands occupied by the tribes.[198] The bill, however, was not passed, and the federal government retained control.

In 1882 the tribe was involved in a contract action to recover attorney fees for representation of the tribe in the earlier land suits. In *Rollins v. Eastern Band of Cherokee Indians*,[199] the North Carolina Supreme Court, in the first judicial recognition that the Eastern Cherokees had any legal status as an Indian tribe, held that the state courts were without jurisdiction to hear the suit.[200] The court ruled that since the federal government oversaw the activities of the tribe, contracts with the tribe could not be enforced against them in the state courts without the consent of the federal government.[201]

During all this time the North Carolina Cherokees had never forsaken their claims to share in the treaty benefits due the Cherokee Nation. In 1882 a special agent was appointed to investigate their claims,[202] and in 1883 Congress gave its approval[203] for a suit to be brought in the Court of Claims against the United States and the Cherokee Nation. Both the Court of Claims and the Supreme Court re-

196. *See* H.R. 3593, 44th Cong., 2d Sess., 5 CONG. REC. 1303 (1877); H.R. EXEC. DOC. No. 106, 44th Cong., 1st Sess. (1876).

197. H.R. EXEC. DOC. No. 106, *supra* note 196, at 2; *see also* J. KINNEY, A CONTINENT LOST—A CIVILIZATION WON 178-81 (1937).

198. H.R. EXEC. DOC. No. 106, *supra* note 196, at 2.

199. 87 N.C. 229 (1882).

200. *Id.* at 248.

201. *Id.* at 245-46, 248.

202. Act of August 7, 1882, ch. 433, 22 Stat. 302.

203. Act of March 3, 1883, ch. 14, 22 Stat. 582.

jected the claims of the North Carolina Cherokees.[204] Both courts ruled that the Cherokees in North Carolina had dissolved their connection with the Cherokee Nation and had ceased to be a part of it when they refused to emigrate west of the Mississippi.[205] In order for them to share in the benefits of the treaties, they must rejoin the Cherokee Nation and comply with its constitution and by-laws.[206] The Supreme Court opinion also contained dictum that questioned the legal status of the North Carolina Indians[207] and has since been cited to deny the tribal status of these Cherokees and establish jurisdiction of the state over the tribe.[208]

"In order to acquire a more definite legal status,"[209] the Cherokees obtained a private act of incorporation from the North Carolina legislature in 1889.[210] The Act granted the tribe all the powers of a corporation under the state law[211] and validated titles and deeds to the tribe.[212] But in 1890 the Cherokee lands were sold for taxes by Swain County, North Carolina, and Congress once again appropriated funds to redeem the land and to pay taxes in subsequent years.[213] Furthermore, in 1894 the still unresolved litigation between the tribe and the creditors of Will Thomas was finally settled by compromise.[214] Congress appro-

204. Eastern Band of Cherokee Indians v. United States, 20 Ct. Cl. 449 (1885), *aff'd*, 117 U.S. 288 (1886) (also referred to as the *Cherokee Trust Funds Case*).

205. 117 U.S. at 309-10; 20 Ct. Cl. at 473-83.

206. *Id.* at 311; 20 Ct. Cl. at 483.

207. The Court said:

> The Cherokees in North Carolina dissolved their connection with their Nation when they refused to accompany the body of it on its removal, and they have had no separate political organization since. Whatever union they have had among themselves has been merely a social or business one. It was formed in 1868, at the suggestion of an officer of the Indian office, for the purpose of enabling them to transact business with the Government with greater convenience. Although its articles are drawn in the form of a constitution for a separate civil government, they have never been recognized as a separate Nation by the United States; they can pass no laws; they are citizens of that State and bound by its laws. . . . [T]hey have been in some matters fostered and encouraged by the United States, but never recognized as a Nation in whole or in part.

Id. at 309-10, 20 Ct. Cl. at 473-83.

208. *See* United States v. Wright, 53 F.2d 300, 303 (4th Cir. 1931), *cert. denied*, 285 U.S. 539 (1932); *In re* McCoy, 233 F. Supp. 409, 412-13 (E.D.N.C. 1964); State v. McAlhaney, 220 N.C. 387, 389, 17 S.E.2d 352, 353 (1941); State v. Wolf, 145 N.C. 440, 444, 59 S.E. 40, 42 (1907); Sasser v. Beck, 40 N.C. App. 668, 670, 253 S.E.2d 577, 578-79, *cert. denied*, 298 N.C. 300, 259 S.E.2d 915 (1979).

209. Mooney, *supra* note 46, at 177.

210. *See* Act of Mar. 11, 1889, ch. 211, N.C. Private Laws 889.

211. *Id.* § 1.

212. *Id.* § 3.

213. Act of August 4, 1892, ch. 376, 27 Stat. 348.

214. *See* H.R. EXEC. DOC. No. 128, 53d Cong., 2d Sess. 7-46 (1894). The 1874 award had not settled the claims of the Indian lands as the Cherokees had hoped. According to George H. Smathers, Special Assistant United States Attorney, "[I]t was by the carelessness and negligence of

priated an additional $68,000 to carry out the terms of the award.[215]

In 1897 the legal status of the Cherokees was enhanced by a decision of the Fourth Circuit Court of Appeals. In *United States v. Boyd*,[216] the court said:

> The congress of the United States has repeatedly, since the treaty of New Echota, recognized the Eastern Band of Cherokee Indians as a distinct portion of the Cherokee race, and has dealt with them, not as individuals, but as a band distinctive in character, dependent on the United States, and entitled to the aid and protection of the general government.[217]

With this language the North Carolina Cherokees, for the first time, were recognized by a federal court as possessing the legal rights and status of other Indian tribes.[218]

Finally, in 1924, in another attempt to resolve the unsettled status of the Cherokees, Congress passed an act "[p]roviding for the final disposition of the affairs of the Eastern Band of Cherokee Indians of North Carolina."[219] The Act provided that the Secretary of the Interior

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the agents and officials of the United States that the title papers and other written contracts of the Indians were lost and destroyed." Report from George H. Smathers to Attorney General Richard Olney (November 25, 1893), *reprinted in* H.R. EXEC. DOC. No. 128, 53d Cong., 2d Sess. 46-58(1894) at 146.

Following the 1874 award, there were a great number of trespasses onto the Indian land by whites. This condition was explained by Eugene E. White, United States Special Indian Agent in his report to the Commissioner of Indian Affairs in December, 1885 (*reprinted in id.* at 46-58):

> To comprehend . . . [how title to the Cherokee lands became confused] it is necessary to know that the State of North Carolina never diminishes her public domain. Under her laws she will grant away the same tract or parcel of land times without number. Any citizens, upon proper application and payment of a specific price, can obtain a grant for any particular tract or parcel, no matter if the State had parted with her title to it forty years before. She will issue grants to the same tract or parcel just as many times and as frequently as proper application is made to her for them. She warrants nothing, however, and leaves it to the grantees to contest the "seniority" of their respective grants between themselves in the courts. Hence, . . . Hyde [the white man with conflicting claims] manifestly experienced no difficulty in procuring grants from the State for all the lands he wanted in Qualla Boundary. And so completely did he cover it and absorb it with grants that my great surprise is that having gone that far he did not go one step further and bring suits of ejectment against the whole band, and set them adrift in the world, without whereon to lay their heads.

Id. at 48.

215. Act of August 23, 1894, ch. 307, 28 Stat. 424.

216. 83 F. 547 (4th Cir. 1897).

217. *Id.* at 554.

218. The court also had its share of land title disputes during this period. *See* Brown v. Smathers, 188 N.C. 166, 126 S.E. 22 (1924); Westfelt v. Adams, 159 N.C. 409, 74 S.E. 1041 (1912); Frazier v. Eastern Band of Cherokee Indians, 146 N.C. 477, 59 S.E. 1005 (1907); Frazier v. Gibson, 140 N.C. 272, 52 S.E. 1035 (1905); Brown v. Brown, 103 N.C. 221, 9 S.E. 706 (1889), *aff'd on rehearing*, 106 N.C. 451, 11 S.E. 647 (1890); Whitsett v. Forehand, 79 N.C. 230 (1878); Colvord v. Monroe, 63 N.C. 288 (1868). *See also* Smythe v. Henry, 41 F. 705 (C.C.W.D.N.C. 1890).

219. Act of June 4, 1924, Pub. L. No. 68-191, ch. 253, 43 Stat. 376.

would prepare a new roll of the Cherokees,[220] and that the tribe would convey all its land, money, and other property in trust to the United States.[221] The Act further provided that the lands and money of the tribe would be alloted and divided among its members.[222] This Allotment Act placed the Cherokees and their lands on the same footing as other Indian tribes under the federal Indian policy.

V. TRIBAL STATUS: THE MODERN PERIOD

A. Federal Indian Policy and Legislation Since 1925

While the General Allotment Act was the most significant general Indian legislation in the late nineteenth century, in the early twentieth century the most important Indian legislation passed by Congress was the Indian Reorganization Act of 1934.[223] The publication of the famous *Meriam Report* in 1928[224] furnished the impetus for the Act. That study of Indian affairs presented in shocking detail the failure of federal Indian policy over the previous fifty years under the allotment policy[225] and recommended many reforms,[226] some of which were carried out in the Indian Reorganization Act.[227]

The purpose of the legislation was "[t]o grant to Indians living under federal tutelage the freedom to organize for purposes of local self-government and economic enterprise."[228] The Act officially ended the policy of allotment[229] and prohibited any transfer of Indian land except for voluntary exchanges for land of equal value when approved

220. *Id.* § 2.

221. *Id.* preamble.

222. *Id.* § 8. After the conveyance of the Cherokee land in trust to the United States, the federal policy of granting allotments eventually was discontinued. In 1931 Congress amended the 1924 Act and directed the Secretary of the Interior to defer the allotments of the Cherokee lands until otherwise directed by Congress. Act of March 4, 1931, Pub. L. No. 71-841, ch. 494, 46 Stat. 1518. The Indian Reorganization Act of 1934 permanently deferred allotments of any Indian trust lands to individual tribal members. *See* text accompanying notes 223-232 *infra.*

223. Act of June 18, 1934, Pub. L. No. 73-383, ch. 576, 48 Stat. 984 (current version at 25 U.S.C. §§ 461-479 (1976). *See* Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972).

224. INSTITUTE FOR GOVERNMENT RESEARCH, STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION (1928) [hereinafter referred to as MERIAM REPORT].

225. The allotment system had resulted in the loss of 90,000,000 acres of land by the Indians since 1887. H.R. REP. No. 1804, 73d Cong., 2d Sess. 6 (1934).

226. *See, e.g.*, MERIAM REPORT, *supra* note 224, at 113, 140-54, 462, 629-45.

227. *See, e.g.*, Act of June 18, 1934, Pub. L. No. 73-383, ch. 576, § 17, 48 Stat. 984 (codified at 25 U.S.C. § 477 (1976)).

228. H.R. REP. No. 1804, 73d Cong., 2d Sess. 1 (1934).

229. 25 U.S.C. § 461 (1976).

by the Secretary of the Interior.[230] It also provided a method for strengthening the governmental structure of the tribes by adoption of a Constitution and issuance of a federal corporate charter.[231]

This legislation, along with the other new federal programs ushered in with the Roosevelt administration represented a "New Deal" for Indians. The Indian people were still encouraged to attain self-sufficiency, but on a more gradual basis and through different methods.[232] But by the end of World War II, federal Indian policy again changed direction. After a series of studies and hearings on the status of Indian tribes throughout the country, Congress adopted a new policy known as "termination."[233] This policy, which lasted well into the 1960's, was based on the hope that by terminating the relationship between the United States and the Indian tribes and by removing federal services, the Indians would be free to manage their affairs on their own, and that they would thereby prosper along with the general population.[234] Many termination acts were passed by Congress that affected a number of Indian tribes.[235] Nevertheless, most Indian tribes, including the North Carolina Cherokees, opposed termination and those who made their opposition known successfully blocked termination legislation.[236]

This termination policy was typified in what is popularly known as

230. *Id.* § 464.

