University of Richmond Law Review

Volume 27 | Issue 2 Article 11

1993

Indian Tribal Sovereignty and the Environment

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NOTE

INDIAN TRIBAL SOVEREIGNTY AND THE ENVIRONMENT

*Dear Aunt _____,**

I've learned so much about Indians recently that I wanted to share some things with you and ask your opinion. My friends and I, with the encouragement of some remarkable Indians, have discussed the issues, starting with the basic questions of what to do about hazardous waste and whether Indian tribes should be allowed to regulate waste dumps on their reservations. These questions have stimulated other inquiries. Specifically, under federal statutes, may they operate waste facilities? Do the environmental statutes allow Indians to regulate themselves? How does the "trust relationship," the traditional association between the white man and the Indian which encourages Indian sovereignty and self-determination, affect the environmental statutes passed by Congress? Morally, is it right to allow Indians to accept waste? Are they prepared to handle it safely? Are the Indians sufficiently aware of the problems that might arise which could permanently damage the only land they have? We start with these questions, move to all corners of the earth, it seems, in discussing potential solutions, and then end up right back where we started. If it is immoral for the white man to dump his trash on the Indians, then perhaps a way can be found to pay for any loss or injury to the Indians that the trash generates. But this solution-seeking itself takes away from the Indians' rights to self-determination: the white man is still looking over the Indians' shoulders to save them from potential disaster. As of now, we've found no perfect solution.

A little background on the legal history of the American Indians might help. It seems that as soon as the white man set foot in the "new world" and brought with him his laws, the less powerful Indians were relegated by the white man to "outsider jurisprudence." Jurisprudence is commonly known as "the science or philosophy of law."[1] *The legal definition delves deeper and notes the significance of the community in jurisprudential decisions: jurisprudence attempts to consider the effect of each potential rule on the multitude of similar cases that may follow, and to choose the*

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* The author had in mind her great-aunt Hattie Miller, when she wrote this article. The reader is invited to fill in any name she or he chooses.

1. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1039 (2d ed. 1987).

rule that produces "the greatest advantage to the community."[2] *But a problem arises when one judicial system must set rules for several distinct and sometimes inharmonious communities. If the judicial system is dominated by one community, as ours is by the white man, then that community is most likely to enjoy the greatest benefits from the decisions, probably to the detriment of the "outsider" communities.*

One Indian legal scholar describes outsider jurisprudence as "a common struggle against a dominant vision of law which we all experience as alien and alienating with respect to our visions of self and community."[3] *Indeed, many groups including gays, lesbians, feminists and people of color, are "outside" the Euro-American community of white man jurisprudence and are fighting to have their perceptions of the world and the laws included in our country's legal system.*[4]

The quintessential example of insider/outsider jurisprudence is the way in which the white man treated the Indians and removed them from their land. The "Marshall trilogy,"[5] *which consists of three early Supreme Court cases written by Chief Justice Marshall, began this removal. The first of these cases,* Johnson v. M'Intosh, *dealt with the right of Indians to give or*

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2. BLACK'S LAW DICTIONARY 855 (6th ed. 1990). The applicable portion of the definition follows:

> [W]hen a new or doubtful case arises to which two different rules seem, when taken literally, to be equally applicable, it may be, and often is, the function of jurisprudence to consider the ultimate effect which would be produced if each rule were applied to an indefinite number of similar cases, and to choose that rule which, when so applied, will produce the greatest advantage to the community.

Id.

3. Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQ. J. 103, 133 (1987).

4. *See* Robert A. Williams, Jr., *Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context*, 24 GA. L. REV. 1019, 1019 (1990). "There is an outsider's jurisprudence growing and thriving alongside mainstream jurisprudence in American law schools. The new feminist jurisprudence is a lively example of this. A related, less celebrated, outsider jurisprudence is that belonging to people of color." *Id.* at n.1 (quoting Mari Matsuda, *Public Responses to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 (1989)).

5. The Marshall trilogy is composed of Johnson v. M'Intosh, 21 U.S. 543, 572 (1823) (Indians could not pass title to land absent the consent of the United States government); Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (Cherokee Nation was held not to be a foreign nation so that the United States Supreme Court did not have original jurisdiction under Article III Section 2 of the Constitution; however, the Court commented favorably on the plaintiff's claim and described the tribes as "domestic dependent nations" resembling a "ward to his guardian"); and Worcester v. Georgia, 31 U.S. 515 (1832) (States can have no jurisdiction in Indian country except under the treaties or acts of Congress).

Georgia has recently pardoned Samuel Austin Worcester and Elihu Butler, missionaries who attempted to help the Cherokees in the early 1800s. The pardon acknowledges that Georgia usurped Cherokee sovereignty and ignored United States Supreme Court orders that would have precluded the removal of Cherokees from their land. *Cherokee Land Mistake Is Admitted*, RICHMOND TIMES-DISPATCH, Nov. 23, 1992, at A3.

Analysis of *Cherokee Nation* and *Worcester* is beyond the scope of this paper.

sell land.[6] *Marshall reviewed the nature of European discovery and conquest, stating that*

> *the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. . . . [T]heir rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.*[7]

In other words, since colonists "discovered" the land, they got exclusive title to it by virtue of discovery. Marshall stated that "[t]he history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles."[8] *"Universal recognition" by the white man, perhaps. The Supreme Court's universe did not include the Indians and other native peoples "discovered" and "conquered" by the European nations. These outsiders had no say in the white man's jurisprudence.*

Even if discovery and conquest were the principles upon which the nation had been built, the United States Supreme Court certainly could have rejected them. Although the legal world is built upon precedent, it is not uncommon for the Supreme Court to turn the law upside down with opinions reversing a long line of legal theory.

Chief Justice Marshall further reasoned that "discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[9] *This reasoning totally ignores the fact that the Indians already occupied the new world! The Indians had already "discovered" the land. What Marshall says is essentially that might makes right. What the strong white man wants, he takes. Nowhere does Chief Justice Marshall consider the Indians' views, how Indians will be affected by the Supreme Court decisions, or whether the white man has a moral right to take exactly what he wants. The Indians are totally outside the picture. Everything is observed from the white man's point of view.*[10]

This is how the story goes: the white man arrives and moves into the Indians' land. With better weapons, the white man overpowers the Indians and, using the white man's laws, takes for restricted use, by limited numbers of white men, the land that had been inexhaustible and bountiful under the Indians' stewardship. Land that had completely satisfied the Indians' needs was now parceled out to individual landowners, preventing use and enjoyment by others. The white man did not attempt to under-

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6. Johnson, 21 U.S. at 572.
7. *Id.* at 574.
8. *Id.*
9. *Id.* at 587.
10. The arrogance of the white man was prominently displayed in *Johnson v. M'Intosh.* Today, it is questionable whether this arrogance has receded, or whether the insider jurisprudence of the American legal system continues to ignore any point of view other than that of the white man.

stand the unfamiliar Indian culture and stewardship of the land. Instead, he imposed upon the natives his own patriarchal modes of life and legal thought. While escaping the tyranny of the English king in the old country, the white man brought his own tyranny to the new world and imposed it upon the Indians through legal doctrines of discovery and conquest, reserving the promised rights of Indian sovereignty for times when it suited the white man.

Some observers disagree with this negative view of these Supreme Court decisions and believe that the decisions in the Marshall trilogy gave the Indians a good basis of protection in the American legal system. These observers believe there is a difference between the history of the white man's dealings with the Indians and the legal principles that came out of that history.[11] *For example, the Marshall trilogy creates for the Indians 1) an independent nature of the tribes, although still under the federal government, 2) a trust relationship between the tribes and the federal government, and 3) limitations on state authority such that states have no jurisdiction in Indian country absent explicit federal authorization.*[12] *These observers believe that such legal principles protected the Indians' sovereign rights, although admittedly under the auspices of the United States government.*

Relatively recent Indian law cases, however, have chipped away at these protections.[13] *It is now questionable whether, on their own reservations, Indians have jurisdiction over the lands owned by non-Indians. This jurisdictional uncertainty creates interesting problems. For example, environmental regulation must be consistent throughout a region in order to be effective. If the Indian landowner on one side of a creek is subject to different pollution laws from the non-Indian landowner on the other side, and this is true every few acres throughout the reservation, the overall beneficial impact of the more stringent regulation is diminished.*

If we accept that white man's law and culture was the best and only system that could have been imposed on the new world, and that no compromise of the doctrines of discovery and conquest was feasible, then perhaps the Marshall trilogy provided fair protection to the Indians. Indeed, those decisions cannot be changed at this late date. Is it not feasible, however, that Marshall and the Supreme Court could have come to a different conclusion? Maybe the white man could have compromised with the Indians and the white man could have lived on reservations. Maybe the white man and Indian tribes could have made treaties agreeing that the white man would never allow his progressive, technological road to the future to

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11. W. Richard West, Jr., Director, National Museum of the American Indians, Smithsonian Institution, Remarks as Allen Chair Visiting Professor at the University of Richmond, T.C. Williams School of Law (Jan. 29, 1992).

