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Implied Limitation on the Jurisdiction of Indian Tribes

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IMPLIED LIMITATIONS ON THE JURISDICTION OF INDIAN TRIBES

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I. INTRODUCTION

In 1978 the Supreme Court in *Oliphant v. Suquamish Indian Tribe* held that the retained sovereignty of Indian tribes over tribal reservations does not include the power to punish non-Indians who commit offenses against tribal law.[1] Based on a number of facts and premises, the Court concluded that it had been assumed from the beginning that the tribes lack this authority except where expressly recognized or conferred by treaty provision or act of Congress.[2] The Court also relied on the fact that during the formative years[3] few Indian tribes had the governmental structure necessary to comply with Anglo-American requirements of due process of law.[4]

This article reviews the *Oliphant* decision and discusses the authority of Indian tribes to make and enforce civil laws applicable to non-Indians[5] within tribal Indian country. The Court's analysis in *Oli-*

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1. 435 U.S. 191 (1978).

2. *Id.* The Supreme Court has sustained the power of Congress to delegate jurisdiction to Indian tribes. United States v. Mazurie, 419 U.S. 544, 556–58 (1975). The *Oliphant* Court interpreted some treaty provisions providing for tribal punishment of illegal settlers as federal recognition of this power. *See* notes 94–96 and accompanying text *infra*.

3. This phrase as a reference to the years in which basic federal Indian policy was established was made popular by F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS (1962).

4. 435 U.S. at 196.

5. The *Oliphant* Court stated the issue presented as tribal criminal jurisdiction over non-Indians, rather than over nonmembers of the Suquamish Tribe. *Id.* at 195. But the Court's opinion in United States v. Wheeler, 435 U.S. 313 (1978), described the *Oliphant* holding as applying to nonmembers of the tribe. 435 U.S. at 326. Because of this discrepancy between contemporaneous opinions, and because the *Oliphant* defendants were in fact whites, the question of tribal criminal jurisdiction over Indians who belong to other tribes was not determined by *Oliphant*. Prior authority indirectly supports jurisdiction over nonmember Indians. *E.g.*, 25 C.F.R. § 11.2(c) (1978); United States v. Burland, 441 F.2d 1199, 1200 n.1 (9th Cir.), *cert. denied*, 404 U.S. 842 (1971); Arizona *ex rel.* Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970). The treatment of whites who became adopted members of some tribes during the 19th century is discussed in notes 135–49 and accompanying text *infra*. Because the Court in *Oliphant* posed the issue as jurisdiction over non-Indians, and because federal law has

phant has already become the focus for lower court decisions dealing with the scope of tribal jurisdiction.[6] In the following discussion, the tribal claim to authority in noncriminal matters and the opposing view that the *Oliphant* rationale should be extended to all forms of tribal authority are evaluated.[7]

A. Retained Tribal Sovereignty

The background for the Court's decision in *Oliphant* was the well-established doctrine that when Indian tribes became subject to the authority of the United States, they nevertheless retained substantial powers of self-government.[8] A number of diverse precedents contributed to this rule,[9] but its survival in our law is most directly attributable to the decisions of the Supreme Court during the tenure of Chief Justice John Marshall. In three opinions written between 1823 and 1832,[10] Marshall articulated the concepts and vocabulary that have defined the legal status of Indian tribes to this day.

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usually made that the relevant category, the discussion in this article does the same except where noted.

6. *E.g.*, Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe, No. C77-882M (W. D. Wash., Nov. 3, 1978); Salt River Project Agricultural Improvement & Power Dist. v. Navajo Tribe of Indians, No. 78-352 (D. Ariz., July 11, 1978).

7. At times attempts have been made to determine what authority Indian tribes have by arguments about the meaning of the legal term "sovereignty." *See, e.g.*, Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME LAW. 600 (1976). This approach confuses two distinct uses of the term. In international law a sovereign has the full range of powers of a nation state, and these powers collectively comprise its sovereignty. American Indian tribes are not full sovereigns in that sense. It is also common in the United States to refer to the states as sovereigns, although they do not fit the international law definition either. What we mean in the latter case is that the states exercise substantial, independent authority within the American constitutional system. Indian tribes do also, so the term in the latter sense is properly applied to them. Supreme Court opinions have implicitly reflected this analysis. The Court has referred to tribes as "quasi-sovereign," Morton v. Mancari, 417 U.S. 535, 554 (1974); the Court has also described the powers tribes exercise as "retained tribal sovereignty," United States v. Wheeler, 435 U.S. 313, 324 (1978). Cases like *Oliphant* turn on how much sovereignty the tribes retain, so semantic debates about the word largely beg the question. As the Court stated in McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973): "The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read." *Id.* at 172.

8. United States v. Wheeler, 435 U.S. 313, 322-23 (1978); *see also* note 20 and accompanying text *infra*.

9. The most significant practice was entering into treaties with many tribes implying that the tribes were independent states capable of making them. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832).

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

First, the Marshall Court established that the Constitution delegated paramount authority over Indian matters to the national government.[11] Thus, federal treaties with Indian tribes and statutes regulating Indian matters prevail over state laws. This rule on allocation of power survived later Courts less generous to federal authority[12] and has been consistently followed.[13]

Second, the Marshall Court described the tribes' status in relation to the United States as a dependent one, based on the common treaty provision that the tribe placed itself under the protection of the United States "and of no other sovereign whatsoever."[14] This dependency has several important consequences. The Court held that the

11. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559, 561 (1832). As the Court there stated, the previous allocation of authority had been uncertain because of ambiguous wording in the Articles of Confederation.

12. Modern decisions of the Court hold that the federal power over commerce with the Indian tribes, U.S. CONST. art. I, § 8, cl. 3, and the treaty power, *id.* art. II, § 2, cl. 2, are the most important sources of federal authority over Indian affairs. United States v. Mazurie, 419 U.S. 544, 554 (1975); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 n.7 (1973). But many federal statutes on Indian matters do not fit ordinary notions of commerce, particularly as "commerce" was construed before the middle of the twentieth century. For this reason the Court in United States v. Kagama, 118 U.S. 375, 378–79 (1886), in sustaining a federal criminal statute dealing with offenses committed on Indian reservations, declined to rely on the Indian commerce power and based its decision on federal guardianship over Indian tribes. The *Kagama* Court referred to the duty of protection assumed by the United States in treaties, *see* note 14 and accompanying text *supra,* but there was no treaty with the tribe involved in the case. The better view is that of Chief Justice Marshall in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), that the commerce clause and the treaty clause when read in light of the early history of relations with Indians (particularly the pre-1789 treaties) manifest a general intent to invest the federal government with plenary authority over Indian affairs.

On the other hand, the Court has rejected the argument that the Indian commerce clause alone precludes all state authority. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 481 n.17 (1976); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 (1973). Rather, under the supremacy clause, U.S. CONST. art. 6, cl. 2, federal statutes (as well as treaties) preempt state laws which interfere with federal Indian policies. *Id.; see also* note 224 *infra.* Certain matters may be preempted by the Constitution alone. *See, e.g.,* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

13. *E.g.,* Williams v. Lee, 358 U.S. 217, 219 (1959). The Supreme Court has never held a federal Indian statute or treaty to be an unconstitutional invasion of state authority, and on several occasions it has reversed contrary holdings of lower courts. *E.g.,* United States v. Sandoval, 231 U.S. 28 (1913).

14. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551–52, 555 (1832) (quoting one of the Cherokee treaties). Later treaties, including that at issue in *Oliphant,* included language acknowledging the tribe's "dependence on the government of the United States." 435 U.S. at 207. In others the tribes acknowledged the "supremacy" of the United States. *E.g.,* Treaty with the Cheyenne Tribe, July 6, 1825, art. 1, 7 Stat. 255, 255. Some treaties, for example, the important Treaty of Greeneville, included no such terms. Treaty with the Wyandot and Other Indian Tribes, Aug. 3, 1795, 7 Stat. 49 (Treaty of Greeneville).

general practice of European sovereigns to monopolize land acquisitions from the Indian tribes had been absorbed into our law.[15] Under this rule, the tribes' use and occupancy of their lands is respected, but they are disabled from selling their lands externally to anyone not acting under authority of the sovereign.[16] The same dependent relationship authorized Congress to legislate broadly respecting the Indians.[17] It was described as imposing on the federal government the duty of protecting the Indians and their property.[18] Marshall analogized the dependent relationship to a common law guardianship over the tribes.[19]

Third, the Marshall Court concluded that the parties to the early Indian treaties intended that the tribes would retain self-government within the territory reserved to them, subject only to federal authority.[20] In reaching this conclusion, Marshall relied on the terms of treaties, the general course of federal legislation and Indian treaties, and the principle of international law that the internal law of conquered or protectorate territory remains in force until affirmatively superseded by the new sovereign.[21] This doctrine has subsequently been applied to tribal lands set aside by unilateral federal action as well.[22]

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15. Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 584-88 (1823).

16. Two early cases involved transactions occurring under British rule. Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). Since 1790, this principle has been codified in successive statutes commonly known as the Nonintercourse Acts. The present version is codified at 25 U.S.C. § 177 (1976). *See generally* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

17. This principle is implicit in much of Marshall's language, particularly Worcester v. Georgia, 31 U.S. (6 Pet.) at 561, and later decisions have depended directly on it. *See, e.g.,* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-84 (1977); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); United States v. Kagama, 118 U.S. 375, 384-85 (1886).

18. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551-52, 556 (1832).

19. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); *see also* United States v. Kagama, 118 U.S. 375, 374-75 (1886). Later Court decisions extended the guardianship concept to individual Indians. *E.g.,* United States v. Nice, 241 U.S. 591, 600-01 (1916); United States v. Rickert, 188 U.S. 432, 437-38 (1903). Recent cases maintain the concept. *E.g.,* United States v. Antelope, 430 U.S. 641, 647 n.8 (1977); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 174 (1973).

20. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556, 560-62 (1832). *See also* United States v. Wheeler, 435 U.S. 313, 322-23 (1978); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 168-74 (1973); Quiver v. United States, 241 U.S. 602, 603-06 (1916); Talton v. Mayes, 163 U.S. 376 (1896); *Ex parte* Crow Dog, 109 U.S. 556, 568-70 (1883); The Kansas Indians, 72 U.S. (5 Wall.) 737, 755 (1867).

21. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556, 560-62 (1832).

22. Both Congress and the executive have treated tribal self-government in Indian

Fourth, the Marshall Court construed Indian treaties and federal statutes in favor of federal protection for and self-government by the tribes.[23] From this principle have evolved several closely related rules of construction governing the interpretation of federal laws and treaties respecting Indian matters. Consensual agreements are to be interpreted as the Indians would have understood them,[24] ambiguities or doubts about the meaning of statutory or treaty provisions are to be resolved in the Indians' favor,[25] ambiguities are to be construed in favor of Indian reservation self-government as opposed to competing federal or state authority,[26] and treaties and statutes are to be interpreted so as to carry out their protective purpose.[27]

A fifth principle, not specifically articulated by Marshall, was developed in later cases: the reservation to tribes of federally protected territory is intended for the Indians' economic self-support as well as their continued self-government. The fish, game, timber, minerals, waters, and other resources are implicitly reserved with the land itself to provide a productive economic base for the Indians.[28]

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country without any distinctions based on the manner in which lands were set aside. This statement is illustrated by a number of statutes, including 18 U.S.C. §§ 1151, 1162; 25 U.S.C. §§ 450-450n, 461-479, 1301-1326; 28 U.S.C. § 1360 (1976). *See also* 25 C.F.R. pt. 11 (1978); United States v. Pelican, 232 U.S. 442 (1914); Donnelly v. United States, 228 U.S. 243, 268-69 (1913); United States v. Kagama, 118 U.S. 375, 385 (1886); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 657-59 (9th Cir. 1975), *cert. denied,* 429 U.S. 1038 (1977); Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975).

23. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551-52, 555-56, 560-62, 582 (1832).

24. *Id.* at 551-54; *see also* Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970); United States v. Winans, 198 U.S. 371, 380 (1905); Jones v. Meehan, 175 U.S. 1, 11 (1899).

25. Bryan v. Itasca County, 426 U.S. 373, 392 (1976); Antoine v. Washington, 420 U.S. 194, 199-200 (1975); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 174-76 (1973); Squire v. Capoeman, 351 U.S. 1, 6-7 (1956); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918); Winters v. United States, 207 U.S. 564, 576-77 (1908).

26. Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 99 S. Ct. 740, 753 (1979); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Bryan v. Itasca County, 426 U.S. 373, 392-93 (1976); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 174-75 (1973); United States v. Quiver, 241 U.S. 602 (1916); *Ex parte* Crow Dog, 109 U.S. 556 (1883).

27. Mattz v. Arnett, 412 U.S. 481, 504-05 (1973); Tulee v. Washington, 315 U.S. 681, 684-85 (1942); Carpenter v. Shaw, 280 U.S. 363, 366-67 (1930); Smith v. McCullough, 270 U.S. 456, 463-65 (1926).

28. The Court in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), emphasized the Indians' "full right" to their lands. *Id.* at 560-61. In Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835), the Court stated that the Indian "right of occupancy is considered as sacred as the fee-simple of the whites." *Id.* at 746. Later cases of importance include Menominee Tribe v. United States, 391 U.S. 404, 405-06 (1968); United States v. Shosone Tribe, 304 U.S. 111 (1938); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89

The Court in recent decisions has sustained each of these principles,[29] and the *Oliphant* decision depended on the interplay of several of them.

B. *Tribal Courts and Laws*

The Suquamish Tribe, whose criminal jurisdiction was denied in *Oliphant,* intended to try the defendants for offenses defined similarly to those of a common law jurisdiction in a tribunal structured much like Anglo-American courts.[30] Most other tribes have adopted legal machinery resembling that of Anglo-American society.[31] The original legal systems of tribes were, of course, quite different.[32] There were many causes for the demise of traditional systems,[33] but a major rea-

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(1918); Winters v. United States, 207 U.S. 564 (1908); United States v. Winans, 198 U.S. 371 (1905). *See also* Pelcyger, *The* Winters *Doctrine and the Greening of the Reservations,* 4 J. CONTEMP. L. 19 (1977).

29. *See, e.g.,* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Bryan v. Itasca County, 426 U.S. 373 (1976); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973).

30. 435 U.S. at 193-94, 211-12; *see* Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976), *rev'd sub nom.* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

31. NAT'L AMERICAN INDIAN CT. JUDGES ASS'N, INDIAN COURTS AND THE FUTURE 7, 11 (1978) [hereinafter cited as NAICJA]. The principal exceptions are the Pueblo tribes of the southwest. Except for the Hopis, the Pueblo tribes were subject to the dominion of Spain and Mexico for over three centuries before their territory became part of the United States. They had self-government on their own lands under Spanish rule, although tribal institutions became modified in certain respects to deal with Spanish authorities. The Pueblos' legal systems which existed at the time of United States' occupation have proved durable and most remain in use. Under those systems most legal disputes are handled directly by the tribes' political authorities; the tribes have established separate courts only for traffic offenses and a few other matters.

32. *Oliphant,* 435 U.S. at 197; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978); W. HAGAN, INDIAN POLICE AND JUDGES 11-19 (1966); K. LLEWELLYN & E. HOEBEL, THE CHEYENNE WAY (1941); W. SMITH & J. ROBERTS, ZUNI LAW: A FIELD OF VALUES (1954); R. STRICKLAND, FIRE AND THE SPIRITS (1975); M. Shepardson, *Navajo Ways in Government,* 65 AMER. ANTHRO. ASS'N. 70-117 (1963).

33. United States policy has been to deal with the tribes as autonomous entities having relations directly with the federal government. The tribes retain the right to govern themselves within tribal territory. But the government has also pursued assorted schemes intended to induce Indian assimilation into the American melting pot, and toward that end it has imposed specific legal restrictions on the tribes, including the Courts of Indian Offenses discussed in text accompanying notes 34-45 *infra.* Assimilation policies have usually been exercised through existing tribal organizations, which continue their separate status but are reoriented away from their traditional governments.

Original tribal legal systems were also undermined by the economic and cultural dislocations resulting from loss of territory, by permanent realignments generated by the

son for the adoption of common law courts was the Courts of Indian Offenses. Beginning in 1883, the Bureau of Indian Affairs established these courts on some Indian reservations[34] to undermine the authority of the traditional chiefs and to provide law and order where tribal systems had deteriorated.[35] Because the Bureau appointed and paid the judges and police, it exercised significant influence over the system.[36] But judges and police were tribal members, so self-government continued under an imposed structure.[37]

The Indian Reorganization Act of 1934[38] and other reforms of the 1930's were intended to revitalize tribal self-government.[39] The Courts of Indian Offenses were retained and extended to more reservations.[40] In 1935 the Secretary of the Interior issued a new code for

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need to confront the settlers, by the effects of European technology and trade, by missionaries and other private efforts to assimilate the Indians, and by social integration with non-Indians. *See* INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 757 (1928) [hereinafter cited as the MERIAM REPORT].

34. W. HAGAN, *supra* note 32, at 104–25; MERIAM REPORT, *supra* note 33, at 769; F. PRUCHA, AMERICAN INDIAN POLICY IN CRISIS 208–11 (1976). Hagan states that two-thirds of the reservations had these courts in 1900, their initial peak period. The Meriam Report mentioned 30 such courts serving less than half the reservations in 1928. The courts then operated under very general regulations giving them jurisdiction over "misdemeanors" and the civil jurisdiction of a justice of the peace. *Id.;* HAGAN, *supra* note 32, at 110, 173–74. The government began setting up Indian police forces in 1878. *Id.* at 23–50.

