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THE DE FACTO TERMINATION OF ALASKA NATIVE SOVEREIGNTY: AN ANOMALY IN AN ERA OF SELF-DETERMINATION

*Benjamin W. Thompson**

Introduction

> *Chefornak is a village of two hundred Eskimos, on the edge of the Bering Sea. I arrived on the day the people had met to consider the adoption of a written tribal constitution. Discussion went on in Yup'ik for an afternoon. Their sense that a tribal government is best for them was manifest, for they consider that neither a municipal form of government nor a corporation suits their needs. They want Native political institutions. They are talking about sovereignty.*[1]

Thomas Berger made these observations in the findings of the Alaska Native Review Commission published in 1985.[2] The Inuit Circumpolar Conference and the World Council of Indigenous Peoples appointed Berger in 1983 to conduct the commission in order to review the Alaska Native Claims Settlement Act of 1971[3] (ANCSA),[4] which Congress enacted in order to settle aboriginal land claims in Alaska.[5] The settlement provided for state-chartered corporations to hold and administer 44 million acres of land and disburse almost one billion dollars in compensation to Alaska Natives.[6] The Alaska Native Review Commission's mission focused on gaining the perspective of Alaska Natives.[7] This took Berger to Chefornak and many other Alaska Native

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*Clerk to the Honorable John F. Wright, Nebraska Supreme Court. J.D., 2000, University of Iowa College of Law; B.S., 1997, University of Nebraska at Omaha.

1. THOMAS R. BERGER, VILLAGE JOURNEY, THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION 137 (1985).
2. *Id.* at vii.
3. 43 U.S.C. §§ 1601-1628 (1994).
4. BERGER, *supra* note 1, at vii.
5. 43 U.S.C. § 1601 (1994).
6. *Id.* §§ 1605, 1611.
7. BERGER, *supra* note 1, at vii. Different terms will be used throughout this Article in reference to particular groups of native inhabitants. While acknowledging the erred historical basis for the term "Indian" and the possible racist connotations of "Native," this Article will nevertheless use both in an effort to distinguish between various native inhabitants. For purposes of this discussion, "Indian" or "American Indian" refers to the original inhabitants of the lower 48 states, "Alaska Natives" refers to Alaskan Indians, Eskimos, and Aleuts, and "Native Americans" shall refer to both American Indians and Alaska Natives. "Indians" and "Indian Tribes" are used in the discussion of constitutional mention for ease of identification with specific

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Villages, where witnesses from virtually every village[8] convinced Berger that Alaska Natives were determined to assert their sovereignty,[9] with their primary concerns after the enactment of ANCSA being land, self-government, and subsistence.[10] Although subsequent amendments to ANCSA addressed some of the concerns expressed by the Alaska Natives during the commission's review,[11] by the end of the century the sovereignty that members of the Alaska Native villages had been so eager to assert essentially ceased to exist.

This de facto termination of Alaska Native sovereignty resulted from the complicit action of the federal government over the past forty years.[12] This process occurred despite the presence of a federal policy of self-determination for Native Americans, generally,[13] and the lack of any relevant constitutional or statutory source of power over Alaska Natives.[14] This makes the Alaska Native situation anomalous in the context of tribal sovereignty in general.

The complicit action behind the de facto termination of Alaska Native sovereignty began with two federal statutes that seriously intrude upon it: (1) Public Law 280,[15] mandating Alaska State criminal and civil jurisdiction over

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provisions. Further, the term "tribe" is used in discussions of sovereignty because of the term's pivotal role in its recognition, but it is not intended to imply that it is the exclusive organizational structure of Native Americans. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 3-27 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN] (discussing definitions of Indian and tribe).

8. BERGER, *supra* note 1, at vii.

9. *Id.* at 143-44.

10. *Id.* at 166.

11. *See* discussion *infra* Part II.B.1 and note 196 (discussing ANCSA).

12. The process is described as de facto because the federal government has not taken explicit and deliberate measures to terminate the Alaska Native trust relationship or sovereignty as it has with specific tribes that were the subject of certain termination statutes in the 1950s and 1960s. *See* discussion *infra* Part I.C (describing the federal termination policy); discussion *infra* Part II.A.1 (utilizing the Western Oregon Indians termination statute to describe the process of de jure termination); discussion *infra* Part II.B.1 (describing the government's activities resulting in de facto termination).

13. *See* discussion *infra* Part II.C (discussing present and historical federal policies towards Native Americans).

14. *See* discussion *infra* Part III.A (discussing the questionable origins of the plenary power doctrine). Obviously, Alaska Natives were not an issue at the framing of the Constitution, because the Alaska Territory was not purchased from Russia until 1867. Treaty Concerning the Cession of Russian Possessions in North America, Mar. 30, 1867, U.S.-Russia, 15 Stat. 539, T.S. No. 301. The Cession Treaty did contain a provision, however, stating that "[t]he uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." *Id.*, art. 3, 15 Stat. at 542, *quoted in* COHEN, *supra* note 7, at 741. However, at least one court has held that the phrase merely provides for the application of the general body of federal Indian and statutory law to such "uncivilized" tribes. *In re* Minook, 2 Alaska 200, 220-21 (D. Alaska 1904), *cited in* DAVID S. CASE, ALASKA NATIVES AND AMERICAN LAWS 58 (1984).

15. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588; *see infra* note 198 (explaining extension of Public Law 280 to Alaska Natives).

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Alaska Native lands, and (2) ANCSA,[16] altering the method and degree of land ownership.[17] The process of the de facto termination of Alaska Native sovereignty came full circle recently with the Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government*.[18] The *Venetie* Court held that the tribal government could not tax the business activities of a nonmember contractor conducting business on tribal fee land because it was not "Indian country."[19] With Public Law 280, ANCSA, and *Venetie*, the federal government's complicit treatment of Alaska Natives over the past forty years divested them of all attributes that would support a sovereign status.[20] Consequently, the sovereignty of Alaska Native villages that existed just forty years ago essentially disappeared.[21]

This Article examines the process of the de facto termination of Alaska Native tribal sovereignty and the untenable legal doctrines that supported the process. Part I provides an overview of Native American law, emphasizing the trust doctrine, tribal sovereignty principles, federal Indian policies, and the context of Alaska Native sovereignty. Part II examines the actual process of the de facto termination of Alaska Native sovereignty resulting from Public Law 280, ANCSA, and the *Venetie* decision, illustrated by analogy to the de jure process employed by federal termination statutes. Part III focuses on the questionable legal doctrines underlying the process of de facto termination and argues that both the de jure and de facto processes are untenable.

I. Overview of Native American Law[22]

The most important principles of federal law pertaining to Native Americans — those defining the roles and respective powers of the numerous tribes, federal government, and states — developed as part of the federal common law.[23] Congress made and continues to make efforts to modify those

16. 43 U.S.C. §§ 1601-1628 (1994).

17. *See* discussion *infra* Part II.B.1 (discussing the provisions of ANCSA pertaining to land ownership).

18. 522 U.S. 520 (1998).

19. *Id.*; *see* discussion *infra* Part II.B.2 (discussing the *Venetie* decision as the result of the de facto process).

20. *See* discussion *infra* Part II.B (discussing the de facto termination of Alaska Native sovereignty) and Part I.B.3 (discussing some of the powers of self-government that sovereign tribes generally employ).

21. The thesis of this note is inapplicable to the sole remaining reservation in Alaska, the Annette Island Reserve for the Metlakatla. ANCSA does not apply to it, 43 U.S.C. § 1618(a) (1994), and consequently neither do the implications of the *Venetie* decision.

22. The thesis of this Article focuses exclusively on federal law as it concerns Native Americans, including Alaska Natives (commonly referred to as "federal Indian law"). This is to be distinguished from actual "Native American," "Indian" or tribal law. Although important insofar as the exercise of tribal sovereignty is concerned, tribal law is not discussed because its substance depends on the particular tribe in question and it is federal law that has determined whether the federal government recognizes a tribe's sovereignty.

23. *See* discussion *infra* Part I.A (discussing the trust doctrine); discussion *infra* Part I.B

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principles, resulting in the various historical federal Indian policies, but their core remains.[24] One overarching principle is the trust doctrine, which describes the relationship between the federal government and Native Americans and their respective roles.[25] Another significant concept inheres in tribal sovereignty principles, which defines the source and scope of the tribes' authority.[26] These principles, and the congressional policies seeking to modify them, are also generally applicable to Alaska Natives,[27] as the following overview explains.

A. Trust Doctrine[28]

Critical to an understanding of the context of tribal sovereignty and the impetus behind the various past federal Indian policies is an awareness of the nature of the relationship of Native Americans to the federal government. The relationship is known as a trust relationship, with Congress as trustee, Native Americans as the beneficiaries, and Native Americans' real property and natural resources as the corpus, whereby the federal government owes a fiduciary duty or obligation to Native Americans.[29] One commentator defined the trusteeship as "the legal and moral duty of the United States to assist Indians in the *protection* of their *property* and *rights*."[30] This relationship has its advantages, but its attendant disadvantages are quite significant.

(discussing tribal sovereignty).

24. *See* discussion *infra* Part I.C (discussing the historical and present federal Indian policies).

25. *See* discussion *infra* Part I.A (discussing the trust doctrine).

26. *See* discussion *infra* Part I.B (discussing tribal sovereignty).

27. *See* discussion *infra* Part I.D (discussing the context of Alaska Native sovereignty).

28. The trust doctrine arose from dicta in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). *See* COHEN, *supra* note 7, at 220. The Cherokee Nation sought to bring suit against Georgia under the Supreme Court's original jurisdiction. Cherokee Nation v. Georgia, 30 U.S. at 15. In holding that the Court did not have jurisdiction to hear the case, Chief Justice John Marshall stated that, although Indian tribes are "states," they are not foreign states within the meaning of article III. *Id.* at 16-20. Instead, tribes are "more correctly denominated domestic dependent nations. . . . Their relation to the United States resembles that of a ward to his guardian." *Id.* at 17. Marshall's basis for the relationship was for the necessary protection of the tribes. *Id.* at 17-18. Later language in the opinion suggests that Marshall viewed Congress as the federal branch charged with the responsibility of being the guardian or trustee for Native Americans. "If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future." *Id.* at 20. Despite the dictum status of much of the opinion, many later cases have cited *Cherokee Nation*, each one reinforcing the trust relationship between Native Americans and the federal government. *E.g.*, United States v. Mitchell, 463 U.S. 206, 225-26 (1983); Seminole Nation v. United States, 316 U.S. 286, 296 (1942); United States v. Kagama, 118 U.S. 375, 382-84 (1886).

29. *See* RAMONA E. SKINNER, ALASKA NATIVE POLICY IN THE TWENTIETH CENTURY 15-18 (John R. Wunder & Cynthia W. Esqueda eds., 1997) (describing the nature of the Trust Doctrine).

30. GILBERT L. HALL, THE FEDERAL-INDIAN TRUST RELATIONSHIP 3 (1979).

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The trust doctrine provides several advantages for Native Americans.[31] First, as land primarily constitutes the corpus of the trust, the federal government protects both the land itself and income derived therefrom.[32] Second, the federal government's role as trustee requires it to represent Native Americans in actions affecting their trust property.[33] Third, Native Americans benefit from the federal government's management of trust funds.[34] Fourth, the trust relationship supports federal action discriminating in favor of Native Americans based on the rationale that it is based on a political rather than a racial classification.[35] Finally, the trust relationship protects Native Americans from federal government action that is inconsistent with its role as trustee.[36]

Despite the advantages, there are several serious disadvantages to the trust relationship. First, federal control over trust lands and resources necessarily prevents the tribes and its members from making decisions affecting their future.[37] Second, a degree of paternalism inheres in the federal trust responsibility, which may influence federal action in a manner inconsistent with the tribes' wishes.[38]

Third, several decisions of the Supreme Court in the late nineteenth and early twentieth centuries, which looked to the trust doctrine as a source of plenary power over Native Americans as individuals, evince a disadvantage.[39] The Court relied on the doctrine to uphold Congress's enactment of the Major Crimes Act,[40] which claimed federal jurisdiction over specific serious crimes committed by Indians in Indian country.[41] The Court also cited the trust

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31. *Id.* at 42.