231. *Id.* §§ 476 to 478.

232. *See id.* § 476.

233. *See generally* DEPARTMENT OF THE INTERIOR, *supra* note 159, at 134-36.

234. *Id.*

235. *See* Act of Aug. 11, 1964, Pub. L. No. 88-419, 78 Stat. 390 (California Rancherias and Reservations); Act of Sept. 5, 1962, Pub. L. No. 87-629, 76 Stat. 429 (current version at 25 U.S.C. §§ 971 to 980 (1976)) (Ponca Tribe of Native Americans of Nebraska); Act of Sept. 21, 1959, Pub. L. No. 86-322, 73 Stat. 592 (current version at 25 U.S.C. §§ 931 to 938 (1976)) (Catawba Indians of South Carolina); Act of Aug. 18, 1958, Pub. L. No. 85-671, 72 Stat. 619 (California Rancherias and Reservations); Act of Aug. 3, 1956, Pub. L. No. 84-943, ch. 909, 70 Stat. 963 (current version at 25 U.S.C. §§ 841 to 853 (1976)) (Ottawa Tribe of Oklahoma); Act of Aug. 2, 1956, Pub. L. No. 84-921, ch. 881, 70 Stat. 937 (current version at 25 U.S.C. §§ 821 to 826 (1976)) (Peoria Tribe of Oklahoma); Act of Aug. 1, 1956, Pub. L. No. 84-887, ch. 843, 70 Stat. 893 (current version at 25 U.S.C. §§ 791 to 807 (1976)) (Wyandotte Tribe of Oklahoma); Act of Sept. 1, 1954, Pub. L. No. 83-762, ch. 1207, 68 Stat. 1099 (current version at 25 U.S.C. §§ 741 to 760 (1976)) (Paiute Indians of Utah); Act of Aug. 27, 1954, Pub. L. No. 83-671, ch. 1009, 68 Stat. 868 (current version at 25 U.S.C. § 677 (1976)) (Uintah and Ouray Ute Mixed Bloods of Utah); Act of Aug. 13, 1954, Pub. L. No. 83-588, ch. 733, 68 Stat. 724 (current version at 25 U.S.C. §§ 691 to 708 (1976)) (Western Oregon Indians—60 bands); Act of Aug. 13, 1954, Pub. L. No. 83-587, ch. 732, 68 Stat. 718 (current version at 25 U.S.C. § 564 (1976) (Klamath Tribe of Oregon); Act of June 23, 1954, Pub. L. No. 83-627, ch. 831, 68 Stat. 768 (current version at 25 U.S.C. §§ 721 to 728 (1976)) (Alabama-Coushatta Tribes of Texas); Act of June 17, 1954, Pub. L. No. 83-399, ch. 303, 68 Stat. 250 (repealed 1973) (Menominee Tribe of Wisconsin).

236. *See* DEPARTMENT OF INTERIOR, A HISTORY OF INDIAN POLICY 161-88 (S. Tyler ed. 1973).

Public Law 280.[237] In 1953 Congress attempted to provide a legislative solution to the increasingly troublesome question of state jurisdiction over Indians.[238] Public Law 280 grew out of an attempt to confer such jurisdiction upon California.[239] Previous grants of jurisdiction from Congress had been limited to reservations within a single state, and had followed consultation with the individual tribes and states concerned.[240] Public Law 280, however, was transformed into a general bill applicable to all states.[241] In the Act Congress authorized certain states to assume civil and criminal jurisdiction over reservation Indians.[242] Those states were given the same criminal jurisdiction over Indian country as they had elsewhere within the state,[243] and the Major Crimes Act[244] and General Crimes Act[245] were made inapplicable within the Indian country.[246] Five states were specifically conferred ju-

237. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (current version at 18 U.S.C. § 1162; 28 U.S.C. § 1360 (1976)). *See generally* Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1974-75).

238. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (current version at 18 U.S.C. § 1162; 28 U.S.C. § 1360 (1976)).

239. H.R. REP. No. 848, 83d Cong., 1st Sess. 5, *reprinted in* [1953] U.S. CODE CONG. & AD. NEWS 2409, 2411.

240. *See* 25 U.S.C. § 232 (1976) (granting New York criminal jurisdiction on reservations); 25 U.S.C. § 233 (1976) (granting New York civil jurisdiction over tribes within the state); Act of Oct. 5, 1949, Pub. L. No. 81-322, ch. 604, 63 Stat. 704 (granting California civil and criminal jurisdiction over Agua Calienta Reservation); Act of June 30, 1948, Pub. L. No. 80-846, ch. 759, 62 Stat. 1161 (granting Iowa criminal jurisdiction over Sac and Fox Reservation); Act of May 31, 1946, Pub. L. No. 79-394, ch. 279, 60 Stat. 229 (granting North Dakota criminal jurisdiction over Devils Lake Reservation); Act of June 8, 1940, ch. 276, 54 Stat. 249 (repealed 1948) (current version at 18 U.S.C. § 3243 (1976)) (granting Kansas criminal jurisidiction over reservations).

241. Act of August 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (current version at 18 U.S.C. § 1162; 28 U.S.C. § 1360 (1976)).

242. *Id.* §§ 2, 4.

243. *Id.*

244. 18 U.S.C. § 1153 (1976).

245. *Id.* § 1152.

246. Act of August 15, 1953, Pub. L. No. 83-280, ch. 505, § 2, 67 Stat. 588 (current version at 18 U.S.C. § 1162(c) (1976)).

The term "Indian country" was given a statutory definition in 1948. The term has been in regular use since the eighteenth century. It originally referred to the separate territory set aside for Indians, and in 1834 was defined as the lands west of the Mississippi and those lands east of the Mississippi where Indian title had not yet been extinguished. Non-Intercourse Act of 1834, ch. 161, § 1, 4 Stat. 729 (current version at 18 U.S.C. § 1151 (1976)). The 1948 Act defined "Indian country" as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. § 1151 (1976). Although this is a criminal statute, the Supreme Court has ruled that it "generally applies as well to questions of civil jurisdiction." DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

This definition is a direct outgrowth of the Supreme Court's decision in Donnelly v. United States, 228 U.S. 243 (1913). In *Donnelly* the defendant argued that the term "Indian country" was confined to lands in which Indians retained their original right of possession and did not apply to public land set apart as an Indian reservation, and not previously occupied by Indians. *Id.* at 268. The Court, however, recognized the changes in Indian affairs had been "so numerous and so

risdiction over Indians within their borders,[247] and consent was given for additional states to assume civil or criminal jurisdiction.[248] To date, eleven additional states have assumed jurisdiction over Indians.[249] North Carolina has taken no action to assume jurisdiction under the Act.

The Act later was amended when Congress provided in the Civil Rights Act of 1968 that thereafter no state could obtain jurisdiction over an Indian tribe through Public Law 280 unless the tribe itself consented to such jurisdiction.[250] This amendment represented a shift away from the assimilation approach to one of concern for tribal governments.

As a result of disastrous experiences of the tribes terminated in the 1950's, the termination policy was recognized as another failure. Again, the federal government sought a different approach to deal with the seemingly endless "Indian problem." In a message to the Senate, President Lyndon Johnson called on Congress to put an end to the termination of Indian tribes and to replace that policy with one promoting "self-determination."[251] The landmark legislation coinciding with this new policy was the passage, under the sponsorship of North Carolina's Senator Sam J. Ervin, Jr., of the 1968 Indian Civil Rights Act.[252] The Act lists specific protections for individual tribal members as well as limitations upon tribal governments.[253] Thus, Congress recognized the attributes of sovereignty and powers of self-government by applying

material, that the term cannot now be confined to land formerly held by the Indians, and to which their title remains unextinguished." *Id.* at 269. The Court held that "nothing can more appropriately be deemed 'Indian country' " than land "set apart as an Indian reservation." *Id.*

The status of non-reservation Indian lands was settled in United States v. Sandoval, 231 U.S. 28 (1913). *Sandoval* involved lands of the Pueblo Indians that were not federally owned reservations but were communally held lands owned in fee. The Court held that the lands were "Indian country" because they were occupied by "distinctly Indian communities" recognized and assisted by the federal government. *Id.* at 46. The 1948 Act definition contained a codification of *Sandoval. See* 18 U.S.C. § 1151(b) (1976).

247. California, Minnesota, Nebraska, Oregon, and Wisconsin. Act of August 15, 1953, Pub. L. No. 83-280, ch. 505, §§ 2, 4, 67 Stat. 588 (current version at 18 U.S.C. § 1162 (1976)).

248. *Id.* §§ 6, 7.

249. Alaska, Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. *See* Goldberg, *supra* note 237, at 547.

250. *See* Act of April 11, 1968, Pub. L. No. 90-284, § 406, 82 Stat. 80 (codified at 25 U.S.C. § 1326 (1976)).

251. 114 CONG. REC. 5394, 5395 (1968) (message of President Johnson, The Forgotten American).

252. Act of April 11, 1968, Pub. L. No. 90-284, §§ 201-203, 82 Stat. 78, (codified at 25 U.S.C. §§ 1301 to 1303 (1976)).

253. 25 U.S.C. §§ 1302, 1303 (1976).

some, but not all, of the Bill of Rights to Indian governments.[254]

The most significant development in federal case law during this period has been the clear application by the Supreme Court of the principles of federal preemption to Indian law. In a twenty year period, the Court decided ten Indian cases on the basis of federal preemption.[255] The principles relied on by the Court can be traced directly back to *Worcester v. Georgia*, which remains the most frequently cited of all Indian cases.[256] Under the preemption doctrine, valid federal legislation enacted for the benefit and protection of Indians preempts state laws that conflict with the federal legislation.[257] In these cases the Court has adopted a strong presumption against the validity of state regulations in Indian country.[258] In the continuing contest between Indian tribes and state and local governments, this doctrine provides the key for resolving these competing interests.

B. Cherokee Case Law Since 1925

1. Status of Cherokee Land

Following the conveyance of the Cherokee lands to the United States in 1925,[259] a number of cases examined the status of the Cherokees and the lands they continued to occupy. Beginning in the 1930's the Fourth Circuit decided a series of cases involving the Cherokees that answered a number of questions concerning the status of their lands. In *United States v. Wright*,[260] officials of Swain County, North

254. *Id.* For additional important Indian social legislation during this period, see, Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 to 450n (1976); Indian Financing Act of 1974, 25 U.S.C. § 1451 (1976); Indian Health Care Improvement Act, 25 U.S.C. §§ 1601 to 1675 (1976); Tribally Controlled Community College Assistance Act of 1978, 25 U.S.C. §§ 1801 to 1815 (Supp. II 1978); Indian Child Welfare Act, 25 U.S.C. §§ 1901 to 1963 (Supp. II 1978); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (Supp. II 1978).

255. *See* United States v. John, 437 U.S. 634 (1978); Bryan v. Itasca County, Minn., 426 U.S. 373 (1976); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976); Fisher v. District Court, 424 U.S. 382 (1976); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Kennerly v. District Court, 400 U.S. 423 (1971) (per curiam); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965); Organized Village of Kake v. Egan, 369 U.S. 60 (1962); Williams v. Lee, 358 U.S. 217 (1959).

256. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 168-69 (1973). *See* text accompanying notes 97-105 *supra*.