Congress never directly authorized these courts. In United States v. Clapox, 35 F. 575, 577 (D. Ore. 1888), their validity was sustained under the general authority of the Secretary of the Interior over Indian matters. Congress gave implicit sanction to the courts beginning in 1888 by appropriating money to pay for them. *Oliphant,* 435 U.S. at 196 n.7; W. HAGAN, *supra* note 32, at 112; MERIAM REPORT, *supra* note 33, at 769. Subsequent cases cast some doubt on the rationale of *Clapox, see, e.g.,* Organized Village of Kake v. Egan, 369 U.S. 60, 63 (1962), but congressional ratification or acquiescence is a valid basis for the courts. *See Ex parte* Wilson, 140 U.S. 575, 576–77 (1891). Congress also recognized the courts in 25 U.S.C. § 1301 (1976).

35. W. HAGAN, *supra* note 32, at 101–02, 154–57, 179. The substantive rules for early Courts of Indian Offenses forbade certain Indian dances, polygamy, and the practices of medicine men. *See* United States v. Clapox, 35 F. 575 (D. Ore. 1888); M. PRICE, LAW AND THE AMERICAN INDIAN 139–42 (1973).

36. W. HAGAN, *supra* note 32, at 104–25, 159, 173.

37. *Id.* at 97, 113, 161, 174.

38. 25 U.S.C. §§ 461–479 (1976) (as amended).

39. *See* Fisher v. District Court, 424 U.S. 382, 387 (1976) (*per curiam*).

40. This fact may appear to contradict the prior textual sentence, but in the circumstances of that time, the only realistic alternatives were greater federal court authority or state jurisdiction. *See* W. HAGAN, *supra* note 32, at 150; MERIAM REPORT, *supra* note 33, at 46–47. The government chose the alternative most consistent with tribal self-government. *See also* note 43 *infra.*

the courts;[41] with minor amendments it remains in force today.[42] The code expressly authorized tribes to establish tribal courts and codes to supplant the secretarial code and courts.[43] Most tribes have established their own judicial systems,[44] using the secretarial code provisions as their point of departure. Consequently, tribal institutions generally resemble this common antecedent, although many tribal codes substantially augment the secretarial code.[45]

II. THE DECISION IN *OLIPHANT V. SUQUAMISH TRIBE*

The *Oliphant* decision struck down two prosecutions initiated by the Suquamish Tribe against non-Indian residents of its treaty reservation in Washington.[46] Defendant Oliphant was charged with assaulting a peace officer and resisting arrest, defendant Belgarde with reckless endangering and damaging tribal property. Both defendants unsuccessfully sought habeas corpus in the federal district court.[47]

41. *See* 3 Fed. Reg. 952 (1938). This code was much more comprehensive than earlier regulations, but it eliminated most of the direct prohibitions of traditional tribal practices. It also restricted criminal jurisdiction to offenses occurring within reservations. *See* 25 C.F.R. § 11.2(a) (1978). The earlier regulations applied to Indians "belonging to the reservation." M. PRICE, *supra* note 35, at 141–42.

42. 25 C.F.R. pt. 11 (1978). *See also* 25 U.S.C. § 1311 (1976) (enacted in 1968 to provide a model penal code for reservations but not yet carried out).

43. 25 C.F.R. § 11.1(e) (1978). The tribes always had that authority. In fact, the Five Civilized Tribes had established effective courts and codes during the nineteenth century. *See* notes 137–47 and accompanying text *infra*. The Bureau of Indian Affairs originally assumed that Indian Reorganization Act (IRA) tribes would immediately set up their own courts, and the 1935 Code was applied only to tribes who rejected the IRA. Concerning these tribes, see note 179 *infra*. When IRA tribes did not set up their own courts, the Bureau extended the code to all tribes. 3 Fed. Reg. 952 (1938).

44. The *Oliphant* opinion stated that 71 tribes operated tribal courts, while there were 30 Courts of Indian Offenses. 435 U.S. at 196 n.7. These figures are a bit misleading, however, because virtually all large tribes are in the former group and some courts in the latter category are operated only for limited purposes.

45. NAICJA, *supra* note 31, at 36–45, 51–80 (describing current practices of tribal courts).

46. 435 U.S. at 192–93. The population of the reservation was 2,928 non-Indians, while only 50 Indians lived there, according to the Court. *Id.* at 193 n.1. This circumstance resulted from the federal allotment and opening laws which affected many reservations between 1854 and 1934. *See* notes 124–25 and accompanying text *infra*. At Port Madison, 63% of the land was non-Indian owned. Defendants in argument relied strongly on the reservation's demography and on the fact that non-Indian residents could not participate in tribal government. The tribe in response argued that it sought only to punish offenses directly affecting Indians. The Court recited the population figures, but the decision appears by its terms to apply to all reservations, including those where there are few non-Indians and the tribe owns all the land. *See also* notes 159–61 and accompanying text *infra*.

47. 435 U.S. at 194–95. The district court had habeas corpus jurisdiction pursuant

The court of appeals affirmed in Oliphant's case, one judge dissenting, holding that criminal jurisdiction is included in the tribe's retained sovereignty.[48] The Supreme Court reversed by a vote of six to two.[49]

The Supreme Court's opinion seemed to approve the court of appeals' statement of the underlying principle that the tribes retain those sovereign powers not expressly terminated by treaty or statute or "inconsistent with their status."[50] The Court in *Wheeler v. United States,* decided the same term, specifically relied on this principle.[51] Thus, the reversal was not based on disagreement over the basic concept of tribal self-government.

A. Statutory Preemption: An Argument Declined by the Court

The *Oliphant* Court decided that retained criminal jurisdiction to try and punish non-Indians is "inconsistent" with the tribes' status. It sidestepped a closely related argument pressed by defendants that federal statutes had preempted tribal power to punish non-Indians,[52] although the Court did rely on these statutes to support its conclusion

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to 25 U.S.C. § 1303 (1976), conferring jurisdiction to test the legality of confinement under the authority of an Indian tribe. *See also* Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965); *Ex parte* Kenyon, 14 F. Cas. 353 (C.C.W.D. Ark. 1878).

48. Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976), *rev'd sub nom.* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The dissenting opinion framed the issue as whether the tribal power "is consistent with the powers granted by Congress to tribal governments," 544 F.2d at 1014, a formulation that apparently looked for an express federal grant for all tribal powers. To that extent the dissent differed conceptually from the Supreme Court majority and from the Court's holding in United States v. Wheeler, 435 U.S. 313 (1978). *See* text accompanying note 53 *infra.* But the dissent considered and rejected the possibility of authority based on congressional aquiescence and, in so doing, cited a number of the factors relied on by the Supreme Court.

49. Justice Rehnquist delivered the Court's opinion. Justice Marshall, joined by Chief Justice Burger, filed a one paragraph dissent concluding that tribal sovereignty to try and punish all offenders against tribal law had never been lost or withdrawn. They relied on the majority opinion of the court of appeals. Justice Brennan did not participate owing to illness. The Court noted that it had granted review of Belgarde's case while it was still pending in the court of appeals. 435 U.S. at 195 n.5. The Court has jurisdiction to grant such review. 28 U.S.C. §§ 1254(1), 2101(e) (1977). Its own Rule 20 apparently limits such review to cases of "imperative public importance," but in fact the Court has granted early review in a number of other cases where an issue identical to one already before the Court in another case was presented. R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 4.21 (5th ed. 1978).

50. 435 U.S. at 208.

51. 435 U.S. 313 (1978).

52. The Court did not directly address that argument, nor did the dissenting judge in the court of appeals. The court of appeals majority necessarily considered and rejected it. Oliphant v. Schlie, 544 F.2d 1007, 1010–11 (9th Cir. 1976), *rev'd sub nom.* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

that the power was implicitly surrendered.[53] An examination of this preemption contention is therefore pertinent.

In 1790 the first Congress included in the first Indian Trade and Intercourse Act a provision for federal punishment of any crime by non-Indians against Indians or their property within tribal territory.[54] Earlier treaties made under the Confederation had similar provisions.[55] In 1817, the general federal enclave law was extended to Indian tribal territory except for crimes by Indians against Indians, and that scheme has continued to the present for many interracial crimes.[56] Defendants asked the Court to hold that this comprehensive and continuous federal jurisdiction preempted tribal authority that might otherwise exist. One of the authorities on which the *Oliphant*

53. 435 U.S. at 197 n.8, 201, 208.

54. Act of July 22, 1790, ch. 33, §§ 5-6, 1 Stat. 137, 138. The provision applied to offenses by "any citizen or inhabitant of the United States," a phrase that appears comprehensive but in context clearly did not include Indians. The victim had to be a "peaceable and friendly Indian;" the offense had to occur within "any town, settlement or territory" belonging to a tribe. The offense was then punished in federal court according to the substantive law of the state or territorial district to which the defendant "may belong" applicable to like cases with white victims. The provision was continued with little change in the Act of Mar. 1, 1793, ch. 19, §§ 4-5, 1 Stat. 329, 329-30. The Act of May 19, 1796, ch. 30, §§ 4, 6, 15, 1 Stat. 469, 470-73, added specific penalties but was otherwise substantially the same. Those sections were continued unchanged in the Act of Mar. 3, 1799, ch. 46, §§ 4, 6, 15, 1 Stat. 743, 744-48, and the Act of Mar. 30, 1802, ch. 13, §§ 4, 6, 15, 2 Stat. 139, 141-44. The 1802 Act was the first "permanent" Indian Trade and Intercourse statute; *i.e.*, it had no automatic expiration date as had the earlier acts. The cited sections of the 1802 Act were largely superseded by the 1817 Act. *See* note 56 and accompanying text *infra*.

55. Treaty with the Wyandot and Other Tribes, Jan. 9, 1789, art. 5, 7 Stat. 28, 29; Treaty with the Chickasaw, Jan. 10, 1786, art. 6, 7 Stat. 24, 25; Treaty with the Cherokee, Nov. 28, 1785, art. 7, 7 Stat. 18, 19.

56. Act of Mar. 3, 1817, ch. 92, 3 Stat. 383. This Act applied to offenses within "any town, district, or territory" belonging to an Indian tribe. Crimes by Indians against non-Indians, and by non-Indians against each other, were included. The Act expressly excluded crimes "by one Indian against another" and also specified that it should not be construed "to affect any treaty now in force" with any tribe.

The 1834 Indian Trade and Intercourse Act continued the 1817 provision with a few changes. Act of June 30, 1834, ch. 161, § 25, 4 Stat. 729, 733. The territorial application was changed to "Indian country," a term defined in sections 1 and 24 of the Act, and the treaty proviso was deleted. Section 29 continued the prior act for tribes residing east of the Mississippi River. The Act of Mar. 27, 1854, ch. 26, § 3, 10 Stat. 270, added provisos excluding offenses by Indians already punished under tribal law and excluding offenses where exclusive jurisdiction was reserved to a tribe by treaty. *See* notes 85, 86 & 150 and accompanying text *infra*. The 1854 Act also specified that the applicable substantive laws did not include those passed for the District of Columbia. There have been no substantive amendments since 1854, but the codifications of 1873 and of the Federal Criminal Code in 1948 altered the wording. The present section, 18 U.S.C. § 1152 (1976), has not been changed since 1948. This article uses "Indian Country Crimes Act" as a convenient descriptive term for this statute, reflecting its terms since 1834.

Court relied was predicated on this line of reasoning,[57] rather than on the theory adopted in the *Oliphant* decision that the federal statutes reflect the lack of retained tribal authority.[58]

There were a number of difficulties with defendants' preemption argument. The Indian Country Crimes Act was amended in 1854 to prohibit federal prosecution of an Indian already punished for the same act under tribal law.[59] That amendment clearly contemplated concurrent tribal jurisdiction.[60] Defendants pointed to the fact that the amendment applied only to Indians, an argument the Court relied on to support the rationale it actually accepted, that the tribes had no jurisdiction over non-Indians in the first place. But the 1854 amendment made the preemption argument difficult, for it could not succeed unless the pre-1854 statute were fully preemptive and the amendment created an exception only for offenses by Indians, or if the pre-1854 statute were preemptive only of jurisdiction over non-Indians. The words of the statute plainly do not support the latter view, and the former is contrary to the evidence. The event recited in the legislative history as giving rise to the 1854 amendment was a federal prosecution of an Indian already punished under tribal law for the same act, showing that tribes had actually exercised jurisdiction before 1854.[61] The legislative history of the 1854 amendment suggests no congressional disapproval of this tribal jurisdiction,[62] and the legislative history of the 1834 reenactment reflects a congressional understanding that the tribes had concurrent authority with the federal government.[63] Contemporary federal policy generally supported tribal authority at least over tribe members.[64]

Two other observations lead to the same conclusion. The later

57. *See* note 78 and accompanying text *infra*.

58. 435 U.S. at 201, 208, 211.

59. *See* note 56 *supra*.

60. The Court recognized this in United States v. Wheeler, 435 U.S. 313, 325 (1978).

61. *See* 435 U.S. at 203; notes 85 & 86 and accompanying text *infra*.

62. The House of Representatives was informed that federal prosecution of a Creek Indian for a liquor offense already punished by the tribe gave rise to the amendment. CONG. GLOBE 33d Cong., 1st Sess. 700-01 (1854). *See* note 86 *infra*.

63. *See* H.R. REP. No. 474, 23d Cong., 1st Sess. 13 (1834), *quoted in* Oliphant v. Schlie, 544 F.2d 1007, 1011 (9th Cir. 1976), *rev'd sub nom.* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). *See also id.* at 98–100, referring expressly to "concurrent remedies."

64. This is demonstrated by the Indian-against-Indian exception in the Indian Country Crimes Act, *see* note 56 *supra;* by the 1854 double jeopardy exception; by another part of the 1854 Act removing all federal prosecutions of Indians for introducing liquor into Indian country; and by numerous statements of policy, such as those cited in note 63 *supra*.

Courts of Indian Offenses established by the Interior Department have consistently exercised concurrent jurisdiction over some offenses by Indians, showing an administrative understanding that the Indian Country Crimes Act does not preempt tribal authority.[65] It is also well established that federal criminal laws do not ordinarily preempt state criminal jurisdiction over the same acts, so the general presumption is that Congress does not intend to preempt concurrent criminal jurisdiction.[66]

The evidence thus weighs strongly against the view that the Indian Country Crimes Act preempted tribal authority. If any doubt remains, the general rule of construction requires that it be resolved in favor of retained tribal sovereignty.[67] For these reasons, the Court correctly declined to adopt the preemption argument.[68]

B. *Absence of Retained Tribal Authority: The Rationale Adopted by the Court*

The Court's conclusion that it is implicit in the status of Indian tribes that they did not retain authority to punish non-Indians was based on inferences from several sources. As already noted, the Court relied on the existence of comprehensive federal jurisdiction over the subject matter.[69] The Court also pointed to the Indians' dependent relationship to the United States, which the Court viewed as inconsistent with retained jurisdiction over non-Indians.[70] A third basis for the Court's conclusion was its review of some prior opinions[71] and of

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65. For a description of these courts, see notes 33–44 and accompanying text *supra*. It appears that general misdemeanor jurisdiction of these courts has applied irrespective of the race of the victim. 25 C.F.R. pt. 11 (1978); W. HAGAN, *supra* note 32, at 130.

66. *See* 18 U.S.C. § 3231 (1976) (last sentence). *See also id.* §§ 233, 245, 927. This principle has been relied on to reject the application of constitutional double jeopardy between the "separate sovereignties" of the state and federal governments. Abbate v. United States, 359 U.S. 187, 194 (1959). The same double jeopardy rule applies between Indian tribes and the United States. United States v. Wheeler, 435 U.S. 313, 330–32 (1978).

67. *See* note 26 and accompanying text *supra*.

68. The Court did not directly refer to the preemption argument. *See* note 52 *supra*. The circumstances imply that the Court declined the argument, but that is not completely certain. The Court's actual rationale is similar and entirely moots the question as to non-Indian defendants. Preemption would have applied as well to those crimes by Indians which are subject to federal jurisdiction. *See* note 56 *supra* and notes 87–90 & 278 and accompanying text *infra*.

69. *See* note 54 and accompanying text *supra*.

70. 435 U.S. at 209–11; *see* notes 14–19 and accompanying text *supra* and notes 107–11 and accompanying text *infra*.

71. *See* notes 78–84 and accompanying text *infra*.

legislative and executive actions apparently reflecting the belief that such authority did not exist.[72] The Court also stressed that until recently few tribes had the governmental machinery necessary to comply with the Anglo-American requirements of due process of law and presumed that the government intended to guarantee its citizens due process of law within the territorial limits of the United States.[73]

From all those sources the Court concluded that historically the "commonly shared presumption"[74] was that Indian tribes did not retain authority to try and punish non-Indians within tribal territory. The Court then examined the particular treaty governing the relationship between the Suquamish Tribe and the United States and concluded that it was consistent with the presumption, so the tribe lacked the authority it had claimed.[75]

The Court's pursuit of the common understanding on the scope of retained tribal authority is not objectionable in principle. As noted above, the doctrine of retained tribal sovereignty within tribal territory is based on the Marshall Court's perception of the common understanding of the tribes and the United States in making treaties, and the Court's construction of the Constitution, statutes, and the law of nations. No particular statute or treaty stated the rule in so many words.