32. *Id.*

33. *Id.* at 42-43.

34. *Id.* at 43.

35. *Id.* at 43-44 (citing Morton v. Mancari, 417 U.S. 535 (1974) (upholding Indian preferences in employment decisions by the Bureau of Indian Affairs); United States v. Antelope, 430 U.S. 641 (1977) (upholding application of federal criminal jurisdictional statute to an Indian when doing so would subject defendant to felony murder rule not applicable in prosecutions of non-Indians in state court for same offense)).

36. *Id.* at 44. The Supreme Court has allowed a breach of trust suit against the United States for its mismanagement of resources on trust lands; however, the Court read the Indian Tucker Act, 25 U.S.C. § 1505 (1994), which waives sovereign immunity for claims by Indians against the federal government, to require an independent statutory source for a trust duty. United States v. Mitchell, 463 U.S. 206 (1983). Although the *Mitchell* Court relied on traditional private trust principles to define the trust duty, the Court refused to apply the same standards when the federal government represented conflicting interests in court proceedings without the beneficiary tribe's consent. Nevada v. United States, 463 U.S. 110 (1983).

37. HALL, *supra* note 30, at 45.

38. *Id.* at 45-46.

39. *E.g.*, United States v. Kagama, 118 U.S. 375 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Sandoval, 231 U.S. 28 (1913). For further discussion of the trust doctrine as a source of plenary power, see *infra* Part III.A.

40. Act of Mar. 3, 1885, ch. 341, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153 (1994)).

41. United States v. Kagama, 118 U.S. 375 (1886). In *Kagama*, the Court was faced with

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doctrine in support of Congress's power to abrogate Indian treaties.[42] Additionally, the trust relationship served as a basis for upholding the application of a federal statute prohibiting the introduction of liquor onto tribal lands held in fee.[43] Although the Court subsequently repudiated the trust doctrine as a separate source of power over American Indians,[44] the federal government still claims the plenary power, which the Court now upholds as supported by the Indian Commerce Clause.[45] Thus, the federal government's plenary power over Native American affairs originated from the trust doctrine. Considering the actions justified by the plenary power, it is a significant disadvantage of the trust doctrine.[46]

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the question of whether Congress had the constitutional power to enact the Major Crimes Act. *Id.* at 375-76. After admitting that a statute with the sole purpose of prohibiting crimes committed by Indians in Indian country had little if anything to do with commerce, the Court rejected the Commerce Clause as a source of power. *Id.* at 378-79. To uphold the constitutionality of the act, the Court chose instead to rely on the trust relationship as a basis for the power necessary to enact such an act, claiming that such a power was necessary to their protection.

> It seems to us that this is within the competency of Congress. These Indian tribes *are* the wards of the nation. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

Id. at 383-84.

42. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). *Lone Wolf* was a class action suit in which members of the Kiowa, Comanche, and Apache tribes claimed that Congress violated the Due Process Clause and acted inconsistently with the Treaty of Medicine Lodge. *Id.* at 564. The treaty required the approval of three-quarters of the tribal members for future land cessions, and the plaintiffs had alleged that Congress enacted a "surplus lands" act by fraudulently securing the minimum amount of signatures. *Id.* at 554, 564. The *Lone Wolf* Court resolved the issue by acknowledging that Congress possessed the power to abrogate Indian treaties. *Id.* at 566. In so doing, the Court relied upon the "status of the contracting Indians and the relation of dependency" to support its proposition that "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning." *Id.* at 564-65. Thus, the trust relationship served as a basis for Congress' assertion of plenary power over the Indians through the abrogation of Indian treaties.

43. United States v. Sandoval, 231 U.S. 28, 39-40, 46 (1913). In *Sandoval*, the Court upheld the application of a federal statute prohibiting the introduction of liquor into the Santa Clara Pueblo despite the fact that the Santa Clara owned their lands in fee simple. *Id.* at 39, 46. "[A]lthough sedentary . . . and disposed to peace and industry," the Court held the Santa Clara Pueblo to be a dependent Indian community and subject to the statute. *Id.* at 39, 46. The Court's basis for the statute's applicability was its view that the Santa Clara shared the same relationship with the federal government as other tribes, and the statute was merely an assertion of guardianship over them. *Id.* at 39-40, 45-47.

44. *See* discussion *infra* Part III.A (criticizing the plenary power doctrine).

45. U.S. CONST. art. 1, § 8, cl. 3; *e.g.*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989); Hodel v. Irving, 481 U.S. 704, 734 (1987); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 156 (1982); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); United States v. Wheeler, 435 U.S. 313, 319 (1978); Morton v. Mancari, 417 U.S. 535, 551-52 (1974).

46. *See supra* notes 41-43 (describing federal actions justified by the plenary power).

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The existence of the trust relationship inescapably affects tribal sovereignty, as its various advantages and disadvantages all seem to have an impact on it. Its mere existence, through the protections that it provides to the trust property, incidentally protects tribal sovereignty at the same time. On the other hand, the plenary power that arose from the trust doctrine has the potential of destroying tribal sovereignty as well. To more fully comprehend the trust doctrine's possible role, an examination of tribal sovereignty follows.

B. Tribal Sovereignty

Recognition of tribal sovereignty is an acknowledgement of a tribe's right and power of self-government.[47] This particular notion of sovereignty is unlike the commonly understood sovereign status of the Union, its member states, or foreign countries.[48] Rather, tribal sovereignty is judicially understood as sovereignty limited by circumstance and shaped by the history of the interaction between European settlers and American Indians.[49] As a result of this interaction, tribal sovereignty is neither limitless nor independent — its scope is predicated on its recognition by the federal government.

The federal government's power to so define, by recognition, the scope of tribal sovereignty arose gradually, through judicial opinion and congressional impulse.[50] The scope of tribal sovereignty became dependent on the existence of "Indian country" — statutorily defined and judicially ascertained — to the extent where, in the absence of Indian country, tribal sovereignty is limited to a group's members.[51] It is this interplay between recognizing tribal status and jurisdiction via Indian country that has led to the anomalous situation of Alaska Native sovereignty. To better understand the nature of that situation, it is necessary to examine the origin, prerequisites, and scope of tribal sovereignty.

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47. COHEN, *supra* note 7, at 231.

48. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-17 (1831) (stating that distinctions marking the relationship of the Indians to the United States make it appropriate to consider tribes "domestic dependent nations").

49. *Id.*; United States v. Wheeler, 435 U.S. 313, 323 (1978) ("Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty.' . . . Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.") (quoting United States v. Kagama, 118 U.S. 375, 381 (1886) (footnote omitted)).

50. *See* discussion *infra* Part I.B.1 (describing origin of tribal sovereignty) and Part I.B.2 (explaining tribal sovereignty prerequisites).

51. *See* discussion *infra* Part I.B.2.b (discussing the existence of Indian country as a prerequisite to tribal sovereignty) and Part I.B.3 (describing impact of Indian country on scope of tribal sovereignty).

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1. Origin of Tribal Sovereignty

Prior to European settlement, American Indians maintained tribal governments, albeit in a multitude of different forms.[52] These self-governing bodies exercised powers in conformity with a modern role of government, acting as political bodies in war and foreign affairs and legal bodies through informal social control.[53] Tribal governments were thus historically sovereign entities that exercised their own autonomy over tribal matters.

That tribes had sovereign attributes prior to contact with Europeans underlies a fundamental principle in Native American law: tribes possess *inherent sovereignty*.[54] Most of the powers of self-government that tribes possess do not originate from congressional delegation, but instead are "'inherent powers of a limited sovereignty that have never been extinguished.'"[55] This fact is confirmed by the language of the Commerce Clause, which recognizes Indians as already possessing sovereignty sufficient to warrant government-to-government interaction for commerce purposes.[56]

Despite the inherent nature of tribal sovereignty, its actual existence and effectiveness depends on certain requirements under federal law. The following explains these tribal sovereignty prerequisites.

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52. COHEN, *supra* note 7, at 229-30.

53. *Id.*

54. Talton v. Mayes, 163 U.S. 376, 384 (1896); COHEN, *supra* note 7, at 231-37. In *Talton v. Mayes*, Talton, a Cherokee, was indicted by a five person grand jury in Cherokee tribal court and subsequently convicted of murder. In appealing a decision of the federal district court to not issue a writ of habeas corpus, Talton argued that the grand jury was unconstitutional under either the Fifth or Fourteenth Amendments. The Supreme Court rejected both contentions and upheld the indictment because the inherent aboriginal sovereignty of the Cherokee Nation preceded and thus was not operated upon by the Constitution. *Talton*, 163 U.S. at 384-85.

55. United States v. Wheeler, 435 U.S. 313, 322-23 (1978) (quoting FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942)). Wheeler, a Navajo, was indicted in federal district court for the crime of statutory rape, after having pled guilty in a tribal court to two lesser included offenses arising out of the same incident. Wheeler asserted that the Double Jeopardy Clause, U.S. CONST. amend. V, prohibited his prosecution in federal court. The Supreme Court rejected Wheeler's argument, noting that the tribe's power to punish tribal offenders existed as part of its retained inherent sovereignty, not by a delegation from the federal government. *Wheeler*, 435 U.S. at 326-28. However, the Court has placed limits on the reach of tribal sovereignty. For instance, the Court has held that a tribe's inherent criminal authority does not extend to non-Indians, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), or even nonmember Indians, Duro v. Reina, 495 U.S. 676 (1990). For tribes to exercise such jurisdiction, then, Congress must delegate the power, which it has done for tribal jurisdiction over nonmembers after *Duro*. *See* Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (amending Department of Defense Appropriations Act, Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892 (codified as amended at 25 U.S.C. § 1301)).

56. U.S. CONST. art. 1, § 8, cl. 3 (providing Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States, *and with the Indian tribes*") (emphasis added); *see infra* note 237 (explaining the significance of the word "with" in terms of the power to regulate commerce with Indian tribes).

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2. Tribal Sovereignty Prerequisites

There are two prerequisites that tribes must meet to successfully assert their sovereignty. First, the native community seeking to assert its sovereignty must constitute a "tribe."[57] Second, the tribe must have jurisdiction prior to asserting its sovereignty.[58] Without tribal status or jurisdiction, tribal sovereignty is an illusion.

a) Tribal Status

Native American communities must first have tribal status in order for the federal government to recognize them as sovereigns[59] as well as for other purposes.[60] The reasons for this are rooted deeply in our history,[61] but it is sufficient to justify the requirement on the grounds that an entity must have certain identifiable characteristics to facilitate recognition, which is ensured most easily by categorization through a definition such as a tribe.[62] In some instances, federal recognition of tribal status may arise by definition from congressional enactment[63] or through administrative action.[64] However, when

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57. *See generally* COHEN, *supra* note 7, at 3-19 (discussing the legal and political definitions of "tribe" in federal Indian law); ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW, CASES AND MATERIALS 79-83 (3d ed., 1991) (same).