12. *Id.*

13. *See, e.g.*, Duro v. Reina, 495 U.S. 676 (1990); Brendale v. Confederated Tribes & Bands of Yakima, 492 U.S. 408 (1989). For a discussion of these cases, see *infra* text accompanying notes 88-110.

pollute or damage in any way the pristine lands of the Indians. These ideas most certainly were never considered.

Instead, fear motivated the white man to dominate the Indians. Marshall described the Indians as "fierce savages . . . brave and high spirited . . ., ready to repel by arms every attempt on their independence."[14] *Nevertheless, the white man's greater power allowed him to conquer the new world and take the land and the resources for himself, without negotiations with Indian outsiders whose ways and laws were different. Thus, the Indians were pushed out. Marshall reasoned that:*

> *However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. . . . However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.*[15]

This passage seems to say, "well, perhaps taking the Indian land wasn't moral, but we did it and have lived with it this long, so we won't change it now." But the courts of justice could have rejected the discovery and conquest doctrines. The Supreme Court had at least two choices in determining the outcome of Johnson v. M'Intosh, *and it chose the white man's insider jurisprudence. Had the Supreme Court the foresight to consider the Indian point of view, perhaps the entire problem of insider/outsider jurisprudence would not be at issue in our country today. Everyone, regardless of race, sex, creed, or sexual preference, might have their own place inside our system of jurisprudence.*

Since the time of the Marshall trilogy, the United States government has attempted to assimilate and relocate Indian tribes and people. The government has also terminated the government-recognized status of many Indian tribes.[16] *The white man's wisdom claimed it would be socially*

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14. Johnson v. M'Intosh, 21 U.S. 543, 590 (1823).

15. *Id.* at 591-92.

16. Although most governmental and legal intervention in Indian affairs has reduced Indian self-determination, not all intervention has ignored the unique circumstances and needs of the Indian people. For example, courts recognized that Indians were at a bargaining disadvantage when it came to the English language. To resolve this inequity, the courts created a rule of construction holding that ambiguous terms in a treaty must be construed in favor of the tribe or in the manner that the Indians would most likely have interpreted it. *See* United States v. Choctaw Nation, 179 U.S. 494, 531-32 (1900). From 1790 to 1834, Congress passed Indian Trade and Intercourse acts to protect the tribes from non-governmental third parties. Under these acts, non-Indians had to have a license to trade with Indians on their lands, and purchase of Indian land was invalid unless it was made pursuant to a treaty or congressional action. *See* Oneida Nation v. County of Oneida, 414 U.S. 661, 667-72 (1974). Finally, in recent years, Congress has recognized that Indian tribes should have the

integrating for the Indians to learn to farm,[17] *to become educated and*

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option of political self-determination and economic self-sufficiency. Resulting legislation includes the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C.S. §§ 450-458e (Law. Co-op. 1992)).

For an overview of the struggles of Indians in Canada, the United States and Latin America to achieve self-government, see Michael S. Serrill, *Struggling to Be Themselves*, TIME, Nov. 9, 1992, at 52.

17. *See generally* General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354, 381 (1983)). The General Allotment Act empowered

> the Bureau of Indian Affairs to allot 160 acres of tribal land to each head of household and forty acres to each minor. Allotments were originally to remain in trust for twenty-five years, where they would be immune from local property taxes during the period of transition from being a tribally owned communal resource to an individually owned piece of land managed and used like surrounding non-Indian farms and ranches.
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> . . . .
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> The allotment policy is best understood, perhaps, when analogized to a land reform policy imposed from the top down without tribal input and consent; a policy grossly undercapitalized, providing as little as ten dollars and less per allottee for implements, seeds, and instruction; a policy insensitive to the hunting and food gathering traditions of non-agricultural tribes; and a policy devoid of any cultural understanding of the roles of the *tiyospaye* (e.g., the extended family of the Lakota) in which the allotments that were often assigned to individuals were located outside their home communities beyond their natural habitat. . . .
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> The results were truly devastating. The national Indian land estate was reduced from 138 million acres in 1887 to fifty-two million acres in 1934. More than twenty-six million acres of allotted land was transferred from the tribe to individual Indian allottees and then passed to non-Indians through sale, fraud, mortgage foreclosures and tax sales.
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> . . . [T]hirty-eight million acres of unallotted tribal lands were declared "surplus" to Indian needs and were ceded to the federal government for sale to non-Indians. The federal government opened to homesteading another twenty-two million acres of "surplus" tribal land. . . .
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> These ravages had equally scarring collateral effects. For the first time, the reservations became checkerboarded with tribal, individual Indian, individual non-Indian, and corporate ownership. Individual Indian allotments quickly fractionated within two or three generations, often resulting in dozens or even hundreds of heirs. Even land that remained in trust was more often leased to non-Indians than uses by the allottees.
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> . . . Some commentators have argued that when the reservations were opened, true traditional governments were essentially doomed in most tribes, and the authority of any form of tribal government was undermined. The great influx of non-Indian settlers coupled with the loss of communal lands and the attendant yoke of federal support of these policies simply eradicated much of the tribes' ability to govern. And in the resulting void, the Bureau of Indian Affairs, in league with Christian missionaries, became the true power brokers and the *de facto* governing forces.
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> The missionaries, in particular, wreaked a debilitating havoc with their religious and educational programs, particularly the boarding school program which took Indian children away from their families for substantial periods of time and specifically forbade the speaking of tribal languages in school. Under these circumstances, it is not difficult to perceive the strain and pressure placed on traditional culture. This is even more apparent when these policies were joined to Bureau of Indian Affairs di-

learn the white man's ways, and to benefit from the white man's culture.[18] *Despite the government's efforts, these attempts failed to divest the Indians of their heritage. The government took Indian children to be educated at "white" schools, hoping to bring them up in the American way of life.*[19]

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rectives outlawing traditional religious practices such as the Sun Dance. As a result, the heart of the culture was driven underground into a shadow existence.

Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 255-57 (1989) (footnotes omitted).

18. The Indian Reorganization Act of 1934 (IRA) ended the period of allotment, encouraged tribal governments to adopt constitutions and bylaws, and regulated the management of Indian forests and grazing lands. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-78 (1983)). As one commentator noted,

> The reforms of the IRA, including explicit authorization and assistance in the adoption of tribal constitutions, sought to engender recovery from stultification. Yet the "new" opportunity held out in the IRA with its notion of "modern" tribal government was, and is, often perceived on the reservation as further evisceration of traditional tribal government with its emphasis on the "white man's way" of elections, English, and the written word.

Pommersheim, *supra* note 17, at 258. Other commentators write of the IRA:

> [A]lmost immediately in 1934 federal land-management authorities began to manipulate the tribal economies, which had evolved to accommodate traditional needs and environmental conditions. Stock-reduction programs were initiated to alleviate what was termed "overgrazing." These programs — applied against Indians, *not* against non-Indian ranchers leasing reservation land for grazing — were set into motion and, since 1935, more than half of all Indian livestock resources have been eliminated.

Ward Churchill & Winona LaDuke, *Radioactive Colonization and the Native American*, JOURNALIST REV., May-June 1985, at 95, 98.