The complement of the doctrine of retained tribal jurisdiction is the exclusion of powers generally understood not to be retained. What is "generally understood" necessarily includes the understanding of the Indians as well as the United States, because treaties are consensual documents. No Indian treaty has ever been construed based on hidden or technical meanings known only to the federal negotiators.[76] The duty of the federal government to protect the Indians requires that, while searching for a general understanding, the Indians be accorded the benefit of doubts.[77] But this affects only the clarity of proof required. The persuasiveness of the *Oliphant* opinion must depend on whether the historical record is as clear as the Court said it was.

72. *See* notes 85–106 and accompanying text *infra*.

73. 435 U.S. at 210–11.

74. *Id.* at 196–97, 206.

75. *Id.* at 206–08 (construing the Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927).

76. To the contrary, the accepted rules of construction require that treaties be interpreted as the Indians understood them, *see* note 24 *supra*, and that ambiguities be resolved in the Indians' favor, *see* note 25 *supra*.

77. *See* notes 18 & 19 and accompanying text *supra*.

C. *The* Oliphant *Opinion Examined*

The prior expressions of legal opinion relied on by the Court are thin support for the *Oliphant* decision. The one judicial precedent cited, a district court holding in 1878, relied on preemption by the federal criminal statutes, a position which the *Oliphant* Court declined to adopt.[78] Even this preemption rationale was at best an alternative holding.[79] An 1834 opinion of the Attorney General, which depended primarily on the construction of a particular treaty, based its

78. 435 U.S. at 200 (citing *Ex parte* Kenyon, 14 F. Cas. 353 (C.C.W.D. Ark. 1878)). *Kenyon* involved a prosecution by the Cherokee Nation of Kenyon, a white man, for larceny of a horse. The court's opinion concluded in one sentence that the Indian court had no jurisdiction, because "to give this court jurisdiction of the person of an offender, such offender must be an Indian and the one against whom the offense is committed must also be an Indian. Rev. St. 1873, § 2146." 14 F. Cas. at 355. The cited statute is now the Indian-against-Indian exception of 18 U.S.C. § 1152 (1976). That reference and the court's language make it clear that the *Kenyon* court viewed tribal jurisdiction as limited by the statute. In its reference to *Kenyon*, the *Oliphant* opinion obscured this rationale by quoting the passage above but omitting the part about the victim. Since Indian courts have exercised jurisdiction over interracial and "victimless" crimes by Indians, the *Kenyon* view was at least overbroad. The judge who decided *Kenyon* reached the same conclusion in *Ex parte* Morgan, 20 F. 298 (W.D. Ark. 1883), a case not cited by the *Oliphant* Court nor in any brief to it. The *Morgan* opinion makes the court's preemption view very clear. *Id.* at 308. The opinion is very doubtful on several issues beyond the scope of this article.

79. The defendant's race was the second of three grounds for the court's decision in *Ex parte* Kenyon, 14 F. Cas. 353 (C.C.W.D. Ark. 1878). The court's first basis was its conclusion that the alleged offense had been committed outside the territory of the Cherokee Nation. 14 F. Cas. at 354–55. The third ground was a response to the Cherokees' reliance on the Treaty with the Cherokee Indians, July 19, 1866, 14 Stat. 115. Article 13 agreed to the future establishment of U.S. courts in Cherokee Territory,

> provided, that the judicial tribunals of the [Cherokee] nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee nation, except as otherwise provided in this treaty.

14 Stat. at 119. Kenyon had been an adopted member of the Cherokee Nation, so this clause was at least relevant. The court concluded, however, that Kenyon had become a domiciliary of Kansas and ceased to be subject to tribal authority. The court said the same conclusion would have applied to a member of the Cherokee Nation by blood. That view was certainly wrong, because the Cherokees claimed that the offense had been committed in their territory before Kenyon left. In *Ex parte* Morgan, 20 F. 298, 308 (W.D. Ark. 1883), the court apparently held that treaty clause to be preempted also. Later Supreme Court decisions to the contrary are cited in note 148 *infra*.

The *Oliphant* opinion placed great reliance on the *Kenyon* decision, even giving biographical data about its author, Judge Isaac C. Parker. 435 U.S. at 200 n.10. The apparent reason was to show that Judge Parker was in a position to know what he was talking about. This part of the *Oliphant* opinion is peculiar. As stated in note 78 *supra*, the *Kenyon* rationale is not at all certain, and the Court's quote from it is misleading. The Court does not usually rely very much on lower court decisions. Judge Parker served

view in large part on the doubtful supposition that concurrent jurisdiction was impossible, because a citizen could not have divided "allegiance."[80] This divided allegiance argument was rejected by a later Attorney General's opinion sustaining tribal civil jurisdiction over non-Indians, though the 1834 opinion was favorably mentioned in passing.[81] Felix Cohen's 1942 *Handbook of Federal Indian Law* stated that jurisdiction to punish non-Indians had not been allowed by the federal courts but cited only the 1878 case.[82] A 1970 opinion of the Interior Solicitor, later withdrawn, also relied entirely on past decisions.[83] None of these legal opinions articulated the rationale relied on by the *Oliphant* Court.[84]

The Court relied on inferences drawn from two pieces of legislation in which Congress addressed criminal jurisdiction only over Indians. The first, the 1854 amendment to the Indian Country Crimes Act, is some support for the Court's decision. In reaction to the federal prosecution of an Indian already punished by his tribe, Congress prohibited such double punishment but did not similarly protect non-

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long after the formative years, when the basic understanding was established. He also presided over the eastern portion of the Indian Territory, where the particular treaties with the Five Civilized Tribes established special jurisdictional rules. *See* note 50 *supra*. One biographer reports that Judge Parker knowingly invaded the jurisdiction of the Indian courts, believing that the Indians should learn from the white man's law. H. CROY, HE HANGED THEM HIGH 206 (1952), *cited in* 435 U.S. at 200 n.10. If so, his views were questionable authority for the *Oliphant* decision.

Judge Parker's term was not without historical interest, however. He was an incorruptible judge whose jurisdiction suffered much lawless violence. He is said to have sentenced more persons (172) to the gallows than any other American judge, and his court and gallows are part of a National Historic Site in Fort Smith, Arkansas. *See* H. CROY, HE HANGED THEM HIGH 10 (1952); F. HARRINGTON, HANGING JUDGE 58–59 (1951).

80. 2 OP. ATT'Y GEN. 693, 695 (1834), *cited in* 435 U.S. at 199. The opinion concerned an alleged offense by a black woman who was the slave of a white resident of Choctaw country, but their status does not otherwise appear. The opinion interpreted the Treaty with the Choctaw, Sept. 27, 1830, 7 Stat. 333. Article 4 indicated the tribe's understanding that it did not have criminal jurisdiction over white men "who shall come into their nation." *See* notes 95 & 145 and accompanying text *infra*. The opinion assumed that the Indian Country Crimes Act was passed on the premise that tribal jurisdiction did not extend to whites.

81. 7 OP. ATT'Y GEN. 174, 177–78 (1855). This opinion recognized that concurrent jurisdiction is unrelated to allegiance and is in fact an ordinary feature of a federal system.

82. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 148 (1942), *cited in* 435 U.S. at 199 n.9.

83. 77 Interior Dec. 113 (1970) (withdrawn in 1974 without explanation), *cited in* 435 U.S. at 201 n.11.

84. As noted in text accompanying note 81 *supra*, the only view similar to the Court's was expressed in a portion of the 1834 Attorney General's opinion that relied on supposed problems of "divided allegiance." 2 OP. ATT'Y GEN. 693, 695 (1834).

Indians.[85] The nature of the amendment, however, does not reflect a deliberative overview of the issue.[86]

Reliance on the second legislative action, the 1885 enactment of the Indian Major Crimes Act, is perhaps the weakest point in the Court's reasoning.[87] The Court said that if the 1885 statute were preemptive of tribal authority, then it would be anomalous that non-Indians were not addressed as well. But the Court declined to find the statute preemptive, reserving the question, and, instead, acknowledged that the legislative history of that statute expressly favored retained concurrent authority of the tribes. Furthermore, the terms of the statute which the Court suggested might be preemptive are similar to terms in the Indian Country Crimes Act,[88] which the Court declined to hold is preemptive of tribal authority.[89] Actual practice under the 1885 law also raises doubts about its preemptive effect.[90]

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85. *See* notes 56 & 62 and accompanying text *supra*.

86. The amendment was added to a bill concerning the federal courts in Arkansas in the Senate Indian Affairs Committee, which made no written report. The bill as amended passed the Senate without discussion or debate. CONG. GLOBE 33d Cong., 1st Sess. 185, 473, 580–81 (1854). In the House it received no committee review and passed the full House with a brief explanation reciting as its cause the federal prosecution of a Creek Indian for a liquor offense after tribal punishment. *Id.* at 700–01. The Act repealed federal jurisdiction entirely over that type of offense, and the double jeopardy wording was inapt and not tied directly to the general Indian Country Crimes provision. We may owe the survival and juxtaposition of the double jeopardy exception as much to the compilers of the Revised Statutes of 1873, who arranged the words in their present form, as to the Congress of 1854.

87. 435 U.S. at 203 n.14 (discussing Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385). The Act provided for federal court punishment of Indians accused of seven named offenses. These have been increased to fourteen by amendment. 18 U.S.C. §§ 1153, 3242 (1976). *See also* United States v. Wheeler, 435 U.S. 313, 325 n.22 (1978).

88. Both acts refer to the laws applicable to places within the "exclusive jurisdiction of the United States," which the Court has logically held identifies the laws incorporated, not the nature of the jurisdiction extended. *Ex parte* Wilson, 140 U.S. 575 (1891). The Major Crimes Act also specifies that the offender shall be subject to the same "penalties" (as well as "laws") as persons committing offenses within the exclusive jurisdiction of the United States. But in context and in light of the legislative history, it is more reasonable to interpret this phrase also as an incorporation by reference rather than a preemption.

89. *See* note 68 and accompanying text *supra*.

90. The Major Crimes Act was passed about the same time as the Courts of Indian Offenses were begun. *See* notes 34–45 and accompanying text *supra*. The jurisdiction of the latter has been confined to minor crimes, mostly ones generally categorized as misdemeanors, and tribal courts have followed the same practice. But some of these tribal offenses punish the same offenses as the Major Crimes Act or punish acts which are "lesser included offenses" within the latter. *E.g., compare* 25 C.F.R. § 11.42 (1978) (theft) *with* 18 U.S.C. § 661 (1976) (larceny, including petty larceny); *see also* 25 C.F.R. §§ 11.39 (assault and battery), 11.75 (attempted rape) (1978). Within one sovereignty, jeopardy for an included offense will preclude prosecution for the greater crime. Waller

Thus the Court's argument based on the 1885 statute either begs the question or is wrong.

A third bill enacted in 1960 included legislative history which tends to support the Court's conclusion,[91] although it is rather distant from the years in which the basic rules were formulated to be of much significance.[92] It is also susceptible to a more neutral interpretation, that Congress was merely expressing the scope of tribal jurisdiction then being exercised, not the scope of the tribes' full authority.[93]

The Court also cited as support for its decision the pattern of treaty provisions which addressed the matter of tribal jurisdiction over non-Indians to any degree. Here the decision is on safer ground. The Court showed that early treaties acknowledged tribal authority to punish illegal white settlers,[94] and one treaty included an explicit indication that the tribe knew it needed federal assent to general criminal

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v. Florida, 397 U.S. 387 (1970). Also, the Court in Keeble v. United States, 412 U.S. 205 (1973), held that a Major Crimes Act defendant has a right to a "lesser included offense" jury instruction, thus invading the traditional field of tribal misdemeanors. *See also* M. PRICE, LAW AND THE AMERICAN INDIAN 10–11 (1973).

Another reality is the reluctance of some federal prosecutors, often located far from reservations, to prosecute Major Crimes Act cases. *See* NAICJA, *supra* note 31, at 33. The tribes thus deal with what are felonies in fact under their own codes of lesser crimes. Since 1968 federal law has limited tribal punishments to six months imprisonment and a $500 fine, 25 U.S.C. § 1302(7) (1976), and this limits tribal effectiveness in dealing with serious crimes or habitual offenders. But sentences for lesser felonies often do not result in actual time served exceeding six months, and the tribes may be able to impose longer periods of probation.

It may be argued that the act preempts some tribal penal authority, such as the right to impose the death penalty. *See* United States v. Whaley, 37 F. 145 (C.C.S.D. Cal. 1888). But that sort of preemption applies to the acts of tribal authorities, not to jurisdiction over defendants in a tribal court, so it does not support the *Oliphant* rationale.

91. *See* 435 U.S. at 205–06 (quoting legislative history leading to the enactment of 18 U.S.C. § 1165 (1976)). *See also* notes 269–71 and accompanying text *infra*.

92. *See* United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968).

93. As described in notes 33–45 and accompanying text *supra*, tribal legal machinery had long been dominated by the Courts of Indian Offenses established by the Interior Department and, at least after 1935, the jurisdiction of those courts clearly applied only to Indian defendants. Tribal courts did not in fact assert jurisdiction over non-Indians until after 1960. *See Oliphant*, 435 U.S. at 196–97 & n.7. Thus the 1960 statements that the tribes did not have jurisdiction over non-Indian trespassers accurately described the scope of tribal authority then being exercised, irrespective of potential authority.

94. 435 U.S. at 197 n.8. Such clauses were common to all treaties made between 1785 and 1795, except for those in New York State. It is doubtful that the clauses survived the later removal treaties under which many of these tribes were moved to the Indian Territory. *See* notes 142–45 and accompanying text *infra*. The first treaty to break the pattern was the Treaty with the Sacs & Foxes, Nov. 3, 1804, 7 Stat. 84. Between 1795 and 1804, all treaties outside New York were with tribes which had previous treaties including illegal settler clauses.

jurisdiction over whites.[95] Many treaties, including the one construed in *Oliphant,* expressly stated that the tribes would turn over offenders to the United States.[96] Yet the treaty pattern is not as certain an indication of the absence of tribal sovereignty as the Court suggested. Each treaty is a particular bargain to be separately construed.[97] Some treaties expressly addressed tribal authority over non-Indians.[98] Many others were silent on the matter of criminal jurisdiction over whites in tribal territory.[99] Most of the agreements to turn over offenders are equally consistent with an intent to extradite fugitives, indicating concurrent jurisdiction, as with the Court's inference.[100]

Another source the Court invoked was the Western Territory Bill, proposed in 1834 to establish the Indian Territory as a self-governing territory under a confederation of the tribes.[101] That bill, which did not pass, would have expressly precluded tribal authority to punish agents of the government, travelers, and others residing among the tribes on government business or pursuant to treaty stipulation.[102] The legislative history, as the Court noted, viewed that provision as necessary for the protection of persons for whom the government was responsible.[103] But what the Court does not mention is that illegal

95. 435 U.S. at 197 (citing Treaty with the Choctaws, Sept. 27, 1830, art. 4, 7 Stat. 333). *See also* note 80 *supra.*

96. 435 U.S. at 207. These provisions were common from the earliest treaties, *e.g.,* Treaty with the Cherokees, Nov. 28, 1785, art. 7, 7 Stat. 18. *See* 435 U.S. at 197 n.8. Other treaties included explicit clauses providing that non-Indians who committed offenses against Indians should be delivered up to the United States, and the government undertook to punish them "in like manner as if the injury had been done to a white man." Treaty with the Osages, Nov. 10, 1808, art. 9, 7 Stat. 107, 109.

97. *E.g., compare* Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970), *with* United States v. Holt State Bank, 270 U.S. 49 (1926). The *Oliphant* Court recognized this in its reference to the illegal settler provisions in early treaties. *See* note 94 and accompanying text *supra.*

98. *E.g.,* Treaty with the Cherokees, Dec. 29, 1835, art. 5, 7 Stat. 478, 481; Treaty with the Siounes and Oglalas, July 5, 1825, art. 4, 7 Stat. 252, 253.

99. This was true of the *Oliphant* treaty except for the agreement to turn over offenders. 435 U.S. at 206; *see* note 96 and accompanying text *supra;* note 100 and accompanying text *infra.*

100. For example, the Treaty with the Sacs & Foxes, Nov. 3, 1804, art. 6, 7 Stat. 84, 86, relied on by the *Oliphant* Court, 435 U.S. at 197 n.8, said that the government agreed to remove illegal settlers upon the Indians' complaint. Any implication that such was an exclusive remedy is very weak. In article 11 of the same treaty the tribes agreed to the safety of "traders and other persons traveling through their country under the authority of the United States," but nothing was said about illegal settlers.

101. *See* H.R. REP. No. 474, 23d Cong., 1st Sess. 36 (1834), *cited in* 435 U.S. at 201 n.12; R. SATZ, AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA 138-42 (1975). The proposed Western Territory was to include most of what is now Oklahoma, Kansas and portions of Nebraska, Colorado, and Wyoming. *Id.* at 141.

102. *See* H.R. REP. No. 474, *supra* note 101, at 18, *quoted in* 435 U.S. at 202.

103. *Id.*

settlers or non-Indians adopted into tribal societies would have been subject to tribal punishment.[104] They were treated as voluntarily submitting to tribal authority.[105]

Because the Western Territory Bill did not pass, reliance on it for any purpose is uncertain. There is no indication that any issue relevant to *Oliphant* caused it to fail, and in any case the bill and its history only support the Court's conclusion with respect to persons directly under the government's responsibility.[106] Also, the fact that Congress proposed to preclude tribal authority over certain non-Indians is equally consistent with the view that these persons were otherwise believed to be under tribal authority.