257. *See, e.g.*, Bryan v. Itasca County, 426 U.S. 373, 376-77 n.2 (1976); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 690-91 (1965).

258. For example, in McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), the Court ruled that state taxes generally are inapplicable against Indians in Indian country unless Congress provides to the contrary. *Id.* at 165, 181.

259. *See* text accompanying notes 219-222 *supra*.

260. 53 F.2d 300 (4th Cir. 1931), *cert. denied*, 285 U.S. 539 (1932).

Carolina, had assessed Cherokee lands and had sold them for taxes after the transfer of the lands to the United States under the 1924 Cherokee Allotment Act. In the suit the court was asked to decide the following three issues:

> (1) Did the Eastern Band of Cherokee Indians "constitute such a tribe of Indians as is subject to the guardianship of Congress?
>
> (2) Is the acceptance of a conveyance in trust of the lands of these Indians and an allotment . . . in severalty a proper exercise of such power?
>
> (3) Is such a trust an instrumentality of the federal government which Congress may exempt from taxation by the state?"[261]

The court answered all three issues in the affirmative. The court held that the Eastern Band is subject to federal guardianship,[262] but it also provided dictum that has been cited as recognizing a limitation on the authority of Congress over the Cherokees and affirming the jurisdiction of the state over the Cherokees.[263] Next, the court found that the guardianship power had been properly exercised[264] and further held that the method used to exercise the power was a political decision to be made by Congress and not the courts.[265] When it reached the question whether the county could impose a tax on the Indian land, the court said:

> It has long been settled that a state may not, without the consent of the federal government, tax a means or instrumentality of the latter employed for the execution of its powers. . . . And it should be noted that what we have here is not . . . a tax levied upon the property of wards of the government, but an attempt to tax property which has been deeded to the government itself to be used by it in behalf of its wards in the exercise of a power given it by the Constitution. The power to tax is the power to destroy; and, if the tax here can be sustained, this property held by the government for a constitu-

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261. *Id.* at 305.

262. *Id.* at 307.

263. The court noted:

> It is clear, however, that not every act of Congress with relation to the band would come within the power. . . . [T]he members of the band, by separation from the original tribe, have become subject to the laws of the state of North Carolina; and clearly no act of Congress in their behalf would be valid which interfered with the exercise of the police power of the state. In such a situation, a law to be sustained must have relation to the purpose for which the federal government exercises guardianship and protection over a people subject to the laws of one of the states; i.e., it must have a reasonable relation to their economic welfare.

Id. See In re McCoy, 233 F. Supp. 409, 413-14 (E.D.N.C. 1964); State v. McAlhaney, 220 N.C. 387, 389, 17 S.E.2d 352, 354 (1941); Sasser v. Beck, 40 N.C. App. 668, 671-72, 253 S.E.2d 577, 579, *cert. denied*, 298 N.C. 300, 259 S.E.2d 915 (1979).

264. 53 F.2d at 307.

265. *Id.* at 308.

tional purpose can be destroyed in its hands.[266]

The court further held that the method of creation of the Cherokee Indian Reservation did not affect the result of the suit.[267] Although title to the land once was held by the state after the Treaty of New Echota, the acquisition of the property by the federal government now precluded state taxation.[268] Finally, the court held that congressional authorization and payment of taxes on this land from 1890 to 1924 was "a mere matter of legislative policy which Congress had the right to change at any time."[269]

After *Wright* the Cherokees seemed secure on their land for the first time in more than a century. But the attack upon their lands did not stop. Throughout the 1930's the tribe was involved in litigation that questioned the Indians' rights to portions of the reservation.[270] Only six years after *Wright* the Fourth Circuit decided another case attacking the status of the land. In *United States v. Colvard*,[271] a suit to enjoin trespass against Indian land, the defendants had entered upon Cherokee lands and had built a road from their sawmill to a public highway. They then started a successful state cartway proceeding against two individual Indians.[272] The court ruled that it had jurisdiction to enjoin trespass and was not estopped from issuing its injunction by the prior proceeding in the state court.[273] The court pointed out that a roadway across Indian lands could be obtained only by adhering to federal procedures.[274]

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266. *Id.* at 308-09.

267. *Id.* at 311.

268. *Id.*

269. *Id.* at 312. The court also held that the 1924 Act was not improper class legislation even though the Indians were citizens of the United States and North Carolina. *Id.* at 311-12. For citizenship of Indians see 8 U.S.C. § 1401(a)(2) (1976); DEPARTMENT OF THE INTERIOR, *supra* note 159, at 516-26.

270. During the 1930's the federal district court consistently ruled against the Cherokees in all land suits and was consistently reversed by the Fourth Circuit. One case was apparently not appealed, but the conclusions and rationale of the decision clearly were refuted by the Fourth Circuit the following year. *Compare* United States v. Rose, 20 F. Supp. 350 (W.D.N.C. 1937) *with* United States v. 7,405.3 Acres of Land, 97 F.2d 417 (4th Cir. 1938).

271. 89 F.2d 312 (4th Cir. 1937).

272. *See id.* at 313.

273. *Id.* at 313-15. The court found that the United States "was not made a party to the proceedings in the state court, and consequently is not bound by these proceedings had behind its back." *Id.* at 314.

274. *Id.* at 314-15. For such procedures, *see* 25 U.S.C. §§ 311-328 (1976).

A criminal suit also grew out of the circumstances that led to the *Colvard* action. In State v. Adams, 213 N.C. 243, 195 S.E. 822 (1938), the farm agent of the Cherokee Indian Agency, a white man, was convicted for destroying a cartway bridge and for hindering the construction of a cartway. The court found jurisdiction and applied its criminal laws to offenses committed within the Indian reservation. *Id.* at 245-47, 195 S.E. at 823-24. The defendant argued that *Colvard*

A year later, the Fourth Circuit decided another land case in *United States v. 7,405.3 Acres of Land*.[275] A local power company claimed title to Cherokee lands under a separate chain of title and by adverse possession. In finding that the United States, as trustees for the Cherokees, held superior title to the land in question, the court said:

> The determinative fact is that the federal government has assumed towards . . . [the Cherokees] the same sort of guardianship that it exercises over other tribes of Indians, from which it results that their property becomes an instrumentality of that government for the accomplishment of a proper governmental purpose and may not be taken from them by contract, adverse possession, or otherwise, without its consent.
>
> . . . .
>
> . . . It is beyond the power of the state, either through statutes of limitation or adverse possession, to affect the interest of the United States; and the United States manifestly has an interest in preserving the property of these wards of the government for their use and benefit.[276]

2. Civil Jurisdiction

During this period the courts were presented with a number of jurisdictional questions. *Blair v. McAlhaney*[277] involved the refusal of the Commissioner of Indian Affairs to renew the license of McAlhaney to operate a store on the Cherokee Reservation. McAlhaney sued the commissioner and the Superintendent of the Cherokee Agency in federal court to enjoin them from interfering with his business. The court ruled that it was without jurisdiction to review the action of the Commissioner in granting or refusing this license, recognizing that this was

protected his actions against prosecution. The court rejected the defense because neither of the parties in *Adams* were parties in *Colvard*. *Id.* at 246, 195 S.E. at 823. Therefore, the defense was merely a collateral attack upon the state cartway proceeding. *Id.*

Construction of highways across Cherokee lands has been challenged in more recent cases. In Walkingstick v. Andrus, No. BC-79-205 (W.D.N.C. Feb. 28, 1980), individual tribal members sued the Secretary of the Interior and the North Carolina Department of Transportation seeking to enjoin the construction of a highway across the Cherokee Indian Reservation because of alleged violations of the National Environmental Policy Act. The district court dismissed the suit on the merits, ruling that the actions and procedures followed by the federal and state defendants did not violate the Act. The Fourth Circuit filed an unpublished per curiam affirmance, adopting the memorandum of the district court. Walkingstick v. Andrus, No. 80-1191 (4th Cir., July 3, 1980).

In the most recent Cherokee case, the Tribe sought injunctive relief against seventeen individuals in order that a highway might be completed across the reservation. Eastern Band of Cherokee Indians v. Griffin, No. BC-80-204 (W.D.N.C. Sept. 29, 1980). A federal court recently granted the Tribe's motion for a permanent injunction.

275. 97 F.2d 417 (4th Cir. 1938).

276. *Id.* at 422-23.

277. 123 F.2d 142 (4th Cir. 1941) (per curiam).

a matter within the control and discretion of the federal goverment.[278]

Haile v. Saunooke[279] involved another jurisdictional dispute in 1957. *Saunooke* was a personal injury action in federal court against individual Indians, the tribe itself, and the United States in its capacity as trustee and guardian for the tribe. The court dismissed the suit against the tribe, finding that "a tribe of Indians under the tutelage of the United States is not subject to suit without the consent of Congress."[280] The court rejected the argument that the 1889 incorporation of the tribe made them subject to such suit.[281] The court, however, did allow the plaintiffs to proceed against the individual Indian defendants and stated that they could recover from the United States if they could show negligence or wrongful acts by an employee of the government acting within the scope of his office.[282]

In 1978 the Fourth Circuit decided a jurisdictional dispute over the Cherokee trout program. In *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission*,[283] the tribe sought a declaratory judgment and injunctive relief prohibiting the state from selling fishing licenses to non-Indians fishing on the Cherokee reservation. The district court found that the federal government had preempted the state's regulation of fishing on the reservation and ruled that the state had no authority to levy and collect fishing license fees.[284] The Fourth Circuit affirmed, observing that the state had no compelling interest in the program and that requiring the purchase of state fishing licenses would have an adverse economic effect upon the tribe.[285] The court applied the preemption doctrine and found that the proposed state regulation and taxation would frustrate tribal self-government.[286]

278. *Id.* at 143. Two years later the Fourth Circuit decided another licensing case in United States v. Parton, 132 F.2d 886 (4th Cir. 1943) (per curiam). In *Parton* the government sought to enjoin an Indian businessman from operating on the reservation without a license. The court held that although Indians were exempt from the penalties prescribed in the federal code, they still were subject to the licensing requirements. *Id.* at 887. The court also rejected the argument that the Eastern Band was not an Indian tribe and that their land was not an Indian reservation. *Id.*

279. 246 F.2d 293 (4th Cir.), *cert. denied*, 355 U.S. 893 (1957).

280. *Id.* at 297.

281. "[A]n act of a state legislature cannot be allowed to interfere with the guardianship over these people which the United States has assumed, since Congress alone must determine the extent to which the immunities and protection afforded by the tribal status are to be withdrawn." *Id.* at 297-98.

282. *Id.* at 298.

283. 588 F.2d 75 (4th Cir. 1978).

284. *See id.* at 77.

285. *Id.* at 79.

286. *Id.* at 78.

The following year the tribe filed a federal suit against the North Carolina Department of Revenue and Swain County, North Carolina, asserting that the state and county were without authority or jurisdiction to impose income and personal property taxes on tribal members living and working on the Cherokee Indian Reservation.[287] The district court held that the state had authority to levy and collect these income and property taxes "on the basis of the unique history of the Eastern Band of Cherokee Indians."[288] The court ruled that because Congress had not addressed specifically the issue of income or personal property taxation of the Cherokees in the 1924 Cherokee Allotment Act, there was no federal preemption of these forms of state taxation.[289] The case is now on appeal to the Fourth Circuit.[290]

287. Eastern Band of Cherokee Indians v. Lynch, No. 78-30 (W.D.N.C., filed June 25, 1979).

288. *Id.* slip. op. at 18.

289. *Id.* slip. op. at 15.