58. *See* discussion *infra* Part I.B.2.b (discussing jurisdiction as a prerequisite).

59. *See* note 57 *supra* (providing references for discussions of "tribe" under federal law); *see also* sources cited *infra* note 71 (referring to the tribe and Indian country analysis as a threshold issue for determining sovereignty).

60. Developing a definition of tribe was originally necessary in treaty-making to identify groups as political entities and in establishing which Native American groups were covered by certain legislation, but has since become necessary for determining eligibility for federal programs. COHEN, *supra* note 1, at 3.

61. *See supra* note 60 (discussing historical purposes).

62. Recognition of tribal status is a necessary corollary to the Commerce Clause's grant of power to Congress to regulate commerce with "Indian tribes." U.S. CONST., art. I, § 8, cl. 3; COHEN, *supra* note 7, at 3; CLINTON ET AL., *supra* note 57, at 82. The power to determine tribal status for political purposes was upheld by the Supreme Court in *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

63. *See, e.g.*, 25 U.S.C. § 450b(e) (1994) (defining an "Indian tribe" for purposes of Indian Self-Determination and Education Assistance Act as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians"); 25 U.S.C. § 1603 (1994 & Supp. V 1999) (using same definition of "Indian tribe" for purposes of Indian health care); 25 U.S.C. § 2026(14) (1994 & Supp. V 1999) (using same definition of "tribe" for purposes of Bureau of Indian Affairs programs); 25 U.S.C. 2703(5) (1994) (defining an "Indian tribe" for purposes of Indian Gaming Regulatory Act as "any Indian tribe, band, nation, or other organized group or community of Indians which — (A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and (B) is recognized as possessing powers of self-government").

64. Tribes may invoke administrative proceedings for federal recognition as a tribe with the

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the legislative or executive branches fail to recognize a tribe in such a manner and tribal status is important to the resolution of a dispute, the judiciary makes its own determination of tribal status.[65]

Tribal status is a function of a legal rather than an ethnological definition of tribe.[66] However, there is no standard legal definition, as it will vary depending on the particular use for which tribe is defined.[67] For recognition by the Department of the Interior, the legal definition consists of a set of criteria[68] which the department promulgated in response to a congressional mandate to publish annually a list of federally recognized tribes.[69] The criteria that petitioning tribes must meet emphasize their political authority, membership roots, and community characteristics.[70]

Tribal status is the first prerequisite to tribal sovereignty; jurisdiction is the second. The following explains the role of jurisdiction as a prerequisite to tribal sovereignty, the jurisdictional term of art being "Indian country."

b) Jurisdiction

Whereas a Native American group's sovereignty hinges on its status as a "tribe," permissible assertion of its sovereignty depends on it having jurisdiction.[71] Although a sovereign tribe generally will have personal

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Department of the Interior, requiring a petition attesting to ethnological as well as political tribal attributes of group. 25 C.F.R. § 83.7 (1999).

65. The seminal case for the Supreme Court's definition of a tribe is *Montoya v. United States*, which defined a tribe as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." Montoya v. United States, 180 U.S. 261, 266 (1901).

66. COHEN, *supra* note 7, at 5-6; CLINTON ET AL., *supra* note 57, at 79-80.

67. COHEN, *supra* note 7, at 3; CLINTON ET AL., *supra* note 57, at 79-80.

68. 25 C.F.R. § 83.7 (1999) ; 59 Fed. Reg. 9280 (1994).

69. Federally Recognized Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791.

70. A petitioning Native American group must meet the following criteria for recognition by the Department of the Interior:

> (a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. . . . (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present. . . . (c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present. . . . (d) A copy of the group's present governing document including its membership criteria. . . . (e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity. . . . (f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe. . . . (g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

25 C.F.R. § 83.7 (1999).

71. *See* Paul A Matteoni, *Alaska Native Indian Villages: The Question of Sovereign Rights,*

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jurisdiction over its members, whether it has personal jurisdiction over nonmembers and non-Indians will depend on the particular conception of sovereignty employed by courts reviewing tribal action. This Article discusses two competing conceptions of tribal sovereignty in part I.B.3 *infra*. Under federal law, a function of the determination as to what conception prevails is whether the land over which the tribe seeks to assert its sovereignty qualifies as "Indian country."

Indian country is the applicable legal term for most purposes of allocating federal jurisdiction over Native American land.[72] Although its definition comes from the United States criminal code,[73] the Supreme Court held that it also applies to issues of civil and tribal jurisdiction.[74] Despite it being a term of art for allocating *federal* jurisdiction, the definition of Indian country includes virtually all tribal land under federal supervision;[75] consequently, courts also determine the boundaries of a tribe's territory in terms of Indian country. Thus, a court's finding that Indian country does or does not exist essentially determines whether the tribe has jurisdiction over its landbase as well.[76]

Title 18 U.S.C. § 1151 defines Indian country as including reservations, dependent Indian communities, and allotments.[77] The meanings of reservations and allotments are relatively straightforward, but the meaning of dependent Indian communities has led courts to devise various analyses aimed at determining its existence.[78] Incidentally, it was not until the *Venetie* case that

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28 SANTA CLARA L. REV. 875, 878 (1988) (referring to the tribe and Indian country analysis as a threshold issue for determining sovereignty); Patricia Thompson, *Recognizing Sovereignty in Alaska Native Villages After the Passage of ANCSA*, 68 WASH. L. REV. 373, 376 (1993) (same).

72. COHEN, *supra* note 7, at 27.

73. 18 U.S.C. § 1151 (1994).

74. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

75. *See infra* note 77 (defining "Indian country").

76. *See* sources cited *supra* note 71 (referring to the tribe and Indian country analysis as a threshold issue for determining sovereignty).

77. The section provides:

> [T]he term "Indian country" ... means (a) all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1994).

78. *E.g.*, United States v. Adair, 111 F.3d 770 (10th Cir. 1997); Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Village of Venetie Tribal Gov't, 101 F.3d 1286 (9th Cir. 1996); United States v. Greger, 98 F.3d 1080 (8th Cir. 1996); Narragansett Indian Tribe of Rhode Island v. Narragansett Electric Co., 89 F.3d 908 (1st Cir. 1996); United States v. Cook, 922 F.2d 1026 (2d Cir. 1991); United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981); United States v. Martine, 442 F.2d 1022, 1023 (10th Cir. 1971); United States v. Oceanside Okla., Inc., 527 F.

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the Supreme Court issued its own interpretation of dependent Indian community as land (1) set aside for the use of Indians and (2) under federal supervision.[79]

Thus, if a court finds that tribal land is neither a reservation nor an allotment, and does not meet the requirements for a dependent Indian community, the tribal sovereignty in terms of its jurisdiction is limited to its own members. The outcome produced by a court's Indian country analysis, then, essentially determines the degree of the tribe's inherent sovereignty that it may assert. The next section addresses the current permissible scope of tribal sovereignty by examining the general powers held by tribal governments and specific exercises of authority deemed permissible by the Supreme Court.

3. Scope of Tribal Sovereignty

Although tribes possess inherent sovereignty, it does not necessarily follow that such sovereignty is absolute. Throughout the history of the interaction between tribes and the United States, restraints on tribal sovereignty arose in the enactment of statutes and the creation of treaties, whereby tribes submitted to the protection and overriding sovereignty of the federal government.[80] The Supreme Court also found restraints on tribal self-government implicit in the relationship between the tribes and the federal government, which it characterized as a guardian-ward or trust relationship.[81] Otherwise, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[82] As a consequence of the various sources of restraints on the tribes' powers of self-government, the specific scope of tribal sovereignty changed over the years.

In general, the scope of tribal sovereignty is evident in the various powers exercised by tribal governments. Among the fundamental powers of tribes are the powers to establish a chosen form of government, administer justice, determine tribal membership, exclude people from tribal lands, and charter business organizations.[83] Tribal governments also enjoy the flexibility of a police power and sovereign immunity from suit.[84]

Supp. 68 (W.D.OK. 1981).

79. 522 U.S. 520, 527 (1998); *see infra* note 210 (discussing *Venetie* Court's interpretation of "dependent Indian community" under 18 U.S.C. § 1151(b)).

80. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551-57 (1832). As an indicator of a further restraint on tribal sovereignty, Congress abolished its treaty-making relationship with the tribes in 1871, forcing tribes to enter into agreements with the federal government via lobbying the legislature for passage of a bill, rather than through diplomatic relations with the executive. Appropriations Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71), *cited in* COHEN, *supra* note 7, at 107.

81. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); *see* discussion *supra* Part II.A. (discussing trust doctrine).

82. United States v. Wheeler, 435 U.S. 313, 323 (1978).

83. AMERICAN INDIAN RESOURCES INST., INDIAN TRIBES AS SOVEREIGN GOVERNMENTS 36 (1988).

84. *Id.* Tribal sovereign immunity depends on a number of variables. In federal court, tribal

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However, the precise scope of a tribe's sovereignty depends on which criteria the courts and legislature base their conceptions of sovereignty.[85] Two views are possible: one is based on tribal membership, and the other is based on territory or geographic boundaries.[86] A membership-based conception of sovereignty only recognizes the tribe's sovereignty over its own members, whereas a territorial-based conception of sovereignty generally recognizes the tribe's sovereignty over members, nonmembers and non-Indians within the tribe's geographic boundaries.[87]

The Court utilized both conceptions in past opinions, but a membership-based conception of tribal sovereignty has prevailed recently.[88] This is particularly evident in the tribal criminal jurisdiction context.[89] While the Court recognized tribal criminal jurisdiction over members,[90] it later declined to do so when it came to non-Indians[91] and even nonmember Indians,[92] stating that "in the criminal sphere membership marks the bounds of tribal authority."[93] Although Congress subsequently provided for tribal criminal jurisdiction over nonmembers,[94] the fact that it had to delegate such authority says little for the retained inherent sovereignty of the tribes.

In the civil jurisdiction arena, the Court was more willing to accept a territorial-based view of tribal sovereignty until very recently. One Court decision recognized exclusive tribal court civil jurisdiction in actions with non-

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sovereign immunity is a matter of federal law. The Supreme Court has held that tribes are immune from suit in federal court, but tribal officials are not immune from suits seeking injunctive relief. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The immunity extends to both reservation and trust lands, Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505 (1991), as well as commercial activity off the reservation, Kiowa Tribe v. Manufacturing Techs., Inc., 523 U.S. 751 (1998).

85. Allison M. Dussias, *Geographically-Based and Membership-Based Views of Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993).

86. *Id.* at 3-4.

87. *Id.*

88. *Id.* at 4-6.

89. It should be noted that Congress has taken much action in the criminal jurisdiction context, claiming and allocating criminal jurisdiction between tribes, states, and the federal government. *See, e.g.*, 18 U.S.C. §§ 1152-1153 (1994) (extending federal criminal law to Indian country and claiming federal jurisdiction over certain serious crimes committed therein); Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (granting selected states criminal and civil jurisdiction over actions involving Indians in Indian country); Indian Civil Rights Act of 1968, tit. IV, Pub. L. No. 90-284, 82 Stat. 78 (codified at 25 U.S.C. §§ 1321-1326 (1994) (consenting to state jurisdiction over criminal and civil matters in Indian country when tribe consents).

90. United States v. Wheeler, 435 U.S. 313 (1978); Duro v. Reina, 495 U.S. 676 (1990).

91. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

92. Duro v. Reina, 495 U.S. 676 (1990).

93. *Id.* at 693.

94. Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (1991) (amending Department of Defense Appropriations Act, Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892 (codified as amended at 25 U.S.C. § 1301 (1994)).