The Court viewed the tribes' dependent relationship with the United States as support for its position.[107] As pointed out above, the treaties commonly expressed the relationship in terms stating that the tribal party acknowledged itself to be under the protection of the United States, and Congress undertook to provide that protection by federal criminal laws.[108] If the Court meant to read the treaty language as an implied cession or relinquishment of the right to punish non-Indians under all circumstances, the conclusion is doubtful. In *Worcester v. Georgia* the Marshall Court rejected these treaty terms as a general surrender of self-government and analogized the treaties to protectorate treaties in Europe between strong and weak states.[109] So understood, the dependent relationship supports a partial surren-

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104. This might be gathered by implication from the provisions just cited; other passages in the House Report make the intent clear. H.R. REP. No. 474, *supra* note 101, at 18, 37.

105. *Id.*

106. The Court said that the Western Territory Bill "contrasted markedly" with the lack of similar provisions respecting "other reservations, which frequently bordered non-Indian settlements." 435 U.S. at 203. This reasoning is based on two erroneous assumptions. First, some treaties had clauses which also reflected the government's recognition that it had particular responsibity for persons lawfully present in tribal territory as opposed to all non-Indians, drawing the same distinctions as the bill. *E.g.*, Treaty with the Cherokees, Dec. 29, 1835, art. 5, 7 Stat. 478, 481; Treaty with the Sacs & Foxes, Nov. 3, 1804, art. 11, 7 Stat. 84, 86. Second, the contemporary policy of the government was the removal of the tribes to the Indian Territory. Act of May 28, 1830, ch. 148, 4 Stat. 411; R. SATZ, *supra* note 101, ch. 1–4. That policy expressed an abhorrence for reservations which "bordered non-Indian settlements" and sought to eliminate them. *See, e.g.*, United States v. Forty-Three Gallons of Whisky, 93 U.S. 188 (1876). The modern use of the term "Indian reservation" as a place set apart for the Indians dates only to the 1850's. Therefore the Court's conclusion makes sense only if the 1834 bill is contrasted to events of the 1850's and later, a very weak inference.

107. 435 U.S. at 209–11.

108. *See* note 14 and accompanying text *supra*.

109. 31 U.S. (6 Pet.) 515, 560–61 (1832), *discussed at* notes 20–22 and accompanying text *supra*.

der of authority. When powerful states enter into protectorate relationships with weak ones, agents of the former are generally not punishable by the latter.[110] Although the Indians did not know European international law, the circumstances of the treaties make it reasonable to assume the Indians' understanding that the soldiers and other agents of the United States who came among them pursuant to the treaties would not be subject to their punishments.[111] To that extent the Court's inference from the dependent relationship is justified.

Finally, the Court relied on the fact that in 1789 no tribes had governmental structures suited to guarantee an accused person Anglo-American due process of law before being deprived of life, liberty, or property.[112] By 1834, when the basic laws were last reenacted, Congress recognized that still only a few tribes had written laws and courts.[113] As the Court pointed out, the Bill of Rights was a basic achievement of the Nation's recently obtained independence, and it is highly unlikely that the United States would allow persons under its

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110. There was (and is) no universal, implicit rule to this effect. *See, e.g.*, J. BRIERLY, THE LAW OF NATIONS 133-34 (6th ed. 1963). Most international agreements provide for some form of diplomatic immunity for envoys and consuls. Nineteenth century treaties establishing protectorates and other clearly unequal relationships commonly included clauses exempting broader classes of the stronger state's citizens from the criminal jurisdiction of the weaker state. *See, e.g.*, Convention, Feb. 1, 1858, The Netherlands-Siak Srie Indrapoera, art. 12, 118 Consol. Treaty Series 293, 299; Treaty, July 3, 1844, China-United States, art. 21, 8 Stat. 592, 596-97; Treaty, May 7, 1830, United States-Ottoman Porte, art. 4, 8 Stat. 408, 409; Secretary of State v. Charlesworth, [1901] App. Cas. 373 (P.C.). The existence of these clauses suggests a common understanding on the part of those versed in international law analogous to the *Oliphant* Court's finding. The absence of like clauses in Indian treaties gives rise to a competing argument, but in context the former inference is more compelling. Both in terminology and in circumstances, the Indian treaties were more unequal than international protectorate treaties. Exemptions from local jurisdiction in international treaties, no matter how unequal, involve extraterritorial jurisdiction, while tribal territory is within the United States.

Some international protectorate treaties also included clauses addressing civil jurisdiction. *See, e.g.*, Papayanni v. Russian Steam Nav. & Tr. Co., 2 Moore, P.C., N.S. 161 (1863). But such clauses were less common than criminal clauses and were less uniform. Some covered only matters not involving citizens of the weaker state; others addressed only particular subjects, such as the death of a citizen.

111. This much can be implied from the treaty language placing the tribes under the protection of the United States; the officials of the United States were the agents to carry out that protection. Most treaties were made under sufficiently unequal circumstances to support the Indians' understanding of the protection clauses.

112. 435 U.S. at 197, 202, 209-11.

113. H.R. REP. NO. 474, *supra* note 101, at 91, *quoted in* 435 U.S. at 197. The only two tribes which had then established legal systems similar to the whites' were the Choctaws and the Cherokees, both under the leadership and influence of descendants of intermarried whites. *See* M. YOUNG, REDSKINS, RUFFLESHIRTS & REDNECKS ch. 1 (1961).

lawful protection and within its borders to be tried and punished without such protections as the rights to trial upon evidence before an independent tribunal, to confrontation of witnesses, and to freedom from cruel and unusual punishment and arbitrary search and seizure.[114]

The Court's dependency and due process analyses are convincing, particularly the latter.[115] They largely remove the doubts remaining after considering the Court's other reasons and precedents. The question remains whether the Court's reasoning justified its inclusion of all non-Indians or should have applied only to persons whose protection the government may be presumed to have intended. As we shall see, the early precedents make the decision more doubtful as applied to intruders and to non-Indians who became tribal members.

D. The Scope of Due Process Protection

The first step toward evaluating the breadth of the *Oliphant* decision is to look at the federal laws and treaties governing non-Indian presence in tribal territory. In the early years, the federal policy intended the rigid separation of tribal territory from white settlements. The treaties reserved the land for the tribes' exclusive use,[116] and early treaties, as already noted, expressly allowed tribal punishment of illegal settlers.[117]

The treaty pattern was supported by statutes. Between 1796 and 1834, it was illegal for non-Indians to enter the treaty lands of the

114. 435 U.S. at 210. The Court itself assumed the absolute worth of due process by describing present day tribal courts' assimilation of it as demonstrating "dramatic advances over their historical antecedents." *Id.*

115. It might be argued that the due process problem only disabled the tribes from trying non-Indians because they could not comply with due process protections, a disability that would be removed when they could do so. But it is far-fetched to assume any such understanding in the context of the early treaties. Also, the Court has held that the constitutional provisions which by their terms limit the state and federal governments do not apply to Indian tribes. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Talton v. Mayes, 163 U.S. 376 (1896). In 1968 Congress imposed some of these limitations on tribes by statute. 25 U.S.C. §§ 1301–1303 (1976); *Oliphant,* 435 U.S. at 195 n.6. *See also* notes 241–44 and accompanying text *infra.*

116. This was the intent behind all the treaties reserving land to tribes, with the possible exception of those after 1854 contemplating allotment. *See* notes 124 & 125 and accompanying text *infra.* The wording varied, but the implication in all was quite clear. *See, e.g.,* McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 174–75 (1973); Treaty with the Wyandot and Other Indian Tribes, Aug. 3, 1795, art. 5, 7 Stat. 49, 52 (Treaty of Greeneville).

117. *See* note 94 and accompanying text *supra.*

powerful southeastern tribes without a federal passport,[118] and federal law punished several kinds of trespass on all tribal lands.[119] There was often a wide gap between these laws and their practical enforcement,[120] but the legal separation of Indian country was so comprehensive that the Supreme Court in 1832 held that the laws of Georgia had "no force" within Cherokee territory in Georgia.[121]

The 1834 statutory revisions altered the pattern to some extent. The passport requirement was repealed except for aliens.[122] The Jackson administration's policy was to move all tribal Indians away from white settlements, to vacant lands in the West.[123] The dominant government policy remained one of complete separation, but it now relied on physical distance as much as legal rules.

After 1845, changing circumstances overtook the early policies. The United States acquired Texas, New Mexico, California, and Oregon, ending any idea of separating the tribes to the west of a frontier. In 1854 the government initiated a basic policy of breaking up tribal lands into individual holdings and trying to assimilate the Indians by making them into family farmers.[124] This program, known as the allotment policy, contemplated that some land within tribal territory would become available for white ownership, either indirectly by sale from individual Indian allottees, or directly from the government.[125]

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118. See section 3 of the Indian Trade and Intercourse statutes of 1796, 1799, and 1802, discussed in note 54 *supra*.

119. *E.g.*, Act of Mar. 30, 1802, ch. 13, §§ 2, 5, 2 Stat. 139, 141–42.

120. F. PRUCHA, *supra* note 3, ch. 7.

121. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

122. Act of June 30, 1834, ch. 161, § 6, 4 Stat. 729, 730. That section was repealed by the Act of May 21, 1934, ch. 321, 48 Stat. 787.

123. *See* note 106 *supra*.

124. Government policy regularly pursued allotment in severalty of tribal lands on a case-by-case basis beginning with the Treaty with the Ottoes & Missourias, Mar. 15, 1854, art. 6, 10 Stat. 1038, 1039. There were a few earlier examples. Act of Mar. 3, 1839, ch. 83, 5 Stat. 349; Treaty with the Wyandot and Other Indian Tribes, Sept. 29, 1817, 7 Stat. 160. Allotment became the dominant policy for all reservations upon enactment of the General Allotment Act, Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, (codified as amended 25 U.S.C. §§ 331–390 (1976)). Allotting of tribal lands was stopped by the Indian Reorganization Act, Act of June 18, 1934, ch. 576, §§ 1–2, 48 Stat. 984, (codified at 25 U.S.C. §§ 461–462 (1976)). *See generally* Mattz v. Arnett, 412 U.S. 481, 496–97 (1973); F. COHEN, *supra* note 82, at 63–64, 78–79, 83–84, 206–17.

125. Some treaties provided for allotment of reservations followed by sale of some or all of the remainder. *See, e.g.*, Treaty with the Kaskaskias, May 30, 1854, arts. 1–4, 10 Stat. 1082, 1082–83, *construed in* Kansas Indians, 72 U.S. (5 Wall.) 737, 759–61 (1867). The Indian allotments in Kansas were to be subject to such restrictions as the Secretary of the Interior might impose, Act of Mar. 3, 1859, ch. 82, § 11, 11 Stat. 430, and the Secretary made them inalienable. The General Allotment Act and related special acts and agreements provided that the Indian allotments would be held in trust for

During the period when the allotment policy was pursued, the Supreme Court held that legal matters within reservations which had no effect on Indians were subject to state or territorial jurisdiction.[126]

In the early years, the period to which the *Oliphant* Court looked to discern its "commonly shared presumption," those persons present within tribal territory under federal authority included agents of the government, both civilian and military, licensed traders and missionaries, and travelers lawfully passing through.[127] Others were either intruders or persons who joined tribal societies by marriage, adoption, or other recognition.

A common understanding that tribes could not punish persons in tribal territory under United States' authority, and that these persons would be under the government's protection, is consistent with the available evidence. There is no recorded instance in which a tribe in the formative years exercised lawful power to punish such persons either under a treaty provision or otherwise. The proposed 1834 Western Territory Bill and a few treaties which addressed this issue precluded tribal authority over these persons.[128] The inferences available from international law and due process of law problems make the conclusion compelling.[129]

The situation of intruders—persons in tribal territory in violation of both federal and tribal law—is less certain. The government showed them much less solicitude. Treaty provisions allowed some tribes to punish illegal settlers, and federal laws punished illegal settlers on tribal lands and other trespassers.[130] The 1834 Western Territory Bill would have omitted intruders from federal protection,[131] and the inference from international law runs against protection of this class of persons. For these reasons a common under-

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25 years, at which time the Indians would receive patents in fee and could alienate the land. The Act in sections 5 and 6 also provided for sale to settlers of "surplus" tribal lands after allotments were made to all tribal families. Other statutes authorized alienation of Indian allotments under various circumstances, the most important of which was the Act of May 8, 1906, Pub. L. No. 149, 34 Stat. 182 (amending § 6 of the General Allotment Act) (currently enacted at 25 U.S.C. § 349 (1976)). Tribal lands in Indian Territory were allotted at the time it was incorporated into Oklahoma under particular agreements and statutes. *See* Heckman v. United States, 224 U.S. 413 (1912).

126. *E.g.*, Thomas v. Gay, 169 U.S. 264 (1898); United States v. McBratney, 104 U.S. 621 (1882). *See* note 224 and accompanying text *infra*.

127. These categories are referred to in various treaties, statutes, court opinions and other sources. *See* notes 98–106 *supra*.

128. *See* notes 101–06 and accompanying text *supra*.

129. *See* notes 109–14 and accompanying text *supra*.

130. *See* notes 94, 117–19 and accompanying text *supra*.

131. *See* notes 101–06 and accompanying text *supra*.

standing that the tribes were precluded from punishing intruders found in their territory is not convincingly shown by the sources relied on by the Court. Resolution of the problem depends on the inferred intent of the government to guarantee due process of law. If that intent was to include all who did not knowingly waive it by joining tribal societies, then even intruders should be within the protection. If, instead, the intent was to protect only persons whose presence the government authorized, as in the Western Territory Bill, then intruders should not be protected from tribal authority.

One circumstance which supports inclusion of intruders within the *Oliphant* holding is the matter of vengeance and retaliation on the frontier.[132] Indian tribes were mostly small groups, and relations among them were governed by the laws of war, which included vengeance and depredations between warring states. Relations between frontier whites and the tribes were frequently similar. Although private white provocations were often the cause, Indian retaliation was greatly feared and was often in turn the pretext for violence. From the beginning, a basic goal of government policy was to suppress revenge, retaliation, depredations, and the like by both whites and Indians on the frontier. This is reflected in treaty clauses[133] and in a number of provisions of the Indian Trade and Intercourse Acts.[134] There is a reasonable inference from these sources that control over frontier raiding was meant to be a federal monopoly.

When considering the third group, non-Indians who became resident members of tribal societies, we first observe, as did the *Oliphant* Court, that in the early years most tribal societies were internally regulated by punishments largely different from the fines, lashes, imprisonment, and execution favored by the whites.[135] Common methods were social ostracism, ridicule, forced restitution, religious controls, and banishment.[136] The *Oliphant* decision did not mean that the tribes were unable to apply these measures to non-Indians; the issue was the criminal jurisdiction of tribal courts to try and punish.

132. The *Oliphant* Court referred briefly to this subject. 435 U.S. at 201.

133. Treaty with the Pawnees, Sept. 30, 1825, art. 5, 7 Stat. 279, 280-81; Treaty with the Osages, Nov. 10, 1808, art. 9, 7 Stat. 107, 109; Treaty with the Sacs & Foxes, Nov. 3, 1804, art. 5, 7 Stat. 84, 85-86; Treaty with the Creeks, Aug. 7, 1790, art. 10, 7 Stat. 35, 37.

134. *See, e.g.*, Act of May 19, 1796, ch. 30, §§ 4, 14, 1 Stat. 470, 470-73. Section 16 of the Act of June 30, 1834, ch. 161, 4 Stat. 729, 731-32, is still in force. 18 U.S.C. § 1160 (1976).

135. 435 U.S. at 197. Flogging was a common punishment by local jurisdictions in the early 19th century, while imprisonment was much less common than today. *See* H. BARNES, THE STORY OF PUNISHMENT 55-60, 150, 164 (1930).

136. *See* note 32 *supra*; W. HAGAN, *supra* note 32, at 93, 123.

Thus, to evaluate the application of *Oliphant* to non-Indians adopted as tribal members, it is necessary to look at situations in which tribes employed courts and penal sanctions. The earliest reported instances involved the five major tribes moved by the government from the southeast to the Indian Territory.[137] These tribes had also early adopted whites who intermarried.[138] The 1834 and 1855 opinions of the Attorney General previously discussed arose in Choctaw country.[139] The former expressed the view that the tribes would not have criminal jurisdiction over non-Indians even if they were tribal members, but, as discussed above, it based that view on the doubtful ground that a citizen could not have divided allegiance.[140]

The Cherokee Nation was one of the first to adopt Anglo-American courts and punishments, together with formal rules recognizing adopted whites as tribal members.[141] In 1835 the Treaty of New Echota set the pattern for Cherokee self-government in the Indian Territory. It supplanted the Cherokees' eastern treaties, which had earlier recognized the right to punish white intruders.[142] Article 5 of the 1835 treaty arguably recognized tribal criminal jurisdiction over adopted, non-Indian members.[143] A later treaty clearly recognized

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137. These tribes were the Cherokees, the Creeks and Seminoles, and the Choctaws and Chickasaws, known from the Anglo-American perspective as the "Five Civilized Tribes." The paired tribes are distantly related and shared common territory for a time. *See* note 145 *infra*. The first two tribes to establish Anglo-American style courts were the Choctaws and Cherokees. *See* note 113 *supra*.

138. *E.g.*, R. STRICKLAND, FIRE AND THE SPIRITS 49 (1975). Most of the authorities relied on by the *Oliphant* Court related to one of these tribes. *See* notes 62, 78–83 and accompanying text *supra*, note 148 *infra*.

139. *See* note 81 and accompanying text *supra*.

