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Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty

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NOTES

SOVEREIGNTY BY SUFFERANCE: THE ILLUSION OF INDIAN TRIBAL SOVEREIGNTY

INTRODUCTION

In his first inaugural address, President Andrew Jackson stated that the Cherokees would receive "as much 'humane and considerate attention to their rights' as was 'consistent with the habits of our Government and the feelings of our people.' "[1] Echoing this statement, the Supreme Court noted in *In re Mayfield*[2] that Congress would allow the inhabitants of Indian Country "such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization."[3] While these statements may sound callous to the modern ear, they accurately reflect the basic approach of the United States government towards Indian tribes.[4] They also demonstrate that tribal sovereiguty is subject to the whim of Congress and is therefore not true sovereiguty but sovereiguty by sufferance.[5]

The status of Indian Nations in the United States today has been called "quasi-sovereignty."[6] Although the federal government recognizes the various tribes as sovereigu peoples with some rights of self-determination,[7] it subordinates their authority to govern themselves

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1 Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 504 (1969) (discussing the political, legal, and moral issues surrounding the Supreme Court's decisions in the Cherokee cases). Although Jackson was concerned with removing the Cherokee Nation from its land in Georgia to Oklahoma, the sentiment applies equally to any of the Indian nations.

2 141 U.S. 107 (1891).

3 *Id.* at 115-16.

4 "The study of Native American history teaches that the overriding, but rarely articulated, policy of Canada and the United States towards Aboriginals was to get them out of the way so their land could be settled and developed by whites." Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians*, 66 WASH. L. REV. 643, 649 (1991).

5 United States v. Wheeler, 435 U.S. 313, 323 (1978) ("The 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."). *See also* Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 369-70 (1989) (discussing and questioning whether Indians have actually consented to be governed by the United States).

6 Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (holding that tribal sovereignty does not extend to the exercise of criminal jurisdiction over a non-Indian for crimes committed on tribal land).

7 *See infra* note 176 and accompanying text.

and their land to that of Congress. Thus, in many locations within the borders of the United States there exist three sovereigns—the Indian Nations, the individual states, and the federal government—all with uncertain powers with respect to each other. This situation causes severe conflicts of interest in which the federal and state governments, the more powerful sovereigns, normally prevail and effectively erode the sovereign base of the Indian Tribes.

This Note argnes that the constant erosion of the remnants of tribal sovereignty is the result of the lack of definition and consent in the current tribal-federal-state relationship. Furthermore, it proposes a system to re-establish the sovereign base of the Indian Nations. The foundation of this system would consist of free association agreements, which would create a new and clearly defined relationship between the tribal, federal and state governments. These agreements would provide a basis for consensual dealings between three equal and coexisting sovereigns. Such agreements would return at least some of the sovereign rights that the current system has stolen from the Indian Nations.

Consent would be the touchstone of the agreements. Any limitation of a nation's sovereign authority must take its legitimacy from consensual arrangements between countries. Thus, consent is a necessary aspect of any relationship between governments. Congress, however, currently does not need the consent of the tribes before legislating with respect to them.[8] Since the tribes may neither accept nor reject the actions of Congress, they do not control their own destiny and thus, are not sovereign in any meaningful sense of the word. The current relationship is one of control, not consent.

Definition is the other necessary aspect of intergovernmental relations. If two governments reach an agreement, it is important that they rigorously define the scope of the agreement. If the parties do not establish their respective rights and obligations it is impossible to develop methods for dealing with conflicts. In the current tribal-federal relationship, the rights and obligations of the tribes change whenever the federal government alters its policy or the state governments push for more control over the tribes. The tribal right of self-govern-

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8 The United States government currently enjoys plenary power over the Indian tribes. There is no single, definitive explanation of the legal source for such complete authority. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 383-84 (1886) (the trust relationship and the dependent status of the tribes provides the authority); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973) (Commerce Clause and treaty-making power are the source of federal power). In practice, the "plenary power" of Congress has been used to authorize the taxation of tribes, to grant jurisdiction over crimes committed on the reservation, and even to terminate the separate status of some tribes. For an in-depth look at the plenary power doctrine, see Nell J. Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).

ment remains undefined and, consequently, there is neither security for the tribes, nor any limitation on the changes that can be imposed by the state and federal governments. Thus, without both consent and definition, tribal sovereignty is an uncertain and malleable concept.

Part I of this Note discusses concepts of tribal sovereignty and conflicts of sovereignty by examining the oscillating nature of relations between the tribal, federal, and state governments throughout United States history. As part of this background discussion, it examines three cases: *Lone Wolf v. Hitchcock*,[9] *Oliphant v. Suquamish Indian Tribe*,[10] and *Washington v. Confederated Tribes of the Colville Indian Reservation*.[11] These cases chronicle the struggles that occur when one sovereign power attempts to operate from under the blanket of another's authority. Part II develops the idea that tribal sovereignty is an illusion by examining the effects that lack of definition and consent have had on the current regime. Part III introduces the principle of self-determination and its significance to the Indian tribes. Finally, Part IV proposes free association agreements and compacts as a solution to the problem of sovereignty erosion. These agreements would infuse definition and consent into the tribal-federal relationship, giving Indian people a more certain status in the United States and the world.[12]

I
TRIBAL SOVEREIGNTY AND CONFLICTS OF SOVEREIGNTY

A traditional definition of "sovereignty" is: "The supreme, absolute, and uncontrollable power by which any independent state is governed."[13] Questions regarding the sovereign rights of tribes are often the starting point of any federal Indian law issue. Although the whole

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9 187 U.S. 553 (1903) (holding that treaty provisions cannot limit the plenary power of Congress over tribal relations and lands).