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Indian plaintiffs and Indian defendants.[95] The Court also held that tribal courts presumptively have civil jurisdiction over non-Indians and that non-Indian defendants must exhaust tribal court remedies before challenging tribal jurisdiction in federal courts.[96] In each case, the Court's holding signals a greater acceptance of territorial-based sovereignty, although the focus on the party's status as an Indian or non-Indian suggests that membership plays a role.

A more recent case highlighted this aspect of the Court's holdings, in which the Court held that a tribe does not have jurisdiction over civil actions between non-Indians, where the facts underlying the action occurred on a federally granted right-of-way over a reservation.[97] Although the non-Indian status of the parties made it unnecessary to draw a distinction between a membership versus territorial-based view, the Court essentially declined to accept the latter when it denied the tribe civil jurisdiction over activities occurring within its reservation's boundaries.[98] Nevertheless, the Court seems to accept a broader view of tribal sovereignty and jurisdiction in civil rather than criminal actions, by virtue of its willingness to give less importance to membership.

The Court's decisions addressing regulatory authority of tribes also point towards a diminished recognition of tribal sovereignty by rejecting a territorial-based view. The Court declined to recognize tribal regulatory authority over nonmembers on land not owned by the tribe, but within a reservation's boundaries, in the absence of a consensual relationship or activity threatening the general welfare of the tribe.[99] Another case concerning the zoning authority of a tribe over alienated land within its reservation led a majority of the Court to deny it jurisdiction, with a conflict of opinion over the role that membership had on the issue.[100] Thus, the Court rejected a territorial-based notion of the tribe's sovereignty while not fully embracing a membership-based view. The Court similarly rejected tribal regulatory authority over non-Indians in a later case, where the lands in question were within the tribe's reservation but had been taken by the federal government for flood control purposes.[101] In short, the Court chose to reject a territorial-based approach to tribal sovereignty by allowing ownership of the affected land to override the fact that it is within a reservation's boundaries. Thus, membership of the parties whose

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

96. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

97. Strate v. A-1 Contractors, 520 U.S. 438 (1997).

98. The definition of "reservation" in the Indian country statute specifically includes rights-of-way, 18 U.S.C. § 1151(a) (1994), which confirms that the *Strate* Court chose not to determine the tribe's sovereignty in reference to its Indian country status, which would have been a territorial-based view.

99. Montana v. United States, 450 U.S. 544 (1981).

100. Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989).

101. South Dakota v. Bourland, 508 U.S. 679 (1993).

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activity is regulated necessarily plays a greater role in determining the scope of the tribe's sovereignty.

When reviewing assertions of tribal sovereignty and making determinations of the appropriate scope permissible, as with any statutory construction, courts will look to congressional intent in any relevant statutes.[102] In addition to looking for such intent in the relevant statutes and treaties, courts may look to the prevalent Indian policies.[103] Thus, the policies existing during the past forty years are relevant to congressional intent as to the scope of Alaska Native sovereignty. As background, a general review of the historical and present federal Indian policies follows.

C. Federal Indian Policies

The federal government adopted numerous policies towards American Indians throughout the course of their interaction.[104] While the substance of the policies depended upon the relative military strength of the tribes and the power that Congress claimed over American Indians,[105] the trend of the policies emphasized an effort by Congress to relieve itself of its trust responsibilities imposed under the Court's trust doctrine.[106]

Since the ratification of the Constitution, the United States embraced seven distinct policies towards American Indians.[107] The first prevailed throughout the time period that Congress enacted trade and intercourse acts,[108] between 1789 and 1835.[109] This era indicated Congress's awareness of its limited role

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102. *See* National Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 855-56 (1985) ("[T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered . . . as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.") (footnote omitted); Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) (stating that statutory construction objective "is to ascertain the congressional intent and give effect to the legislative will").

103. *See* Bryan v. Itasca County, 426 U.S. 373, 389-90 (1976) (viewing other actions by the same Congress, "In para materia," as "cogent proof" of its intentions in another act); Menominee Tribe v. United States, 391 U.S. 404, 411 (1968) (same).

104. *See generally* CLINTON ET AL., *supra* note 57, at 137-65 (discussing the history of federal policy towards Native Americans); COHEN, *supra* note 7, at 47-206 (same).

105. *See generally* CLINTON ET AL., *supra* note 57, at 137-65 (discussing the history of federal policy towards Native Americans); COHEN, *supra* note 7, at 47-206 (same).

106. SKINNER, *supra* note 29, at 4, 13.

107. *See* CLINTON ET AL., *supra* note 57, at 137-65 (discussing the history of federal policy towards Native Americans).

108. Act of June 30, 1834, ch. 161, 4 Stat. 729 (repealed in part) (codified as carried forward and amended at 18 U.S.C. §§ 1152, 1160, 1165, 25 U.S.C. §§ 177, 179, 180, 193, 194, 201, 229, 230, 251, 263, 264); Act of May 6, 1822, ch. 58, 3 Stat. 682; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; Act of July 22, 1790, ch. 33, 1 Stat. 137, *cited in* COHEN, *supra* note 7, at 110.

109. CLINTON ET AL., *supra* note 57, at 142-44.

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in American Indian affairs, namely regulating commerce *with* tribes;[110] but, Congress conducted its role in a manner that claimed exclusive control over the power.[111] With the momentum of the westward expansion of the nation and the states' increased discontent with tribal enclaves within their borders, the federal government gradually adopted a policy seeking the removal of American Indians westward.[112] This effort was voluntary at first, but eventually became forced as the United States' relative military strength increased.[113] The removal period ended in 1861 when the federal government began to establish reservations for Indian tribes.[114] This shift in policy accompanied the end of westward expansion as settlement reached the West Coast, raising the same concerns with the non-native population as those prompting the removal period.[115] The reservation policy continued until 1887.[116]

Whereas the preceding policies all represented an attempt at segregating the American Indians from the non-native population, the federal government changed its policy focus towards the end of the reservation policy era to one aimed at assimilating the native population into the mainstream.[117] Congress attempted this new change in policy primarily by an act[118] providing for the allotment of reservation lands to individual Indians and the sale of "surplus" lands to non-Indians.[119]

The passage of the Indian Reorganization Act (IRA)[120] in 1934 substantially interrupted efforts at assimilation.[121] Congress passed the IRA following the issuance of a report emphasizing the failures and shortcomings of the allotment policy.[122] The IRA prohibited any further allotment of reservation land[123] and provided for the voluntary adoption of tribal

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110. *See* CLINTON ET AL., *supra* note 57, at 308 (noting that original trade and intercourse acts with tribes that prohibited particular crimes excepted intra-Indian crimes, indicating an acceptance of tribal sovereignty over such internal matters).

111. *Id.*

112. *Id.* at 144-46.

113. *Id.*

114. *Id.* at 146-47.

115. CLINTON ET AL., *supra* note 57, at 146-47; SKINNER, *supra* note 29, at 19.

116. CLINTON ET AL., *supra* note 57, at 146-47.

117. *See id.* at 147-52.

118. The Dawes General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381 (1994)), *cited in* CLINTON ET AL., *supra* note 57, at 148.

119. CLINTON ET AL., *supra* note 57, at 148-51.

120. Ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (1994)) (Wheeler-Howard Act).

121. *See* CLINTON ET AL., *supra* note 57, at 152.

122. *See id.* The report is known as the Meriam Report. INSTITUTE FOR GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (Lewis Meriam et al. eds., 1928), *cited in* COHEN, *supra* note 7, at 144.

123. Indian Reorganization Act, 48 Stat. at 984 (codified at 25 U.S.C. § 461 (1994)).

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government and/or corporate charters by tribes.[124] This drastic change in policy from the preceding assimilationist efforts, giving American Indian groups greater voice in their self-government and direction, prompted much legislative debate.[125] This led to a renewed effort at assimilating the native population, sought through complete termination of tribal status.[126]

The termination policy prevailed between 1940 and 1962.[127] Following a House resolution reemphasizing the assimilation policy,[128] Congress passed several statutes[129] in the 1950s terminating the tribal status of and federal trust relationship with certain tribes, with the goal being the subjection of the tribal members to state authority.[130] During this period Congress also enacted Public Law 280,[131] which mandated concurrent state criminal and civil jurisdiction over specific reservations in place of federal jurisdiction.[132]

Support for termination diminished in the 1960s, and federal policy began to shift towards native self-determination.[133] Congress passed statutes granting recognized tribes standing to sue in federal district courts[134] and ending the nonconsensual transfer of jurisdiction to states under Public Law 280.[135] In 1970, President Nixon emphasized a self-determination policy in a message to Congress in which he sought the end of involuntary tribal termination, protection of tribal sovereignty and land, and greater tribal control over federal programs for American Indians.[136] Subsequently, Congress passed statutes restoring certain previously terminated tribes to federal recognition,[137]

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124. *Id.*, 48 Stat. at 987-88, (codified at 25 U.S.C. §§ 476-477 (1994)).

125. *See* CLINTON ET AL., *supra* note 57, at 155-57.

126. *See id.* at 155-58.

127. *See id.*

128. H.R. Con. Res. 108, 83d Cong. (1953).

129. *E.g.*, Act of Aug. 13, 1954, ch. 732, 68 Stat. 718 (codified at 25 U.S.C. §§ 564 to 564w-2 (1994)) (Klamath Tribe); Act of Aug. 13, 1954, ch. 733, 68 Stat. 724 (codified at 25 U.S.C. §§ 691-708 (1994)) (Western Oregon Indians); Act of Aug. 1, 1956, ch. 843, 70 Stat. 893 (codified at 25 U.S.C. §§ 791-807 (1976)) (repealed by Act of May 15, 1978, Pub. L. No. 95-281, § 1(b)(1), 92 Stat. 246) (Wyandotte Tribe of Oklahoma); Act of June 17, 1954, ch. 303, 68 Stat. 250 (codified at 25 U.S.C. §§ 891-903 (1970)) (repealed by Act of Dec. 22, 1973, Pub. L. No. 93-197, § 3(b), 87 Stat. 770 (1973)) (Menominee Tribe).

130. H.R. Con. Res. 108, 83d Cong. 2-4 (1954), *cited in* COHEN, *supra* note 7, at 171.

131. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified in part at 18 U.S.C. § 1162 (1994) and 28 U.S.C. § 1360 (1994)).

132. *See* CLINTON ET AL., *supra* note 57, at 158.

133. *See id.* at 158-59.

134. Act of Oct. 10, 1966, Pub. L. No. 89-635, § 1, 80 Stat. 880, 880 (codified at 28 U.S.C. § 1362 (1994)), *cited in* CLINTON ET AL., *supra* note 57, at 159.

135. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77 (codified in part at 25 U.S.C. §§ 1301, 1321(a), 1322(a) (1994)), *cited in* CLINTON ET AL., *supra* note 57, at 160.

136. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 363, 91st Cong. (1970), *cited in* CLINTON ET AL., *supra* note 57, at 160.

137. Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116, 107 Stat. 1118 (codified at 25 U.S.C. §§ 941-941n (1994)); Ponca Restoration Act,

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strengthening tribal control over federal programs,[138] and maximizing tribal jurisdiction in child custody and adoption proceedings involving Indian children.[139] Self-determination remains the current federal policy towards American Indians and Congress reaffirmed it throughout the 1980s and 1990s.[140]

The federal policies toward American Indians are equally applicable to Alaska Natives; indeed, an assertion regarding the loss or termination of Alaska Native sovereignty necessarily must be phrased and measured in terms of the sovereignty of American Indian tribes. To make such a comparison requires an awareness of the similarity in the context of Alaska Native and American Indian sovereignty. To that end, the next section provides a background on the Alaska Native context.