140. *Id.*

141. R. STRICKLAND, *supra* note 138, at 53–72.

142. Treaty with the Cherokees, July 2, 1791, art. 8, 7 Stat. 39, 41; Treaty with the Cherokees, Nov. 28, 1785, art. 5, 7 Stat. 18, 19. Later treaties prior to removal to the west reaffirmed these, and the Court in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 553, 556 (1832), viewed them as the principal treaties in force and referred specifically to the right to punish illegal settlers. In an 1819 treaty the United States undertook to remove and punish white intruders, although there is no indication that that was meant to supersede the earlier provisions. Convention with the Cherokee Nation, Feb. 27, 1819, art. 5, 7 Stat. 195, 197.

143. In relevant part, articles 5 and 6 stated:

Article 5. The United States . . . shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as

this right and seemed to assume that the 1835 treaty had included it.[144] The other four tribes had the same right recognized later, as they too adopted Anglo-American forms of government.[145] This jurisdic-

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may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.

Article 6. . . . The Cherokees shall . . . be protected against interruption and intrusion from citizens of the United States, who may attempt to settle in the country without their consent; and all such persons shall be removed from the same by order of the President of the United States. But this is not intended to prevent the residence among them of useful farmers mechanics and teachers for the instruction of Indians according to treaty stipulations.

Treaty with the Cherokees, Dec. 29, 1835, art. 5, 6, 7 Stat. 478, 481.

144. The treaty of July 19, 1866, stated:

Article XIII. The Cherokees also agree that a court or courts may be established by the United States in said Territory, with such jurisdiction and organized in such manner as may be prescribed by law: Provided, That the judicial tribunals of the [Cherokee] nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty.

Treaty with the Cherokees, July 19, 1866, art. 13, 14 Stat. 799, 803.

145. The Choctaw removal treaty specified self-government for the Choctaws in the west but made it clear that the tribe understood it did not have jurisdiction over "any white man who shall come into their nation, and infringe any of their national regulations." Treaty with the Choctaws, Sept. 30, 1830, art. 4, 7 Stat. 333, 333–34. *See* note 95 *supra*. There was no particular reference to non-Indian members, and the quoted language appears to describe visitors. The Creek removal treaty referred to tribal self-government in the west but did not refer to authority over whites or intruders. Treaty with the Creeks, Mar. 24, 1832, art. 14, 7 Stat. 366, 368. A supplemental treaty with the Creeks provided for placing removed Seminoles with the Creeks. Agreement with the Creeks, Feb. 14, 1833, art. 4, 7 Stat. 417, 419. A treaty with the Choctaw and Chickasaw placed the Chickasaws in Choctaw country. Convention between the Choctaws and Chickasaws, Jan. 17, 1837, 11 Stat. 573.

The 1855 treaty with the Choctaw and Chickasaw separated the tribes:

Article 7. So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits; excepting, however, all persons with their property, who are not by birth, adoption, or otherwise citizens or members of either the Choctaw or Chickasaw tribe, and all persons, not being citizens or members of either tribe, found within their limits, shall be considered intruders, and be removed from, and kept out of the same, by the United States agent, assisted if necessary by the military, with the following exceptions, viz: such individuals as are now, or may be in the employment of the government, and their families; those peacefully travelling, or temporarily sojourning in the country or trading therein, under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States agent, to reside within their limits, without becoming citizens or members of either of said tribes.

Treaty with the Choctaws and Chickasaws, June 22, 1855, art. 7, 11 Stat. 611, 612. This provision was reaffirmed by a later treaty with the same tribes. Treaty with the Choctaws and Chickasaws, Apr. 28, 1866, arts. 38, 43, 14 Stat. 769, 779.

tion was preserved by statutes in 1889 and 1890,[146] and abolished only upon the general dismantling of these tribes' courts in 1898.[147]

Sources recognizing tribal jurisdiction over adopted tribal members, which the *Oliphant* Court does not mention,[148] could possibly

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The Treaty with the Creek and Seminole Tribes, Aug. 7, 1856, 11 Stat. 699, separated these tribes. Article 15 of this treaty was very similar to article 7 of the 1855 Choctaw and Chickasaw treaty quoted *supra*. This provision was implicitly continued by the Treaty with the Seminole Indians, Mar. 21, 1866, art. 7, 9, 14 Stat. 755, 758, 760, and the Treaty with the Creek Indians, June 14, 1866, art. 10, 12, 14 Stat. 785, 788, 790.

Some members of these five tribes had owned slaves before the Civil War. The four treaties made in 1866 abolished slavery and conferred the rights of tribal members on freed slaves. *See* F. COHEN, *supra* note 82, at 181–82.

A number of other tribes were settled on lands of the five tribes and some became members for many purposes. *See, e.g.*, Cherokee Nation v. Journeycake, 155 U.S. 196 (1894).

146. The Act of Mar. 1, 1889, ch. 333, 25 Stat. 783, established a federal court in Indian Territory. Section 5 conferred on the court exclusive original jurisdiction over seven offenses against federal law defined in the Act except by one Indian against another, and section 6 conferred jurisdiction over civil causes of action except those "between persons of Indian blood only." The exclusive criminal jurisdiction appeared to invade the treaty jurisdiction over non-Indian members described in the previous note, and the civil jurisdiction appeared to invade the exclusive civil jurisdiction of the Cherokee courts. *See* note 144 *supra*. But the Act of May 2, 1890, ch. 182, 26 Stat. 81, amended or clarified the 1889 Act. It reduced the Indian Territory to its eastern portion and established the remainder as the Territory of Oklahoma. Sections 29 through 31 altered the 1889 Act in several ways. A proviso to section 30 stated "that the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties." This Act preserved the prior tribal jurisdiction, with the possible exception of causes of action which "arise in the Cherokee Nation." Alberty v. United States, 162 U.S. 499, 503 (1896).

147. The courts of these tribes were abolished by the Curtis Act. Act of June 28, 1898, ch. 517, § 28, 30 Stat. 495. *See* F. COHEN, *supra* note 82, at 429–30. Nonmember whites over whom the tribes had no criminal jurisdiction had entered tribal territory in overwhelming numbers, generating severe law and order problems and prompting abolition. R. STRICKLAND, *supra* note 138, at 175–82. Although there were special laws applicable, this history is additional support for the Court's holding as applied to nonmembers of the tribes.

148. The validity of tribal authority to prosecute non-Indian members was a necessary premise to the holding in Alberty v. United States, 162 U.S. 499, 500–05 (1896). *See also* Cherokee Intermarriage Cases, 203 U.S. 76, 82 (1906); Nofire v. United States, 164 U.S. 657 (1897); Westmoreland v. United States, 155 U.S. 545, 548 (1895); *Ex parte* Mayfield, 141 U.S. 107 (1891); G. SHIRLEY, LAW WEST OF FORT SMITH 183 (1961). The *Oliphant* Court quoted a passage from the *Mayfield* opinion, 435 U.S. at 204, which seemed to recognize the understanding that the United States had undertaken to protect non-Indians in tribal territory, thus supporting the Court's due process rationale. *See* notes 112–14 and accompanying text *supra*. The Court also quoted another passage which in isolation might reach non-Indian tribal members but which read in the context of the full opinion and other cases does not. The Court in United States v. Wheeler, 435 U.S. 313, 322 (1978), said the tribes have criminal jurisdiction over "tribe members," but it is doubtful whether the Court intended to refer to the adopted member question. *See* note 4 *supra*.

be distinguished on the ground that those persons legally became Indians upon adoption, but the Court has several times held to the contrary.[149] The Court might also have said the right depended on express grants, but this is far from clear. The treaties apparently began to recognize the right as soon as it became relevant to do so. The situation of non-Indian members prior to the execution of these treaties is unclear, and the common provisions in the early treaties allowing punishment of illegal settlers are at least consistent with the view that non-Indians who voluntarily joined tribal societies subjected themselves to tribal laws.[150] It is thus doubtful that the "commonly shared presumption" included non-Indian members of the tribes. Having voluntarily joined tribal societies, the government could assume that they had relinquished their claim to its protection.

The early pattern may be summarized as follows: the tribes had no authority to punish non-Indians lawfully present in tribal territory under federal authority and protection, jurisdiction over non-Indian members of tribal societies was extensively exercised by Indian Territory tribes, and the status of intruders was uncertain except under a few treaties.

E. The Position of Non-Indian Residents Under the Allotment Policy

How then do we classify non-Indians who became lawful residents of reservations under the later allotment policy? Most allotment

149. The leading case is United States v. Rogers, 45 U.S. (4 How.) 567, 573 (1846). The *Rogers* Court left open the "obligations" of non-Indian members to tribal jurisdiction but sustained federal jurisdiction to prosecute them as non-Indians. *See also* 7 OP. ATT'Y GEN. 174, 184–85 (1855). The holding respecting federal jurisdiction was followed in Alberty v. United States, 162 U.S. 499, 501 (1896), and Westmoreland v. United States, 155 U.S. 545, 548 (1895).

150. *See* notes 94, 101–06 *supra*. Implied support for the contention that an express grant was needed might be sought in the proviso excepting from federal jurisdiction "any case where, by treaty stipulation, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. § 1152 (1976). It is more likely, however, that the purpose of the proviso was to guarantee exclusive jurisdiction, rather than to grant any jurisdiction. The proviso was added as part of the Act of Mar. 27, 1854, ch. 26, § 3, 10 Stat. 270, 289. Curiously, there were at that time no treaties explicitly providing for exclusive tribal jurisdiction. But the proviso used specifically future language (the original terms were "exclusive jurisdiction may now or hereafter be secured to said Indian tribes") and treaties with exclusive jurisdiction clauses were made in 1855 and 1856. *See* note 145 *supra*. Concurrent jurisdiction, on the other hand, had been previously authorized under the illegal settler treaty clauses, *see* note 94 *supra*, and at least by the Cherokees over adopted members, *see* notes 143 & 149 and accompanying text *supra*.

schemes directly contemplated non-Indian settlement within the reservations on what was deemed to be "surplus" Indian land,[151] and the resulting integration was an affirmative policy of the government.[152] For purposes of criminal punishments, these settlers must be classified with those under federal protection.[153] Some allotment schemes resulted in non-Indian ownership indirectly; Indian allotments were made alienable and were subsequently acquired by non-Indians. The same conclusion of federal protection is likely because alienability was a deliberate policy of the government.[154] Furthermore, the allotment schemes presupposed the eventual withering away of the reservations and tribal authority through assimilation of the Indians, a view that was not abandoned until 1934.[155]

The Port Madison Reservation, the site of the *Oliphant* cases, is more than half non-Indian-owned as a result of allotment and sale, and the reservation's population is overwhelmingly non-Indian.[156] Both defendants were residents as a consequence of the allotment policy. The Suquamish Tribe attempted to base its jurisdiction on the implied consent of non-Indians present on the reservation.[157] For the reasons already discussed, residents under the allotment policy should be classified with those under government protection. Therefore tribal criminal authority over the defendants was properly precluded.

The same reasoning applies to most non-Indians within reservations today. Tribal adoption of resident non-Indians is no longer prac-

151. *See* notes 124 & 125 and accompanying text *supra*.

152. Mattz v. Arnett, 412 U.S. 481, 496 (1973).

153. Their situation was very similar to the blacksmiths, farmers, and teachers who were to reside among and assist the tribes under the terms of many treaties and who were clearly under the same protective policy as government agents. *See* notes 98, 102, 103 & 127 *supra; cf.* 25 U.S.C. § 48 (1976) (authorizing the Secretary to allow tribes to supervise such persons). Lawful travelers had generally been treated as under government protection anyway, and this would extend to those visiting resident non-Indians. *See* notes 100, 102, 118 & 122 and accompanying text *supra*.

154. Allotment purchasers were not the direct instruments of government policy in the same sense as described in the previous note. But the laws allowing sale of allotments generally took effect later than the reservation opening laws, and alienability was an integral part of the basic assimilation scheme of the allotment laws. After an allotment was taken out of trust, the allottee was made subject to state laws. 25 U.S.C. § 349 (1976). That policy was later reversed within reservations. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 477–79 (1976). It nevertheless suggests an original understanding that non-Indian purchasers of allotments were an anticipated part of the allotment scheme.

155. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Mattz v. Arnett, 412 U.S. 481 (1973).

156. *Oliphant*, 435 U.S. at 193 n.1, 202 n.13; *see* note 46 *supra*.

157. 435 U.S. at 193 n.2.

ticed,[158] and most reservations established by agreement with the tribes have been opened by allotment. Some reservations, especially in the southwest, were never allotted and opened,[159] and distinct portions of other reservations were never opened.[160] On these reservations, a continued tribal right to try and punish non-Indian intruders was not clearly precluded by the reasoning or precedents of the *Oliphant* decision.[161] But the Court's conclusion appears to deny the authority anyway.

III. TRIBAL SOVEREIGNTY IN NONCRIMINAL MATTERS

The *Oliphant* decision established that no tribal court authority exists to punish non-Indians except where Congress grants it.[162] Tribal authority in other than criminal cases, however, was not determined. The Court was careful to limit its statement of the issue to criminal matters,[163] and the opinions in other cases decided the same term reaffirmed the reasoning of prior cases sustaining tribal civil jurisdiction over non-Indians.[164]

In most respects the *Oliphant* Court's rationale does not apply to noncriminal cases.[165] As discussed above, an important basis for the

158. One factor discouraging the practice was the enactment in 1888 of an act prohibiting intermarried white men from acquiring rights in tribal property. 25 U.S.C. § 181 (1976).

159. The aridity of some reservations saved them from allotment; in other cases better functioning tribal economies led to the same result. Both factors were present in the southwest.

160. *See* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

161. *See also* notes 130–34 & 147 and accompanying text *supra;* notes 194–96 and accompanying text *infra*.

162. As discussed in Part II–*D*, the *Oliphant* rationale applies less certainly to intruders, but the Court's opinion appears to include all non-Indians.

163. 435 U.S. at 195. The Court's opinion included a few comments which taken in isolation can be cited for or against application of the decision to noncriminal matters. The Court cited with approval Morris v. Hitchcock, 194 U.S. 384 (1904), a leading case sustaining tribal authority to tax non-Indians within a reservation. 435 U.S. at 206; *see* note 186 and accompanying text *infra*. However, the Court quoted the concurring opinion of Justice Johnson in Fletcher v. Peck, 10 U.S. (6 Cranch.) 87, 147 (1810), to the effect that the tribes lost "the right of governing every person within their limits except themselves." 435 U.S. at 209. The Court also mentioned civil and criminal jurisdiction together in a footnote that rejected any relevance of the Indian Civil Rights Act. 435 U.S. at 195 n.6. In the context of the full opinion, none of these references can be taken as an indication of the Court's view in noncriminal cases.

164. United States v. Wheeler, 435 U.S. 313, 322–24 (1978); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65–66 (1978).

165. A number of relevant distinctions between civil and criminal matters were discussed in 7 OP. ATT'Y GEN. 174 (1855), *cited in* 435 U.S. at 199. *See* note 81 and accompanying text *supra*.

decision was the presumed intent of the government to guarantee its citizens due process of law. This concern has traditionally been less important in civil litigation than criminal prosecution.[166]

Federal law has always been less comprehensively involved in civil than in criminal jurisdiction. In the treaties, the tribes placed themselves under the protection of the United States, and the government implicitly undertook to provide that protection. This duty of protection was fulfilled by comprehensive criminal laws governing interracial matters.[167] But most civil matters are not within the government's duty of protection,[168] and Congress has never attempted to supply a legal system governing civil relationships between Indians and non-Indians in tribal territory.[169]

The denial of tribal criminal authority is thus set against a backdrop of comprehensive federal court authority.[170] A similar denial of tribal civil authority would leave most interracial matters to state or, formerly, territorial law.[171] But federal policy in the formative years consistently excluded state authority over Indians in tribal territory.[172] The states were recognized as hostile to the Indians.[173] As the Supreme Court stated in *Rice v. Olson,* "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Na-

166. Civil cases which involve a taking of property come closest to the criminal punishment situation. *See* notes 229–30, 247–51 and accompanying text *infra; see also* United States v. Mazurie, 419 U.S. 544, 557–58 (1975).

167. *See* notes 54 & 56 and accompanying text *supra.*

168. Two exceptions in the context of the formative years were recompense for violence by whites and control of traders. *See* note 169 *infra.*

169. The only provisions in the Indian Trade and Intercourse Acts were those regulating trade with Indians and the provisions for restitution to Indian victims of crimes. *See* notes 54 & 56 *supra.* In the early years, control of trade was considered necessary to prevent hostilities, so much so that between 1796 and 1822 the government operated its own trading houses to supply goods to the Indians. F. PRUCHA, *supra* note 3, ch. 5. Control of frontier violence by both sides motivated the restitution provision. *See* notes 131, 133–34 and accompanying text *supra.* The only more comprehensive system was the jurisdiction given the United States Court for the Indian Territory over some interracial cases between 1889 and 1907. *See* note 146 *supra.*

170. Federal jurisdiction does not, however, extend to offenses by non-Indians against non-Indians within Indian country in a state. United States v. McBratney, 104 U.S. 621 (1882), *cited in* United States v. Antelope, 430 U.S. 641, 644 n.4 (1976). *See* note 126 and accompanying text *supra;* note 224 and accompanying text *infra.*

171. Absent tribal or federal jurisdiction, state laws generally apply in Indian country. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 474 n.13, 481 n.17 (1976); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 (1973). In the Indian Territory before 1889, the only civil law systems were those of the tribes, except for the few cases where the federal district courts had jurisdiction. *See* note 146 *supra.*

172. *See* notes 20–22 and accompanying text *supra.*

173. United States v. Kagama, 118 U.S. 375, 385 (1886).

tion's history."[174] Thus, the absence of federal statutes governing the field impairs any inference that the tribes were presumed not to have civil authority in interracial matters.[175]

Finally, as noticed below, tribal authority over non-Indians has historically been sustained in a variety of circumstances where non-Indians enter into voluntary relationships with Indians.