10 435 U.S. 191 (1978) (ruling that Indian Nations do not retain the inherent sovereign power to assert criminal jurisdiction over non-Indians because their sovereign authority is diminished as a necessary result of their dependant status).

11 447 U.S. 134 (1980) (concluding that the State of Washington may validly impose taxes on cigarette sales made on the tribal reservation to nonmembers).

12 This Note does not discuss the illegality of the United States' treatment of Indian tribes or argue for their acceptance into the international community as full sovereigns. The purpose of this Note is to propose and analyze a solution to the current weakness of Native American sovereignty in the United States which accepts the realities of relations between three sovereigns of unequal power occupying the same territory. Although this solution would not create independent, wholly sovereign tribal nations, it would lay the groundwork for a system which would re-establish the foundation of Indian sovereignty and self-determination in North America.

13 BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

of federal Indian law is quite complex,[14] the essence of tribal sovereignty is simply the extent to which a tribe can attend to its own affairs and control its own cultural, societal, and economic development free from outside restraints. Under the current legal and political regimes, the extent of tribal control is ambignous. The *Handbook of Federal Indian Law* lists three "fundamental principles" that demonstrate the anomalous and restricted nature of tribal sovereignty: (1) Indian tribes possess all the powers of a sovereign state; (2) conquest renders the tribes subject, however, to the legislative authority of the United States and terminates the tribes' external sovereign powers, but does not affect the internal sovereign powers of the tribes; and (3) these powers are subject to qualification by treaties and congressional legislation.[15]

Cohen's three principles demonstrate the dichotomy between internal and external sovereignty[16] that pervades the concept of tribal sovereignty. Tribes are supposedly full sovereigns with respect to their own internal affairs and interests. At the same time, however, the United States government has completely extingnished their external sovereign powers.[17] This state of affairs might not be problematic if defined standards for maintaining the relationship between the tribal and federal governments existed and the relationship were based upon the consent of the tribes. The history of tribal-federal relations demonstrates, however, that neither standards nor consent exist, and that the relationship is uncertain at best.

Tribal-federal relations have periodically oscillated between two diametrically opposed views on the status of Indian Tribes. At one end of the spectrum is the belief that tribes are independent political communities and should control their own development.[18] At the other end lies the belief that the tribal system should be dismantled and individual Indians should be assimilated into the greater Ameri-

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14 For an example of the complexities of federal Indian law, see Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976) (discussing the confusing question of criminal jurisdiction in Indian country).

15 FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 241-42 (1982).

16 The concept of internal versus external sovereignty is central to an understanding of federal Indian law. Internal sovereignty encompasses the authority of a government over its own people and affairs. The levying of taxes aud the punishment of crimes are prime examples of "internal" sovereign authority. External sovereignty, on the other hand, involves the powers possessed by a government with respect to other sovereign entities. The making of international treaties is an example of external sovereignty. *See, e.g.*, Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 424-28 (1989) (discussing the internal-external dichotomy of tribal power).

17 *Id.* at 426.

18 This end of the spectrum may exist only in theory. It is questionable whether the tribes have ever been viewed as fully separate and independent political entities.

can society.[19] While these views appear to be in extreme conflict, their implementation produces very similar results. The United States government dominates the tribal-federal relationship, allowing it to manipulate the situation to protect federal interests. The following historical background will demonstrate how the lack of definition and consent in the relationship promotes federal dominance.

A. A Brief History of Tribal-Federal Relations

The European powers conducted their early dealings with the tribes of North America on a government-to-government basis, recognizing the independent sovereign authority of the Indian Nations.[20] This recognition led to the practice of entering into treaties with the tribes, a practice that the colonies continued when they became the United States of America.[21] This approach made sense for the early settlers, who were small in number and often depended upon the larger Indian tribes for protection from the smaller tribes on whose land they had encroached.[22] These early relations were the last time that Indian tribes held the status of truly independent sovereigns. Indeed, these early treaties represent the last time that their relationships with non-Indians were well defined and at least partially consensual. Significant cultural differences and the settlers' cries for land soon generated conflicts that resulted in the elimination of much of tribal sovereignty. These increasing conflicts are evident in the three "Marshall decisions," which are considered the "classic pronouncements of the theoretical underpinnings upon which [federal Indian law] is based."[23] Thus, any discussion of the modern conception of Indian tribal sovereignty must begin with an examination of these three cases.

1. *The Marshall Cases*

The Marshall cases provided the first legal interpretations of tribal status and the tribal-federal relationship.[24] The first of these cases,

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19 Johnson, *supra* note 4, at 654-66; Robert W. McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests*, 13 HARV. C.R.-C.L. L. REV. 357, 369-76 (1978); WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 9-31 (2d ed. 1988).

20 Rachel San Kronowitz et al., Note, *Toward Consent and Cooperation: Reconsidering The Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 511-12 (1987).