D. Context of Alaska Native Sovereignty

Despite Alaska Natives having a distinct history, a different organization, and a younger relationship with the federal government, the federal principles pertaining to American Indians also apply to them.[141] Thus, it is not only necessary but also appropriate to measure the termination of Alaska Native sovereignty in terms of American Indian tribal sovereignty. The following briefly describes the historical relationship that Alaska Natives share with the federal government and their political organization.

Pub. L. No. 101-484, 104 Stat. 1167 (1990) (codified at 25 U.S.C. §§ 983-983g (1994)); Coquille Restoration Act, Pub. L. No. 101-42, 103 Stat. 91 (1989) (codified at 25 U.S.C. §§ 715-715g (1994)); Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 669 (1987) (codified at 25 U.S.C. §§ 731-737, 1300g (1994)); Coos, Lower Umpqua, and Siuslaw Restoration Act, Pub. L. No. 98-481, 98 Stat. 2250 (1984) (codified at 25 U.S.C. §§ 714-714f (1994)); Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-227, 94 Stat. 317 (1980) (codified at 25 U.S.C. §§ 761-768 (1994)); Act of May 15, 1978, Pub. L. 95-281, 92 Stat. 246 (codified at 25 U.S.C. §§ 861-861c) (Wyandotte, Peoria, Ottawa, and Modoc Tribes); Siletz Indian Tribe Restoration Act, Pub. L. No. 95-195, 91 Stat. 1415 (1977) (codified at 25 U.S.C. §§ 711-711f (1994)); Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973) (codified at 25 U.S.C. §§ 903-903f (1994)).

138. Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified in part at 25 U.S.C. § 450a), *cited in* CLINTON ET AL., *supra* note 57, at 161.

139. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (1994)), *cited in* CLINTON ET AL., *supra* note 57, at 161.

140. *See* SKINNER, *supra* note 29, at 67. President Clinton, while hosting a meeting of tribal leaders at the White House, also voiced support for the self-determination policy, stating: "Today I reaffirm our commitment to self-determination for tribal governments." THOMAS R. BERGER, ALASKA NATIVE REVIEW COMM'N, VILLAGE JOURNEY xv (rev. ed. 4th prtg. 1995) (quoting President Clinton on April 29, 1994), *quoted in* Ben Summit, *The Alaska Native Claims Settlement Act (ANCSA): Friend of Foe in the Struggle to Recover Alaska Native Heritage*, 14 T.M. COOLEY L. REV. 607, 626-27 (1997).

141. *See* discussion *infra* Parts I.D.1 and I.D.2 (explaining the unimportance of the distinction to sovereignty and the political organization of Alaska Natives).

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1. Alaska Native Historical Relationship with Federal Government

The historical relationship between the United States and Alaska Natives initially differed from its relationship to American Indians.[142] For almost thirty years after the United States purchased Alaska from Russia in 1867,[143] the territorial government made little distinction in the applicability of the law between non-native and native residents of the Alaska territory.[144] Both natives and non-natives seemed to be subject to the territorial laws,[145] and federal statutes[146] implied that Alaska Natives did not have aboriginal land rights like those recognized for American Indians.[147]

However, subsequent acts of Congress[148] singled out Alaska Natives from non-natives for certain federal programs.[149] The Bureau of Indian Affairs assumed responsibility over the administration of Alaska Native matters in 1931.[150] The following year, the Solicitor of the Department of the Interior issued an opinion equating the status of Alaska Natives to American Indians.[151] Congress reaffirmed this position when it amended the Indian Reorganization Act[152] to include Alaska Natives in 1936.[153] These changes in the federal government's policy towards Alaska Natives and its consequent

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142. DAVID S. CASE, ALASKA NATIVES AND AMERICAN LAWS 6 (1984).

143. Treaty of Mar. 30, 1867, U.S.-Russ., 15 Stat. 539.

144. The Organic Act of 1884 provided for federal educational services regardless of the recipient's race, the administration of which was done by the Bureau of Education rather than the Bureau of Indian Affairs. Act of May 17, 1884, ch. 53, § 13, 23 Stat. 24, 127-28, *cited in* CASE, *supra* note 142, at 7. The Alaska Federal District Court held in *In re* Sah Quah that a group of Alaska Natives was subject to the Thirteenth Amendment just as all United States residents were. *In re* Sah Quah, 1 Alaska Fed. 136 (1886), *cited in* CASE, *supra* note 142, at 7.

145. It was not until 1957 that the Alaska Federal District Court held that a tribal government had exclusive jurisdiction over its territory and members. *In re* McCord, 151 F. Supp. 132 (D. Alaska 1957), *cited in* CASE, *supra* note 142, at 13-14.

146. Act of June 6, 1900, ch. 786, § 27, 31 Stat. 321, 330; Homestead Act of May 14, 1898, ch. 299, § 7, 30 Stat. 409, 412; Organic Act of May 17, 1884, ch. 53, § 13, 23 Stat. 24, 27-28; Act of Mar. 3, 1891, ch. 561, § 14, 26 Stat. 1095, 1100-01. These acts are cited in CASE, *supra* note 142, at 6 n.52.

147. *See* Case, *supra* note 142, at 6.

148. Act of May 25, 1926, 44 Stat. 629, 43 U.S.C. §§ 733-736 (1970), *repealed* with a savings clause by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 703, 90 Stat. 2743, 2789; Act of May 17, 1906, 34 Stat. 197 (codified as amended at 43 U.S.C. § 270-1 (1970) (Alaska Native Allotment Act), *repealed* with a savings clause by Alaska Native Claims Settlement Act of December 18, 1971, Pub. L. 92-203, § 18, 85 Stat. 688, 710 (codified at 43 U.S.C. § 1617 (1994)); Act of Mar. 30, 1905, ch. 1483, 33 Stat. 1156 (Nelson Act). These statutes are cited in CASE, *supra* note 142, at 8-9.

149. *See* CASE, *supra* note 142, at 8-9.

150. U.S. Dep't of the Interior, Secretarial Order 494 (Mar. 14, 1931), *cited in* CASE, *supra* note 142, at 9 n.78.

151. Status of Alaska Natives, 53 Interior Dec. 593, 605 (1932), *quoted in* CASE, *supra* note 142, at 9-10.

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

153. Act of May 1, 1936, ch. 254, 49 Stat. 1250 (codified at 25 U.S.C. § 473a (1994)).

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recognition of their communities as autonomous bodies on par with American Indians shows that the general trust relationship, the tribal sovereignty principles, and the general federal policies towards Indians apply to all Native Americans, including Alaska Natives.

2. Political Organization

Following contact with Russians and Americans, many Alaska Native villages established councils with characteristics reflecting the influence of non-natives.[154] Many also organized as municipalities, first under Territorial and later under State law.[155] When Congress extended the Indian Reorganization Act[156] to the unique circumstances of Alaska Native communities in 1936,[157] a significant number organized and incorporated under its provisions as well.[158] Thus, by the time Congress passed ANCSA in 1971, a variety of autonomous governmental entities existed in Alaska Native communities.

The wide variety of political organizations is important when making a broad generalization regarding sovereign status. Those villages that organized as municipalities will most likely remain unaffected by changes in federal law, as they received their power from, and are organized under, state law.[159] Similarly, traditional village governments or councils established of the natives' own volition may be influenced by such changes differently than tribal governments and corporations organized under the Indian Reorganization Act, which is federal law. Thus, the political context is crucial to understanding the full ramifications of the process of the de facto termination described below.

II. The Termination of Alaska Native Sovereignty

The federal government did not statutorily terminate Alaska Native sovereignty, yet this sovereignty was in effect terminated. Nevertheless, this Article best illustrates the de facto termination of Alaska Native sovereignty by analogizing to the statutory, or de jure, process of termination provided by certain statutes during the era when a federal policy of termination prevailed. It should be noted, however, that the de jure process described is not explicitly one of terminating tribal sovereignty. Rather, the termination of tribal sovereignty was an incidental effect of the process's express goal, which was terminating the trust relationship with the federal government.[160]

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154. *See* COHEN, *supra* note 7, at 750-51.

155. *See id.* at 751.

156. Act of June 18, 1934, §§ 16-17, 48 Stat. at 987 (codified as amended at 25 U.S.C. §§ 476-477 (1994)).

157. Act of May 1, 1936, ch. 254, 49 Stat. 1250 (codified at 25 U.S.C. § 473a (1994)).

158. *See* COHEN, *supra* note 7, at 751-52.

159. *See* ALASKA STAT. § 29.35.010 (Michie 1998) (establishing the power of municipal governments).

160. *E.g.*, Act of June 17, 1954, ch. 303, § 1, 68 Stat. 250, 250 (formerly codified at 25

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Notwithstanding, the de facto process described below shares a similar process and the same result. To illustrate this process of the de facto termination of Alaska Native sovereignty, this Article compares the de jure process and result involved in a termination statute to the relevant provisions and effects of Public Law 280, ANCSA, and the *Venetie* case.

A. De Jure Termination

There were a number of federal termination statutes passed in the 1950s and 1960s, but many of them were essentially identical in substance.[161] This Article examines the provisions contained in the termination statute for the Western Oregon Indians,[162] as its provisions are substantially the same as those of others passed during the federal policy of termination.[163] The process called for in the statutes had the effect of ending tribal jurisdiction and consequently terminating the sovereignty of the affected tribes.[164]

1. Process of De Jure Termination

Following the preparation of tribal membership rolls[165] and the assignment of personal property rights in tribal property to members,[166] the termination statute for the Western Oregon Indians called for several changes relevant to tribal sovereignty: (1) removal of federal restrictions on tribal and individually

U.S.C. § 891 (1970)) (repealed by Act of Dec. 22, 1973, Pub. L. No. 93-197, § 3(b), 87 Stat. 770, 770) (Menominee Tribe); Act of Aug. 13, 1954, ch. 733, § 1, 68 Stat. 724, 724 (codified at 25 U.S.C. § 691 (1994)) (Western Oregon Indians); Act of Aug. 13, 1954, ch. 732, § 1, 68 Stat. 718, 718 (codified at 25 U.S.C. § 564 (1994)) (Klamath Tribe).

161. Act of Sept. 5, 1962, Pub. L. No. 87-629, 76 Stat. 429 (codified at 25 U.S.C. §§ 971-980 (1994)) (Poncas); Act of Sept. 21, 1959, Pub. L. No. 86-322, 73 Stat. 592 (repealed 1993) (codified at 25 U.S.C. §§ 931-938 (1988)) (Catawbas); Act of Aug. 3, 1956, ch. 909, 70 Stat. 963 (repealed 1978) (codified at 25 U.S.C. §§ 841-853 (1976)) (Ottawa); Act of Aug. 2, 1956, ch. 881, 70 Stat. 937 (repealed 1978) (codified at 25 U.S.C. §§ 821-826 (1976)) (Peoria); Act of Aug. 1, 1956, ch. 843, 70 Stat. 893 (repealed 1978) (codified at 25 U.S.C. §§ 791-807 (1976)) (Wyandotte); Act of Sept. 1, 1954, ch. 1207, 68 Stat. 1099 (repealed 1980) (codified at 25 U.S.C. §§ 741-760 (1976)) (Southern Paiutes); Act of Aug. 13, 1954, ch. 733, 68 Stat. 724 (repealed 1977 with respect to Siletz Tribe) (codified as amended at 25 U.S.C. §§ 691-708 (1976)) (Western Oregon Indians); Act of Aug. 13, 1954, ch. 732, 68 Stat. 718 (repealed with respect to Modoc Tribe) (codified as amended at 25 U.S.C. §§ 564-564x (1994)) (Klamath Tribe); Act of June 17, 1954, ch. 303, 68 Stat. 250 (repealed 1973) (codified at 25 U.S.C. §§ 891-902 (1970)) (Menominee Tribe). These statutes are cited in COHEN, *supra* note 7, at 173-74.