A. The Indian Reorganization Act and Prior Precedents

In 1934 Congress enacted the Indian Reorganization Act (IRA).[176] A basic purpose was to revitalize tribal self-government by establishing a framework in federal law for tribal governments under written codes.[177] Some tribes, especially those which then had better functioning tribal governments, declined to adopt the federal structure, [178] but a majority of tribes chose to operate pursuant to the IRA's governmental provisions.[179]

The Act specified certain tribal powers but largely relied on the existing, retained sovereignty of the tribes.[180] Like most Indian legislation, the IRA is administered by the Interior Department. Shortly

174. 324 U.S. 786, 789 (1945).

175. *Oliphant* held that criminal jurisdiction over non-Indians is inconsistent with the tribes' dependent status. *See* note 107 and accompanying text *supra*. In United States v. Wheeler, 435 U.S. 313 (1978), the Court identified from its precedents two other aspects of original tribal sovereignty whose exercise would be inconsistent with their dependent status. "Indian tribes can no longer freely alienate to non-Indians the lands they occupy." 435 U.S. at 326; *see also* notes 15 & 16 and accompanying text *supra*. Also, Indian tribes "cannot enter into direct commercial or governmental relations with foreign nations." 435 U.S. at 326. Because these three limitations on tribal sovereignty are based on the tribes' dependent relationship with the federal government, they do not imply any federal consent to state jurisdiction over Indian country.

176. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (1976)).

177. 25 U.S.C. § 476 (1976); Fisher v. District Court, 424 U.S. 383, 387 (1976).

178. The bill which became the Indian Reorganization Act was to apply to all tribes, but the opposition of many tribal spokesmen led to a section which provided for a tribal referendum on whether or not to accept the Act. 25 U.S.C. § 478 (1976).

179. A 1947 report stated that 181 tribes accepted the Act, 77 declined it and 14 others came under it because they had not voted. T. HAAS, TEN YEARS OF TRIBAL GOVERNMENT UNDER THE IRA (1947). Tribes in Alaska and Oklahoma are governed by special sections, and figures for them are not included. Of those accepting the Act, all but a few operate pursuant to it. *Id.*

180. 25 U.S.C. § 476 (1976). The second paragraph of that section begins: "In addition to all powers vested in any Indian tribe or tribal council by existing law . . . ." In its submission to Congress of the bills which became the IRA, the Interior Department described these powers as the "right of an Indian tribe to deal with many matters affecting the lives and property of its members." Hearing on S. 2755 Before the Senate Comm. on Indian Affairs, 73d Cong., 2d Sess. 24 (1934).

after its enactment, the Department published an opinion detailing the scope of retained tribal powers and the precedents sustaining them.[181] The matter was further elaborated in Felix Cohen's *Handbook of Federal Indian Law*.[182] And the Supreme Court favorably cited the Interior Department opinion in *United States v. Wheeler,* in a context directly relevant to the decision,[183] shortly after *Oliphant* was decided.

The 1934 Interior opinion is thus an authoritative starting point for analysis of tribal authority over non-Indians in civil matters. The opinion dealt with tribal government authority in general, addressing the particular question of jurisdiction over non-Indians only on some subjects. Prominent among these were the powers of licensing and taxation. The opinion concluded that tribes may tax nonmembers "so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions."[184] In other words, the tribes may tax non-Indians within tribal territory who enter into consensual relationships with Indians or who use Indian land. That rationale includes taxing, licensing, and regulatory authority over non-Indians who have commercial dealings or contractual relations with Indians, or leases, licenses, contracts or other arrangements with tribes.

The Interior opinion based its conclusion on a series of decisions sustaining the authority of the tribes in Indian Territory to impose taxes and business license fees on non-Indians using tribal land or engaging in trade with Indians.[185] The leading court decisions are *Morris v. Hitchcock,*[186] sustaining a tribal tax on white-owned cattle which were grazed within tribal territory, and *Buster v. Wright,*[187] sustaining a business license fee on white-owned businesses which traded with Indians within tribal territory. In the latter case the court said:

> The authority of the Creek Nation to prescribe the terms upon

181. 55 Interior Dec. 14 (1934).

182. F. COHEN, *supra* note 82, at 122–50. The Court has relied on Cohen's work on many occasions. For example, each of the three major Indian law decisions of the 1977 October term referred to it. Santa Clara Pueblo v. Martinez, 436 U.S. at 55; United States v. Wheeler, 435 U.S. at 322; *Oliphant,* 435 U.S. at 199 n.9. A revision of Cohen's work will be published soon. *See* 25 U.S.C. § 1341(a)(2) (1976).

183. 435 U.S. 313, 328 (1978).

184. 55 Interior Dec. 14, 46 (1934).

185. *Id.* at 46–48.

186. 194 U.S. 384 (1904); *see* note 163 *supra.*

187. 135 F. 947 (8th Cir.), *appeal dismissed,* 203 U.S. 599 (1905). This decision was quoted in a brief submitted by the Interior Department to Congress during its consider-

> which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it. . . .
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> . . . .
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> . . . It is said that the sale of these lots and the incorporation of cities and towns upon the sites in which the lots are found authorized by act of Congress to collect taxes for municipal purposes segregated the town sites and the lots sold from the territory of the Creek Nation, and deprived it of governmental jurisdiction over this property and over its occupants. But the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes, and to enact and enforce municipal ordinances. Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual power of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners.[188]

Between the 1934 Interior opinion and the *Oliphant* decision, the only reported tax cases sustained a tribal tax on non-Indian lessees of Indian trust lands within the tribe's reservation.[189] Since *Oliphant,* several cases have been initiated in which the *Oliphant* rationale is raised by the parties opposing the taxes or fees. None has been finally resolved. A federal court in Arizona refused to extend *Oliphant* to preclude taxing jurisdiction over non-Indians. The case involved a tribal possessory interest tax levied on mineral lessees of tribal lands.[190] A federal court in Washington held that the *Oliphant* rationale precludes all civil as well as criminal jurisdiction over non-Indians.[191] Both cases are now on appeal. Other cases involving tribal taxes are pending in several courts.[192]

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ation of the IRA. Hearings on S. 2755 & 3645 Before the Senate Comm. on Indian Affairs, 73d Cong., 2d Sess. 269 (1934).

188. 135 F. at 950-52.

189. Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir.), *cert. denied,* 358 U.S. 932 (1958); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).

190. Salt River Project Agricultural Improvement & Power Dist. v. Navajo Tribe of Indians, No. 78-352 (D. Ariz. July 11, 1978).

191. Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe, No. C77-882M (W.D. Wash. Nov. 3, 1978). The case involved a tribal license fee.

192. Merrion v. Jicarilla Apache Tribe, Nos. 77-292, 77-343 (D.N.M. Dec. 29,

The 1934 Interior decision seems consistent with *Oliphant* and, as noted, the decision was cited with approval the same term in *United States v. Wheeler*.[193] The importance of fundamental constitutional considerations is reduced both by the shift from criminal law, where the greatest protection has traditionally been required, and by the emphasis on consensual relationships voluntarily undertaken. As the Interior decision documents, the precedents support retained tribal civil jurisdiction over non-Indians in consensual circumstances.

The 1934 Interior opinion also discussed the right of an Indian tribe to exclude nonmembers from its reservation,[194] concluding as follows:

> Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty. But over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, provided only such determination is consistent with applicable Federal laws and does not infringe any vested rights of persons now occupying reservation lands under lawful authority.[195]

The cases on which this part of the opinion relied were basically the same as those supporting tribal taxing power discussed above.[196]

The importance of the exclusion right to the issues discussed in this article is that "the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business." This right is similar in its effect to the consensual relationship basis discussed above.

B. Civil Jurisdiction of Tribal Courts

Tribal enforcement of tax, licensing, and regulatory laws is some-

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1977), *appeal docketed*, Nos. 78-1154, 78-1201 (10th Cir. 1978), was decided before *Oliphant*. It involves a tribal oil and gas severance tax which the district court held to be invalid. One ground for the decision was that the tribe had no jurisdiction to tax non-Indians. Snow v. Quinault Indian Nation, No. C77-138T (W.D. Wash. 1977) involves a tribal business license tax and fee; it is pending in the district court. Confederated Tribes of the Colville Indian Reservation v. Washington, 446 F. Supp. 1339 (E.D. Wash. 1978) (three judge panel), *review granted*, 99 S. Ct. 1210 (1979) (No. 78-630), involves a tribal tax on tobacco sales to non-Indian customers; the district court sustained the tax.

193. 435 U.S. 313, 328 (1978).

194. 55 Interior Dec. 14, 49 (1934).

195. *Id.* at 50.

196. *See* notes 185-88 and accompanying text *supra; see also* F. COHEN, *supra* note 82.

what restricted by the lack of criminal jurisdiction found in *Oliphant*. In the Indian Territory tax and fee cases discussed above, it was further restricted by application of the rule that a tax is generally not a civil debt collectible in a civil action,[197] and by congressional abolition of those tribal courts.[198] But the government viewed enforcement of the taxes as a duty it owed the tribes and enacted an administrative enforcement system, which was sustained by the federal courts.[199] The cases do not discuss tribal use of the traditional enforcement methods of liens and property seizures. Where the taxes are valid, these methods should be available.[200]

The 1934 Interior decision concluded that the tribal judicial power is generally coextensive with legislative and executive, and it said that the tribes had civil court jurisdiction over an interracial property dispute in the Indian Territory.[201] But the Indian Territory cases arose under specific laws which recognized exclusive tribal court jurisdiction over cases involving tribal members, whether Indian or not and in civil as well as criminal cases, and established federal courts with exclusive jurisdiction in interracial matters.[202] These laws are no longer in force, and there was little other precedent in 1934.

In 1959 the Supreme Court in *Williams v. Lee*[203] reviewed a state court's assertion of jurisdiction over an action on a debt filed by a non-Indian against an Indian couple. The debt arose on a self-governing reservation which had a Court of Indian Offenses.[204] The Supreme Court held that the Indian court had jurisdiction exclusive of the state court.[205] The Court stated, "It is immaterial that [plaintiff] is not an Indian. He was on the Reservation and the transaction with an Indian took place there . . . . The cases in this Court have consistently guarded the authority of Indian governments over their

197. Crabtree v. Madden, 54 F. 426 (8th Cir. 1893). *But see* Barta v. Oglala Sioux Tribe, 259 F.2d 553, 555-56 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959) (sustaining jurisdiction when the United States sued to collect the tax). *Barta*, however, involved a federal district court, while *Crabtree* arose in proceedings before the U.S. Court for the Indian Territory.

198. *See* note 146 *supra*.

199. Buster v. Wright, 135 F. 947, 954-58 (8th Cir. 1905).

200. *Id.* at 956.

201. 55 Interior Dec. 14, 56, 62-63 (1934).

202. *See* note 146 and accompanying text *supra;* Raymond v. Raymond, 83 F. 721 (8th Cir. 1897).

203. 358 U.S. 217 (1959).

204. *Id.* at 222.

205. *Id. See also* Kennerly v. District Court, 400 U.S. 421 (1971); Hot Oil Service Co. v. Hall, 366 F.2d 295 (9th Cir. 1966); Littell v. Nakai, 344 F.2d 486 (9th Cir.), *cert. denied*, 382 U.S. 986 (1965).

reservations."[206] Subsequent state and lower court decisions have recognized like principles in tort[207] and domestic relations cases,[208] and the Court has indicated that state court jurisdiction is preempted by federal protection of the tribal right of self-government over tribal reservations.[209] In *Santa Clara Pueblo v. Martinez* the Court stated, "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."[210]

Where non-Indians have entered into consensual relationships with Indians or for the use of Indian land, the historical case for tribal civil jurisdiction and related tribal legislative authority is quite strong. As noted above, the authority to tax, license, and regulate has been sustained in those situations. The same reasoning should apply to matters of domestic relations in instances of intermarriage,[211] to contracts, leases, and agreements concerning the use of Indian land, and other interracial matters. Torts arising directly out of such relationships should be governed by the same principle.[212]

The important question not settled by authoritative court decisions is whether and to what extent the tribes may assert civil court jurisdiction over non-Indian defendants when the claim does not arise out of a consensual relationship. Most tribes had not asserted such authority except in the Indian Territory,[213] but recently some tribes have

206. 358 U.S. at 223.

207. Schantz v. White Lightning, 502 F.2d 67 (8th Cir. 1974); Schantz v. White Lightning, 231 N.W.2d 812 (N.D. 1975); Nelson v. DuBois, 232 N.W.2d 54 (N.D. 1975); Enriquez v. Superior Court, 115 Ariz. 342, 565 P.2d 522 (App. 1977). *See also* Kain v. Wilson, 83 S.D. 482, 161 N.W.2d 704 (1968) (claim for wrongful use and possession of land).

208. Wisconsin Potowatomies v. Houston, 393 F. Supp. 719 (W.D. Mich. 1973); Wakefield v. Little Light, 347 A.2d 722 (Md. 1975); *In re* Buehl, 87 Wash. 2d 649, 555 P.2d 1334 (1976).

209. Fisher v. District Court, 424 U.S. 382 (1976).

210. 436 U.S. 49, 65–66 (1978).

211. One aspect of this area is now the subject of a federal statute allocating jurisdiction. 25 U.S.C.A. §§ 1901–1963 (Supp. 1978). *See* notes 272–77 and accompanying text *infra*.

212. For example, a claim by an Indian customer against a non-Indian trading post for damages based on the negligent failure to maintain a safe premises should be subject to tribal authority.

213. *See* notes 143–50 and accompanying text *supra* (jurisdiction over non-Indian tribal members). Many Indian Reorganization Act tribal constitutions expressly provide for authority to exclude nonmembers from tribal land, condition their entry, license their use of property, license businesses, and govern trade. These are consistent with the powers recognized in 55 Interior Dec. 14 (1934), discussed in Part III–*A supra*. The constitutions typically provide for secretarial approval of such tribal ordinances.

amended their codes to do so. The propriety of such jurisdiction is discussed in the following section.

C. *Tribal Authority over Non-Indians Not Based on Consensual Relationships*

There are few precedents dealing with tribes seeking to exercise jurisdiction, legislative or judicial, over non-Indians in matters not arising out of consensual relationships. The category includes regulatory, tax, and licensing authority over non-Indians using land not owned by Indians and jurisdiction over torts. As already noted, some cases have implicitly sustained authority over tort actions against Indians, and these are surely correct.[214] Also, the court in *Buster v. Wright* sustained tribal power to impose a license tax on white-owned businesses on fee land, but those businesses were trading with Indians.[215]

These issues did not arise in the formative years, making their resolution more difficult. Tribal societies often had a system of forced restitution in lieu of both criminal and tort law,[216] and this was imposed on non-Indian tribal members, but was not suited for resolution of controversies involving nonmembers. In the early years, most kinds of tax, regulatory, and licensing laws which we now take for granted were not yet employed by Anglo-American governments, much less by Indian.[217]

The case for tribal jurisdiction has two bases in policy and history. First, the Supreme Court has clearly accepted the proposition that the tribes retain so much of their original sovereignty as was not explicitly taken from them or implicitly surrendered by their submission to federal authority.[218] Although the *Oliphant* Court found that criminal law authority over non-Indians was yielded, the reasons for that view do not apply to civil matters involving or affecting Indians or tribal property.[219] Because the authority has not clearly been taken away, it should continue.

See, e.g., CONST. OF SHOSHONE-BANNOCK TRIBE OF FORT HALL RESERVATION art. VI, §§ 1(i), (l); AMENDED CONST. OF WASHOE TRIBE OF NEVADA & CALIFORNIA art. VI, § 1(f); CONST. OF FORT BELKNAP INDIAN COMMUNITY art. V, § 1(s).

214. *See* Williams v. Lee, 358 U.S. 217 (1959); 25 C.F.R. § 11.22 (1978).

215. 135 F. 947, 952-54 (8th Cir. 1905).

216. *See* W. HAGAN, *supra* note 33, at 93, 123.

217. The government has, however, always required a license to trade with Indians in Indian country. *See* notes 248-52 and accompanying text *infra*.

218. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978); United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

219. *See* notes 166-74 and accompanying text *supra*.

The principal difficulty with this proposition is that, without further analysis, it would seem to establish the right to make laws applicable to the relations of non-Indians with each other in matters of no direct concern to Indians—for example in tort, contract, or domestic relations cases where no party is an Indian. Given the great differences between Indian and Anglo-American societies during the early years, a point emphasized in the *Oliphant* opinion,[220] the authority to govern relations of non-Indians with one another seems unlikely to have been contemplated as part of retained tribal sovereignty.

A more satisfactory analysis begins with the recognition that tribal sovereignty has a dual nature, relating to certain subject matters as well as to territory. The two principal subjects of retained sovereignty are internal self-government[221] and economic self-support.[222] Authority over non-Indians is included within those subject areas only in interracial matters. Thus, tribal authority over non-Indians exists only when there is a direct impact on Indians or their property.[223] The purposes of federal protection of Indians justify the exercise of tribal jurisdiction over non-Indians only in these subject areas, not over tribal territory generally. This view is reflected in a number of statutes and court decisions.[224]

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220. 435 U.S. at 197, 201, 210–11.

221. *See* notes 20–22 and accompanying text *supra*.

222. *See* note 28 and accompanying text *supra*.