21 VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 3-4 (1983).

22 *Id.* at 3.

23 *Id.* at 33.

24 Sharon O'Brien, *Tribes and Indians: With Whom Does The United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461, 1464 (1991). This legal interpretation is, of course, the interpretation of the United States government and, consequently, says very little about how the tribes would describe the relationship.

Johnson v. M'Intosh,[25] involved a dispute over the validity of two apparently legitimate sources of title to the same tract of land. The plaintiffs claimed title to the land through a direct purchase from the Piankeshaw and other Indian tribes, while the defendants claimed title through a grant by the United States government.[26] The Supreme Court held that the government possessed the only valid title because the Indian nations were not free to sell their land to whomever they chose. They could only sell it to the European sovereign who "discovered" the land and thus held title to it.[27] The Court explained that through the effects of this "discovery doctrine," "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 dimin-

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25 21 U.S. (8 Wheat.) 543 (1823).

26 *Id.* at 543-62.

27 *Id.* at 573. The Spanish, and later the other European nations, followed the advice of Spanish theologian Francisco de Vitoria, who determined that the natives were the true owners of the land and concluded that absent a "just war" that land could not be taken without their consent. DELORIA & LYTLE, *supra* note 21, at 3. The upshot of this view was that the desired land was not *terra nullius*, land both unoccupied and unacquired, and, consequently, a European nation could not claim it through the doctrine of "discovery."

The traditional view of the "discovery doctrine" is that the discoverer may lay claim to *terra nullius* merely by effectively occupying it. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 173 (1979). If land is not *terra nullius*, then a nation may only acquire that land through cession or conquest. *Id.* at 174. In contrast to these views, Justice Marshall held that the "discovery doctrine" did apply. According to Marshall's view of the doctrine, any sovereign that "discovered" a land not previously known to Christian peoples gained title to that land against all other European nations. Johnson v. M'Intosh, 21 U.S. at 573-76.

Marshall's version of the discovery doctrine modified the traditional view of *terra nullius* by applying the doctrine to an occupied land. The basis for this modification was the idea that the Indians were non-Christian and uncivilized peoples, and so, did not own the land they occupied. *Id.* at 576-77 (referring to natives as "heathen" peoples). To further support his position, Marshall asserted that the discovery doctrine, as he defined it, had been accepted by the nations of Europe and so was part of international law. *Id.* at 584. Vitoria never accepted this view, however, nor did other important international law theorists. *See* Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1, 70-71 n.300 (1983) (describing the lack of historical foundation for Chief Justice Marshall's view of the discovery doctrine). Indeed, the nations of Europe apparently did not follow this view of the discovery doctrine. *See, e.g.*, Western Sahara, 1975 I.C.J. 12, 39 (Advisory Opinion of October 16) ("[s]tate practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. . . . Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them."). Thus, Justice Marshall's use of the discovery doctrine deviated from the principles of that period's international law and "probably was invented to solve expediently the difficult question raised in *M'Intosh* as to the supraconstitutional source of the federal government's authority to acquire lands from Indian tribes." Williams, *supra*, at 71 n.300.

ished."[28] Thus, the Court reduced the Indians' sovereign title over their land to a mere right of occupancy.[29]

The next case, *Cherokee Nation v. Georgia*,[30] involved an action brought by the Cherokee Nation prevent the State of Georgia from enforcing legislation that sought to dissolve the Cherokee Nation, bring it under the laws of the State, and distribute its lands among various counties within Georgia.[31] In a decision that would shape the contours of future tribal-federal relations, Justice Marshall refused jurisdiction over the case on the grounds that the Indian Nations were not foreign nations.[32] He determined that the tribes were "domestic dependent nations" and characterized the tribes' relationship to the United States as resembling "that of a ward to his guardian."[33] Thus, *Cherokee Nation* established the "trust" relationship that would later serve as the basis for the plenary powers of Congress and the permanent subjection of tribal sovereignty to the whim of federal authority.[34]

In the third case, *Worcester v. Georgia*,[35] Justice Marshall defined the relationship between the Indian Nations and the individual states. This case involved the conviction of four missionaries who had resided on Cherokee land in violation of Georgia law.[36] The Court ruled that the laws under which the missionaries had been convicted were un-

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28 *M'Intosh*, 21 U.S. at 574.

29 *M'Intosh* demonstrates that, even at this early point in time, the consent of the tribal nations was no longer a concern of the Court. Marshall made it quite clear that the tribes were subordinate to the United States government.

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

31 *Id.* at 15. Two of the acts passed by the State of Georgia were: "an act to add the territory lying within this state and occupied by the Cherokee Indians, to the counties of Carroll, De Kalb, Gwinett, Hall, and Habersham, and to extend the laws of this state over the same, and for other purposes," and "an act to . . . annul all laws and ordinances made by the Cherokee nation of Indians, and to provide for the compensation of officers serving legal processes in said territory, and to regulate the testimony of Indians." *Id.* Other acts involved the surveying and settling of Cherokee lands. *Id.* at 13.

32 *Id.* at 20. The Supreme Court has original jurisdiction over cases in which a "State" is a party. U.S. CONST. art. III, § 2, cl. 2. Note that "State" is used here in its international sense.