19. A member of the Ojibway tribe recalls his experiences in the white schools:

> I was forced to go to a BIA [Bureau of Indian Affairs] boarding school and also to a Catholic mission school. I don't know which of these schools I remember more fondly. At the Catholic mission school we were made to sit in a room, all facing towards the front, and the good kind loving sister stood up there and she taught whatever it was she was teaching us. I hardly ever understood. When it came time to answer questions, she would say, "Edward, stand up and tell me, who was the King of Spain in 1492?" And I would stand up and say, "I don't know." Only I would say it in Ojibway, not English — for which I was summarily snatched by the ear and marched up in front of the room and told to stretch out my hands, palms down, and the good kind loving sister would hit the backs of my hands twelve times with her yardstick. That was repeated almost daily. I never did learn who the hell the King of Spain was. Maybe I should have. Maybe my little finger would be straight now. . . . And then there was the BIA boarding school. I happened to go to a very endearing institution called the Pipestone Indian Training School. I'll never forget my first day there. We'd been riding on a school bus the better part of the day from Wisconsin to southwestern Minnesota, and we arrived at Pipestone around midnight. I thought for sure they would feed us — but they didn't do that. They marched us all, boys in one direction and girls in the other, and the first stop was this little room that had four chairs in it. And there everybody got their hair lopped off. I remember how I cried. My mother used to take care of my braids and, I remember, when I left her earlier that day, she had tied an eagle plume in my hair. She said, "I want you to look nice when you get there." She also told me, "Always remember to take care of your hair. Braid it when you can but for sure keep it clean, comb it, tie it back. But always remember, when you go out to pray your hair must be in braids. And I want you to keep this eagle

The government gave Indians limited allotments of land on which to farm and made the "surplus" land available to whites.[20] *Throughout it all, however, the Indians held their culture closely. Did the government ask the Indians what they thought of these plans? No — if the families had wanted to give up their children to the white man's education they wouldn't have tried to hide them from the authorities who came to take the children away.*[21] *Once again, the white man's government operated from the white man's perspective without considering the Indian needs and inclinations.*

Today, many Indian tribes live on reservations and some, like the Pueblos, maintain their own land which is not a reservation. Some tribes have natural resources, such as uranium, on their land; others have no natural resources. Most Indians live in relative poverty, with few economic resources on the reservations. It has been asserted that

> *Native Americans, on the average, have the lowest per capita income, the highest unemployment rate, the lowest level of educational attainment, the shortest lives, the worst health and housing conditions and the highest suicide rate in the United States. The poverty among Indian families is nearly three times greater than the rate for non-Indian families and Native people collectively rank at the bottom of every social and economic statistical indicator.*[22]

In an attempt to escape this extreme poverty, some tribes are taking on industries typically considered unclean and contemptible, such as waste dumps and gambling. The Indians, insiders on their own reservations, are anxious to gain economic footing and are willing to undertake what other Americans are not. States containing reservations are concerned about the potential criminal activity and environmental hazards associated with

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plume with you until we get back together." That same night they chopped off my hair. And I mean they cut it right down to the skin. And there on the floor lay my pretty eagle plume and the braids that my mother had so carefully fixed and tied. That was the first atrocity I experienced at the BIA boarding school. From that room we were marched into a shower — a big, long, common shower — and some kind of substance was poured all over us to "delouse" us, they said. That was the second atrocity. Then all of our clothes were taken away from us and we were all dressed in blue coveralls. If we were wearing moccasins, those were taken away and we were all put into government-issue black shoes. So that was my first day at the BIA boarding school, and I shall always remember that. I will let you guess which one of those boarding schools I loved the best.

STEVE WALL & HARVEY ARDEN, WISDOMKEEPERS: MEETING WITH NATIVE AMERICAN SPIRITUAL ELDERS 52-55 (1990) (interview with Eddie Benton-Banai).

20. See Pommerstein, *supra* note 17, at 256.

21. West, *supra* note 11.

22. W. Richard West, Jr., *From* Cherokee Nation v. Georgia *to the National Museum of the American Indian: Images of Indian Culture*, 15 AMER. INDIAN L. REV. 409, 410-11 (1990-91) (quoting U.S. COMM'N ON SEC. & COOPERATION IN EUR., FULFILLING OUR PROMISES: THE UNITED STATES AND THE HELSINKI FINAL ACT 156 (1979)). Mr. West notes that although the study was done in 1979, "[t]o the best of my knowledge not one of these statements has ceased to be true during the past decade." *Id.* at 411.

these pursuits. States want to regulate the reservations, and those states with laws against gambling want those laws to apply on the reservations. The Indians, on the other hand, want to maintain what sovereignty the United States government allows them and to avoid the binding effects of state laws and regulations.

The federal judiciary has decided cases on various topics concerning the jurisdiction and sovereignty of the Indians on their reservations. So far, the trust relationship between the federal government and the Indians and the policy of Indian sovereignty and self-determination have allowed the Indians to keep some of their power/jurisdiction intact. However, in some situations the states have taken over jurisdiction, at least of those lands belonging to non-Indians on reservations.

It is time for the tribes to have more control over their reservations.[23] *It is time that the tribes are given an inside position in American jurisprudence. Land is the only resource available to the tribes, and the Indians should be able to make use of the land as they see fit. Waste dumps must go somewhere. If the Indians want waste dumps, and if, like all other American citizens who must be licensed to do something, they show themselves capable of the task at hand, they should be allowed to operate waste facilities.*

The situation seems familiar enough. Take the medical field. Doctors take the Hippocratic Oath, swearing to heal people. What a wonderful promise! But then patients appear who don't want to be healed by modern medicine: Christian Scientists; patients who have incurable, painful diseases and want to die; or under-educated patients who are afraid the medical procedures will be worse than their illnesses. Whose should be controlling — the doctor's or the involuntary patient's?

Likewise, who should decide what is best for the Indians? The white man's doctor? Or the Indian elders? If the white man takes responsibility, but the "cure" or regulations don't work, then under the white man's law, the best route was taken and nothing can be done about it. The white man suffers no liability for the failure. If the Indians are given responsibility, however, and the Indians make a choice that doesn't work, will they be held responsible because they made the "outsider" choice? Even if the Indians choose the white man's way, will they be held responsible for failure because they are outsiders?[24]

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23. There are conflicting opinions about the Indians' ability to regulate themselves. For example, Robert A. Williams, Jr., an Indian legal scholar who works with Indian tribes, is not certain that Indians are prepared for the responsibilities of full domestic sovereignty. *See infra* text accompanying note 131.

24. Perhaps Congress would react with "see, we knew we should not have given the Indians so much responsibility. We knew they would not be able to handle it." According to the Supreme Court, "[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." Rice v. Rehner, 463 U.S. 713, 719 (1983) (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978) (emphasis in *Rice*)). Therefore, Congress, with its "plenary power" over the Indians, could take away the Indians' remaining sovereignty if it disagreed with the Indians'

As the legal situation now exists, the Indians seem damned if they do and damned if they don't. Below you will find legal analysis of some recent Indian cases. As one of the Indians I've talked with said, "No one knows what the law is!"[25] *The Environmental Protection Agency (EPA) has decided to treat the Indians as having environmental jurisdiction over the entire reservation. This decision delegates federal power to the Indians; it does not give them environmental decision-making powers over the reservation. Supreme Court decisions find limited jurisdiction in other areas of the law. The Court has yet to decide a case dealing with Indian reservation environmental regulation. But lower court cases do damn the Indians both ways! One case says Indians have no authorization to regulate waste on their reservation,*[26] *while another case holds the Indians liable for the waste despite the lack of authority and Indian arguments favoring sovereign immunity.*[27]

I am of the opinion, although it is not legally grounded, that the tribes should have environmental jurisdiction. After the way the United States has historically treated the Indians, it is time for the courts to treat them as sovereign on the reservations. If non-members living and working on reservations don't like tribal sovereignty, they can move their homes and businesses elsewhere. Because of the way the judicial system treated the Indians, however, they have nowhere else to go. The reservation land — their home, their Mother, their earth — is all they have.