223. The Suquamish Tribe had asserted authority over non-Indians only in cases affecting Indians. *See* Brief for Tribe at 52–56, Oliphant v. Suquamish Tribe, 425 U.S. 494 (1978). No tribe has ever sought to assert jurisdiction over non-Indians who were not tribal members in matters having no direct effect on Indians or the tribe. *See* note 224 *infra*.

224. The federal criminal jurisdiction over Indian country reflects a subject matter as well as territorial scope. The earliest laws applied only to crimes by non-Indians against Indians. *See* note 54 *supra*. The Indian Country Crimes Act excepts crimes by an Indian against another Indian. *See* note 56 *supra*. The Supreme Court has interpreted it to except non-Indian against non-Indian crimes also. *See* United States v. Antelope, 430 U.S. 641, 644, n.4 (1977) (citing United States v. McBratney, 104 U.S. 621 (1882)); notes 124 & 170 and accompanying text *supra; see also* New York *ex rel.* Ray v. Martin, 326 U.S. 496, 501 (1946); Donnelly v. United States, 228 U.S. 243, 271–72 (1913); *Ex parte* Crow Dog, 109 U.S. 556 (1883).

In civil matters the Supreme Court has held that states have jurisdiction over non-Indians in Indian country in matters not affecting Indians or tribes. Montana Catholic Missions v. Missoula County, 200 U.S. 118, 128–29 (1906); Thomas v. Gay, 169 U.S. 264 (1898). The test formuated by the Court to determine when state jurisdiction in Indian country is precluded (in the absence of a particular federal statute allocating authority) is whether state jurisdiction interferes with the Indians' right to govern themselves. Fisher v. District Court, 424 U.S. 382, 386 (1976); Williams v. Lee, 358 U.S. 217, 220 (1959). This test applies to interracial matters. As the Court stated in McClanahan v. Arizona Tax Commission:

[In situations involving Indians and non-Indians], both the tribe and the State

The basis for tribal authority over non-Indians is thus distinct from that for authority over tribal members. Within reservations the tribes have plenary, direct, and exclusive authority over members except when expressly limited by federal law.[225] Tribal authority over non-Indians is retained only where necessary to carry out the purposes of the reservations, that is, it is derived from authority over Indians and over tribal property. This instrumental view underlies all prior instances when tribal authority over non-Indians has been recognized or sustained.

The tribes should retain sufficient authority to carry out these purposes. To deny tribal authority over non-Indians who injure Indians or whose property is intermingled with Indian property to the extent that the use of one affects the other would derogate from the purposes of the reservations. For the tribes to have self-government, they must be able to govern the relations of their members with others within tribal territory.[226] For the tribes to have the full economic use of their reservations, they must be able to deal with non-Indian practices substantially affecting tribal property and its uses.[227] A related point supporting tribal authority is that state regulatory laws cannot apply to tribal lands,[228] so only the tribes can supply a uniform regulatory system for the intermingled lands in "opened" reservations.

Parties opposing tribal authority have argued that the rationale of *Oliphant* should be extended to preclude all tribal jurisdiction over non-Indians. Both precedent and analysis suggest that argument will

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could fairly claim an interest in asserting their respective jurisdictions. The [test of *Williams v. Lee*] was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

411 U.S. 164, 179 (1963). *See also* Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 99 S. Ct. 740, 744 n.1, 758–61 (1979).

225. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); United States v. Wheeler, 435 U.S. 313 (1978).

226. *See* notes 203–06 and accompanying text *supra*.

227. A number of important court decisions have held that express or implied Indian economic and property rights necessary to fulfill the purposes of a reservation prevail over competing non-Indian rights. For example, in Winters v. United States, 207 U.S. 564, 576 (1908), the Supreme Court held that an implied retention of rights to the waters of a river was necessary to make a reservation productive. The Court recognized that non-Indian landowners along the river had great need of the same water but held that the Indian claim must predominate. *See also* Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970); Arizona v. California, 373 U.S. 546, 599–601 (1963); Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); United States v. Winans, 198 U.S. 371 (1905); Pelcyger, *supra* note 28.

228. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir.), *cert. denied*, 429 U.S. 1038 (1975); *see* Bryan v. Itasca County, 426 U.S. 373, 388 n.14 (1976); 25 C.F.R. § 1.4 (1978); note 233 *infra*.

fail. But in the more specific area of nonconsensual relationships, aspects of the argument have more force. Although the due process protection inferred by the *Oliphant* Court is most significant in criminal law, it is nevertheless of importance in those civil cases involving a possible taking of private property without just compensation.[229] Indian traditions concerning property, particularly land, are very different from Anglo-American traditions.[230] Although non-Indians who enter into consensual relationships with Indians might justly subject themselves to tribal authority, those who do not do so should arguably retain the same implicit protection from tribal authority found in *Oliphant*. Also, some precedents sustaining tribal jurisdiction have emphasized the consensual relationships involved;[231] there is no reported authority supporting tribal jurisdiction in nonconsensual cases.[232]

Another argument made against tribal jurisdiction over non-Indians is lack of consent of the governed.[233] The Supreme Court did not mention this point in deciding *Oliphant*, and in two prior cases it expressly rejected arguments of this sort.[234] But the authority formerly exercised by some tribes over adopted non-Indian members indicates that consent has some relevance to the due process questions of criminal jurisdiction.[235]

229. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). A few treaties had clauses protecting the property of traders and others. *See, e.g.*, Treaty with the Cheyenne Tribe, July 6, 1825, art. 4, 7 Stat. 255, 255–56; Treaty with the Sacs & Foxes, Nov. 3, 1804, art. 11, 7 Stat. 84, 86–87.

230. This proposition is perhaps most graphically illustrated by the allotment policy of 1854 to 1934 which sought to induce and compel the Indians to convert their communal lands into family holdings. *See* note 124 and accompanying text *supra*. While that policy succeeded in some individual cases, it was generally recognized as a failure, showing the tenacity of Indian communal traditions.

231. Buster v. Wright, 135 F. 947, 949 (8th Cir. 1905); 55 Interior Dec. 14, 46 (1934).

232. It must be emphasized that the "consent" is not to jurisdiction over the dispute itself but to the relationship giving rise to it. Thus non-Indians who become tribal members consent to all tribal authority. *See* notes 105 & 135–50 and accompanying text *supra*. Non-Indians who enter into contracts, leases, marriages, or other arrangements with Indians are subject to tribal authority respecting those arrangements. Non-Indians who seek to sever the parental rights of Indians and adopt Indian children are subject to tribal authority pro tanto. *See* note 211 and accompanying text *supra*. Non-Indians who wish to recover damages or other judicial relief from reservation Indians must bring suit in tribal court and submit to its jurisdiction. *See* notes 203–09 and accompanying text *supra*.

233. *See, e.g.*, United States v. Mazurie, 419 U.S. 544, 557–58 (1975); Barta v. Oglala Sioux Tribe, 259 F.2d 553, 557 (8th Cir.), *cert. denied*, 358 U.S. 932 (1958). The *Oliphant* defendants also raised this point. Brief for Appellant at 111–12, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

234. United States v. Mazurie, 419 U.S. 544, 557–58 (1975); Williams v. Lee, 358 U.S. 217, 223 (1959).

235. *See* notes 137–50 and accompanying text *supra*.

Tribal jurisdiction in the noncriminal circumstances discussed in this section does not normally conflict with the reasonable expectations of those subjected to that jurisdiction. Corporations and nonresidents of a reservation have no legitimate expectation of local political representation.[236] As discussed above, tribal jurisdiction depends on a consensual relationship between the non-Indian and Indians or the tribe, a conditional entry into a reservation, or an activity which has a direct impact on Indians or tribes. Only in the latter category and when a non-Indian resident of the reservation is involved are normal expectations of political representation infringed upon. Even in those cases the infringement is a fairly narrow one, confined to particular circumstances.[237]

The difficulty of the problem in nonconsenual cases is perhaps illustrated by the history of a current case involving regulatory authority over underground water supplies, where salt water intrusion causes all rights to be interrelated. The court initially issued an opinion sustaining tribal authority, then withdrew it.[238] The correct analysis should stress the federal purposes for the reservations by sustaining tribal authority upon a showing that the non-Indian activity has a direct impact on Indians or their property. The tribes should have authority to pass land use laws for reservation areas where non-Indian land is substantially intermingled with Indian land, but not where the land is virtually all non-Indian. Tort authority in interracial cases should be sustained.[239] Tax authority, aside from the consensual and exclusionary situations described previously, should be limited to the imposition of taxes for the support of activities justified by the same

236. Nonresidents or corporations may argue that the general expectation is that all local residents regardless of race will participate politically. But that is a much more rarified interest than the right of participation of residents themselves and, in light of the nature of an Indian reservation, it is hard to sustain as a reasonable expectation.

237. In light of the many special laws and doctrines applicable to Indian reservations, some variation in expectations is implicit in presence within a reservation.

238. United States v. Bel Bay Community and Water Ass'n, No. 303-71C2 (W.D. Wash., Mar. 3, 1978). *Cf.* Colville Confederated Tribes v. Walton, 460 F. Supp. 1320 (E.D. Wash. 1978) (court held that unrestricted water rights in excess of reserved tribal rights are subject to state rather than tribal regulation).

239. As noted above, tribal jurisdiction over cases against Indians arising within tribal territory is exclusive. *See* notes 205 & 209 and accompanying text *supra*. In the reverse situation, actions by Indians against non-Indians, the tribal courts historically have not asserted jurisdiction, and state court jurisdiction has been sustained. *E.g.*, Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966). Whether tribal court jurisdiction in the latter cases would be exclusive or concurrent is uncertain. Most private causes of action are traditionally transitory, and concurrent jurisdiction is common. *But see* note 224 *supra*.

rationale, that is, where there is a direct impact on Indians or Indian property.

D. Effects of Specific Federal Statutes

Tribal authority is specifically limited or confirmed by a number of federal statutes. The importance of the Indian Reorganization Act in strengthening tribal self-government has already been discussed.[240] The Indian Civil Rights Act, passed in 1968,[241] imposed on self-governing tribes many of the limitations which the Constitution imposes on federal and state governments.[242] In *Santa Clara Pueblo v. Martinez*,[243] the Supreme Court held that Congress intended both to strengthen and to limit tribal self-government through this Act. These goals were in conflict because the issue was the extent of the enforcement power given to federal courts by the statute. The Court held that, in light of the legislative history and the tradition of tribal sovereignty, federal jurisdiction is limited to habeas corpus.[244]

A statute important to the issues discussed here is the civil jurisdiction part of Public Law 280, which conferred on certain states judicial authority over civil causes of action in Indian country "between Indians and to which Indians are parties" and provided a mechanism

240. *See* notes 176–80 and accompanying text *supra*.

241. 25 U.S.C. §§ 1301–1303 (1976). The popular name "Indian Civil Rights Act" is often applied to all of Titles II–VII of the Civil Rights Act of 1968. *E.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51 (1978). All six titles concerned Indian affairs but were otherwise only loosely related. The point made here concerns only Title II, which has been separately called the Indian Bill of Rights. Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969).

242. As noted in note 115 *supra*, constitutional provisions which by their terms limit the federal or state governments do not of their own force limit Indian tribes. The Act guaranteed to persons subject to tribal jurisdiction the right of habeas corpus and rights taken from amendments 1, 4, 5, 6, 8, and 14 of the federal Constitution, and it prohibited bills of attainder and ex post facto laws by tribes. Some rights are set out in the same terms as the Constitution; others are modified. The most notable omissions are the establishment clause and the right to appointed counsel in criminal cases. The Act also limits criminal punishments by tribes to the petty misdemeanor level of 18 U.S.C. § 1 (1976) (a maximum of six months imprisonment and a $500 fine). 25 U.S.C. § 1302(7) (1976); *see also* note 90 *supra*.

243. 436 U.S. 49 (1978).

244. The Court indicated that enforcement of the Act would be in tribal courts, 436 U.S. at 65–66, and that in some cases the Secretary of the Interior may have authority to enforce the Act where tribal legislation requires secretarial approval, 436 U.S. at 66 n.22. Such requirements are common in Indian Reorganization Act constitutions under 25 U.S.C. § 476 (1976), *see* notes 174–79 and accompanying text *supra*, and are imposed by some statutes, *e.g.*,18 U.S.C. § 1161 (1976).

for other states to acquire like authority.[245] Court decisions have made it clear that the statute does not apply to tax and regulatory authority;[246] it is essentially concerned with private civil actions. The statute provides that general state laws governing civil actions apply, and that tribal laws apply in that sphere only when consistent with state law.[247]

Another statutory limitation on tribal authority is the federal control over trading with Indians. Since 1790 federal law has required a federal license to trade with Indians in Indian country.[248] Since 1882, the laws have specified that a license is needed by anyone except an "Indian of the full blood,"[249] although the persons regulated have in fact almost all been non-Indians.[250] The federal courts have held that these statutes are broad in scope, both as to federal authority[251] and duty.[252] The question here is whether the tribes may tax or regulate licensed traders without federal permission. An 1824 opinion of the Attorney General denied the power to tax a licensed trader,[253] and the 1934 Interior Decision discussed above reached the same conclusion.[254] Neither opinion analyzed the point, and the Attorney General's opinion is based on reasoning since rejected in other contexts.[255] It is more consistent with modern preemption law to postulate that the tribes can tax and regulate traders unless the federal pur-

245. Act of Aug. 15, 1953, ch. 505, Pub. L. No. 83-280, §§ 3-7, 67 Stat. 589-90 (codified, as amended, at 28 U.S.C. § 1360 (1976)). This act was superseded in part by the Act of Apr. 11, 1968, Pub. L. No. 90-284, §§ 402-406, 82 Stat. 79-80 (codified at 25 U.S.C. §§ 1322-1326 (1976)). *See* Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 99 S. Ct. 740 (1979).

246. Bryan v. Itasca County, 426 U.S. 373 (1976); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir.), *cert. denied*, 429 U.S. 1038 (1975).

247. 28 U.S.C. § 1360(c), 25 U.S.C. § 1322(c) (1976).

248. *See* note 55 supra. The current statutes and regulations are at 25 U.S.C. §§ 68, 261-264 (1976) and 25 C.F.R. §§ 251-252 (1978).

249. Act of July 31, 1882, ch. 360, 22 Stat. 179; *see* 25 U.S.C. § 264 (1976).

250. The early traders laws by their terms applied to any "person" but it is reasonably certain that Indians (at least of the same tribe) were not intended to be regulated. *See* note 54 *supra*.

251. Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

252. Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971).

253. 1 OP. ATT'Y GEN. 645 (1824). The opinion relied on the phrase in the Cherokee treaties giving the United States the "sole and exclusive right" of "managing all their affairs." *Id.* at 647-48. The Supreme Court gave a different construction to that clause in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 553-54 (1832), casting doubt on the 1824 opinion.

254. 55 Interior Dec. 14, 48 (1934). No authority was cited except the statutes themselves.

255. In addition to the treaty point mentioned in note 253 *supra*, the 1824 opinion relied on the "power to tax was a power to destroy" argument of McCulloch v. Mary-

pose of the statutes and regulations is thereby frustrated.[256] Tribal regulations should be allowed when not inconsistent with the federal regulatory system,[257] and tribal taxes should be permitted so long as they do not frustrate the statutory purpose of having goods provided to Indian people at reasonable prices.[258]

Federal laws governing allotted lands also limit tribal authority. These statutes specify that state laws governing heirship and partition shall apply even to Indians,[259] and it is implicit that the tribes cannot infringe on the basic federal statutory purpose to make land available in severalty to Indians.[260] Federal law also specifies that under certain circumstances Indians may sell their allotments.[261] The statutes concerned apply to non-Indians who are heirs of Indians, joint or common owners with them, or purchasers from them.

As previously discussed, the allotment system allowed, and at times encouraged, non-Indians to become landowners within reservations. That purpose reduced the exclusively Indian nature of those reservations and altered related tribal power to exclude from the reservation all nonmembers except agents of the government.[262] Purchasers of those lands are subject to tribal authority only when they enter into consensual relations with Indians[263] or when their activities directly affect Indians or Indian lands.[264]

Liquor control has long been a field of comprehensive federal control over Indian country. From an early date, federal policy mandated

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land, 17 U.S. (4 Wheat.) 316, 431 (1819). 1 OP. ATT'Y GEN. at 650. The scope of that view of tax immunities has, of course, been considerably modified by subsequent cases. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 391–401 (1978).

256. L. TRIBE, *supra* note 255, at 376–401. This position is also supported by the general rule that tribes retain powers not clearly taken by treaty, statute, or implicitly lost in their submission to the United States. United States v. Wheeler, 435 U.S. 313, 322–26 (1978). *See also* Williams v. Lee, 358 U.S. 217 (1959) (plaintiff was a licensed trader).

257. 25 C.F.R. pt. 252 (1978) provides relatively comprehensive regulations for the Navajo, Hopi, and Zuni reservations. 25 C.F.R. pt. 251 applies in all other areas of Indian country and arguably leaves many matters to potential tribal authority. Neither part forbids tribal taxes.

258. *See* Rockbridge v. Lincoln, 449 F.2d 567, 571 (9th Cir. 1971).

259. 25 U.S.C. § 348 (1976); *see id.* § 335. Similar sections relate to condemnation, *id.* § 357, and mortgage foreclosure, *id.* § 483a. Other statutes provide for secretarial control over wills and probate respecting allotted lands. *Id.* §§ 372–373.

260. *Id.* § 331 (restricted by *id.* § 461). The provisions of section 331 did not require tribal consent.