33 *Cherokee Nation*, 30 U.S. at 17, 18.

34 DELORIA & LYTLE, *supra* note 21, at 30 ("Marshall's views in this case established the foundation upon which much of the idea of federal responsibility over Indian affairs is built.").

35 31 U.S. (6 Pet.) 515 (1832).

36 Georgia prosecuted the missionaries under a law that it passed on December 22, 1830, entitled:

> An act of [sic] prevent the exercise of assumed and arbitrary power, by all persons, under pretext of authority from the Cherokee Indians and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia, occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the state within the aforesaid territory.

Id. at 521.

constitutional.[37] In this decision, Justice Marshall reinstated some of the political independence that he stripped away in *Cherokee Nation.* Setting the relationship between the tribes and the individual states on a base of political independence, Marshall provided some of the definition necessary for sovereignty:[38] "The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . ."[39]

The three Marshall cases established the basic principles of federal Indian law. The "domestic dependent nation" status of the Indian tribes indicated that they were under the protection of the federal government and, consequently, lacked sufficient sovereign authority for complete political independence. They did possess, however, sufficient sovereignty to exclude state incursions into their internal affairs.[40] This internal-external dichotomy might have offered an adequate definition of the tribal-federal-state relationship if there had been some assurance that the tribes would continue to exist as sovereign entities within the federal system.[41] Events soon followed, however, that made it quite clear that no such assurance existed and that the relationship, as defined by the Marshall decisions, was not set in stone.

2. *Removal and Assimilation*

In practice, the Marshall cases offered very little protection for the remaining sovereign rights of the Indian Nations.[42] The clamor created by the settlers, who wanted more land, was too great for the federal government to ignore. President Jackson urged voluntary removal of the tribes to a point beyond the Mississippi river.[43] On May 28, 1830, Congress heeded Jackson's suggestion and passed the Indian Removal Act,[44] authorizing voluntary removal of the tribes. Voluntary removal was not expeditious however, and Jackson used the military to hasten the process.[45] Nevertheless, removal only postponed the problem. Further westward expansion eventually filled the

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37 *Id.* at 561.

38 This equality was, however, limited to tribal relations with the states. The federal government still dominated in its relationship with the tribes.

39 *Worcester,* 31 U.S. at 561.

40 DELORIA & LYTLE, *supra* note 21, at 33.

41 *Id.*

42 *Id.*

43 *Id.* at 6-7.

44 Act of May 28, 1830, ch. 148, 4 Stat. 411 (codified as amended at 25 U.S.C. § 174 (1988)).

45 Deborah J. Borrero, Note, *They Never Kept But One Promise*—County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, *112 S. Ct. 683,* 67 WASH. L. REV. 937, 937-38 (1992).

open spaces of the west, once again bringing the non-Indians into conflict with the tribes.[46]

As federal Indian policy merged with Manifest Destiny,[47] it became far less practical to deal with the Indian Nations as separate powers.[48] The Plains tribes refused to cede more territory for white settlement and called upon the United States to fulfill its treaty commitments.[49] In 1871 Congress, in an attempt to increase its power over Indian affairs, ended treaty-making with tribes,[50] and by the late 1870s shifted the focus of federal Indian policy toward assimilation.[51] The greatest expression of this desire to bring the Indian into the mainstream of white culture was the Indian General Allotment Act of 1887, also known as the Dawes Act.[52] The purpose of the Dawes Act was to break up the tribal system and transform the Indians into farmers, that being the quickest route to assimilation.[53] The Act provided for the division of reservation land into individual allotments that the government granted to individuals in trust for 25 years.[54] At the end of that period, the trust converted to ownership in fee and the land and the Indian became subject to all federal and state laws.[55] The Act also provided for the purchase of "surplus" reservation lands by non-Indians settlers.[56]

The Dawes Act and the assimilationist policies of the federal government were disastrous for Indian peoples. They also failed to make

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46 DELORIA & LYTLE, *supra* note 21.

47 Journalist John L. O'Sullivan captured the spirit of westward expansion when he wrote in 1845 that nothing must interfere with "the fulfillment of our *manifest destiny* to overspread the continent allotted by Providence for the free development of our yearly multiplying millions." JOHN A. GARRATY, THE AMERICAN NATION: A HISTORY OF THE UNITED STATES 286 (3d ed. 1975) (emphasis in original).

48 DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW CASES AND MATERIALS 111 (2d ed. 1986).

49 O'Brien, *supra* note 24, at 1465.

50 Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (1871) (codified in part at 25 U.S.C. § 71 (1988)).

51 O'Brien, *supra* note 24, at 1465.

52 Indian General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 336, 339, 341-342, 348-349, 381 (1988)).

53 DELORIA & LYTLE, *supra* note 21, at 8-9; Johnson, *supra* note 4, at 651; O'Brien, *supra* note 24, at 1465. For an interesting look at official thought on the reservation and allotment policies, see the reports of the commissioners of Indian Affairs in FRANCIS P. PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 77-80, 92-94, 123-26 (2d ed. 1990).

54 Dawes Act, 24 Stat. 389. *See also* County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 112 S. Ct. 683, 686 (1992) (holding that the Indian General Allotment Act of 1887 permitted the county to impose an ad valorem tax on reservation land patented in fee pursuant to the Act).