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handling of a situation. *See* Judith V. Royster & Rory S. Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 587-90 (1989). For example:

> [O]ne of the primary tenets of the plenary power doctrine is the unilateral power of the federal government to legislate specifically regarding native peoples, lands, and governments, and to exercise near complete control over significant aspects of native life.
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> . . . In stark fact, it means that congressional whim ultimately can control fully the tribal exercise of sovereign powers. Under the ruse of plenary power, Congress can strip tribes of specific governmental powers, force state jurisdiction onto unconsenting and unwilling native governments, unilaterally abrogate native treaties, or choose even to end the existence of tribes as federally recognized entities. Congressional exercise of its plenary power frequently is said to be subject to the restraints of the Constitution and the federal-Indian trust doctrine, through the mechanism of judicial review. These restraints, however, ultimately are ineffective defenses . . . [and] do not prevent Congress from acting, but only permit the subsequent remedy of money damages in selected instances.

Id. (footnotes omitted).

25. David Harrison, Executive Director, National Tribal Environmental Council, Remarks as Allen Chair Visiting Professor at the University of Richmond, T.C. Williams School of Law (Feb. 19, 1992). Mr. Harrison is Executive Director of the National Tribal Environmental Council. The author gratefully acknowledges Mr. Harrison's help in providing research materials that made this article possible.

26. Washington, Dep't of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985).

27. Blue Legs v. EPA, 668 F. Supp. 1329 (D.S.D. 1987).

You're a history buff. Do you disagree? Read on, and see how you think the Supreme Court will decide the issue.

With much affection,

Sally

STATES AND INDIAN TRIBES: WHO CALLS THE ENVIRONMENTAL SHOTS ON RESERVATIONS?

I. A QUESTION OF JURISDICTION

A. *State Concerns*

States and Indian tribes alike have compelling reasons for demanding regulatory jurisdiction over the Indian reservations' environments. Proponents of state regulation argue that "[a] state's ability to coordinate a successful and comprehensive hazardous waste management plan depends at least in part on state control of all hazardous waste activity within its borders."[28] In some states, the reservations are not isolated from the activities and residents of the state. In Washington state, for example, some Indian reservations have a high percentage of non-Indian residents, and others contain cities, municipalities, and heavily industrialized areas.[29] This "checkerboard"[30] reservation developed from the federal government's policy to make "surplus" reservation lands not allocated to the Indians available to non-Indians.[31] Now, states want to avoid checkerboard environmental regulation, and Washington, for example, "fear[s] that there would be an incentive for hazardous waste actors to locate on reservations if they could avoid the state's more stringent standards by doing so."[32]

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28. Leslie Allen, *Who Should Control Hazardous Waste on Native American Lands? Looking Beyond* Washington, Dep't of Ecology v. EPA, 14 ECOLOGY L.Q. 69, 72 (1987).

29. *Id.* at 71-72. Allen notes, for example, that

> ninety-nine percent of the Puyallup Native American Reservation is owned by non-Native Americans, tribal members having alienated all but twenty-two acres of their 18,000 acre reservation. Eighty percent of the residents of the Yakima Indian Reservation and fifty percent of the residents of the Colville Reservation are non-Native Americans. In addition, some reservation lands encompass municipalities that operate pursuant to Washington law. For example, the City of Toppenish lies within the Yakima Indian Reservation, and much of the heavily industrialized city of Tacoma is located within the Puyallup Indian Reservation.

Id. (footnotes omitted).

30. "Checkerboard" refers to the inconsistent ownership and use of land on Indian reservations. Instead of a solid block of Indian-owned land, checkerboard reservations contain lands owned by non-Indians and even municipalities where no Indians live. For specific examples, *see supra* note 29.

31. See Pommersheim, *supra* note 17, at 256.

32. Allen, *supra* note 28, at 73.

B. *Indian Concerns*

Indian tribes have similar concerns and converse arguments. Washington tribes fear "that their reservations would become 'dumping grounds' for off-reservation hazardous wastes if the state is permitted to control the hazardous waste program on the reservations."[33] The tribes want control of the only land they have. One Indian advocate has indicated that if the environment on the reservation becomes degraded, Indian tribes have no means to move elsewhere.[34] Thus, reservations, as both home and economic base to over three hundred tribes throughout the country, must be protected to meet both the present and future needs of the Indians.[35]

Reservations are important to the Indians not only for economic purposes but also for preservation of the Indians' cultural and emotional attachment to the land. Even in contemporary reservation life, Indian people consider the land their Mother and find solace and nurturing there.[36]

Much of the Indians' devotion to the land is foreign to western thought. Still, the Indian dedication to and connection with the land is well-known. It leads the Administrator of the EPA to call the Indians "the country's first and arguably best stewards" of the environment.[37] From the Indians' point of view, environmental degradation of the reservation means further destruction of their land base.[38] Since they have the greatest interest at stake, the Indian tribes do not trust anyone but themselves to protect the land. Therefore, they insist that the tribal governments,

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33. Washington, Dep't of Ecology v. EPA, 752 F.2d 1465, 1470 (9th Cir. 1985).

34. Letter from Margaret B. Crow, California Indian Legal Services, to E. Donald Elliott, General Counsel, EPA (Dec. 10, 1990) (on file with author).

35. *Id.*

36. One commentator describes the Indian relationship with the land this way:

> Land is inherent to Indian people; they often cannot conceive of life without it. They are part of it and it is part of them; it is their Mother. . . . [I]t is a cultural centerpiece with wide-ranging implications for any attempt to understand contemporary reservation life.
>
> . . . .
>
> The reservation is home. It is a place where the land lives and stalks people, where the land looks after people and makes them live right, a place where the earth's ways provide solace and nurture. Yet, paradoxically, it is also a place where the land has been wounded and the sacred hoop has been broken; a place where there is the stain of violence and suffering. And it is this painful dilemma that also stalks the people and their Mother.

Pommersheim, *supra* note 17, at 250-51 (footnotes omitted).

37. Letter from William K. Reilly, Administrator, EPA, to Michael T. Pablo, Chairman of the Tribal Council, The Confederated Salish and Kootenai Tribes (June 19, 1989) (on file with author).

38. EPA, Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments 1 (policy statement, signed by EPA Administrator William K. Reilly on July 10, 1991) [hereinafter EPA, Federal, Tribal & State Roles].

rather than state governments, be allowed to oversee and protect the reservation environments.[39]

C. *EPA Policy*

The EPA has decided to view the Indian tribes as the government entities responsible for carrying out programs affecting the Indian reservations, the reservation environments and the health and welfare of individuals living there.[40] Tribes must be approved on a case-by-case basis, however. Each tribe must demonstrate competent jurisdiction over sources of pollution on the reservation.[41] The EPA policy gives the approved tribes border-to-border jurisdiction over the entire reservation, regardless of whether the land is owned by Indians or non-Indians, and regardless of the non-Indian population on the reservation.[42] The EPA acknowledges each state's interest in its citizens living on reservations and the concern that reservation pollution might affect other parts of the state.[43] The agency "encourages cooperation between state, tribal and local governments to resolve environmental issues of mutual concern."[44]

II. Federal Indian Case Law

Western states, where most Indian reservations are located, are opposed to the EPA's decision.[45] Based on certain recent Supreme Court decisions,[46] the states argue that they should have authority over the tribes. The law is very unclear, and each side has legitimate arguments in

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39. *Id.*

40. *Id.* at 3.

41. *See id.* at 3-4. The EPA policy statement makes clear that

> the Agency will view Indian reservations as single administrative units for regulatory purposes. Hence, as a general rule, the Agency will authorize a tribal or state government to manage reservation programs only where that government can demonstrate adequate jurisdiction over pollution sources throughout the reservation. Where, however, a tribe cannot demonstrate jurisdiction over one or more reservation sources, the Agency will retain enforcement primacy for those sources. Until EPA formally authorizes a state or tribal program, the Agency retains full responsibility for program management.

Id.

42. *See* Letter from B. Leigh Price, Jr., Indian Law Counsel, EPA, Region VIII, to Rennard J. Strickland, Professor, University of Oklahoma Law Center 1 (Dec. 24, 1991) (stating that "the reservation should be regulated as a legal and administrative unit, defined by exterior, political boundaries, and not be subdivided into Indian and non-Indian areas") (on file with author).

43. *See* EPA, Federal, Tribal & State Roles, *supra* note 38, at 2.

44. *Id.* at 3.