290. As this Article went to print, the Fourth Circuit reversed the decision of the district court, ruling that "because the United States recognizes the Band as an Indian tribe and holds in trust the Indian reservation on which its members live, the state must show express federal permission to impose these taxes." Eastern Band of Cherokee Indians v. Lynch, No. 79-1588, slip. op. at 4 (4th Cir., *filed* Oct. 10, 1980). The court recounted an "abridged history" of the Eastern Band that "demonstrates that the Act of 1924 significantly altered the relationship of the Band both to North Carolina and to the United States." *Id.* at 12. The court specifically rejected that state's argument that it maintained authority over these Indians because of their state citizenship and the "unique history" of the tribe. The court noted that "the dominion of North Carolina over the Eastern Band, established by the 1835 Treaty of New Echota, is not immutable." *Id.* at 17. The court explained the result of its own previous Cherokee holdings was that

> the members of the Eastern Band of Cherokees have a dual status. They are citizens of North Carolina. Nevertheless, they are a federally recognized Indian tribe, and the land on which they earn their livelihood is a federally recognized Indian reservation held in trust for their benefit by the United States.

Id. at 12-13. Thus, the court indicated that the Cherokees are entitled to the same legal status and treatment as other Indian tribes and reservations recognized by the federal government. Principles of federal Indian law were applied to resolve this conflict, with the court relying on White Mountain Apache Tribe v. Bracker, 100 S. Ct. 2578 (1980), United States v. John, 437 U.S. 634 (1978), and McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).

In United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974), another tax case came before the Fourth Circuit. In *Critzer* a Cherokee Indian was convicted of federal income tax evasion. The defendant had been advised by Bureau of Indian Affairs officials that she was not taxable for rental income from her possessory interest holdings on Indian land. *Id.* at 1161. The appellate court reversed her conviction, finding that the "defendant cannot be guilty of willfully evading and defeating income taxes on income, the taxability of which is so uncertain that even co-ordinate branches of the United States Government plausibly reach directly opposing conclusions." *Id.* at 1162. After reversal of her criminal conviction, Mrs. Critzer filed a civil suit in the Court of Claims seeking a ruling that her income derived on the Cherokee Reservation was exempt from federal income taxation. The trial division ruled in her favor, but the full panel reversed. Critzer v. United States, 597 F.2d 708, (Ct. Cl.) *cert. denied*, 100 S.Ct. 239 (1979). The court followed the well-established rule that only income directly derived from a tribal member's portion of the tribal land is exempt from federal taxation. *Id.* at 711-12. *See* Squire v. Capoeman, 351 U.S. 1 (1956). Her income was found to be too remote to fall into the exemption. 597 F.2d at 713.

In State Bd. of Pub. Welfare v. Board of Comm'rs of Swain County, 262 N.C. 475, 137 S.E.2d 801 (1964), the court held that Swain County, North Carolina, was required to spend welfare

In 1979 the North Carolina Court of Appeals also ruled on the civil jurisdiction of the state courts over Cherokee Indians. In *Sasser v. Beck*,[291] the plaintiff sued an Indian motel operator for injuries sustained by a youth in a swimming pool accident occurring on the reservation. In a case of first impression, the court ruled that the North Carolina courts have civil jurisdiction over such tort claims.[292] The court concluded that

> North Carolina has had civil jurisdiction over the Eastern Band of Cherokee at least since the emigration west following the Treaty of New Echota. . . . The fact that these Indians have since been recognized as an Indian tribe and brought under federal supervision did not remove the existing jurisdiction of the State of North Carolina.[293]

In its most recent action, the Eastern Band of Cherokees, together with the Ketooah Band of Cherokees in Oklahoma, filed suit in federal court against the Tennessee Valley Authority, seeking an injunction to prevent the flooding of the Little Tennessee River and the completion of the Tellico Dam project.[294] The Tellico Dam project has been the subject of numerous lawsuits,[295] including two that resulted in injunctions halting construction for some four years, the last being the much publicized "Snail Darter" case.[296] On September 25, 1979, President Carter signed the Energy and Water Development Appropriation Act of 1980,[297] which provided that "notwithstanding the provisions of [the Endangered Species Act] or any other law," the TVA would complete the Tellico project.[298] The Cherokee suit claimed that this provision in the Act was unconstitutional because it would infringe upon the reli-

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funds for the Cherokees. *Id.* at 478, 137 S.E.2d at 803. The court ruled that because North Carolina had adopted the provisions of the Federal Social Security Act, the right of the Cherokees to enjoy the benefits could not be impaired even though the Cherokees resided on tax exempt lands. *Id.* at 477-78, 137 S.E.2d at 802-03. The court also summarily rejected the contention that the Cherokees were not citizens and therefore not entitled to the benefits. *Id.* at 477, 137 S.E.2d at 802-03.

291. 40 N.C. App. 668, 253 S.E.2d 577, *cert. denied*, 298 N.C. 300, 259 S.E.2d 915 (1979).

292. *Id.* at 674-75, 253 S.E.2d at 581.

293. *Id.* at 673, 253 S.E.2d at 580.

294. Sequoyah v. TVA, 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, — U.S. — (1980).

295. *See, e.g.* TVA v. Hill, 437 U.S. 153 (1978); United States *ex rel.* TVA v. Two Tracts of Land, 532 F.2d 1083 (6th Cir.), *cert. denied*, 429 U.S. 827 (1976); Environmental Defense Fund v. TVA, 492 F.2d 466 (6th Cir. 1974) (per curiam); Environmental Defense Fund v. TVA, 468 F.2d 1164 (6th Cir. 1972); United States v. Three Tracts of Land, 415 F. Supp. 586 (E.D. Tenn. 1976), *appeal docketed*, No. 78-1098 (6th Cir.)

296. TVA v. Hill, 437 U.S. 153 (1978).

297. Pub. L. 96-69, 93 Stat. 479 (codified in scattered sections of 42 U.S.C.).

298. *Id.* tit. 4.

gious exercise of traditional Cherokee Indians. The sites of a number of former Cherokee villages, known as the "overhill" villages, are located along the banks of the Little Tennessee River. The Cherokees asserted that completion of the dam would deny them the right to make pilgrimages to these sites sacred to their religion and would destroy the fabric for their traditional religious beliefs.[299] In 1978 Congress recognized the constitutional protection due such religious beliefs when it enacted the American Indian Religious Freedom Act.[300]

The District Court dismissed the suit, ruling that the Cherokees had no "property interest" in the lands and that the First Amendment was not a "license" to enter or use government property.[301] On appeal, the Sixth Circuit affirmed, ruling that the Cherokees had not alleged an "infringement of a constitutionally cognizable First Amendment right."[302] The court ruled that the Cherokee affidavits demonstrated only a " 'personal preference' " in the use of the land, and that they did not show that the land was central or indispensable to Cherokee religious observances.[303] In a dissent, Judge Merritt observed that "[i]n view of the liberal rules of pleading and the protective attitude that federal courts should follow in considering Indian claims, we should reverse . . . in order to give the Cherokees an opportunity to offer proof concerning the significance and centrality of their ancestral burial grounds."[304]

3. Criminal Jurisdiction

During this period the courts decided a number of cases involving significant questions of criminal jurisdiction. In *State v. McAlhaney*,[305] a non-Indian defendant was convicted in the state court for assaulting an Indian on the reservation. The defendant argued that the state court was without jurisdiction on the reservation. The court held that the federal courts do not have exclusive jurisdiction over criminal offenses

299. *See* 480 F. Supp. at 610; No. 79-1633, slip. op. at 2, 5-7 (6th Cir. April 15, 1980).

300. Pub. L. 95-341, 92 Stat. 469 (codified at 42 U.S.C. § 1996 (Supp. II 1978)).

301. 480 F. Supp. at 612. The court also rejected a statutory claim based on the Indian Religious Freedom Act because it found that the language "notwithstanding. . . any other law" in the 1980 Appropriation Act effectively exempted the Tellico project from the provisions of the first act. *See id.* at 411.

302. Sequoyah v. TVA, 620 F.2d 1159, 1165 (6th Cir.), *cert. denied*, — U.S. —(1980).

303. *Id.* at 1164.

304. *Id.* at 1165 (Merritt, J., dissenting).

305. 220 N.C. 387, 17 S.E.2d 352 (1941). *See also* States v. Adams, 213 N.C. 243, 195 S.E. 822 (1938).

committed on the reservation.[306] "Criminal statutes relating to Indians," observed the court, "enacted by The Congress in furtherance of the guardianship relation the Federal Government undertakes to maintain towards Indians, are not exclusive."[307]

In 1964 a federal court was presented with a question of the criminal jurisdiction of the state courts over the Cherokees. *In re McCoy*[308] involved the conviction of a Cherokee in state court for felonious breaking and entry. In a petition for habeas corpus to the federal district court, the defendant questioned the jurisdiction of the state. Because the crime had been committed by an Indian on a reservation, he argued that jurisdiction was exclusively with the federal courts.[309] The district court, however, held that the state had exercised criminal jurisdiction over the Cherokees since the Treaty of New Echota and that the federal government had never exercised exclusive jurisdiction.[310] The court quoted from the *Cherokee Trust Funds Case* to the effect that "they are citizens of that state, and bound by its laws."[311]

In *United States v. Hornbuckle*[312] the Fourth Circuit heard its first appeal questioning the jurisdiction of federal courts over crimes on the Cherokee Resevation. An Indian convicted in federal court for assault argued that the North Carolina state courts had exclusive jurisdiction. In a per curiam decision, the court rejected this argument, observing: "Contrary to [the defendant's] contention, the United States and North Carolina exercise concurrent criminal jurisdiction over the reservation."[313]

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306. *See id.* at 389, 17 S.E.2d at 354.

307. *Id.*

308. 233 F. Supp. 409 (E.D.N.C. 1964).

309. *Id.* at 411.

310. *Id.* at 412. The court noted that:

> When sections 1151 and 1153 of Title 18 U.S.C.A. were enacted by Congress in 1948 they incorporated and codified the treaty of New Echota of 1835. The intention of the legislators was not to circumvent or override the treaty, but to effectuate it and to regulate and control the prosecution of Indians in an area of ten major crimes where such crimes were unaffected by treaties previously entered into by Congress. . . . Jurisdiction of the two governments is concurrent; the state government derives it from the treaty of New Echota, and the federal government derives it from its position as guardian and protector of these native Americans.

Id. at 414.

311. *Id.* at 413 (quoting Eastern Band of Cherokee Indians v. United States, 117 U.S. 288, 311 (1886)).

312. 422 F.2d 391 (4th Cir. 1970) (per curiam). *See also* United States v. Lossiah, 537 F.2d 1250 (4th Cir. 1976) (federal jurisdiction applied to a second degree murder conviction of a Cherokee under 18 U.S.C. §§ 1111, 1153 (1976)).

313. 422 F.2d at 391.

4. Civil Rights Act

The 1968 Indian Civil Rights Act produced litigation that further examined the legal status of the Cherokees. In *Nettie Crowe v. Eastern Band of Cherokee Indians, Inc.*,[314] a tribal member sued the tribe and the United States under the Act, alleging due process and equal protection violations when the tribe assigned part of her lands to another tribal member. The court found jurisdiction under the Act to hear the suit.[315] It then held that the tribe's assignment of land to another Indian, without a hearing or notice to the plaintiff, violated her right to due process under the Act.[316] The court went on to hold that the actual assignment of the land was a decision to be made by the tribe and not the court.[317] In doing so, the Court discussed principles of Indian tribal sovereignty and applied them to the North Carolina Cherokees:

> What has been described as 'perhaps the most basic principle of all Indian law' is that the powers vested in an Indian tribe are not powers granted by express Acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished . . . .
>
> . . . .
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> This doctrine of Indian sovereignty is relevant not only 'because it provides a backdrop against which the [Indian Civil Rights Act] must be read,' but also because it plays an integral role in the concept of tribal property law. . . .
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> . . . From this [description by the district court of the plaintiff's property rights as vested] it would appear that the court was applying Anglo-American principles of real property law, and in so doing adopted an approach that was incompatible with the established principle that lands belong to the Indian tribe as a community and not to the members severally or as tenants in common. . . . Such a controversy involving tribal land should not be resolved by the application of technical rules of common law, but in the light of the traditions and customs of the Indian people.[318]

The jurisdictional ruling of *Nettie Crowe* survived for only four

314. 506 F.2d 1231 (4th Cir. 1974).