55 Dawes Act, 24 Stat. 389-90; *Yakima*, 112 S. Ct. at 686.

56 Dawes Act, 24 Stat. 389-90; Johnson, *supra* note 4, at 651. This provision for the sale of "surplus" land advanced the assimilationist purposes of the Dawes Act by accelerating the reduction of the tribal land base and further breaking down the tribe as a political entity.

the Indians "productive American citizens" in the eyes of the government.[57] The end of the allotment era saw approximately two thirds of Indian lands converted to non-Indian ownership[58] and very little progress towards the assimilation of Indians into United States culture.

3. *Self-Government and Reorganization*

Federal Indian policy shifted from assimilation to self-government when Congress enacted the Indian Reorganization Act (IRA) in 1934.[59] The IRA ended the allotment policies and attempted to remedy some of the damage they had caused.[60] The Act offered tribes the opportunity to restructure their governments according to models created by the federal government.[61] The purpose of the IRA was to restore some of the self-government and tribal sovereignty that the Dawes Act had destroyed and to place tribal members under the control of tribal governments rather than the federal Indian bureaucracy.[62] Almost all aspects of the reorganization program, however, required the approval of the Secretary of the Department of the Interior.[63] Thus, the IRA did not vest the tribal governments with true sovereign powers, but merely offered a limited level of self-government through the delegation of federal authority.[64] The IRA offered some level of self-government, yet it denied the authority necessary for tribal sovereignty. Consequently, the shift away from the policies of the Dawes Act was merely cosmetic.

4. *Termination*

After World War II, federal Indian policy underwent another shift. The policies underlying the IRA fell into disfavor and "Indian 'emancipation' and freedom was again to be achieved through legislation promoting the integration of Indian individuals into the Ameri-

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57 *See* Johnson, *supra* note 4, at 650-51. *See also* Borrero, *supra* note 45, at 943 (noting that the allotment programs "devastated Indian Country" and that Native Americans never became successful farmers); Andrée Lawrey, *Contemporary Efforts to Guarantee Indigenous Rights Under International Law*, 23 VAND. J. TRANSNAT'L L. 703, 715-16 (1990) (pointing out that government policies involving forced assimilation generally have disastrous consequences for indigenous peoples).

58 DELORIA & LYTLE, *supra* note 21, at 10; Johnson, *supra* note 4, at 651.

59 The Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-79 (1988)).

60 *See* CANBY, *supra* note 19, at 23-24 (noting that the IRA enabled the return of some former tribal lands to the tribes and the creation of new reservations); O'Brien, *supra* note 24, at 1466 (similarly outlining the provisions of the IRA).

61 CANBY, *supra* note 19, at 24.

62 *See* DELORIA & LYTLE, *supra* note 21, at 14 (describing the aims of the IRA).

63 *See* Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 206 (1989) (discussing the ineffectiveness of the IRA with respect to re-establishing tribal sovereignty).

64 *Id.* at 213-14.

can mainstream."[65] In 1953 Congress passed House Concurrent Resolution 108, declaring that it was

> the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, [and the members of other named tribes] should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians.[66]

This statement spurred the passage of thirteen separate acts of termination, affecting 109 tribes and bands.[67] By severing all tribal-federal relations, the termination acts left the members of the affected tribes under the control of the states in which they were located. Thus, termination effectively eliminated tribal sovereignty.[68]

5. *Self-Determination*

The policies of the federal government shifted again in the 1970's, returning to the concepts of self-government and self-determination. In 1970 President Nixon issued a statement to Congress setting forth the current direction of federal Indian policy.[69] He called upon Congress to repudiate the termination policy and to follow a program of legislation aimed at maximizing Indian autonomy.[70] One representative measure of this latest period is the Indian Self-Determination and Education Assistance Act of 1975.[71] The purpose of the Act is to allow tribes to contract with the government in order to take over the operation of programs on their reservations with minimum outside control.[72] This era of self-determination represents the most recent trend in federal Indian policy. It remains to be seen, however, if it will be the last.[73]

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65 O'Brien, *supra* note 24, at 1466.

66 H.R. CON. RES. 108, 67 Stat. B132 (1953).

67 O'Brien, *supra* note 24, at 1466-67. *See also* United States v. Burland, 441 F.2d 1199, 1202 n.4 (9th Cir.) (listing termination statutes), *cert. denied*, 404 U.S. 842 (1971).

68 *See* DELORIA & LYTLE, *supra* note 21, at 20. Congress also passed Public Law 280 in 1953. This statute extended civil and criminal jurisdiction over Indian tribes in five states. *See* Pub. L. No. 280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1988)).

69 *See* H.R. DOC. No. 363, 91st Cong., 116 CONG. REC. S23,258-62 (daily ed. July 8, 1970) ("Proposed Recommendations Relating to the American Indians Message from the President").

70 *Id.*

71 25 U.S.C. § 450 (1988), *amended by* Pub. L. Nos. 301, 644 (1990).

72 O'Brien, *supra* note 24, at 1467.

73 *See* CANBY, *supra* note 19, at 31 (cautioning against the conclusion that the state of Indian affairs will not change in the future, especially given the history of oscillating federal policies toward Indians).