45. *See, e.g.*, Letter from Harley R. Harris, Montana Assistant Attorney General, to E. Donald Elliott, General Counsel, EPA (Aug. 2, 1990) (on file with author).

46. *See* Duro v. Reina, 495 U.S. 676 (1990); Brendale v. Confederated Tribes & Bands of Yakima, 492 U.S. 408 (1989).

support of its view. Not only is the case law ambiguous regarding the status of tribal jurisdiction, but, as discussed below, the federal environmental statutes do not treat this issue consistently.[47]

A. *Environmental Decisions*

1. *Washington, Department of Ecology v. EPA*

In *Washington, Department of Ecology v. EPA*,[48] the EPA refused to permit Washington state to regulate Indian reservations under the Resource Conservation and Recovery Act [RCRA].[49] RCRA allows states to implement their own waste management programs in lieu of following the federal program.[50] The statute applies to all persons' activities[51] and includes Indians in the definition of "persons."[52]

In *Washington, DOE v. EPA*, the Ninth Circuit found that RCRA does not authorize the states to regulate Indians on Indian lands, but the court did not determine whether a state could regulate non-Indians on Indian land.[53] The statute does not state, nor does legislative history indicate, whether the states may enforce hazardous waste regulations against Indian tribes.[54] The Ninth Circuit deferred to the federal agency decision, reasoning that since the statute was silent on the issue, the court must defer to the rational construction of the agency charged with administering the statute.[55] By virtue of the gap in RCRA, Congress had implicitly delegated the policy-making authority to the EPA.[56]

A court must defer to an administrative agency as long as the agency's construction of the statute is reasonable, even though there may be other reasonable interpretations.[57] Citing *Chevron, Inc., v. Natural Resources Defense Council*, the Ninth Circuit noted that deference to the agency is particularly important when ordinary knowledge of the regulations' sub-

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47. *See* Amanda K. Wilson, *Hazardous & Solid Waste Dumping Grounds Under RCRA's Indian Law Loophole*, 30 SANTA CLARA L. REV. 1043, 1065-68 (1990) (discussing model statutes for amendments to RCRA); Royster & Fausett, *supra* note 24, at 614-28 (discussing authority of "states" and how the Indian tribes fit in federal environmental statutes).

48. 752 F.2d 1465 (9th Cir. 1985). For a good discussion of this case, see Wilson, *supra* note 47, at 1061-63.

49. *Washington, Department of Ecology*, 752 F.2d at 1466. RCRA is codified at 42 U.S.C. §§ 6901-6991i (1988).

50. 42 U.S.C. § 6926.

51. *See id.* § 6928.

52. *See id.* § 6903(13), (15).

53. *Washington, Department of Ecology*, 752 F.2d at 1467-68.

54. *Id.* at 1469.

55. *Id.* (citing Chevron, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)).

56. *Id.*

57. *Id.*

ject matter is insufficient to fully understand the statutory policies.[58] Following this logic, the reasonable interpretations of EPA should always win out over the reasonable interpretations of the states, given that the EPA is the expert in the field of environmental protection. Therefore, as long as the EPA continues to support the Indian tribes' stewardship of the reservation environments, and Congress makes no changes to the statute, Indian tribes should be assured that states will not be given environmental jurisdiction over the reservations.

The Ninth Circuit also found in *Washington, Department of Ecology v. EPA* that well-settled federal Indian law principles supported EPA's interpretation of RCRA. For example, absent clear congressional intent, "[s]tates are generally precluded from exercising jurisdiction over Indians in Indian country."[59] The federal government plays a fiduciary role in protecting Indian rights from state intrusions,[60] and Indian tribes have a long tradition of sovereignty.[61] Finally, ambiguous statutes must be weighed against the " 'backdrop' of tribal sovereignty,"[62] particularly when the statute concerns an area in which federal policy supports tribal sovereignty or where tribes traditionally have exercised their sovereign powers.[63]

These well-settled principles of Indian law seem to provide the Indians strong protection against state intrusion,[64] particularly where, as in this case, the principles are combined with the *Chevron* deference to agency doctrine that also protects the tribes from intrusion. The principles lack the strength, however, to automatically garner the tribes' regulatory authority under RCRA. Although the Ninth Circuit denied Washington state regulatory authority over the tribes, it did not give the tribes authority under RCRA to regulate the reservations. Instead, the court held that the EPA retained authority over the Indian reservations.[65]

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58. *Id.* (citing *Chevron*, 467 U.S. at 844 (quoting United States v. Shimer, 367 U.S. 374, 382 (1961))).

59. *Id.* at 1469-70 (citing Bryan v. Itasca County, 426 U.S. 373, 376 n.2 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973)).

60. *Id.* at 1470. The tribes fear their reservations will become "dumping grounds" for Washington's hazardous waste if the state controls reservation waste programs. *Id.*

61. *Id.*

62. *Id.* (citing Rice v. Rehner, 463 U.S. 713, 719 (1983)).

63. *Id.*

64. *But see* cases cited *supra* note 13 (whittling away the protections of the Marshall trilogy).

65. *Washington, Department of Ecology*, 752 F.2d at 1472.

2. *Blue Legs v. EPA*

In a 1987 federal district court case, *Blue Legs v. EPA*,[66] the court held that implementation of RCRA regulations for nonhazardous waste was not the direct responsibility of the EPA but of the tribe.[67] The court distinguished *Washington, Department of Ecology v. EPA*[68] on the ground that *Washington, Department of Ecology* involved hazardous waste,[69] for which Title III of RCRA explicitly required implementation of a program by the EPA.[70] With regard to nonhazardous waste under Title IV of the Act, however, the *Blue Legs* court found that the EPA has no congressionally granted authority over open dumping.[71] Instead, the Indian tribe itself regulates open dumping through tribal ordinances created by the tribal council.[72] Thus, the court in *Blue Legs* interpreted RCRA as holding the tribe responsible for preventing open dumping on tribal lands.[73]

3. Resulting Confusion

The dichotomy between *Washington, Department of Ecology* and *Blue Legs* seems strained. The *Blue Legs* court distinguished the cases on the basis of the type of trash dumped, interpreting RCRA to require Indian tribes to maintain responsibility for nonhazardous waste and the EPA to govern procedures for handling hazardous waste on reservations.[74] The line between hazardous and nonhazardous waste is not so clear; however any type of waste can be potentially harmful to human health or the environment.[75] Arguably, the waste management industry's knowledge of how "nonhazardous" wastes break down and combine with one another in nonhazardous waste sites is not sufficiently advanced to say absolutely that certain wastes pose hazards and others do not. In light of this uncertainty, the decisions to hold Indians liable for some forms of waste but to deny them the authority to regulate other forms of waste appear to be arbitrary and patronizing.

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66. 668 F. Supp. 1329 (D.S.D. 1987).

67. *Id.* at 1341.

68. 752 F.2d 1465 (9th Cir. 1985).

69. *Blue Legs*, 668 F. Supp. at 1338-39.

70. *Id.* at 1339.

71. *Id.*

72. *Id.*

73. *Id.* at 1341.

74. For an excellent article on the application of RCRA to Indian reservations, see Wilson, *supra* note 47.

75. RCRA defines hazardous waste as waste that may 1) materially contribute to a rise in mortality or increase in certain serious or incapacitating illnesses or 2) pose a significant present or potential threat to the environment or human health when improperly managed. 42 U.S.C. § 6903(5) (1988).

B. *Non-Environmental Decisions*

The United States Supreme Court has yet to decide any case addressing the question of Indian jurisdiction over environmental issues on the reservation. The Supreme Court has, however, analyzed several issues in recent years concerning the power of Indian tribes to regulate non-member residents of the reservation in the areas of hunting and fishing on non-Indian fee land,[76] criminal activities,[77] and zoning.[78] These Supreme Court cases have tended to diminish the Indian tribes' sovereign powers over non-members on non-Indian fee land. Some observers and officials in western states believe that this erosion of Indian sovereignty indicates that the Supreme Court will not recognize Indian border-to-border environmental jurisdiction on reservations.[79] Indian tribes and the EPA, on the other hand, believe that the fact-specific nature of these cases, the continuing federal policy of Indian self-government and the *Chevron* rule of deference to the federal agency together indicate that the Supreme Court will allow the Indians to have border-to-border environmental jurisdiction on the reservations.[80]

1. *Montana v. United States*

In 1980, the Supreme Court decided *Montana v. United States*,[81] a case concerning the power of Indian tribes to regulate hunting and fishing by non-members on reservation land owned by non-members.[82] *Montana v. United States* contains several notable observations by the Court. First, absent specific congressional delegation, tribal authority is limited to protection of tribal self-government and control of internal affairs.[83]

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76. *See* Montana v. United States, 450 U.S. 544 (1980).