162. 25 U.S.C. §§ 691-708 (1994).

163. *See, e.g.*, Act of Aug. 1, 1956, ch. 843, 70 Stat. 893 (repealed by Pub. L. 95-281, § 1(b)(1), May 15, 1978, 92 Stat. 246) (Wyandotte Tribe of Oklahoma); Act of Sept. 1, 1954, ch. 1207, § 5, 68 Stat. 1099, 1100-01 (codified in part at 25 U.S.C. § 745(a)(1), (2) (1994)) (Paiute Indians of Utah); Act of Aug. 13, 1954, ch. 732, § 5, 68 Stat. 718, 718-19 (codified in part at 25 U.S.C. § 564d(5)) (Klamath Tribe).

164. *See* discussion *infra* Part II.A.2. (explaining the result effected by the termination statutes).

165. 25 U.S.C. § 693 (1994).

166. *Id.* § 694.

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owned property;[167] (2) transfer of tribal property to a corporation or other legal entity;[168] and (3) application of state law to the tribe and its members.[169]

The termination statute governing the Western Oregon Indians provided for the removal of federal restrictions on tribal and individually owned property, after which the federal trust relationship terminated.[170] As a consequence, the services provided for the members because of their status as Indians were discontinued.[171] Also, the laws applicable to Indians generally no longer applied.[172]

The Western Oregon Indians termination statute also contained a provision establishing a procedure for transfer of tribal property.[173] It gave the tribes the option of transferring title to a "corporation or other legal entity" or a tribally designated trustee to manage the property.[174] Alternatively, the statute provided for the sale of the property with a pro rata distribution of the proceeds to tribal members.[175]

Another consequence of statutorily terminating the federal trust relationship with the Western Oregon Indians was the application of state law to the tribes and their members.[176] The statute provided that state laws were to apply "in the same manner as they apply to other citizens or other persons within their jurisdiction."[177] Following distribution of tribal property, both the property and income derived from it also became subject to state taxation.[178]

2. Result of De Jure Termination

As the Western Oregon Indians statute indicated, the termination legislation of the 1950s read in terms of ending the federal trust relationship with specific tribes.[179] To implement that goal, some statutes provided for the actual sale

167. *Id.* §§ 695, 696(b).

168. *Id.* § 695(a). Section 696 also provided for the removal of any restrictions on the alienation of or encumbrances on individually owned trust property and vested title in such property in fee simple.

169. *Id.* §§ 699, 703(a).

170. *Id.* § 703(a).

171. *Id.*

172. *Id.* Although certainly relevant, neither the termination of the federal trust relationship nor the ineligibility for federal services is decisive to the issue of remaining tribal sovereignty. It is the removal of federal restrictions on the sale of property that poses a greater threat to continued assertions of sovereignty. *See* discussion *infra* Part II.B.3 (discussing the implications of the de facto termination of Alaska Native sovereignty).

173. 25 U.S.C. § 695(a) (1994).

174. *Id.*

175. *Id.*

176. *Id.* § 703(a).

177. *Id.*

178. *Id.* § 699.

179. A common declared purpose of the termination statutes was to "provide for the termination of Federal supervision over the trust and restricted property" of the tribe. *E.g.*, Act

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of tribal land with the proceeds distributed among the members.[180] Other statutes gave members the option of either changing the federal trusteeship into a private trust and receiving payments or transferring ownership of the land into member-controlled state-chartered corporations.[181] Additionally, the statutes provided the states with legislative and judicial jurisdiction, including taxing authority, over the individual members of the affected tribes.[182]

The result of the termination statutes was that affected tribal governments no longer had jurisdiction over the former tribal land,[183] and tribal law no longer applied in either criminal or civil cases arising on any remaining tribal land.[184] In legal terms, the land was no longer Indian country, as the federal trust relationship is a crucial component to reservation, allotment, and dependent Indian community status.[185] Because Indian country became a necessary component to an assertion of tribal sovereignty,[186] the statutes terminated the affected tribes' sovereignty, as well as the federal trusteeship. As the following section explains, the termination of Alaska Native sovereignty resulted in a similar fashion.

B. The De Facto Termination of Alaska Native Sovereignty

Although not contained in tribe-specific legislation, the collective provisions of Public Law 280 and ANCSA are quite similar to the termination statutes, including the one applicable to the Western Oregon Indians. In addition to providing for a similar process, Public Law 280 and ANCSA similarly result in the termination of tribal sovereignty for Alaska Natives. The *Venetie* decision confirms this conclusion, by holding that land owned in fee by an Alaska Native tribal government is not Indian country. The next two sections compare the process and result of the de facto termination of Alaska Native sovereignty to the de jure process and result outlined above.

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of Sept. 1, 1954, ch. 1207, § 1, 68 Stat. 1099, 1099-1100 (codified in part at 25 U.S.C. § 741) (Paiute Indians of Utah); Act of Aug. 13, 1954, ch. 733, § 1, 68 Stat. 724, 724 (codified at 25 U.S.C. §§ 691-708 (1994)) (Western Oregon Indians); Act of Aug. 13, 1954, ch. 732, § 1, 68 Stat. 718, 718 (codified in part at 25 U.S.C. § 564) (Klamath Tribe).

180. *E.g.*, Act of Sept. 5, 1962, Pub. L. No. 87-629, § 4, 76 Stat. 429, 430 (codified in part at 25 U.S.C. § 974(a) (1994)) (Ponca Tribe of Nebraska); Act of Sept. 1, 1954, ch. 1207, § 5, 68 Stat. 1099, 1100-01 (codified in part at 25 U.S.C. § 745(a)(3) (1994)) (Paiute Indians of Utah).

181. *E.g.*, Act of Sept. 1, 1954, ch. 1207, § 5, 68 Stat. 1099, 1100-01 (codified in part at 25 U.S.C. § 745(a)(1), (2) (1994)) (Paiute Indians of Utah); Act of Aug. 13, 1954, ch. 733, § 5, 68 Stat. 724, 725 (codified in part at 25 U.S.C. § 695(a) (1994)) (Western Oregon Indians); Act of Aug. 13, 1954, ch. 732, § 5, 68 Stat. 718, 718-19 (codified in part at 25 U.S.C. § 564d(5) (1994)) (Klamath Tribe).

182. COHEN, *supra* note 7, at 175.

183. *Id.* at 175.

184. *Id.* at 175.

185. *See supra* note 77 (defining Indian country as it appears in 18 U.S.C. § 1151).

186. *See* discussion *supra* Part I.B.2.b (treating jurisdiction as a prerequisite to tribal sovereignty).

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1. Process of De Facto Termination

Whereas the termination statutes represented an immediate and direct effort by Congress to end the trust relationship with the affected tribes and implement the various provisions, Public Law 280 and ANCSA represent a drawn out effort without an explicit congressional commitment to any specific result.[187] Nevertheless, the two statutes provide for a similar process — they remove federal restrictions on alienability, transfer tribal property to corporations, and transfer federal jurisdiction over the affected lands to the state.

Just as the termination statute for the Western Oregon Indians terminated the federal trust relationship with the Western Oregon Indians, ANCSA's express policy was that "the settlement should be accomplished . . . without creating a . . . lengthy wardship or trusteeship."[188] To that end, ANCSA similarly provides for the expiration of alienability restrictions on land held by the regional and village corporations after a twenty-year period.[189] A subsequent amendment to ANCSA provides the corporations with the power to extend that period, but it is phrased in such a manner as to still require the eventual removal of alienability restrictions.[190]

ANCSA also provides for a transfer of tribal property to state chartered corporations, just as the Western Oregon Indians termination statute had. To settle Alaska Native land claims, ANCSA requires villages to organize as shareholders into for-profit or nonprofit corporations (as "village corporations")[191] and that Alaska Natives organize into thirteen different "regional corporations" under Alaska state law.[192] ANCSA charges the regional corporations with administering the disposition of the funds[193] and retaining title to the subsurface estates of the lands conveyed to the village corporations,[194] while the village corporations hold title to the surface

187. Explicit evidence of Congress's decision to remain silent on the issue of Alaska Native sovereignty and the existence of Indian country after ANCSA exists in a disclaimer to ANCSA amendments passed in 1987. Act of Feb. 3, 1988, Pub. L. No. 100-241, § 17(a), 101 Stat. 1788, 1814.

188. 43 U.S.C. § 1601(b) (1994). Subsequent court decisions have differed in opinion as to whether ANCSA actually terminated the trust relationship with Alaska Natives. Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979) (special duty does extend to Alaska Natives); Seldovia Native Ass'n, Inc. v. U.S., 35 Fed. Cl. 761 (1996) (ANCSA did not create special duty between federal government and the regional and village corporations).

189. 43 U.S.C. § 1629c (1994).

190. Act of Feb. 3, 1988, Pub. L. No. 100-241, § 2, 101 Stat. 1788 ("[A]mong other things, the shareholders of each Native Corporation must be permitted to decide . . . *when* restrictions on alienation of stock issued as part of the settlement should be terminated") (emphasis added). Note that it does not say "whether" or "if" the restrictions should be terminated, but rather "when." *Id.*

191. 43 U.S.C. § 1607 (1994).

192. *Id.* § 1606(b), (c).

193. *Id.* § 1605(c).

194. *Id.* § 1613(e), (f), (h).

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estates.[195] ANCSA also provides that villages have an option of foregoing other benefits[196] of the act in exchange for corporate title to both the surface and subsurface estate of a previous reserve.[197]

In Alaska, Public Law 280[198] performs a function similar to the termination statute with respect to application of state laws. Public Law 280 mandates the transfer of jurisdiction over criminal and civil matters on Alaska Native lands from the federal government to the Alaska state government.[199] Unlike the termination statutes, though, the extent of the jurisdiction conferred on the state is not absolute. Public Law 280 exempts the alienation, encumbrance, or taxation of trust lands and the regulation of property, such as hunting, fishing, and trapping rights, that are protected by treaty, agreement, or statute.[200] Public Law 280 also provides that tribal ordinances and customs should be given "full force and effect" in civil lawsuits, but only to the extent that they are consistent with state law.[201] Additionally, a Supreme Court decision held that Public Law 280 did not transfer regulatory authority to the states.[202]

Thus, for Alaska Natives, the current scope of tribal sovereignty depends on a number of issues. One issue is whether they continue to have the special relationship with the federal government arising out of the trust doctrine. Whether native lands remain Indian country after ANCSA is another issue, one on which the *Venetie* decision provides insight. The following section addresses the result of the de facto termination of Alaska Native sovereignty, illustrated through the *Venetie* case.

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195. *Id.* § 1613(a).

196. In an effort to permanently settle all aboriginal claims to land by Alaska Natives, Congress provided for a total of up to $962 million in compensation and transferred fee title to 40 million acres of land; those villages choosing to take title to their previous reserve would not receive any compensation or other land. *Id.* § 1618(b).

197. *Id.* The village corporation in the *Venetie* case was one of those choosing to acquire title to its land in this manner. COHEN, *supra* note 7, at 747 n.81.

198. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §§ 1360, 1360 note (1994)), *cited in* COHEN, *supra* note 7, at 175. When originally enacted in 1953, Public Law 280 applied only to certain tribes located in California, Minnesota, Nebraska, Oregon, and Wisconsin. *Id.* However, Congress extended Public Law 280 to Alaska when it was admitted to the Union as a state in 1959. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1994)), *cited in* COHEN, *supra* note 7, at 176.

199. Act of Aug. 15, 1953, §§ 1-7, 67 Stat. at 588-90, *cited in* COHEN, *supra* note 7, at 176; Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (amended and codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1994)).

200. Act of Aug. 15, 1953, §§ 2, 4, 67 Stat. at 588-89 (codified at 18 U.S.C. § 1162(b), 25 U.S.C. § 1322(b) (1994)), *cited in* COHEN, *supra* note 7, at 177.

201. Act of Aug. 15, 1953, § 4, 67 Stat. at 589 (codified at 25 U.S.C. § 1322(c) (1994)), *cited in* COHEN, *supra* note 7, at 177.

202. Bryan v. Itasca County, 426 U.S. 373 (1976).

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2. Result of De Facto Termination

Although Public Law 280 and ANCSA effect a result similar to that intended by the statutes specifically seeking to terminate tribes and their relationship with the federal government, the statutes lack an important component. The termination statutes, including the one applicable to the Western Oregon Indians, explicitly ended the federal trust relationship with the affected tribes.[203] There is no equivalent expression in either Public Law 280 or ANCSA,[204] which raises the question: Did the sovereignty of Alaska Native tribal governments nevertheless survive the termination-like provisions in Public Law 280 and ANCSA? The *Venetie* decision suggests that the answer must be no. A comparison of Alaska Native sovereign attributes remaining after *Venetie* to those of American Indian tribes generally serves as the basis for this conclusion.

As previously discussed, Public Law 280 and ANCSA collectively result in the future alienability of Alaska Native property, a coerced transfer of ownership of such property into state corporations, and the application of state adjudicatory jurisdiction over Alaska Native lands. Although all three are relevant to Alaska Native sovereignty, it is ANCSA's transfer of trust lands that poses the biggest threat. This is because it is the only one that directly intrudes upon the authority exercised by the previously existing governments.[205] Thus, the practical impact of the two acts depends on the significance of this alteration in land ownership.

Although ANCSA does not preclude pre-existing forms of government and IRA corporations from existing in conjunction with the ANCSA corporations, their coexistence inescapably affects tribal sovereignty. As the act places with the corporations the responsibility of administering the benefits of the act and holding title to the land conveyed,[206] their roles may conflict or overlap with those of pre-existing governments. This is so particularly if the corporate land ownership affects the tribal government's territorial jurisdiction.[207] The precise role of Alaska Native tribal governments after ANCSA is dependent not only

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203. 25 U.S.C. § 703(a) (1994).

204. However, the declaration of the policy of ANCSA stated that "the settlement should be accomplished . . . without creating a lengthy wardship or trusteeship." 43 U.S.C. § 1601(b) (1994). A federal district court decision interpreted the language as showing that Congress did not create a trusteeship via ANCSA. Cape Fox Corp. v. United States, 456 F. Supp. 784, *rev'd on other grounds*, 646 F.2d 399 (9th Cir. 1981), *cited in* CLINTON ET AL., *supra* note 57, at 1063. The *Venetie* decision suggests that the Supreme Court not only agreed that it did not create such a trust relationship, but that it actually terminated the relationship that existed prior to ANCSA.

205. *See* discussion *supra* Part I.D.2 (discussing various forms of political organization by Alaska Natives).

206. 43 U.S.C. § 1605 (1994).

207. *See* discussion at parts I.B.3 *supra* and II.B.2 *infra* (discussing the Court's trend towards a membership-based conception of sovereignty and the *Venetie* Court's treatment of the issue).

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upon the powers of self-government that they previously exercised,[208] but also upon the Court's interpretation of the "Indian country" status of the tribal land over which those powers would be exercised. For this reason, the Court's decision in *Venetie* is crucial to determining the role of Alaska Native tribal governments after Public Law 280 and ANCSA.

In *Alaska v. Native Village of Venetie Tribal Government*,[209] the Supreme Court held that lands owned in fee simple by a tribal government following ANCSA did not constitute Indian country under 18 U.S.C. § 1151.[210] The Court based its holding on a determination that land included in the claims settlement did not constitute a dependent Indian community because (1) it was not really set aside for the use of Alaska Natives, considering the expiration on alienability restrictions, and (2) the land was no longer under federal supervision once the corporations took title.[211] In holding that the land was not Indian country, the Court approved of the district court's original opinion that the tribal government could not tax the activities of a nonmember private contractor doing business on such land owned in fee simple by the tribal government.[212]

An interesting aspect of the *Venetie* case is that ANCSA provided the Native Village of Venetie tribal government with the option of taking corporate title to its former reservation land and foregoing other land and cash benefits of the settlement,[213] an option that the tribal government elected to

208. COHEN, *supra* note 7, at 755.

209. 522 U.S. 520 (1998).

210. *Id.* at 532. The contractor in the *Venetie* case had constructed a public school in Venetie, funded by the State of Alaska. When the tribal government demanded and failed to collect $161,000 in taxes from either the State, the contractor, or the school district for doing business on the tribally owned land, the tribe filed suit in tribal court to collect the tax. The State then filed suit in federal district court seeking to enjoin the tribe's collection of the tax. The district court held that the tribal lands were not "Indian country" and therefore the tribal government did not have the authority to tax the activities of nonmembers. State *ex rel.* Yukon Flats School Dist. v. Native Village of Venetie Tribal Gov't, No. F87-0051 CV (HRH), 1995 WL 462232 (D. Alaska, Aug. 2, 1995). The court of appeals reversed, applying a different test and finding that the tribal land constituted a "dependent Indian community" and was thus Indian country. Alaska *ex rel.* Yukon Flats School Dist. v. Native Village of Venetie Tribal Gov't, 101 F.3d 1286 (9th Cir. 1996).

In reversing the court of appeals, the Supreme Court issued its own interpretation of dependent Indian community and found that the tribal land in question was not Indian country under 18 U.S.C. § 1151(b). The Court looked to *United States v. Sandoval*, 231 U.S. 28 (1913), the case initially influencing Congress to include the dependent Indian community provision in the Indian country statute to support its requirement that land be (1) set aside for the use of Indians and (2) be under federal supervision in order to constitute a dependent Indian community. Under this interpretation, the Court justifiably found it difficult to say that the land was a dependent Indian community, because ANCSA evidenced neither a congressional intent for federal set-aside nor a method of federal superintendence.

211. *See supra* note 210 (discussing the Court's dependent Indian community analysis).

212. Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. at 525.

213. 43 U.S.C. § 1618(b) (1994).

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exercise.[214] The corporation subsequently transferred title to the tribal government in fee simple.[215] Thus, a tribal government, rather than a corporation, owned the land in question in *Venetie*. This fact strengthens the significance of the holding for tribal governments that do not hold title to the relevant land.[216] The next section addresses the implications of the *Venetie* decision as it relates to the de facto termination of Alaska Native sovereignty. This is accomplished by comparing the scope of sovereignty now permitted of Alaska Native tribal governments to the permissible scope of tribal sovereignty of tribes in general.

3. Measurement of Alaska Native Sovereignty: Implications of De Facto Termination

In Alaska, Public Law 280 set the stage for the de facto termination of Alaska Native governmental entities. It imposes state jurisdiction over tribal lands without consent of the Alaska Native population, impairing the ability of tribal governments to self-govern.[217] The process of de facto termination continued with the enactment of ANCSA. ANCSA forces the transfer of lands held by Alaska Natives to state-chartered corporations, just as several termination statutes did in the 1950s and 1960s.[218] By ending the trust relationship with respect to Alaska Native land holdings, the lands became alienable[219] and consequently subject to state taxation and foreclosure.

These changes by themselves make tribal self-government over such lands much more difficult, thereby limiting the sovereignty of the tribal governments. But what, precisely, is left of Alaska Native sovereignty? That question is best answered via comparison to the scope of tribal sovereignty generally recognized for American Indian tribes.[220]

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214. COHEN, *supra* note 7, at 747 n.81.

215. *Id.*

216. A tribal government that owns the land over which it seeks to assert authority, as in the *Venetie* case, presumably has a stronger basis for doing so than it would if the land was owned by an ANCSA corporation. The ownership issue is significant because nonmembers may eventually become part-owners of the land when alienability restrictions expire on the corporate stock. Assuming that members consent to be governed because of their voluntary decision to be a member, it follows that tribal government-owned land would be a stronger candidate for tribal authority because consent of the governed would not be an issue. The *Venetie* Court refused to recognize that authority. Therefore, the *Venetie* decision seems to foreclose the exercise of tribal authority over lands held by ANCSA corporations as well.

217. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (amended and codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1994)).

218. *See* discussion *supra* Part II.B.1 (comparing ANCSA provisions to termination statute provisions).

219. ANCSA did contain a provision, however, exempting land from state and local property taxes for up to 20 years provided that they are not developed, leased, or used for purposes other than exploration. 43 U.S.C. § 1620(d)(1) (1994).

220. *See* discussion *supra* Part I.B.3. (discussing the scope of tribal sovereignty in terms of criminal, civil, and regulatory authority).

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Venetie's holding that the tribal land did not constitute Indian country serves as an initial starting point for measuring Alaska Native sovereignty. The holding commanded a membership-based perspective of sovereignty by rejecting a geographic or territorial-based conception.[221] In other words, without jurisdiction over the land, the tribal governments in Alaska may only exercise authority over their own members.

In the criminal context, this membership-based conception deprives the tribal governments of jurisdiction over nonmember Alaska Natives or Indians over which they would otherwise have jurisdiction.[222] In the civil context, the tribal governments no longer have presumptive jurisdiction over non-Indian or nonmember Indian defendants as do non-Alaskan tribal governments.[223] The regulatory jurisdiction of Alaska Native tribal governments is another matter, as Public Law 280 did not provide state regulatory jurisdiction.[224] Thus, tribal regulatory authority would seem necessary to fill a void of authority. However, it is uncertain how broad courts may read *Venetie* in the future, and the tribal governments will experience difficulty enforcing regulations beyond its own membership without criminal and civil jurisdiction over nonmembers.

After the *Venetie* decision, Alaska Native tribal governments face an uncertain future regarding the practical ability to self-govern. Without having any authority over nonmembers residing or conducting business on tribal land,[225] the tribal government's effectiveness is impaired substantially. This forces dependence on the state to exercise jurisdiction where the tribal government supposedly is without the power to do so, complicating the self-government of the tribe. When a tribal government may no longer exercise jurisdiction over people residing, working, or conducting business on tribal land, it is hardly a sovereign entity. For Alaska Native tribal governments, it is more appropriate now to merely characterize them as groups of Alaska Natives voluntarily organized into tribal corporate vehicles or village

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221. *See id.* (describing the scope of tribal sovereignty in terms of membership versus territorial-based conceptions).

222. Congress delegated criminal jurisdiction over nonmember Indians to tribal governments. Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (1991) (amending Department of Defense Appropriations Act, Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892 (codified as amended at 25 U.S.C. § 1301 (1994)). However, Public Law 101-511 defined "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code, if that person were to commit an offense listed in that section in Indian country to which that section applies." *Id.* § 8077(c), 104 Stat. at 1892-93. This delegation does not extend to Alaska Native tribal governments, though, as the federal government transferred its jurisdiction under 18 U.S.C. § 1153 to the state when it extended Public Law 280 to Alaska. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (amended and codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1994)).

223. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

224. Bryan v. Itasca County, 426 U.S. 373 (1976).

225. *See* discussion *supra* Part II.B.2 (discussing the holding of the Court in *Venetie*).

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"governments."[226] Their sovereignty has eroded to the extent that they even lack the autonomous attributes of Alaska municipalities, which are themselves merely subdivisions of the sovereign state.[227] Between Public Law 280, ANCSA, and *Venetie* the federal government effectively terminated the sovereignty of Alaska Natives.

The power that the federal government relied upon in reaching that result lacks a proper basis. Also, the Court's conclusion in *Venetie* suffers from specious reasoning. For these reasons, the process of the de facto termination of Alaska Native sovereignty is untenable, as the following explains.

III. The Untenable Process of De Facto Termination

When one considers the tribal sovereignty principles set out in Part I.B, *supra*, in light of the only constitutional source of power even pertaining to Native Americans, the Commerce Clause,[228] the processes of both de jure and de facto termination outlined above should appear extralegal and unsupportable. Both processes exceed the power originally granted in the Commerce Clause. Two possible explanations follow for how the federal government gradually assumed such a magnitude of power enabling it to define the existence and scope of tribal sovereignty.

A. Enigmatic Origin of Plenary Power

The drafters and amenders only mentioned "Indians" and "Indian Tribes"[229] at three places within the United States Constitution and its amendments. Article I provides that the government shall exclude "Indians not taxed" from the determination of the apportionment of Representatives and taxes.[230] The Fourteenth Amendment, which excludes Indians from the amended method of apportionment, reaffirms the article I provision.[231] Neither provision purports to grant any power over Indians to the federal government. Rather, the provisions merely explain the method of apportioning Representatives and taxes among the states.

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226. At least one court has drawn the analogy of tribes to private voluntary organizations. In *United States v. Mazurie*, the court of appeals characterized the Wind River Reservation as a voluntary private organization incapable of receiving delegated power from the federal government to regulate the activities on non-Indian owned lands within the reservation. United States v. Mazurie, 487 F.2d 14 (10th Cir. 1973), *rev'd*, 419 U.S. 544, 557 (1975).

227. Some Alaskan Native tribal governments organized as municipalities under Alaska law prior to ANCSA. CASE, *supra* note 142, at 372-73. The thesis of this Article is therefore inapplicable to those governments as they surrendered their inherent sovereignty by organizing under another sovereign.

228. U.S. CONST. art. I, § 8, cl. 3.

229. *See supra* note 7 (explaining usage of "Indians" and "tribes").

230. U.S. CONST. art. I, § 2, cl. 3.

231. U.S. CONST. amend. XIV, § 2.

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The only grant of power in the Constitution that is relevant to Indians is in the Commerce Clause.[232] The Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and *with the Indian Tribes*."[233] This provision was the basis for a number of trade and intercourse laws passed by Congress from the late eighteenth century and well into the nineteenth century.[234] These laws were all in line with the scope of power granted to Congress — they regulated trade and intercourse *with* the Indian tribes.[235]

However, in the period between the ratification of the Constitution and the present, the federal government assumed a position to all Native Americans that far exceeds the scope of power granted in the Commerce Clause.[236] The federal perspective shifted from viewing tribes as entities possessing sufficient sovereignty to warrant dealing *with* them[237] to entities that are an appropriate focus of plenary power, which is exercised *over* the tribes.[238] This paradigm shift was made possible and rationalized through the evolution and interaction of decisions of the Supreme Court, laws and resolutions passed by Congress, and actions of the executive branch.[239]

The power granted to the federal government by the Commerce Clause seems to limit the applicability of many federal laws that are irrelevant to commercial dealings with tribes.[240] However, the "Indian country" statute

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232. U.S. CONST. art. I, § 8, cl. 3.

233. *Id.* (emphasis supplied).

234. *See* COHEN, *supra* note 7, at 109-10; *see supra* note 108 (citing the early trade and intercourse acts passed by Congress).

235. For instance, the original act, Act of July 22, 1790, ch. 33, 1 Stat. 137, regulated the sale of Indian lands and the conduct of traders licensed to trade with Indians, as well as crimes and trespasses committed against Indians and the manner for the punishment of non-Indians committing them. *See* COHEN, *supra* note 7, at 110.

236. *See* discussion *supra* Part I.A (discussing the nature and source of the plenary power asserted by Congress during the late 19th and 20th centuries).

237. The language of the Commerce Clause, "[t]o regulate Commerce . . . with the Indian Tribes," U.S. CONST. art. I, § 8, cl. 3, suggests that the Framers viewed the tribes as separate and independent sovereigns. The power thus granted is on par with the power "[t]o regulate Commerce with foreign Nations." *Id.* Had the Framers viewed tribes as distinct from foreign nations, the language might have instead been "of the Indian tribes" or even "among the Indian tribes."

238. *See* discussion *infra* Part I.A (discussing the trust doctrine as an asserted source of plenary power).

239. *See* discussion *infra* Part I.A (discussing the trust doctrine as an asserted source of plenary power).

240. Most statutes dealing with Native Americans arguably exceed the original grant of power in the Commerce Clause, but it is the criminal laws passed that seem to be most irrelevant to commercial dealings. *See, e.g.*, 18 U.S.C. § 1151 (1994) (defining Indian country for purposes of federal criminal statutes); 18 U.S.C. § 1152 (1994) (claiming federal criminal jurisdiction over interracial crimes committed by Indians in Indian country); 18 U.S.C. § 1153 (1994) (claiming federal criminal jurisdiction over certain enumerated offenses committed by Indians in Indian country).

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construed in the *Venetie* case, 18 U.S.C. § 1151, resides in the criminal code, preceding two other statutes that claim federal criminal jurisdiction over the "Indian country."[241] The Supreme Court upheld 18 U.S.C. § 1153, originally enacted and known as the Major Crimes Act,[242] on the basis that the judicially imposed trust relationship provided the power to enact such a statute for their protection.[243] Thus, despite the lack of any explicit grant of power over Native American affairs in the Constitution, Congress assumed a plenary power over them enabling it to claim and allocate federal jurisdiction over tribal lands, and the Court upheld the assertion of power.[244]

The Supreme Court called into question the vitality of using the trust relationship as a source of plenary power in the latter half of this century. Dictum in a 1973 Supreme Court decision repudiated the trustee relationship as a source of power independent of the Commerce Clause.[245] Language in a decision four years later also suggested that the plenary power doctrine has limits on its application.[246] Nevertheless, the use of the plenary power continues.

Just as the basis asserted in support of the power to claim federal jurisdiction over "Indian country" is questionable, so is the link between the existence of Indian country and tribal sovereignty. As the following explains, it is a strained path between allocating jurisdiction via Indian country and recognizing sovereignty.

B. The Strained Path From Allocation of Federal Jurisdiction to Recognition of Sovereignty

In addition to the suspect use of the trust doctrine as a source of plenary power to enact the statute, there also exists a tenuous relationship between the

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241. 18 U.S.C. §§ 1152-1153 (1994).

242. Act of Mar. 3, 1885, ch. 341, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153 (1994)).

243. United States v. Kagama, 118 U.S. 375 (1886); *see supra* note 41 (discussing the *Kagama* Court's rationale).

244. *See* discussion in text accompanying *supra* notes 39-46 (explaining the origin of the plenary power and citing the power as a disadvantage of the trust doctrine).

245. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973) ("[I]t is now generally recognized that the power [over Indian matters] derives from federal responsibility for regulating commerce with the Indian tribes and for treaty making.").

246. In *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977), the Court stated:

> The statement in Lone Wolf . . . that the power of Congress "has always been deemed a political one, not subject to be controlled by the judicial department of the government;" . . . has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment. . . ." The power of Congress over Indian affairs may be of a plenary nature, but it is not absolute."

Id. at 84 (quoting Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) and United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946) (plurality opinion)).

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allocation of federal jurisdiction and the recognition of tribal sovereignty. As noted above, the Court historically recognized tribal sovereignty as inherent and retained, rather than delegated from the federal government.[247] Yet the Supreme Court in the *Venetie* decision predicated its determination of the appropriate scope of the tribal government's sovereignty on an interpretation of the Indian country statute — which allocates federal criminal jurisdiction.[248] The Court's determination seems to base recognition of tribal sovereignty in terms of that which is delegated by Congress rather than retained.[249]

To best understand the tenuous relationship, it helps to view the Court's rationale in reverse order. Critical to an understanding of the relationship is the premise that, because the tribal government does not have jurisdiction over the tribal lands, the retained sovereignty virtually is nonexistent. As noted above, the *Venetie* Court approved of the district court's conclusion that because the tribal lands were not Indian country, the tribal government could not tax the activities of a nonmember contractor conducting business on the tribal land.[250] Thus, the Court essentially utilized the reasoning that the tribe has no jurisdiction over the tribal land because it is not Indian country. The Court's explanation for why the tribal land is not Indian country is clear and logical, but the tenuous relationship remains: how does a statute allocating federal criminal jurisdiction by defining Indian country support the role of determining the existence and scope of tribal sovereignty?

To restate the Court's reasoning: the land in question is not Indian country; because the land is not Indian country, the tribe does not have jurisdiction over an activity merely because the activity occurred on tribal lands. It naturally follows that, if a tribal government does not have jurisdiction over its landbase, then its sovereignty is an illusion. The Court's emphasis on a membership-based conception of sovereignty denies such a tribal government jurisdiction over its territory.[251] The result is that the tribal government's sovereign status ceases to exist, and the reasoning supporting that result relies on a statute that Congress enacted to allocate federal, not tribal, criminal jurisdiction over native lands.

Conclusion

Over the past forty years, the federal government took actions that have the effect of virtually terminating the sovereignty of Alaska Native groups. This

247. *See* discussion *supra* Parts II.B.1 and II.B.2 (explaining the inherent sovereignty principle and the nature of the scope of tribal sovereignty).

248. *See supra* note 210 (discussing the *Venetie* Court's interpretation of 18 U.S.C. § 1151(b) (1994)).

249. *Id.*

250. Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998).

251. *See* discussion *supra* Part I.B.3. (explaining membership versus territorial-based conceptions of sovereignty).

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process of the de facto termination occurred through the enactment of Public Law 280,[252] the Alaska Native Claims Settlement Act,[253] and the Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government.*[254] By imposing Alaska state jurisdiction,[255] transferring title to state corporations,[256] and refusing to recognize tribal jurisdiction over tribal lands,[257] the federal government essentially divested Alaska Native tribal governments, like the Village of Venetie Tribal Government, of most if not all of their autonomous attributes. This process of de facto termination occurred in the face of a general federal policy of Native American self-determination.[258] Further, there is no constitutional authority over Native American affairs that supports the process. Indeed, the Court even called into question the trusteeship asserted as a justification for the plenary power.[259] When one also considers the tenuous relationship between the allocation of federal jurisdiction and recognition of tribal sovereignty, the process of de facto termination that occurred seems untenable. The bottom line is that the elusive nature of Alaska Native sovereignty is an anomaly in an era of self-determination.

252. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (amended and codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §§ 1360, 1360 note (1994)).

253. 43 U.S.C. § 1601-1628 (1994).

254. 522 U.S. 520 (1998).

255. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (amended and codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §§ 1360, 1360 note (1994)).

256. 43 U.S.C. §§ 1606-1607, 1618 (1994).

257. Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998).

258. See discussion *supra* Part I.C (discussing current policy of self-determination).

259. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973)

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