B. Conflicts of Sovereignty

The fluctuations evident throughout the history of federal Indian policy-making are the results of an ill-defined tribal-federal relationship. Because of the absolute nature of sovereignty, the existence of multiple sovereign authorities within the same territory creates, in the absence of dispute resolution mechanisms capable of preserving the authority of all concerned parties, an unstable relationship.[74] This instability results in the erosion of the weaker nation's sovereign authority. Unless the tribes and the federal government develop a mutually defined relationship that ensures the security of interests vital to both sides, these conflicts will continue to erode the sovereign base of the Indian tribes.

The nature of the United States' interests tends to be territorial. It is generally accepted that "[t]he legal competence of states and the rules for their protection *depend on and assume the existence of a stable, physically delimited, homeland.*"[75] The federal government cannot allow a foreign power to operate unrestrained within its territorial borders. Such a situation jeopardizes the stability of the nation and threatens the safety of its people. Therefore, the federal government attempts to limit the sovereign power of the tribes.[76] In *United States v. Kagama*,[77] the Court described this state of affairs by remarking that

> Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the

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74 Thomas Hobbes discussed the absolute nature of sovereignty in *Leviathan*. After listing all of the necessary rights of a sovereign, he stated that "[t]hese are the rights which make the essence of sovereignty, and which are the marks whereby a man may discern in what man or assembly of men the sovereign power is placed and resides. *For these are incommunicable and inseparable.*" THOMAS HOBBES, LEVIATHAN 150 (Oskar Piest ed., 1958) (emphasis added). Among the rights that Hobbes enumerated are those which this Note discusses in reference to the example cases: "Seventhly is annexed to the sovereignty the whole power of prescribing the rules" (legislature); "Eighthly is annexed to the sovereignty the right of judicature—that is to say, of hearing and deciding all controversies" (criminal and civil jurisdiction); "and to levy money upon the subjects" (taxation). *Id.* at 148-49 (emphasis added).

Chief Justice John Marshall acknowledged the absolute nature of sovereignty in The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch.) 116 (1812) (involving the peacetime jurisdiction of United States courts over a French warship). Marshall stated that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed hy itself." *Id.* at 136.

75 IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 109 (3d ed. 1979) (emphasis added). *See also* CRAWFORD, *supra* note 27, at 36 ("the right to be a State is dependent at least in the first instance upon the exercise of full governmental powers with respect to some area of territory.").

76 This territorial integrity argnment does not enjoy unanimous support. *See, e.g.*, McCoy, *supra* note 19, at 391-92 (rejecting the argnment that awarding special rights to Indian tribes threatens the territorial integrity of the United States).

77 118 U.S. 375 (1886).

> Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these.[78]

Any mutually defined system must take into account each party's territorial interests. The current system, however, recognizes the interests of the United States, but denies such recognition of tribal interests. Thus, until the parties devise a mutually acceptable approach, these sovereignty conflicts will continue to erode tribal sovereignty because the more powerful sovereign will not sacrifice its vital interests.[79] The following case discussions offer concrete examples of this problem.[80]

C. Erosion of Tribal Sovereignty: Three Examples

The following three cases offer good examples of common areas of conflict between Indian tribes and the United States government: legislative authority of Congress, criminal jurisdiction, and taxation. Each of these cases involves the collision of sovereign powers. In all three instances, the sovereign base of the weaker entity, the Indian tribe, was "necessarily diminished."[81] The real danger to the Indian Nations is not that these conflicts of sovereignty exist, for they are inevitable, but rather that there is no mutually deflned system for dealing with conflicts when they arise. Vine Deloria described this lack of definition as follows:

> [w]e are told that federal Indian law can be understood as the tracing of the flow of power from and between various governments. But, we have no understanding of the nature of these governments,

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78 *Id.* at 379.

79 It is accepted in international law that "a State may continue to be sovereign even though important governmental functions are carried out, by treaty or otherwise, by another State." CRAWFORD, *supra* note 27, at 27. However, in practice, only the weaker sovereign will assign these functions to another state. Interestingly, in the tribal-federal relationship the United States assumed governmental functions on behalf of the tribes, without the tribes ever affirmatively assigning these functions.

80 The discussion in this Note focuses on the tribal-federal relationship. The majority of the conflicts that threaten tribal sovereignty, however, arise out of the tribal-state relationship. *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981) (conflict over tribal regulation of hunting and fishing within the reservation); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (conflict over authority to zone land within reservation boundaries). These cases resulted from undefined tribal-state relationships in situations wbere the sovereign authority of those entities conflicted. On an individual basis, the definition of the relationship between the states and the tribes would seem to be of greater import than the definition of federal relations. A properly defined federal-tribal relationship, however, would limit state authority over the tribes to cases where the tribes had specifically compacted with the state and agreed to surrender rights to the state government. Thus, the federal-tribal relationship is the foundation upon which improved tribal-state relations should be built.

81 *M'Intosh*, 21 U.S. (8 Wheat.) at 574.