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

78. *See* Brendale v. Confederated Tribes & Bands of Yakima, 492 U.S. 408 (1989).

79. *See, e.g.*, Peter W. Sly, *EPA and Indian Reservations: Justice Stevens' Factual Approach*, 20 ENVTL. L. REP. 10,429 (1990); *see also* Letter from Duane Woodard, Attorney General, State of Colorado, to Thomas A. Speicher, Regional Counsel, EPA, Region VIII (Aug. 15, 1990) (on file with author) (asserting that *Brendale* is quite applicable to environmental regulatory matters).

80. *See* Regulatory Jurisdiction of Indian Tribes, 56 Fed. Reg. 64,876 (1991) [hereinafter Reg. Jur. of Indian Tribes] (to be codified at 40 C.F.R. § 131) (legal analysis of the EPA published in the Preamble to the Indian Reservation Water Quality Standards Regulation); Letter from B. Leigh Price, Jr., Indian Law Counsel, EPA, Region VIII, to Rennard J. Strickland, Professor, University of Oklahoma Law Center (Dec. 24, 1991) (on file with author); Letter from Richard A. Du Bey, Environmental Counsel, The Puyallup Tribe of Indians, to E. Donald Elliott, Assistant Administrator and General Counsel, EPA (Jan. 23, 1991) (on file with author); Letter from Margaret B. Crow, California Indian Legal Services, to E. Donald Elliott, General Counsel, EPA (Dec. 10, 1990) (on file with author).

81. 450 U.S. 544 (1980).

82. *Id.* at 547.

83. The Court stated the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent

Next, the Court stated that inherent tribal sovereign powers generally do not cover the activities of non-members.[84] The Court found exceptions to this general proposition, however, in that "tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."[85] For example, tribes may regulate non-member activities that involve the tribe or its members, such as contractual agreements, leases, commercial dealings, etc.[86] A tribe may also have civil jurisdiction over the activities of non-members when the conduct threatens "the political integrity, the economic security, or the health or welfare of the tribe."[87]

States might argue that the first of these points indicates that without specific authority given to Indians in federal environmental statutes, even the EPA cannot confer regulatory power over the reservations on the tribes. On the other hand, the environmental integrity of the reservation affects the health and welfare of the tribe, as well as its economic security, since the reservation includes only a finite amount of land that holds all the Indians' natural resources. Furthermore, in light of the Indians' cultural attachment to the land, any threat to their reservation is a threat to their tribal identity as well.

A non-member wishing to build a nuclear reactor or a hazardous waste facility on non-member fee land on the reservation might enter into commercial or contractual relations with the tribe by procuring supplies or employing tribal members. The non-member's project creates a potential threat to the health and welfare of the tribe. Under these circumstances, the *Montana v. United States* observations indicate that the Indians should have environmental jurisdiction over the entire reservation.

2. *Duro v. Reina*

In 1990, in *Duro v. Reina*,[88] the Supreme Court addressed a more direct intrusion on individual liberties[89] than the hunting and fishing rights issue presented in *Montana v. United States*. In this criminal case, a non-member[90] living on the reservation shot and killed a member of the tribe within the reservation borders.[91] The Court found that Indians, by virtue of their "dependent" status, are not full sovereigns and therefore cannot

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status of the tribes, and so cannot survive without express congressional delegation." *Id.* at 564.

84. *Id.* at 565.
85. *Id.*
86. *Id.*
87. *Id.* at 566.
88. 495 U.S. 676 (1990).
89. *Id.* at 693.
90. This individual was a member of another tribe.
91. *Duro*, 495 U.S. at 679.

enforce their laws against everyone entering their territory.[92] Rather, tribes have only "the retained sovereignty . . . needed to control their own internal relations, and to preserve their own unique customs and social order."[93]

The Court also made clear, however, that it still recognizes broader tribal powers outside the arena of criminal law.[94] It is only in the context of criminal enforcement that tribal power does not extend beyond internal relations among tribal members.[95] Thus, while the criminal context sharply curtails the tribes' jurisdiction over non-members on the reservation, *Duro* does not diminish tribal powers over non-criminal issues.

To the extent that environmental problems raise criminal issues, the *Duro* decision may curtail tribal environmental jurisdiction. However, when criminal activities are not involved in environmental issues, *Duro* should not restrict the power of Indian tribes observed above in the *Montana v. United States* discussion. In fact, even with criminal environmental laws, the *Chevron* rule of deference to the federal agency and the potential impact of environmental crimes upon the health and welfare of the tribe may outweigh the *Duro* considerations. Thus, the Supreme Court could find that tribes have jurisdiction even in cases involving environmentally related criminal activities.

3. *Brendale v. Confederated Tribes & Bands of Yakima*

In 1989, the Supreme Court decided *Brendale v. Confederated Tribes & Bands of Yakima*.[96] This case has generated much controversy and has added to the confusion in Indian law.[97] *Brendale* involved different zoning by the Yakima Nation and Yakima County for the same parcels of land on the Yakima reservation. The Yakima Nation challenged the county's authority to zone on the reservation. Some of the challenged zoning involved Indian-owned land; other zoning involved *non-member fee land on* the reservation.[98] The Yakima Nation sought a declaratory judgment that the tribe had exclusive authority to zone the properties in question.[99]

The Supreme Court could not garner a majority opinion in *Brendale*, and a divided Court found that the tribe had authority to zone in the tribal area of the reservation. The Court determined that the county had

92. *Id.* at 686.
93. *Id.* at 685-86.
94. *Id.* at 687.
95. *Id.* at 688.
96. 492 U.S. 408 (1989).
97. "The law after *Brendale* is an absolute muddle!" *See* Harrison, *supra* note 25.
98. *Brendale*, 492 U.S. at 408.
99. *Id.* at 419.

authority to zone in the primarily non-member area of the reservation.[100] While zoning may be best controlled by the particular community that defines the character of that part of the reservation, environmental threats to health and welfare will never be delimited by demography and should continue to fall within the *Montana v. United States* guidelines for tribal jurisdiction.

Justice Stevens wrote the controversial opinion in *Brendale* which focused on the demography of the reservation and asked whether the tribe had "the power to define the essential character of the territory."[101] In the area of the reservation reserved solely for members of the tribe,[102] Justice Stevens found that the tribe did have an interest in the character of the land and could zone there.[103] In the open area, however, the alienation of part of the property had created "an integrated community [not] economically or culturally delimited by reservation boundaries."[104] Therefore, the tribe's zoning interest in restraining inconsistent uses was substantially reduced.[105]

The EPA believes that since *Brendale* lacked a majority rationale, its primary significance is in its result.[106] *Brendale* stands for the proposition that in a zoning matter, where the political and economic status and the health and welfare of the tribe are not threatened, there is no tribal jurisdiction over non-member lands.[107] The EPA asserts that this result is consistent with and does not overrule the *Montana v. United States* pronouncement of tribal jurisdiction when conduct threatens the political and economic integrity or health and welfare of the tribe.[108]

III. Impact of Non-Environmental Decisions on Tribal Jurisdiction

Those who argue for state environmental jurisdiction over reservations believe that *Brendale* further undermines the tribes' sovereignty on the reservations. By focusing on the character of the land, and on whether

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100. *Id.* at 444-45. *See generally* Reg. Jur. of Indian Tribes, supra note 80 at 64,876 (arguing that *Brendale* is consistent with *Montana v. United States*).

101. *Brendale*, 492 U.S. at 444-45.

102. The Supreme Court opinions referred to this as the "closed area." The closed area has been closed to the general public at least since 1972 when the Bureau of Indian Affairs restricted the use of federally maintained roads in the area to members of the Yakima Nation and to its permittees, who must be record land owners or associated with the Tribe. Access to the open area, as its name suggests, is not likewise restricted to the general public.