315. *Id.* at 1234.

316. *Id.*

317. *Id.* at 1237.

318. *Id.* at 1234-36. The tribe again was sued under the Civil Rights Act in Wachacha v. Eastern Band of Cherokee Indians, Inc., No. 74-23, (W.D.N.C., filed Dec. 31, 1974). The plaintiff tribal members alleged violations of due process and equal protection in a tribal election. The court held that the representational scheme of the tribe for the Tribal Council violated the equal protection provisions of the Act because it did not comply with the principles of Baker v. Carr, 369 U.S. 186 (1962), which were applicable to an Indian reservation. Wachacha v. Eastern Band of Cherokee Indians, Inc., No. 74-23, slip. op. at 14 (W.D.N.C. Dec. 31, 1974).

years. In *Berdina Crowe v. Eastern Band of Cherokee Indians, Inc.*,[319] the tribe again was sued under the Civil Rights Act for alleged violations in a tribal election. The district court dismissed the suit, finding that the plaintiffs had failed to state a claim.[320] On appeal, the Fourth Circuit ruled that the district court was without jurisdiction to hear the dispute.[321] The court based its conclusion on the Supreme Court decision in *Santa Clara Pueblo v. Martinez*,[322] a 1978 case in which the Court held that Indian tribes were protected by their sovereign immunity against suits under the Indian Civil Rights Act.[323] The Fourth Circuit found that the "clear and unequivocal holding" of *Martinez* overruled the jurisdictional ruling in *Nettie Crowe*.[324]

C. *The Result of Cherokee Legislation and Case Law*

As a result of the legislation and case law dealing with the North Carolina Cherokees a number of matters clearly are established with respect to these Indians. It is now "well established that the Eastern Band of Cherokee Indians is an Indian Tribe within the meaning of the Constitution and laws of the United States."[325] It is also clear that "the federal government has assumed toward them the same sort of guardianship that it exercises over other tribes of Indians."[326] The federal government's long course of dealing with the tribe and its clear assumption of trust responsibilities[327] have established this "guardianship" status.

These principles have been established despite the existence of the Treaty of New Echota and the removal of the Cherokee Nation west of

319. 584 F.2d 45 (4th Cir. 1978) (per curiam).

320. Crowe v. Eastern Band of Cherokee Indians, Inc., 442 F. Supp. 334, 340 (W.D.N.C. 1977), *rev'd*, 584 F.2d 45 (4th Cir. 1978).

321. 584 F.2d at 45.

322. 436 U.S. 49 (1978).

323. *Id.* at 72.

324. 584 F.2d at 46.

The holding of *Berdina Crowe* was reaffirmed in Toineeta v. Andrus, No. BC-80-97 (W.D.N.C. August 13, 1980). In *Toineeta*, an individual tribal member sued the Secretary of the Interior, other federal officials, and twenty-one tribal officers seeking a writ of mandamus and an injunction, alleging she had been deprived of property without due process by the defendants. The court dismissed her claim on the merits against the Indian defendants because the Indian Civil Rights Act did not give federal jurisdiction over such intratribal disputes and because plaintiff did not state an enforceable civil rights claim under either 42 U.S.C. §§ 1983 or 1985.

325. *See, e.g.*, Haile v. Saunooke, 246 F.2d 293, 294 (4th Cir.), *cert. denied*, 355 U.S. 893 (1957).

326. United States v. 7,405.3 Acres of Land, 97 F.2d 417, 422 (4th Cir. 1938).

327. *See* Act of June 4, 1924, Pub. L. No. 68-191, ch. 253, 43 Stat. 375.

the Mississippi.[328] The Treaty of New Echota, which divested the Cherokees of all holdings in North Carolina,[329] remains operative today, but only to the extent that its terms are unmodified by later congressional enactments. Historical and legal developments since 1835 have altered greatly the effects of this Treaty upon the Cherokees who remained in North Carolina.

Congress has the power to unilaterally abrogate provisions of Indian treaties,[330] as well as the power to change the terms or effects of treaties.[331] It also has the sole authority to recognize an Indian tribe and extend federal guardianship.[332] Once Congress determines the status of an Indian group, that decision is binding on the courts.[333] Furthermore, Indian reservations can be established in various ways. The courts have recognized that full tribal and reservation status can be acquired by treaty, statute, or executive order.[334] Thus, it is not inconsistent for the Cherokees of North Carolina to have established full legal status as an Indian tribe and as a reservation many years after the Treaty of New Echota. This is exactly what happened.

The federal government, after taking "the same supervisory charge of the North Carolina Cherokees as of other tribes of Indians"[335] authorized the tribe to sue to protect its land claims[336] and appropriated money to survey the land,[337] to pay part of the costs of the suits,[338] to

328. *See* text accompanying notes 75-80 *supra.*

329. *See* text accompanying note 76 *supra.*

330. *See* Choate v. Trapp, 224 U.S. 665, 671 (1912); Hijo v. United States, 194 U.S. 315, 324 (1904) ("[T]he last in date must prevail"); Thomas v. Gay, 169 U.S. 264, 271 (1898); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870) ("A treaty may supercede a prior act of Congress, and an act of Congress may supercede a prior treaty.")

331. *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), in which the Supreme Court said:

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so.

Id. at 566.

332. *See* United States v. Holliday, 70 U.S. (3 Wall.) 407 (1867), in which it was established that such recognition is a political decision vested in Congress by the Constitution. *Id.* at 419.

333. *See* United States v. Sandoval, 231 U.S. 28, 48 (1913).

334. *See* Antoine v. Washington, 420 U.S. 194, 199-204 (1975); Alaska Pac. Fisheries v. United States, 248 U.S. 78, 87-88 (1918); Spalding v. Chandler, 160 U.S. 394, 403 (1896). Although there is nothing magical about the term "reservation," federal acquisition of lands for Indians can have the effect of preempting state authority over the affected Indians. *See* United States v. McGowan, 302 U.S. 535, 539 (1938).

335. Act of July 27, 1868, ch. 259, § 3, 15 Stat. 228.

336. Act of July 15, 1870, ch. 296, § 11, 16 Stat. 335.

337. Act of June 23, 1874, ch. 455, 18 Stat. 204.

338. Act of March 3, 1875, ch. 131, 18 Stat. 402.

pay taxes on the land,[339] and to clear title to the land.[340] Congress then directed these Indians to convey their land to the government in trust with the intention of alloting it among the tribal members at a later date.[341] Congress, however, deferred this allotment of the Cherokee land indefinitely,[342] and in 1934 announced a national policy of deferring allotments and extended indefinitely the trust period of Indian trust lands.[343] As a result of these congressional actions, the lands of the North Carolina Cherokees are held in trust status and enjoy the protection of the federal goverment to the same extent as other Indian reservations. Any other conclusion ignores an entire body of federal law.

VI. JURISDICTION

Principles of federal Indian law have not been applied consistently by the North Carolina courts in asserting jurisdiction over the Cherokees. The opinions generally have found that the state has jurisdiction over all persons within its borders.[344] One commentator, however, has noted that these jurisdictional rulings are inconsistent with the general trend in federal Indian law.[345]

The jurisdiction of a state generally is based on its sovereignty over the land within its borders. In Indian affairs, however, the powers of a state are limited by the supreme authority of the federal government to regulate commerce with Indian tribes and to exercise its guardianship responsibilities over its Indian wards.[346] The constitutional authority of the federal government to prescribe laws and to administer justice on an Indian reservation is plenary.[347] The task of the courts is to determine how Congress actually exercised its constitutional powers.

When Indians are not involved in tribal relations, they are subject

339. Act of August 4, 1892, ch. 376, 27 Stat. 348.

340. Act of August 23, 1894, ch. 307, 28 Stat. 424.

341. Act of June 4, 1924, Pub. L. No. 68-191, ch. 253, 43 Stat. 375.

342. Act of March 4, 1931, Pub. L. No. 71-841, ch. 494, 46 Stat. 1518.

343. Act of June 18, 1934, Pub. L. No. 73-383, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. § 463 (1976)).

344. *See, e.g.*, State v. McAlhaney, 220 N.C. 387, 389, 17 S.E.2d 352, 354 (1941).

345. "The only clear exception to the pattern of affording either exclusive state or federal jurisdiction over Indian lands is the situation with respect to the Eastern Band of Cherokee Reservation in North Carolina, where federal and state judicial decisions have clearly indicated that the jurisdiction is concurrent." Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 570-71 (1976).

346. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 116-17 (1958).

347. *See, e.g.* United States v. Kagama, 118 U.S. 375, 379-80, 383-85 (1886).

to the police power of the state to the same extent as non-Indians.[348] A state also has jursidiction over the conduct of an Indian while he is off the reservation[349] and has jurisdiction over some, but not all, acts of non-Indians while they are on the reservation.[350] In 1953 Congress gave its consent for all states to assume limited criminal and civil jurisdiction over Indians and Indian reservations through Public Law 280.[351] The Act, however, did not grant jurisdiction to North Carolina, and the state has not brought itself under its provisions.[352] Prior to Public Law 280, some states had exercised limited civil and criminal jurisdiction over non-Indians within Indian country.[353] Congress also had granted some states jurisdiction over specific Indian tribes and reservations.[354] Recent court decisions indicate that exercises of state jurisdiction, not in strict accordance with Public Law 280 or other jurisdictional enactments, are subject to close scrutiny and are not easily upheld.[355]

Given the plenary authority of Congress over Indian affairs, North Carolina would not appear to have more authority over the Indians within its boundaries than those states granted powers under Public Law 280 or other jurisdictional enactments. Because Congress has been silent on the question of state jurisdiction over the Cherokee Reservation since its establishment under the 1924 Act,[356] this tribe would appear to possess the same immunities from state regulation as possessed by tribes in states not granted jurisdiction by Congress.

The acknowledged authority on Indian Law was Felix S. Cohen, former assistant Solicitor for the Department of the Interior and author of the first comprehensive treatise on Indian law.[357] While serving as

348. *See, e.g.*, Goudy v. Meath, 203 U.S. 146 (1906); Scott v. Sanford, 60 U.S. (19 How.) 393, 403-04 (1857).

349. *See, e.g.*, Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

350. *See, e.g.*, New York v. Martin, 326 U.S. 496 (1946); Draper v. United States, 164 U.S. 240 (1896); Utah & N. Ry. v. Fisher, 116 U.S. 28 (1885); United States v. McBratney, 104 U.S. 621 (1881).

351. *See* text accompanying notes 237-49 *supra*.

352. *Id.*

353. For criminal jurisdiction over offenses by non-Indians against non-Indians see Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney, 104 U.S. 621 (1881). For taxation of personal property of non-Indians see Thomas v. Gay, 169 U.S. 264 (1898).

354. *See* authorities cited in note 240 *supra*.

355. *See* Bryan v. Itasca County, 426 U.S. 373 (1976); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Kennerly v. District Court, 400 U.S. 423 (1971) (per curiam); Williams v. Lee, 358 U.S. 217 (1959).