> no idea how they originate, what powers they possess, and what their previous relations have been.[82]

Thus, the only certainty in the current system is that the powerful entity will be able to protect its rights and the weaker entity will suffer.[83]

1. Lone Wolf v. Hitchcock: *Treaties v. the Plenary Power of Congress*

Lone Wolf v. Hitchcock[84] has been called the "Indians' Dred Scott decision."[85] In that case, the Court held that treaty provisions cannot limit Congress' power to legislate with respect to the Indians[86] and that "[t]he power exists to abrogate the provisions of an Indian treaty."[87] This determination greatly limited the effectiveness of agreements between the tribes and the federal government.[88] The authority to make agreements with other nations is one of the primary powers of a sovereign nation; without such powers, sovereignty is a hollow concept.

The controversy in *Lone Wolf* centered around two treaties between the United States and the Kiowa and Comanche tribes. The first treaty, the Medicine Lodge treaty, went into effect in 1867 and established a reservation for the two tribes.[89] The two pertinent provisions of this treaty are the Sixth and Twelfth articles. The Sixth Article of the treaty provided for allotment of lands in fee to heads of families.[90] The Twelfth Article stated that:

> No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and

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82 Deloria, *supra* note 63, at 213.

83 The discussion of each of these cases assumes that the tribes have at least the level of sovereignty established by the Marshall cases. With that assumption, the analysis focuses on the effect of these decisions upon the tribes' limited sovereign authority. It will become apparent, however, that given the overriding power of Congress, and the tendency of the Court to protect federal and state interests at the expense of tribal interests, even the assumption of that limited level of sovereignty is questionable.

84 187 U.S. 553 (1903).

85 Matthew D. Wells, Comment, Sparrow *and* Lone Wolf: *Honoring Tribal Rights In Canada and the United States*, 66 WASH. L. REV. 1119 (1991) (calling for legislation to explicitly overrule the tenets of *Lone Wolf* and to follow Canadian practices with respect to the "trust" responsibility).

86 187 U.S. at 564.

87 *Id.* at 566.

88 *See* Sioux Nation of Indians v. United States, 601 F.2d 1157, 1173 (Ct. Cl. 1979) (Nichols, J., concurring) (*Lone Wolf* indicated that the tribes had "no rights by treaty which the Congress was bound to respect"), *aff'd*, 448 U.S. 371 (1980).

89 187 U.S. at 554. A separate treaty incorporated the Apache tribe with the other two tribes. *Id.*

90 *Id.*

> signed by at least three fourths of all the adult male Indians occupying the same . . . .[91]

On October 6, 1892, 456 adult male members of the confederated tribes signed a second agreement regarding a proposed treaty between the United States and the tribes.[92] This agreement provided that the tribes surrender to the United States all rights in the reservation in exchange for allotments of land to the Indians in severalty.[93] Individual tribal members would gain fee simple title to their prospective allotment after a twenty-five year period.[94] In addition, the proposed treaty provided that the United States pay the tribes $2,000,000 for their surplus lands.[95]

The agreement went to Congress, and after several amendments Congress approved it on January 19, 1900.[96] On June 6, 1901, the tribes filed suit to enjoin the Government from enacting the legislation. Generally, the tribes argned that the legislation violated the Constitution by denying them the use of their land without due process.[97] Specifically, the Indians claimed that the Government procured the agreement through fraud, that three fourths of the male adult members of the tribe did not sign the agreement, and that Congress changed portions of the signed agreement without tribal consent.[98]

The Court held in favor of the Government, basing its decision on the "relation of dependency" of the Indian tribes.[99] Congress' authority to change the agreement was rooted in its responsibility to protect the Indians.[100] The Court noted that the tribes' contention that they had a vested property interest granted by treaty "ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States."[101] Moreover, it determined that Congress' authority over the tribes is a political concern and is not subject to judicial control.[102] Thus, the Court clearly demonstrated that Congressional authority is

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91 *Id.*

92 The Indian agent present at the signing represented that there were 562 adult males in the three tribes. *Id.* at 554. According to the Secretary of the Interior, however, there were 725 males over the age of eighteen, and 639 over the age of twenty-one. *Id.* at 557.

93 187 U.S. at 555.

94 See the discussion of the Dawes Act, *supra* notes 52-58 and accompanying text.

95 *Lone Wolf*, 187 U.S. at 555.

96 *Id.* at 556-59. Further amendments were made after passage. *Id.* at 560.

97 *Id.* at 560-61.

98 *Id.* at 561.

99 *Id.* at 564.

100 *Id.*

101 *Id.*

102 *Id.* at 565.

unlimited when questions arise that affect the lands and people within the territorial borders of the United States. Quoting from an earlier case that established complete Congressional authority over the Indians, the Court reinforced both the dependence notion and the decisive issue of territoriality:

> The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, *because the theatre of its exercise is within the geographical limits of the United States* . . . .[103]

By protecting the sovereign interests of the United States in *Lone Wolf*, the Court further diminished the already eroding sovereignty of the Indian Nations.

2. Oliphant v. Suquamish Indian Tribe: *The Question of Tribal Criminal Jurisdiction over Non-Indians*

While the ability to make binding treaties is a fundamental aspect of sovereignty, the issue addressed in *Oliphant v. Suquamish Indian Tribe*[104] is arguably more central to Indian sovereignty concerns. In *Oliphant*, the Court considered whether an Indian tribe retains criminal jurisdiction over non-Indians who commit crimes on the tribe's reservation.[105] This issue cuts to the core of the concept of sovereignty. The sovereign's right to promote and enforce order within its territorial borders is a central feature of sovereiguty.[106] In his dissent, Justice Thurgood Marshall stated that the "power to preserve order on the reservation . . . is a sine qua non of the sovereignty that the Suquamish originally possessed."[107] It also represents a strong point of conflict between a tribe's interests in maintaining order and peace and the United States' interest in protecting its citizens' rights.