Id. at 415-16 (White, J.).

103. *Id.* at 444 (Stevens, J., concurring).

104. *Id.*

105. *Id.* at 445.

106. Reg. Jur. of Indian Tribes, supra note 80, at 64,877.

107. *See id.* at 64,878.

108. *See id.* at 64,877-78.

the land is more Indian or non-Indian in character, the supporters of state environmental jurisdiction argue that *Brendale* overrides the second *Montana v. United States* exception. The *Montana* exception provides for tribal jurisdiction over non-member activity "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[109] The proponents of state jurisdiction argue that if an area of the reservation has lost its tribal character, the exception no longer applies.[110]

Tribes and the EPA, on the other hand, believe that *Brendale* and *Duro* address the exercise of naked inherent tribal power, while the environmental issue concerns the implementation programs authorized by federal statute and supported by long-standing federal policy fostering tribal sovereignty.[111] In a slightly different vein, those in favor of tribal jurisdiction note that in the provisions of certain federal environmental statutes, such as the Clean Water Act, the Safe Drinking Water Act, and the Clean Air Act, the federal government has explicitly delegated to Indian tribes the authority to regulate the environment throughout the reservation.[112] Ownership interest of land is not a factor under these Acts. Indeed, the delegation of power was not relevant to or limited by the tribes' inherent powers with which the Court dealt in *Brendale*.[113] From this observation it follows that Congress also intended to delegate regulatory authority to tribes under other environmental statutes, regardless of any limitations on the inherent powers of tribal government.

The EPA itself continues to support Indian tribal sovereignty finding *Brendale* to hold that a notable distinction exists between water quality management and land use planning.[114] The Supreme Court has explicitly acknowledged this distinction, observing that while land use planning mandates certain uses for land, environmental regulation directs only that harm to the environment be maintained within prescribed limits, without regard to how the land is used.[115] Based on this distinction, greater tribal power would be required to zone property than to regulate the environment. If this is the case, then *Brendale* deals with a higher level of sovereign power than that required for environmental jurisdiction

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109. Montana v. United States, 450 U.S. 544, 566 (1980).

110. *See, e.g.*, Letter from Duane Woodard, Attorney General, State of Colorado to Thomas A. Speicher, Regional Counsel, EPA, Region VIII (Aug. 15, 1990) (on file with the author).

111. Letter from Margaret B. Crow, California Indian Legal Services, to E. Donald Elliott, General Counsel, EPA (Dec. 10, 1990) (on file with author).

112. Letter from Senator Daniel K. Inouye, Chairman, Select Committee on Indian Affairs, to William K. Reilly, Administrator, EPA (Dec. 18, 1990) (on file with author).

113. *Id.*

114. Reg. Jur. of Indian Tribes, *supra* note 80, at 64,879.

115. *Id.* (quoting California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 587 (1987)).

and therefore has no legal impact on the tribes' power to regulate the environment.

IV. CONCLUSION

In light of the EPA's concern with pollution and its effects on the environment, it is not surprising that the EPA supports the Indian tribes as the regulatory agents governing reservations. The EPA has promised to protect the Indian reservation environments to the same extent that it protects the rest of the country,[116] and the Indians have the greatest interest in seeing that their reservations are well protected. The EPA recognizes the practical difficulties of permitting the states to regulate non-member reservation lands while the tribes regulate member lands. The mobile nature of pollution makes this arrangement ineffective and undesirable.[117] The EPA embraces the traditional concept of tribal self-government and therefore views the tribal governments as the appropriate non-federal entities for environmental decision-making on the reservations.[118] However, the EPA will continue to be guided by federal Indian law, EPA Indian policy, and its own responsibility to protect human health and the environment.[119]

There seems to be no definitive answer as to how the Supreme Court will decide the issue of tribal environmental jurisdiction. Existing Indian law is too jumbled to answer whether the Court will emphasize the "dependent nation" status of the tribes and deny environmental jurisdiction, or will allow Indian jurisdiction based on the doctrine of inherent tribal sovereignty and the federal policy of Indian self-government. As the above cases indicate, there has been a trend toward diminishing tribal sovereign rights, seemingly to protect the non-members living on reservations and to ensure that their rights under non-Indian laws are protected.[120] However, the tribes and their supporters have strong arguments in their favor for border-to-border environmental jurisdiction. A western state is likely to challenge the EPA soon.[121] If the Supreme Court decides

116. EPA, Federal, Tribal & State Roles, *supra* note 38, at 1.

117. *See* Reg. Jur. of Indian Tribes, *supra* note 80, at 64, 878.

118. EPA, Federal, Tribal & State Roles, *supra* note 38, at 3.

119. *Id.* at 4.

120. A restrictive approach by the Court to protect non-members demonstrates flawed logic. The reservations were provided to the Indians as a homeland for them to govern as sovereign domestic dependents. Non-members who choose to live on the reservations should have to obey tribal laws, just as Americans who choose to live in a particular state must follow that state's laws. Non-members can choose to move away from the reservation to a more sympathetic state government. The tribe cannot leave the reservation and should be allowed to govern the land within the United States Constitution and federal laws.

121. Letter from B. Leigh Price, Jr., Indian Law Counsel, EPA, Region VIII, to Rennard J. Strickland, Professor, University of Oklahoma Law Center 2 (Dec. 24, 1991) (on file with author).

to grant certiorari, an answer to tribal environmental jurisdiction will soon be forthcoming.

Dear Aunt _____,

Since I last wrote to you, my friends and I have met yet another remarkable Indian[122] in our study of Indians and the environment. Robert Williams has studied and written extensively about the legal ideas which the Europeans brought to this country and their ensuing racist notions of the cultural inferiority of the Indian people.[123] He traces the problem to the Crusades and the Christian justification for battles with heathens and infidels. The Christians believed that heathens had no rights -- they could not hold property because they had no knowledge of God and therefore could not experience the grace of God.[124] Europeans brought these notions of superiority with them to the new world and treated the Indians the same way.

While members of the "Indian Law Establishment" litigate Indian cases under the arguably racist laws handed down by the Marshall trilogy which hailed the doctrines of discovery and conquest, critical race scholars believe that such practice only perpetuates and legitimizes a racist doctrine.[125] Critical race scholars argue that federal government Indian policies have been intended to destroy Indian culture[126] — which has been termed "genocide at law."[127] President Theodore Roosevelt, for example, called the General Allotment Act of 1887 "a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and the individual."[128] This and other federal Indian laws sought to destroy Indian culture in order to make the Indians behave more like the white man.

The more I read and learn about the white man's historical treatment of the Indians, the more reasonable the critical race scholars' point of view seems. The Eurocentric white man's jurisprudence does tend to "pulverize" the culture and rights of outsiders. Even when the white man's jurisprudence professes to help the outsiders, it seldom asks what outsiders want or need. Witness the disasters of the General Allotment Act and the

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122. The students in the "Toxic Waste in the Indian Community" class at the University of Richmond Law School were very fortunate to meet with Rick West, David Harrison, Paula Gunn Allen, and finally Rob Williams. The author owes many thanks to Professor Nancy Collins for organizing this singular opportunity and to the George K. Allen family for its Chair endowment that made it possible for these Native Americans to visit.

123. *See, e.g.*, Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

124. Robert A. Williams, Jr., Remarks as Allen Chair Visiting Professor at the University of Richmond, T.C. Williams School of Law (Apr. 15, 1992) [hereinafter Williams, Remarks]. *See generally* Williams, *supra* note 123.

125. Williams, Remarks, *supra* note 124 (Apr. 8, 1992).

126. *Id.*

127. *Id.* (quoting Rennard J. Strickland, Professor, University of Oklahoma Law Center).

128. Pommersheim, *supra* note 17, at 255 (quoting S. TYLER, A HISTORY OF INDIAN POLICY 104 (1973)).

Indian Reorganization Act. The Indians who were not farmers did not want to become farmers. Allotted lands and voting districts were drawn without consideration of Indian community locations, but Indians did not want to leave or vote outside of their established communities.