261. The most important provision is 25 U.S.C. § 349 (1976).

262. *See* notes 125, 151–57, and accompanying text *supra;* 55 Interior Dec. 14, 48–50.

263. *See* Parts III–*A,–B supra.*

264. *See* Part III–*C supra.*

liquor prohibition in tribal territory,[265] and that applied to Indians and others alike.[266] In 1953 Congress authorized the tribes to remove the federal prohibition laws,[267] and many tribes have elected to do so. The 1953 statute gave the tribes broad authority to condition the sale of liquor in tribal territory, and that authority applies equally to Indians and non-Indians.[268]

In 1960 Congress enacted a law prohibiting hunting and fishing on restricted Indian lands without tribal permission.[269] This reinforced with federal criminal penalties the traditional tribal right to condition entry onto tribal lands.[270] Some tribes have enacted comprehensive codes for fish and game management, relying on the federal act for enforcement. These codes have been sustained by the courts, but an unsettled issue is whether tribal regulation of non-Indians may

265. The Act of Mar. 30, 1802, ch. 13, § 21, 2 Stat. 146, authorized administrative control. The Act of May 6, 1822, ch. 58, § 2, 3 Stat. 682, added the power to forefeit the goods of any trader bringing liquor into Indian country. The Act of July 9, 1832, ch. 174, § 4, 4 Stat. 564, added a general prohibition on introduction of liquor into Indian country. The Act of June 30, 1834, ch. 161, §§ 20-21, 4 Stat. 732-33 (codified as amended at 18 U.S.C. § 1154, 25 U.S.C. § 251 (1976)), added prohibitions on sale to Indians and on operating a distillery in Indian country and provided monetary penalties for violations. The Act of Feb. 13, 1862, ch. 24, 12 Stat. 338, added imprisonment as a penalty. The Act of May 25, 1918, ch. 86, 40 Stat. 561, 563 (codified at 18 U.S.C. § 1156 (1976)), made possession of liquor in Indian country a crime. *See also* 18 U.S.C. §§ 3055, 3113, 3488, 3618-3619; 25 U.S.C. § 253 (1976).

266. Dick v. United States, 208 U.S. 340 (1908) (Indian defendant); United States v. Holliday, 70 U.S. (3 Wall.) 407 (1865) (non-Indian defendant). The Act of Mar. 27, 1854, ch. 24, § 3, 10 Stat. 270, 271, repealed application of the introduction and sale prohibitions to Indian defendants, but that exception was removed in 1862. United States v. Miller, 105 F. 944 (D. Nev. 1901); United States v. Shaw-Mux, 27 F. Cas. 1049, No. 16,268 (D. Ore. 1873).

267. Act of Aug. 15, 1953, ch. 502, § 2, 67 Stat. 586, 586 (codified at 18 U.S.C. § 1161 (1976)).

268. United States v. Mazurie, 419 U.S. 544 (1975); *see* United States v. New Mexico, 590 F.2d 323 (10th Cir. 1978). The statute does not expressly authorize tribal punishment of non-Indians who violate the tribal laws it authorizes, and it conditionally sets aside a comprehensive federal criminal law scheme. On the other hand, the statute provides for secretarial approval of any tribal ordinance under it, a factor the Court relied on in *Mazurie,* 419 U.S. at 558 n.12, to reject a constitutional challenge by non-Indians. If the Secretary were to approve a tribal ordinance which included punishment of non-Indian violators, it would likely be valid under *Mazurie*. No tribe has yet sought that authority.

269. The statute superseded a more limited provision which had provided a civil penalty and forfeiture for hunting or trapping by non-Indians on the lands of any treaty tribe. The latter had been enacted as section 8 of the Act of June 30, 1834, ch. 161, 4 Stat. 730. *Cf.* United States v. Sturgeon, 27 F. Cas. 1357 (D. Nev. 1879) (prosecution of non-Indians fishing on the reservation of a nontreaty tribe under a provision prohibiting return to Indian country after lawful removal).

270. *See* notes 194-96 and accompanying text *supra*.

preempt state regulation which interferes with the tribal scheme.[271]

In 1978 Congress enacted the Indian Child Welfare Act[272] in response to growing Indian concern over attempts under state law to sever the parental rights of Indians and place Indian children in non-Indian adoptive and foster homes. The courts had previously recognized tribal rights to control these matters within reservations,[273] but cases involving both state and tribal jurisdictional claims had generated no clear rules.[274] The Act confirms paramount tribal rights over Indian children who are residents or domiciliaries of a reservation even if the children are temporarily outside the reservation.[275] It also provides for primary tribal court authority over Indian children residing elsewhere and for full faith and credit for tribal laws in child custody matters.[276] In light of the Act's purpose, it clearly includes tribal authority over any non-Indian who seeks to obtain or retain custody of an Indian child.[277]

E. Territorial Scope of Tribal Jurisdiction

The authority of tribes, like that of other governments, is largely confined to tribal territory.[278] In the early years that was an uncom-

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271. Confederated Tribes of the Colville Indian Reservation v. Washington, 591 F.2d 89 (9th Cir. 1979); Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, 588 F.2d 75 (4th Cir. 1978), *petition for cert. filed,* 47 U.S.L.W. 3730 (U.S. Apr. 30, 1979) (No. 78-1653); Quechan Tribe of Indians v. Rowe, 531 F.2d 408 (9th Cir. 1976); Mescalero Apache Tribe v. New Mexico, No. 77-395-M (D.N.M. 1977); California v. Quechan Tribe of Indians, 424 F. Supp. 969 (S.D. Cal. 1977).

272. Pub. L. No. 95-608, 92 Stat. 3069 (1978) (to be codified in 25 U.S.C. §§ 1901-1963 and scattered sections of 28, 42, 43 U.S.C.).

273. *See, e.g.,* Fisher v. District Court, 424 U.S. 382 (1976).

274. *Compare* cases cited at note 208 *supra with In re* Duryea, 115 Ariz. 86, 563 P.2d 885 (1977); Adoption of Doe, 89 N.M. 606, 555 P.2d 906 (App. 1976); Brokenleg v. Butts, 559 S.W.2d 853 (Tex. Civ. App. 1977), *petition for cert. filed,* 47 U.S.L.W. 3010 (U.S. July 3, 1978) (No. 78-25).

275. 25 U.S.C.A. § 1911 (Supp. 1978).

276. *Id.* The Act also includes requirements of notice to tribes of the pendency of a child custody case involving a member, *id.* § 1913, and of Indian preference in selecting adoptive parents, *id.* § 1915.

277. The general purpose of the Act is to assist tribes in keeping Indian children in Indian homes. *Id.* § 1902.

278. For example, note the emphasis on boundaries in the basic authority on the subject, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), discussed at note 20 and accompanying text *supra.* Tribes have off-reservation authority over members, but state laws regulating conduct usually prevail over tribal laws outside reservations, so that tribal authority is limited as a practical matter to such subjects as membership, selection of officers, use of property, and the like. When tribes have particular off-reservation federal rights, tribal courts have jurisdiction over off-reservation conduct of tribal members. Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974).

plicated concept, referring to land reserved or granted to tribes by treaty or law. Tribal ownership within such territory was uniform except for small sites for government buildings, trading posts, and missions. Federal Indian country laws mostly applied to the same territory.[279] Tribal and federal authority within tribal boundaries was uniform and comprehensive.[280]

Beginning with the Indian Trade and Intercourse Act of 1834, the matter of tribal territory became more complicated. Congress greatly reduced the complexity in 1948 by statutorily defining Indian country but did not entirely eliminate it. Also, litigants sometimes try to rely on precedents under pre-1948 law. A brief review of the matter is thus useful.

The Indian Trade and Intercourse Act of 1834 made the principal territorial term for federal laws "Indian country," which it defined as all land in Indian title outside the boundaries of the states then existing.[281] Congress repealed the section containing this definition in 1874 but retained many laws applicable only in Indian country.[282] The Supreme Court was thus compelled to define the term judicially. It did so by attempting to adjust the 1834 definition to changing conditions.[283] This approach produced complications until the Court in a

279. The territorial terms of the early Indian Trade and Intercourse Acts were somewhat imprecise, but the basic terms seem consistent with this statement. *See, e.g.*, Act of Mar. 30, 1802, ch. 13, §§ 4–11, 2 Stat. 139, 141–43. Some provisions were particularly concerned with trespasses and depredations along the principal frontier. *See, e.g., id.* §§ 1, 2, 14, 16.

280. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561–62 (1832).

281. Act of June 30, 1834, ch. 161, §§ 1, 24, 4 Stat. 729, 729. But section 29 of the Act included a proviso retaining the earlier 1802 Trade and Intercourse Act for all tribes residing east of the Mississippi. Also, sections 9 and 11 through 15 of the Act were not confined to Indian country. *See, e.g.*, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670–71 (1974); New York Indians, 72 U.S. (5 Wall.) 761, 771 (1867). This division is also reflected in the later codifications of these laws. *See* 25 U.S.C. chs. 5, 6 (1976).

282. *Ex parte* Crow Dog, 109 U.S. 556, 560–62 (1883).

283. *Id.* The principal case the Court relied on during the 1874–1913 period was Bates v. Clark, 95 U.S. 204 (1877), which generated some confusion and uncertainty in the law. The events giving rise to *Bates* occurred prior to the repeal of the 1834 statutory definition of "Indian country." The Supreme Court decided the case after the repeal but took no notice of it. The problem addressed by the Court was how to apply the 1834 statutory definition to the greatly changed conditions of the 1870's. *Bates* involved a liquor seizure by the Army in Dakota Territory but on land ceded to the United States by the Indians. Under the imprecise wording of the 1834 definition, it was arguable that all of Dakota Territory was defined as Indian country regardless of Indian cessions. The Court sensibly rejected that view and held that ceded lands implicitly ceased to be Indian country. But the Court's opinion said that Indian country consisted of land in "original" Indian title "unless by the Treaty by which the Indians parted with their title, or by some Act of Congress, a different rule was made applicable to the case." 95 U.S.

series of decisions written in 1913 and 1914 shed most of the uncertainties, largely by rejecting the 1834 scheme.[284] One feature of the 1834 definition which survived these decisions, however, was the rule that land within reservations to which the Indian title had been fully extinguished was not Indian country.[285] This produced some rather absurd results.[286]

The matter was further complicated by other actions of Congress. In 1882 Congress explicitly added "Indian reservations" to "Indian country" as places in which Indian traders needed a federal license,[287] and in 1885 Congress passed a law punishing crimes "within any In-

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at 208. This language was open to the construction that Indian reservations not held in original title (that is, aboriginal title confirmed by the government) were not Indian country. There were many reservations of that sort in 1877, and Congress had already given one indication that Indian reservations might not all be Indian country. *Compare* Act of June 30, 1834, ch. 161, § 10, 4 Stat. 729, 730 (removal of persons from "Indian country") *with* Act of June 12, 1858, ch. 155, § 2, 11 Stat. 329, 332 (removal of persons from "any tribal reservation"). *See also* notes 287 & 288 *infra*. In *Bates* terms, the issue was whether an act of Congress, treaty, or executive order establishing a reservation had to specify that it was Indian country, or whether that status was implicit in the nature of a reservation.

The *Bates* opinion was also open to the inference that the scheme of section 1 of the 1834 Act confining Indian country to areas outside of any state was implicitly extended to new states upon their admission absent a statute or treaty provision to the contrary. The *Bates* opinion took no notice of section 29 of the 1834 Act and even misstated the areas east of the Mississippi which were not yet states in 1834, omitting Florida. 95 U.S. at 207. Again the issue in *Bates* terms was whether the statute, executive order, or treaty establishing a reservation within a state, or the state enabling act as to prior reservations, had to specify that the reservation was Indian country or whether that status was implicit in the nature of a reservation.

284. United States v. Pelican, 232 U.S. 442 (1914); United States v. Sandoval, 231 U.S. 28 (1913); Donnelly v. United States, 228 U.S. 243 (1913). These cases, and some laws discussed in them, made it clear that Indian country did not require original Indian title and that it could exist within a state without an act of Congress so specifying. Their reasoning had been anticipated by United States v. Leathers, 26 F. Cas. 897 (D. Nev. 1879) and United States v. Bridelman, 7 F. 894 (D. Ore. 1881). *See also* United States v. John, 437 U.S. 634 (1978) (reservation land in a state admitted before 1834—Mississippi—is Indian country); United States v. McGowan, 302 U.S. 535 (1938) (land purchased by U.S. in trust for Indians is Indian country).

285. The rule was obliquely referred to as late as United States v. Chavez, 290 U.S. 357, 364 (1933) (dictum). It was honored but distinguished in United States v. Soldana, 246 U.S. 530 (1918).

286. The Court in Clairmont v. United States, 225 U.S. 551 (1912), voided a conviction on the ground that the offense occurred on a right-of-way to which the Indian title had been extinguished. A similar conviction was sustained in United States v. Soldana, 246 U.S. 530 (1918), on the ground that the right-of-way in question was not owned in fee simple by the grantee. Criminal convictions thus turned on the refinements of easement law. *See* Seymour v. Superintendent, 368 U.S. 351 (1962).

287. Act of July 31, 1882, ch. 360, 22 Stat. 179 (now part of 25 U.S.C. § 264 (1976)). *See* notes 248–50 and accompanying text *supra*.

dian reservation."[288] These laws were apparently not confined to land in Indian title, and the Court so held in 1894.[289]

The effect of these confusing and inconsistent laws on the territorial scope of tribal self-government is not certain. The only pre-1948 case on point appears to be *Buster v. Wright*,[290] in which the court of appeals sustained tribal taxing authority over non-Indian traders on fee patented lands within tribal territory, even though that land could not have been Indian country under the contemporary definition.[291]

In 1948 the federal criminal laws were unified by reestablishing one statutory definition of Indian country. That law specifies that all land within a reservation is Indian country regardless of ownership.[292] The Supreme Court has sustained the 1948 scheme in federal criminal cases, to which it applies directly,[293] and has applied the definition in cases involving the civil jurisdiction of tribes over their members.[294] The Court seems to view the 1948 statute as establishing a unitary system for most jurisdictional purposes.[295] Subsequent actions by Congress appear to be based on the same premise.[296] The 1948 statute thus established a relatively practical and common sense definition of "Indian country,"[297] which applies generally to tribal as well as to federal authority.

IV. CONCLUSION

The Supreme Court's holding in *Oliphant* is reasonably convincing

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288. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385 (codified, as amended, at 18 U.S.C. §§ 1153, 3242 (1976)). This Act applied anywhere in a territory, but only within reservations in the states. United States v. John, 437 U.S. 634, 651 n.22 (1978). *See also* note 87 and accompanying text *supra*.

289. United States v. Thomas, 151 U.S. 577 (1894).

290. 135 F. 947 (8th Cir.), *appeal dismissed*, 203 U.S. 599 (1905), discussed at note 187 and accompanying text *supra*.

291. The court specifically discussed the point in 135 F. at 952-54.

292. 18 U.S.C. § 1151(a) (1976).

293. Seymour v. Superintendent, 368 U.S. 351 (1962).

294. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 477-79 (1976); DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

295. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 477-79 (1976); DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

296. In 1953 Congress enacted Public Law 280, a comprehensive statute providing the principal means for transferring partial jurisdiction over Indian country to the states. *See* note 245 and accompanying text *supra*. The operative term of place in that law is "Indian country," and the statute applies to civil and tribal jurisdiction as well as to federal criminal laws. *See* cases cited at note 246 *supra*.

297. In United States v. John, 437 U.S. 634 (1978), the Court referred to the *Bates* definition discussed in note 283 *supra*, as "more technical and limited" than "the more expansive scope of the term that was incorporated in the 1948 revision of Title 18." *Id.* at 649 n.18.

as applied to persons in tribal territory under federal authority but is less certainly applied to illegal intruders and is doubtful as to non-Indians who became members of tribes. The *Oliphant* defendants were neither intruders nor members, however, so the decision seems correct in its result. Its application in criminal cases today raises questions only in the case of tribes retaining the right to exclude intruders from reservations.

The *Oliphant* holding aside, the Court's opinion is unsatisfactory in several respects. The marshaling and use of precedents is selective and at times inaccurate and misleading. Court decisions should not be based on a "common understanding" of decisionmakers of more than a century ago without much more convincing evidence than the Court had. It is the logic of the Court's reasoning about due process of law, tribal dependence on federal protection, and the federal criminal statutes which rescues the opinion. If the decision rested on the reconstructed opinions of the formative years alone, it would be questionable indeed.

Indians are a politically impotent minority. It is to Congress' credit that it has generally sought to deal honorably with them and that its errors have been founded more on misguided paternalism than on baser motives. State and private interests have a much less creditable record, and popular pressures have at times induced Congress to break faith with the Indians. For any period, records of anti-Indian views can be collected to support the understanding (or desire and hope) of many that Indian rights should be swept aside.

Throughout our history the Supreme Court has protected Indians by requiring that the political will to take their rights be clearly and certainly expressed.[298] The Court's approach has been entirely just and proper in light of the Nation's undertakings in treaties made when the Indians still had the power to make war. Congress in any case retains the authority to restrict the tribes where it sees the need. Where there is reasonable doubt, the Court should continue to leave that duty to Congress.

As discussed in this article, the reasoning of *Oliphant* as a whole is not inconsistent with the Court's traditions and precedents in Indian cases. If that reasoning is applied with other precedents, tribal authority over non-Indians in civil matters should be sustained where necessary to fulfill the purposes of the reservations: tribal self-government and economic self-support.

298. *See* Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CALIF. L. REV. 601, 655–61 (1975).