356. Act of June 4, 1924, Pub. L. No. 68-191, ch. 253, 43 Stat. 376.

357. Felix S. Cohen (1907-1953) was the author of HANDBOOK OF FEDERAL INDIAN LAW,

Acting Solicitor, Cohen rendered his legal opinion on the status of the North Carolina Cherokees to the then Attorney General of North Carolina:

> It is true that during a certain period in their history, namely, between the treaty of New Echota in 1835 . . . and the act of July 27, 1868 . . . , the Indians who now constitute the Eastern Band of Cherokees of North Carolina occupied an exceptional position in that they had left their regular tribal organization and became subject to the laws of the State of North Carolina and had lost all title to the lands which they continued to occupy. But by the act of July 27, 1868, however, Congress regularized their position and instructed the Secretary of the Interior to "cause the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians." From that time on the Indians were again treated as wards of the Federal Government receiving all the benefits and supervision generally accorded to other Indians in the United States. It is true that thereafter, in 1889, the Indians obtained a corporate charter from the North Carolina Legislature . . . which regulated their tribal functions. The United States, however, did not cease during this entire period to execise its guardianship over these Indians.
>
> The act of June 4, 1924 . . . authorized the tribe to convey all its land which it had obtained since the treaty of New Echota to the United States. These lands were then declared tax free. This provision of the act of 1924 was upheld by the ruling in *United States v. Wright*. . . . When the Indian Reorganization Act of June 18, 1934 . . . passed it was held to extend to the Cherokees who thereupon voted in favor of the act.
>
> This brief history would seem to show that since the act of 1868, and certainly since the act of 1924, the Cherokees have in every respect been treated by the Federal Government as any other tribe of Indians and have enjoyed the same benefits and protection as Federal wards.[358]

The North Carolina Attorney General, however, never has accepted this reasoning[359] and, since the Cohen analysis was published only recently, it probably never has been argued to the North Carolina courts.

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supra note 346, published by the Department of Interior in 1942 and recently republished by the University of New Mexico Press. Cohen's work was revised, with a new edition published as FEDERAL INDIAN LAW by the Department of Interior in 1958. This revision has been criticized and presently a new revision is being prepared for publication.

358. Letter from Felix S. Cohen, Acting Solicitor, Department of Interior, to Harry McMullan, Attorney General of North Carolina (August 25, 1942), *reprinted in* DEPARTMENT OF INTERIOR, 2 OPINIONS OF SOLICITOR OF DEPARTMENT OF INTERIOR RELATING TO INDIAN AFFAIRS 1163 (1979).

359. *See generally* Brief for Attorney General, Eastern Band of Cherokee Indians v. Lynch, No. 78-30 (W.D.N.C., June 25, 1979); Letter from Malcolm B. Seawell, North Carolina Attorney General, to James S. Currie, North Carolina Commissioner of Revenue (June 2, 1958).

Indeed, the North Carolina case law dealing with jurisdiction of the state courts over the Cherokees is not large. The case law dealing with civil jurisdiction is very limited. The earliest case[360] was not a general consideration of the broad jurisdictional powers of the state courts over individual Cherokees because of its narrow factual circumstances. Civil jurisdiction of the courts again was questioned in a 1966 case;[361] the court, however, ruled on other grounds and avoided the jurisdictional question.[362] *Sasser v. Beck*,[363] recognizing the state's civil jurisdiction over the Cherokees, was the first attempt of a North Carolina court to come to grips with this issue. Unfortunately, the Court of Appeals relied almost exclusively on prior North Carolina decisions, some of which were *criminal* jurisdiction cases, and revealed a lack of comprehension of general principles of federal Indian law.

The earliest North Carolina cases dealing with criminal jurisdiction over Cherokees and their lands are now of little significance. Unfortunately, the North Carolina courts continually cite them with unquestioning approval. *State v. Ta-cha-na-tah*,[364] which extended the state's criminal jurisdiction to the Cherokees, was decided in 1870 before the Cherokee lands were consolidated, before the land was conveyed in trust to the United States, and before the enactment of the Major Crimes Act.[365] In light of the state of the law as it related to Indians in 1870, *Ta-cha-na-tah* was perhaps correct when it was rendered. Because of the legal developments since that time, however, it offers no significant guidance to the present state of the law.

State v. Wolf,[366] which upheld the conviction of a Cherokee for violating a state compulsory school attendance law by not sending his child to the Indian school, is a questionable decision, as was recognized at the time by the strong dissent. *Wolf* simply was decided incorrectly. This is made evident when it is noted that in 1892 Congress authorized the Commissioner of Indian Affairs to enforce attendance of Indian children at Indian schools.[367] There was no mention of this Act in the

360. Rollins v. Eastern Band of Cherokee Indians, 87 N.C. 229 (1882). *See* text accompanying notes 199-201 *supra*.

361. Young v. Sweet, 266 N.C. 623, 146 S.E.2d 669 (1966).

362. *Id.* at 625, 146 S.E.2d at 671.

363. 40 N.C. App. 668, 253 S.E.2d 577, *cert. denied*, 298 N.C. 300, 259 S.E.2d 915 (1979). *See* text accompanying notes 291-93 *supra*.

364. 64 N.C. 614 (1870).

365. 18 U.S.C. § 1153 (1976). *See* text accompanying note 167 *supra*.

366. 145 N.C. 440, 59 S.E. 40 (1907). *See* note 180 *supra*.

367. *See* Act of July 13, 1892, ch. 164, § 1, 27 Stat. 120, 143 (current version at 25 U.S.C. § 282 (1976)). The Secretary of Interior is authorized to regulate enrollment and regular attendance of

Wolf opinion. Under present federal Indian law principles, such federal legislation would oust the state of any subject matter jurisdiction.[368]

State v. Adams[369] was decided correctly but perhaps for the wrong reasons. In *Adams* the defendant, a non-Indian, was charged with destroying property of another non-Indian on Cherokee lands. These facts clearly bring *Adams* within the *McBratney-Draper* rule established by the Supreme Court.[370] Under this rule states are vested with exclusive authority over offenses committed by non-Indians against non-Indians in Indian country, unless Congress specifically has provided for exclusive federal jurisdiction.[371] Although the North Carolina court cited *McBratney*, the opinion rested on "a *prima facie* presumption of rightful jurisdiction,"[372] and there was no discussion of the distinction made between Indians and non-Indians by the court.

In *State v. McAlhaney*[373] the court reached a conclusion that contributed significantly to the confusion in subsequent Cherokee jurisdiction cases. The court ruled: "Criminal statutes relating to Indians, enacted by The Congress in furtherance of the guardianship relation the Federal Government undertakes to maintain towards Indians, are not exclusive."[374] The *McAlhaney* rationale was adopted in *In re McCoy*[375] when the federal district court observed that the federal government "has exercised concurrent jurisdiction in this area, but never has it exercised exclusive jurisdiction."[376] This was the first time the term "concurrent" was applied to this question, and the appearance of this word added further confusion to an already clouded area of law.

Indian children in government or public schools. 25 U.S.C. § 282 (1976). Present day enforcement of school attendance by Indian children is governed by *id.* § 231 (1976), which authorizes the Secretary of Interior to permit state agents to enter Indian lands to enforce state compulsory school attendance laws, but only if the Indian tribe "has adopted a resolution consenting to such application." *Id.* For non-Cherokee cases construing § 231, see *In re* Colwash, 57 Wash. 2d 196, 356 P.2d 994 (1960) (en banc); State v. Superior Court, 57 Wash. 2d 181, 356 P.2d 985 (1960) (en banc).

368. *See* authority cited in note 420 *infra*. *See also* note 180 *supra*.

369. 213 N.C. 243, 195 S.E. 822 (1938).

370. *See* New York v. Martin, 326 U.S. 496 (1946); Draper v. United States, 164 U.S. 240 (1896); Utah & N. Ry. v. Fisher, 116 U.S. 28 (1885); United States v. McBratney, 104 U.S. 621 (1885).

371. Authorities cited note 370 *supra*.

372. 213 N.C. at 245, 195 S.E. at 823. This legal presumption is no longer the law in North Carolina after State v. Batdorf, 293 N.C. 486, 494, 238 S.E.2d 497, 502-03 (1977) (state has burden to show beyond a reasonable doubt that N.C. has jurisdiction).

373. 220 N.C. 387, 17 S.E.2d 352 (1941).

374. *Id.* at 389, 17 S.E.2d at 354.

375. 233 F. Supp. 409 (E.D.N.C. 1964). *See* text accompanying notes 308-11 *supra*.

376. 233 F. Supp. at 412.

When the question of criminal jurisdiction finally reached the Fourth Circuit, the matter was still not clarified. In *United States v. Hornbuckle*[377] the court repeated the simplistic conclusion of *McCoy* and observed that "the United States and North Carolina exercise concurrent criminal jurisdiction over the reservation."[378]

The rationale for this line of cases clearly was rebutted by the Supreme Court in 1978 when it specifically held in *United States v. John*[379] that certain federal criminal jurisdiction statutes were exclusive.[380] In *John* a Choctaw Indian was convicted in federal court of a lesser offense to a charge of assault with intent to kill. The questions before the Supreme Court were (1) whether the Choctaw Indian Reservation was "Indian country" and therefore covered by the federal criminal statutes applicable to Indians, and (2) "whether these federal criminal statutes operate[d] to preclude the exercise of state criminal jurisdiction over the offenses."[381] After determining that the Choctaw Reservation, which, like the North Carolina Cherokee Reservation, was created for a remnant band following the removal of most of the Choctaw Nation to Oklahoma in the 1830's, was "Indian country,"[382] the Court then found that legislative history and prior Supreme Court decisions supported the conclusion that the federal criminal statutes were "pre-emptive of state jurisdiction."[383]

The Supreme Court of Maine recently reached this same conclusion under factual circumstances even more favorable to the state's interest than those involving the North Carolina Cherokees. The question before the court in *State v. Dana*[384] concerned the application of the term "Indian country," which is used in federal criminal statutes, to Passamaquoddy Indians, whose status as "bona fide Indians" is not established as clearly as that of the Cherokees.[385] The Maine court rec-

377. 422 F.2d 391 (4th Cir. 1970) (per curiam). *See* text accompanying notes 312-13 *supra*.

378. 422 F.2d at 391. See, however, Eastern Band of Cherokee Indians v. Lynch, No. 79-1588 (4th Cir. Oct. 10, 1980), in which the court stated that North Carolina "acknowledges that *John* casts doubt on the viability of [*Hornbuckle*]." *Id.* at 16 n.34.

379. 437 U.S. 634 (1978). For other cases holding that federal statutes give exclusive jurisdiction to the federal courts see Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351 (1962); Williams v. Lee, 358 U.S. 217, 220 & n.5 (1959); Rice v. Olsen, 324 U.S. 786 (1945).

380. 437 U.S. at 651. The statutory provisions were 18 U.S.C. § 1153 (1976) (Major Crimes Act; *see* text accompanying notes 165-69 *supra*) and 18 U.S.C. § 1151 (1976) (statutory definition of "Indian country").

381. 437 U.S. at 635.

382. *Id.* at 648-50.

383. *Id.* at 651 & n.22.

384. 404 A.2d 551 (Me. 1979), *cert. denied*, 100 S. Ct. 1064 (1980).