Could the white man's intentions have been honorable? Perhaps he sincerely believed that assimilation into the Euro-American life was in the Indian's best interest. But patriarchy of this sort is the entire problem. If the white man had allowed the tribes to maintain their freedom and way of life, the Indians' problems might be nonexistent today. Outsiders should not be forced to become insiders before they can gain the respect of those in power.

Some members of Congress knew this long ago. An 1880 minority report of the House Indian Affairs Committee warned that passage of the General Allotment Act was unprincipled. The report stated with great insight:

> *The real aim . . . is to get at the Indian lands and open them up to settlement. The provisions for the apparent benefit of the Indian are but the pretext to get at the lands and occupy them . . . . If this were done in the name of Greed, it would be bad enough; but to do it in the name of Humanity, and under the cloak of an ardent desire to promote the Indian's welfare by making him like ourselves, whether he will or not, is infinitely worse.*[129]

Either insufficient numbers of congressmen read this report, or the intentions of the white man were not honorable. "Honorable intentions" based on this minority report's insight would never have passed the General Allotment Act.

Even though my experience with critical race Indian scholarship has been an affirming one, I am also disheartened by the prospects for Indian sovereignty in our world of unyielding white man's jurisprudence. Even some of the "Indian Law Establishment" lawyers have become disillusioned in the wake of the Brendale *decision. Rick West, another of our Indian mentors, stated that "[i]n explanation of why this Indian lawyer has become a museum director, I guess the most accurate thing to say is that I have given up, at least for the moment, on the Supreme Court."*[130]

Even worse, as Rob Williams pointed out, many Indian tribes, their systems of government still in turmoil from the Indian Reorganization Act upheaval, may not be ready for environmental and toxic waste disposal responsibility.[131] *This possibility wreaks havoc upon my thesis that we must stop patronizing the Indians and give them free reign as sovereigns on the reservations. Perhaps I have jumped the gun with my suggestions.*

Furthermore, once the tribal governments are prepared for environmental responsibility, under existing law, they would not have true environ-

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129. *Id.* at 257-58 (quoting DELOS S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 19 (1973)).

130. West, *supra* note 22, at 417.

131. Williams, Remarks, *supra* note 124 (Apr. 8, 1992).

mental decision-making power over their reservation. They would only have power delegated by the federal government to implement and regulate in accordance with the federal environmental laws. Still, there is no complete sovereignty for the Indians.

To top it all off, Williams argues that existing Indian law, beginning with the Marshall trilogy, should be thrown out, just like Brown v. Board of Education of Topeka[132] *threw out notions of "separate but equal."*[133] *My first letter dismissed this notion, saying there was no going back at this late date. But now, with Williams' serious suggestion, I must face the unwelcome fact that reversal of the Marshall trilogy could mean that the Indians would have claim to my house and yard. On the other hand, if reversal impacted present legal controversies only and did not affect my property, I would welcome it enthusiastically.*

Now I am beyond disheartened; I feel guilty and hypocritical too.

With much affection,

Sally

Dear Aunt _____,

I haven't come up with any answers to the problems I presented to you in my last letter, but I do feel better than I did about the issues.

At least five distinct legal decisions could affect Indian sovereignty. First, as Rob Williams suggested, the Supreme Court could reverse the Marshall trilogy and make the reversal retroactive throughout American history. Second, treaties which have been unconstitutionally terminated could be reactivated,[134] *with Indians receiving all which was theirs under those treaties.*[135] *Third, starting with the present, the Supreme Court could decide to give Indians total sovereignty over criminal, environmental, and land use planning issues on the reservations, denying Congress plenary power to control the tribes. Fourth, the Supreme Court could determine that tribes have environmental sovereignty on the reservations to implement and regulate the environment through the powers delegated by the EPA and perhaps even total sovereignty to make environmental decisions regardless of the federal statutory requirements. Fifth, the Supreme Court could decide that everything will remain as it is — the confusing status quo remains the status quo.*

The first two possibilities seem very unlikely. Even if the Supreme Court were willing to reach these conclusions, sorting out land ownership and the ensuing myriad of property suits would likely prove to be impossible undertakings. In light of the tremendous problems these suggestions would

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132. 347 U.S. 483 (1954).

133. Williams, Remarks, *supra* note 124 (Apr. 8, 1992).

134. For example, perhaps the Supreme Court would determine that Congress has no plenary power to unfairly terminate treaties.

135. *See generally* Churchill & LaDuke, *supra* note 18, at 96 (discussing land taken away from Indians by legislation and violation of treaty rights).

present, however, the third and fourth suggestions suddenly look much more appealing.

But would the Supreme Court take one of these steps? There remains the difficult question of whether the tribal governments are ready for sovereignty, whether full and complete or merely environmental. And as usual, there is the nagging question: who is the white man to decide whether the Indians are ready? Will Indians never escape from beneath the white man's thumb?

It occurs to me that perhaps the Indian tribes are more patient with this sovereignty problem than I am. Paula Gunn Allen, with her "poet's approach from a tribal mode of inquiry,"[136] told us that to Indians, "harmony and balance is justice. Various things happen, and then we learn something."[137] It's as simple as that. When harm or adversity arises, the Indian does not automatically pursue resolution or compensation. Pain is a part of life from which Indians learn; it is not harmful in itself.[138] Paula Gunn Allen also reminded us that "new life always begins in pain, but goes on to be profoundly creative."[139] Maybe what the Indians and their advocates currently endure is the painful, difficult birth of a new era of Indian law, which will turn out well for them. Maybe, after various things happen, insider jurisprudence will learn something about the outsiders: to respect differences, and that no formal resolution of differences is required for everybody to live happily ever after.

Perhaps the Supreme Court will eventually expand its jurisprudence to include outsiders. In the meantime, there is one more suggestion for Indian advocates: the place to begin helping the Indians is in the reservation communities. Finding out what Indians want and implementing their agenda are the keys to empowering the Indians.[140] Those of us who probably will not go to the reservations can help too, by talking about what we have learned and encouraging others to think about the problems the Indian people face. The more people who know and consider the issues, the more likely solutions to sovereignty and other problems will be found.

At least one Indian, however, knows that sovereignty and empowerment must begin with himself. This must be the best solution to the problems. If the Indians regain a glow of pride in their culture and their sense of self-determination, the federal government will be bound to notice. The government cannot deny a sovereignty that is manifestly there.

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136. Paula Gunn Allen, Professor of English, University of California at Los Angeles, Remarks as Allen Chair visiting Professor at the University of Richmond, T.C. Williams School of Law (Mar. 25, 1992) (describing her perspective as a Laguna Indian/poet) [hereinafter Allen, Remarks].

137. *Id.*

138. Pain is not, however, an acceptable part of life in the white man's world. Instead of seeking harmony and balance and learning from pain as Indians do, the white man's judicial system encourages compensation for pain and resolution of conflict by strict laws. This method of justice seldom results in harmony and balance between opposing sides.

139. Allen, Remarks, *supra* note 136.

140. Williams, Remarks, *supra* note 124 (Apr. 15, 1992).

I leave you with Eddie Benton-Banai's answer to the question, "what is sovereignty?":

> *Personally, I'm sovereign. I'm not dependent on anybody. For thirteen years I was a high-steel construction man. I did that very well and I loved it. It satisfied something in my ego and my manhood. But then, after I'd put up hundreds of towers and skyscrapers and bridges, I looked around and saw that no skyscrapers were being built on the reservation. I said, 'Hey, this ain't doin' my people any good.' So I climbed down off the iron and picked up the flag of self-determination. Then I had to learn how to make my family sovereign, how to make my people sovereign. Sovereignty is something that goes in ever-widening circles, beginning with yourself. In order for Indian people to attain sovereignty, each of us has to be sovereign in ourselves. If a person can go out into the stream and fish for their needs, if they can do whatever they have to do to provide for those who are dependent on them, then that person is sovereign. Sovereignty isn't something someone gives you. You can't give us our sovereignty. Sovereignty isn't a privilege someone gives you. It's a responsibility you carry inside yourself. In order for my people to achieve sovereignty, each man and woman among us has to be sovereign. Sovereignty begins with yourself.*[141]

With much affection,

Sally

Sarah P. Campbell

141. WALL & ARDEN, *supra* note 19, at 51.