385. *Id.* at 552-53.

ognized that when the statutory definition of "Indian country" was enacted in 1948, Congress was involved in "virtually a new undertaking" in which it sought to " 'consolidate . . . numerous conflicting and inconsistent provisions of law into a concise statement of the applicable law."[386] The court found that Congress sought to apply to all "dependent Indian communities" a uniform "protection that certain enumerated crimes committed within any such Indian community would be controlled by federal, instead of state, jurisdiction."[387]

After the *John* decision, North Carolina officials conceded that the state courts are without criminal jurisdiction for acts included in the Major Crimes Act.[388] State and federal law enforcement officials interpreted the decision differently, and local state officials soon withdrew most law enforcement services from the reservation.[389] Constrained to fill this sudden void, the Bureau of Indian Affairs, with the approval of the Cherokee Tribal Council, authorized the establishment of a Court of Indian Offenses.[390] The court system is designed "to provide an adequate machinery for law enforcement" on the Cherokee Reservation.[391] Once this court is operational, many of the previous criminal jurisdiction conflicts will be resolved. For offenses committed on the Reservation, the federal courts will continue to try Indian and non-Indian felons, the Indian Court will try the lesser offenses commited by Indians, and the state courts will try non-Indians for lesser offenses. Tribal officials have begun studies that may result in the eventual replacement of the Court of Indian Offenses with a purely Tribal Court.[392] Tribal officials hope that their local court system eventually will become the primary forum for both criminal and civil disputes that arise on the reservation which involve Indians.[393]

Thus, it seems clear that the conclusion of the North Carolina Supreme Court in *McAlhaney* has been invalidated completely. Even

386. *Id.* at 535.

387. *Id.* at 557.

388. Letter from Rufus L. Edmisten, North Carolina Attorney General, to Harold M. Edwards, U.S. Attorney, W.D.N.C., (Aug. 8, 1978).

389. The North Carolina Attorney General recognized that the resulting lack of state jurisdiction after *John* would necessitate a reduction in the authority of the Cherokee Police Department. *See id.* at 7.

390. *See* 44 Fed. Reg. 24,305 (1979) (to be codified in 25 C.F.R. § 11.1(a)).

391. *Id.* at 24,305-06.

392. *See* 18 U.S.C. § 1153 (1976); 25 C.F.R. § 11.2 (1979).

393. One of the judicial problems that will have to be dealt with immediately is the Indian Child Welfare Act, 25 U.S.C. §§ 1901 to 1963 (Supp. II 1978), in which Congress specifically referred matters of placement of Indian children in custody cases to Indian tribes and their local courts for determination. *Id.* § 1911.

though the North Carolina Attorney General has conceded jurisdiction for felonies on the reservation,[394] the courts have not yet tempered the erroneous language and rationale of *McAlhaney*, *McCoy*, and *Hornbuckle*.

Moreover, the application of this erroneous rationale and presumption in the area of jurisdiction, together with the imprecise use of the term "concurrent," has contributed not only to confusion in the courts but also to confusion in law enforcement agencies in western North Carolina.[395] For several decades, federal and state officials shared enforcement of criminal laws on the Cherokee Reservation. Whether an individual was tried in federal or state court often depended primarily on which officer was first on the scene to make an arrest. The term "concurrent" was, quite naturally, interpreted on the local level to mean that federal and state governments and courts had equal powers and responsibilities over the Indians on the reservation.

There is a sense, of course, in which "concurrent" is correct when applied to federal and state jurisdiction over an Indian reservation. For example, it is well established that states have both criminal and civil jurisdiction over non-Indians in Indian country in matters not affecting Indians, their property, or their tribal self-government.[396] In that context, the term "concurrent" refers not to simultaneous jurisdiction over the same events and persons, but rather to simultaneous jurisdiction over the same territory with different persons and different subject matters. Unfortunately, this distinction has not been made in the Cherokee cases.

Another aspect of the Cherokee cases that continues to contribute to confusion and erroneous results is the failure to the courts to apply the federal preemption doctrine in a civil context. Preemption is a constitutional doctrine that permits the federal government to oust some or all state authority over specific subject matter areas.[397] It is based on the exercise of constitutional authority—usually the Commerce Clause, coupled with the Supremacy Clause[398]—and is applied to resolve conflicts in Indian country. If preemption is found, state authority is ex-

394. Letter, *supra* note 388.

395. *See* text accompanying notes 277-293 *supra*.

396. *See* text accompanying notes 350-54 *supra*.

397. *See, e.g.*, Bryan v. Itasca County, 426 U.S. 373, 376-77 n.2 (1976); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 690-91 (1965).

398. *See generally* Note, *The Pre-emption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975); Note, *Pre-emption as a Preferential Ground: a New Cannon of Construction*, 12 STAN. L. REV. 208 (1959).

cluded in favor of federal or tribal authority.[399] While this doctrine has been approved by the Fourth Circuit in a civil setting,[400] the North Carolina courts still have not recognized its proper application to the Cherokees,[401] and a United States District Court recently misinterpreted the doctrine.[402]

In *Sasser v. Beck*,[403] the North Carolina Court of Appeals justified its finding of state civil jurisdiction on prior Cherokee cases and distinguished all non-Cherokee case law and legislation. Unfortunately, the court justified its holding with incorrect factual assumptions.[404] It dismissed federal preemption with the unsupported conclusion that "[t]he fact that these Indians have since been recognized as an Indian tribe and brought under federal supervision did not remove the existing jurisdiction of the State of North Carolina."[405]

The federal district court in *Eastern Band of Cherokee Indians v. Lynch*[406] followed this same rationale, finding the Cherokees subject to state taxation because the 1924 Cherokee Allotment Act did not specify exemption from income or personal property taxes and because the "unique history" of the Cherokees gave North Carolina authority over these Indians.[407] Once again, the court ignored non-Cherokee federal

399. *See generally* authorities cited in note 420 *infra*.

400. *See* Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, 588 F.2d 75 (4th Cir. 1978). *See* text accompanying notes 283 & 284 *supra*.

401. *See* Sasser v. Beck, 40 N.C. App. 668, 253 S.E.2d 577, *cert. denied*, 298 N.C. 300, 259 S.E.2d 915 (1979).

402. *See* Eastern Band of Cherokee Indians v. Lynch, No. 78-30 (W.D.N.C., filed June 25, 1979). *See* text accompanying notes 287-89 *supra*.

403. 40 N.C. App. 668, 253 S.E.2d 577, *cert. denied*, 298 N.C. 300, 259 S.E.2d 915 (1979).

404. The court cited *Haile v. Saunooke*, *see* text accompanying notes 279-82 *supra*, as supporting jurisdiction in the state courts, stating that the federal court "allowed the suit against the individual Indian defendants." 40 N.C. App. at 672, 253 S.E.2d at 580. The federal court in *Saunooke*, however, had subject matter jurisdiction in that suit because the "transaction" took place in "Indian country" and by virtue of diversity of citizenship. Under such facts, jurisdiction in the federal forum does not *a fortiori* establish jurisdiction in a state forum. The court also misinterpreted the effect of Public Law 280 and language in Public Law 280 and the 1968 Indian Civil Rights Act giving "to any State not having jurisdiction" the power to assume civil jurisdiction. The court found that North Carolina had jurisdiction *before* the enactment of Public Law 280, which granted civil jurisdiction to five states. 40 N.C. App. at 672-73, 253 S.E.2d at 580. The court rejected the idea that "any state not having jurisdiction" should be interpreted as "any state not having jurisdiction *by virtue of . . . earlier statute[s]*," *Id.* at 673, 253 S.E.2d at 580, and concluded that "such an interpretation would be nonsensical if applied to Sec. 7 of Public Law 280, since it was the first statute enacted on the subject." *Id.* at 673, 253 S.E.2d at 580. This was clearly an incorrect conclusion. Congress had previously, on a number of occasions, enacted statutes "on the subject." *See* statutes cited in note 240 *supra*.

405. 40 N.C. App. at 673, 253 S.E.2d at 580.

406. No. 78-30 (W.D.N.C. June 25, 1979). *See* text accompanying notes 287-89 *supra*.

407. *Id.*, slip op. at 15, 18.

Indian cases[408] and even reversed the presumptions established by the Supreme Court for Indian preemption cases.[409]

That the North Carolina state courts have never applied this doctrine is evident from the continued reliance on dictum from *United States v. Wright*.[410] The *Wright* court stated:

> [W]e think there can be no doubt that Congress has the power to legislate for the protection of the Eastern Band of Cherokee Indians and for the regulation of the affairs of the band. It is clear, however, that not every act of Congress with relation to the band would come within the power. . . . [t]he members of the band, by separation from the original tribe, have become subject to the laws of the state of North Carolina; and clearly no act of Congress in their behalf would be valid which interfered with the exercise of the police power of the state. In such a situation, a law to be sustained must have relation to the purpose for which the federal government exercises guardianship and protection over a people subject to the laws of one of the states, i.e., it must have reasonable relation to their economic welfare.[411]

This language perhaps was supportable in 1931, considering the state of the law at that time, but it is clearly incorrect today. In 1931 there was some uncertainty, both as a matter of constitutional and statutory law, regarding federal authority to preempt state jurisdiction over Indian reservations. As a matter of constitutional law, the Supreme Court was still following its "dual sovereignty" approach under the Commerce Clause.[412] But that approach was rejected completely by the Supreme Court in the 1930's.[413] Furthermore, principles of federal preemption in Indian affairs were upheld by the Supreme Court in 1938. In *United*

408. The court dismissed *John* as having "no bearing" because it was a criminal case. *Id.*, slip op. at 11. The court, however, subsequently cited *McAlhaney* and *Wolf* as establishing jurisdiction over the Cherokees. *Id.*, slip op. at 17-18.

409. The test established by the Supreme Court for federal preemption in Indian cases includes a strong presumption against state taxation and requires the state to show affirmative approval from Congress to tax reservation Indians. *See generally* Bryan v. Itasca County, 426 U.S. 373 (1976); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973). The district court reversed this presumption. It assumed that the state tax was valid and insisted that the Indians show that Congress had specifically exempted them from the particular form of tax under question. *See* Eastern Band of Cherokee Indians v. Lynch, No. 78-30, slip op. at 9-18 (W.D.N.C. June 25, 1979).

As this Article went to print, the Fourth Circuit reversed the district court and applied the same presumption established by the Supreme Court in other Indian cases. *See* note 290 *supra*.

410. 53 F.2d 300 (4th Cir. 1931), *cert. denied*, 285 U.S. 539 (1932). *See* notes 260-69 and accompanying text *supra*.

411. *Id.* at 307.

412. *See* Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 883 (1946).

413. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

States v. McGowan[414] the Ninth Circuit held that land purchased in trust by the United States for Indians in Nevada was not "Indian country" and therefore was not subject to a federal criminal statute in question.[415] In upholding the state's jurisdiction, the court used language similar to that used in *Wright*.[416] The Supreme Court, however, unanimously reversed[417] and upheld federal authority over the land because it was indeed "Indian country."[418] In the course of its opinion, the Court said that "[e]nactments of the Federal Government passed to protect and guard its Indian wards . . . affect the operation . . . of such state laws as conflict with the federal enactments."[419]

The restrictive language in *Wright* simply does not harmonize with the language, rationale, or results of the Indian preemption cases decided by the Supreme Court during the past twenty years.[420] In these cases the Court has found preemption arising from federal action of a

414. 89 F.2d 201 (9th Cir. 1937), *rev'd*, 302 U.S. 535 (1938).

415. *Id.* at 202.

416. *Id.*

417. United States v. McGowan, 302 U.S. 535 (1938).

418. *Id.* at 539. The standards used by the Supreme Court were codified by Congress when it enacted the present statutory definition of "Indian country." *See* 18 U.S.C.A. § 1151 (1966) (Reviser's Note).

419. 302 U.S. at 539. For other cases sustaining federal power over Indian reservations established in a state after statehood, see Antoine v. Washington, 420 U.S. 194, 200-05 (1975); Arizona v. California, 373 U.S. 546, 597-98 (1963); Donnelly v. United States, 228 U.S. 243 (1913); United States v. Kagama, 118 U.S. 375 (1886). *See also* Board of County Comm'rs v. Seber, 318 U.S. 705, 715-19 (1943).

420. The recent Indian pre-emption cases decided by the Supreme Court are: United States v. John, 437 U.S. 634 (1978), Bryan v. Itasca County, 426 U.S. 373 (1976); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976); Fisher v. District Court, 424 U.S. 382 (1976); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Kennerly v. District Court, 400 U.S. 423 (1971) (per curiam); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965); Organized Village of Kake v. Egan, 369 U.S. 60 (1962); Williams v. Lee, 358 U.S. 217 (1959).

In a recent opinion from the Department of the Interior, the acting Associate Solicitor "conclude[d] that North Carolina state courts lack jurisdiction to order the execution of a judgment against a tribal member on the Cherokee Indian Reservation." Memorandum from Hans Walker, Jr., Acting Associate Solicitor, Division of Indian Affairs, to the Agency Special Officer, Cherokee Agency, 1, (May 5, 1980). Relying on the Supreme Court's Indian preemption cases, the opinion found that

> under general principles of Indian law, therefore, the state is precluded from asserting jurisdiction over Indian property on the reservation both because the state has not followed the procedures set out in 25 U.S.C. §§ 1321-1326 to obtain jurisdiction and because the exercise of such jurisdiction would infringe on the authority of [the] Eastern Band of Cherokees and the Cherokee Court of Indian Offenses.

Id. at 3. The opinion recognized that many state and lower federal courts (*McAlhaney, Hornbuckle, McCoy*) had relied on the *Wright* dictum to rule "that the general principles of Indian jurisdiction have been modified with respect to the Eastern Band of Cherokees because of the special history of that group." *Id.* at 4. The opinion, however, found that *John* rejected this. *Id.* "[I]t is now clear that the decisions of state and lower federal courts holding that North Carolina

general nature, such as setting aside land for an Indian tribe. The power of the state then is analyzed by the Court against a "backdrop" of the tribe's inherent governmental sovereignty. Since *Williams v. Lee*[421] was decided in 1959, the Supreme Court has approved state jurisdiction within an Indian reservation only once. In *Moe v. Confederated Salish & Kootena Tribes of the Flathead Reservation*[422] the Court prohibited any state taxation of the Indians, but upheld a state law requiring an Indian merchant to collect state taxes from non-Indian customers when the tribe itself did not tax the sales transaction.[423]

It is apparent that the North Carolina courts are unduly impressed with the State's actual "assumption" of jurisdiction over the Cherokee Reservation. But the acquiescence by Indians or the federal government in past actions of the state does not in itself authorize state jurisdiction.[424] It is not unusual for state governmental and administrative officials to trespass on tribal affairs. These trespasses, however, have not impaired the vested rights of Indian tribes.[425] "Power and authority rightfully conferred do not necessarily cease to exist in consequence of long [nonuse]."[426]

The North Carolina courts have failed to heed a necessary caveat in reading and interpreting Indian cases and statutes. The proper construction of such matters was pointed out in a leading treatise in the field:

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has more jurisdiction over the [Cherokee Reservation] than states usually have over Indian reservations are *no longer good law. Id.* at 6 (emphasis added).

The opinion, furthermore, rejected the ruling of the federal district court in *Lynch*. *Lynch* upheld state taxation of Cherokee personal property because of a lack of " 'any showing that state and local taxation interferes with reservation self-government or impairs any right granted or reserved by federal law.' " *Id.* at 7 (quoting Eastern Band of Cherokee Indians v. Lynch, No. 78-30, slip op. at 12 (W.D.N.C. June 25, 1979)). The opinion noted that since *Lynch* "the federal government ha[d] established the Cherokee Court of Indian Offenses in order to advance tribal self-government," and concluded that

> [s]tate assertion of jurisdiction to seize Indian property on the reservation without involvement of the Cherokee Court of Indian Offenses would both interfere with the right of that court to regulate such activity and with the right of the Band to decide for itself how judgments should be enforced.

Id.

421. 358 U.S. 217 (1959).

422. 425 U.S. 463 (1976).

423. *Id.* at 481-83.

424. *See, e.g.*, United States v. Wright, 53 F.2d 300, 312 (4th Cir. 1931), *cert. denied*, 285 U.S. 539 (1932) (acquiesence of federal government in payment of taxes on Cherokee lands prior to 1925 did not estop the government from exempting the land from state taxation).

425. Incursions by state governments into tribal affairs are set aside when challenged in the courts. *See* cases cited in note 420 *supra*.

426. United States v. Crook, 25 F. Cas. 695, 697 (C.C.D. Neb. 1879).

> In referring to any court decision or law, careful consideration must be given to its date, because its importance may lie solely in the historical situation to which it applied. While some decisions of the courts may be explained on the basis of express constitutional powers, the language in other cases indicates that decisions were influenced by a consideration of the peculiar relationship between Indians and the Federal Government at a particular period in our history.[427]

The North Carolina courts have failed to consider the effect of subsequent legislation on such legal milestones as the Treaty of New Echota and the dictum in the *Cherokee Trust Funds Case* and *United States v. Wright*. Consideration of general Indian legislation, such as the Indian Reorganization Act and Public Law 280, has been limited in scope. The courts have accepted their prior decisions as settling the jurisdiction issue for all time without viewing them in an historical context or considering that the application of prior decisions may have been modified by other non-Cherokee federal Indian legislation or case law. In short, the North Carolina courts have not realized that federal Indian law applies to the North Carolina Cherokees.

In spite of the seriousness of these errors, it is easy to see how the courts have reached their present posture. Until the tribe retained an attorney in 1957,[428] the Cherokees were virtually without legal representation. Their sole representation was provided by the federal government and consisted primarily of defending the tribe against assaults on their land base. Not surprisingly, the courts have consistently protected the status of the Cherokee lands, but in cases involving individuals, the courts have disregarded their tribal status. Furthermore, because of the geographical isolation of the Cherokees, cases have not been appealed routinely until recently, and because only one federally recognized Indian tribe remains within the state, no expertise has developed within the state bar or judiciary.[429] The courts never have un-

427. DEPARTMENT OF THE INTERIOR, *supra* note 159, at 23.

428. The Honorable Frank M. Parker was the first attorney hired by the Tribe on a continuing basis. Judge Parker served as Tribal Attorney until his appointment to the North Carolina Court of Appeals on January 23, 1968.

429. To indicate the lack of expertise in or recognition of the application of federal Indian law to the North Carolina Cherokees, as of December, 1979, the North Carolina Supreme Court Library did not contain a copy of either of the standard treatises on Indian law—Cohen's HANDBOOK OF FEDERAL INDIAN LAW (1942) or the later revision by the Department of the Interior, FEDERAL INDIAN LAW (1958). The North Carolina treatises are generally deficient in this area. For example, STRONG'S NORTH CAROLINA INDEX (1977), contains only a two-page discussion on the topic "Indians" and cites only three cases. Nothing in STRONG'S INDEX would indicate the existence of a substantial body of case and statutory law.

derstood that individual Cherokees, as well as their lands, are controlled by a separate set of legal principles.

It is beyond question that federal supremacy has emerged as the controlling principle in federal Indian jurisdiction cases. But oft-repeated, traditional convictions are perhaps the most difficult to displace. So it is with the North Carolina courts' continued assertion of "unique powers" over the Cherokees. States have obtained jurisdiction over, or responsibility for, Indians within their borders in one of the following ways: (1) Indians have migrated off their reservations seeking employment and have settled in the communities, subjecting themselves to state laws;[430] (2) the federal government has by statute transferred certain functions to the states pertaining to Indians still living on reservations;[431] or (3) the federal government has terminated its special responsibility for an individual Indian tribe.[432] Because of the "unique relationship" between the federal government and the Indian tribes, states must obtain jurisdiction over Indians in one of these three ways.

In North Carolina, once the federal government "recognized" the Cherokees who remained after the Treaty of New Echota, it assumed political and economic responsibility for them, provided for their welfare, and accepted title to their lands in trust. No room was left for authority by the state except as specifically delegated by the federal government. Since the establishment of the trust status of the Cherokee lands in 1924, the federal government has not transferred control over the Cherokees to North Carolina, and the Cherokee tribal status has not been terminated. Therefore, North Carolina is without judicial jurisdiction over the people, lands, and affairs of the Cherokee Indian Reservation. The federal government has preempted supervisory duties and jurisdiction over the Cherokee Indians.

VII. CONCLUSION

As Barbara Tuchman has pointed out, in matters of historical investigation, contradictions are "not merely a matter of conflicting evidence," but a "part of life."[433] One should "expect contradictions, not uniformity."[434] This is certainly true in an historical review of the

430. *See, e.g.*, Nagle v. United States, 191 F. 141 (9th Cir. 1911).
431. See text accompanying notes 237-40 *supra*.
432. See statutes cited in note 235 *supra*.
433. B. TUCHMAN, A DISTANT MIRROR xvii (1978).
434. *Id.*

North Carolina Cherokee Indians. If we are to examine the Cherokees for the purpose of determining their present legal status, we should expect cross-currents and apparently conflicting developments over the past 150 years. The interests of the state and federal governments, and of the Cherokees themselves, have been in competition and conflict may times during the past two centuries. This Article has attempted to view these developments with some sense of historical and legal perspective and to resolve some of these conflicts by viewing the Cherokee cases against the larger backdrop of federal Indian law, in order to determine what law seems most pertinent to these Indians today.

The interpretations of the North Carolina courts reveal a continuing paternalistic view of the Cherokees and a stubborn refusal to surrender the antifederalist attitude in the area of Indian affairs. In even the most recent cases[435] the North Carolina courts continue to decline to follow decisions of other courts dealing with Indian tribes. In North Carolina, law continues to be made by dictum. None of the early cases are questioned, analyzed, or viewed with an historical perspective.

The Cherokee cases seem to indicate that North Carolina has jurisdiction over this Indian tribe because of its "unique" history. Such a conclusion is a continuing adherence to judicial error. Questions of jurisdiction and taxation—the most troublesome questions in Indian country—should be answered in favor of the Cherokees just as they are answered in favor of other Indian tribes in other states.

In the area of Indian affairs, Congress never has delegated to North Carolina any special or unique powers over this tribe of Indians. Unlike most of the twenty-six states with Indian populations, North Carolina can point to no federal legislation granting it jurisdiction or authority over the Cherokees since the federal government clearly assumed trust responsibilities over the tribe.

It is difficult to believe that the federal courts will permit this situation to continue. As a matter of policy, laws regulating the affairs of Indian reservations must come from Congress and the Department of the Interior by virtue of the Indian Commerce Clause and the Supremacy Clause of the United States Constitution. Indian law is a national law, and federal Indian policy cannot be carried out if an individual state is permitted to create exceptions based upon a self-serving historical interpretation of the legal status of a particular Indian tribe.

435. *See, e.g.*, Sasser v. Beck, 40 N.C. App. 668, 253 S.E.2d 577, *cert. denied*, 298 N.C. 300, 259 S.E.2d 915 (1979).

Federal Indian policy has encountered serious problems over the years, but if individual states are permitted to create their own separate body of Indian law, Indian affairs will be in complete chaos. The Supreme Court noted as early as 1886 that Indian affairs have always been the sole concern of the federal government and that only the federal government can apply a uniform policy and set of laws to all Indian tribes.[436] The North Carolina Cherokee cases represent an improper judicial incursion in an area of traditionally federal concern by a single state without any action by Congress.

436. United States v. Kagama, 118 U.S. 375, 384-85 (1886).