The petitioners in *Oliphant* were charged with criminal conduct under the Tribal Code,[108] arraigned, and then released. Both petitioners filed for writs of habeas corpus to the United States District Court for the Western District of Washington, alleging that the Tribal Court did not have jurisdiction over non-Indians.[109] The district court

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103 *Id.* at 567 (quoting United States v. Kagama, 118 U.S. 375 (1886)) (emphasis added).

104 435 U.S. 191 (1978).

105 *Id.* at 195.

106 HOBBES, *supra* note 74, at 148.

107 435 U.S. at 212 (Marshall, J., dissenting).

108 *Id.* at 194. The tribe charged petitioner Oliphant with assaulting a tribal officer and resisting arrest, and petitioner Belgarde with "recklessly endangering another person and injuring tribal property." *Id.* (quoting tribal court).

109 *Id.* at 194.

denied both petitions.[110] On appeal, the Court of Appeals affirmed, stating that Indian tribes, "though conquered and dependent, retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress."[111]

In an opinion written by Justice Rehnquist, the Supreme Court reversed, holding that Indian tribes do not retain criminal jurisdiction over non-Indians.[112] In support of the holding, Rehnquist discussed various treaty provisions[113] and argued that the history of Indian treaties demonstrates that Indian tribes never retained the authority to try non-Indians. Justice Rehnquist opined that:

> The earliest treaties typically expressly provided that 'any citizen of the United States, who shall do an injury to any Indian of the [tribal] nation, or to any other Indian or Indians residing in their towns, and under their protection, shall be punished according to the laws of the United States.' While . . . these provisions were not necessary to remove criminal jurisdiction over non-Indians from the Indian tribes, they would naturally have served an important function in the developing stage of United States-Indian relations by clarifying jurisdictional limits of the Indian tribes.[114]

Justice Rehnquist further argued that Congress always intended to deny such jurisdictional authority to the Indians.[115] He pointed to the Trade and Intercourse Act[116] of 1790 and the Major Crimes Act[117] of 1885, both of which transferred jurisdiction over certain classes of crimes from Indian tribes to the federal courts, as evidence that Congress followed an "unspoken assumption" that such jurisdiction was not within the power of tribal courts.[118] He stated that "[w]hile Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion . . . that Congress consistently believed this to be the necessary result of its repeated legislative actions."[119]

Justice Rehnquist further justified the Court's holding by quoting from *Ex parte Crow Dog*:[120]

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110 *Id.* at 194-95.

111 *Id.* at 196 (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)). Note again that the authority of the tribes is qualified even as it is being upheld.

112 *Id.* at 195.

113 *Id.* at 197-203.

114 *Id.* at 198 n.8 (citation omitted) (brackets in original). The language quoted by the Court here is very similar to choice of law clauses in modern international agreements.

115 *Id.* at 203.

116 Ch. 38, sec. 5, 1 Stat. 137 (1790).

117 Ch. 341, sec. 9, 23 Stat. 385 (1885) (codified, as amended at 18 U.S.C. § 1153 (1988)).

118 *Oliphant*, 435 U.S. at 201-03.

119 *Id.* at 204.

120 *Id.* at 210.

> [In *Crow Dog*,] [t]he United States was seeking to extend United States "law, by argument and inference only, . . . over aliens and strangers; over the members of a community separated by race [and] tradition, . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code . . . ; which judges them by a standard made by others and not for them . . . . It tries them, not by their peers, nor by the customs of their peoples, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception . . . ."[121]

Crow Dog answered a question related to that of *Oliphant*—whether federal courts could exercise jurisdiction over an Indian who had killed another Indian while on reservation land.[122] Rehnquist asserted that the considerations in *Crow Dog*, which required that the Court deny jurisdiction to the federal courts, applied just as strongly when applied to non-Indian offenders in tribal courts.[123]

The Court's reasoning reveals a concern that a non-Indian would not receive justice in an Indian court. Regardless of the validity of this concern, using it as a reason to deny jurisdiction is strange in comparison to concerns that arise in analogous international law situations. It is extremely unlikely that a foreign nation would accept such an argument as the basis of a United States decision to deny the foreigu nation's jurisdiction over an American citizen who committed a crime within the foreign nation's borders. The Court accepted this argument in *Crow Dog* only because the United States attempted to take jurisdiction over a matter completely internal to the tribal nation. Granting the United States jurisdiction in *Crow Dog* would have been analogous to granting the United Kingdom jurisdiction over the murder of a United States citizen committed by a United States citizen within the territorial boundaries of the United States. The United States government would never grant the United Kingdom such jurisdiction. Although this argument may be valid in the context of jurisdictional invasions, in *Oliphant* the argument is strained because the crime was committed within the borders of the tribe's reservation.

The conflict in *Oliphant* pitted the interest of the United States government in protecting its citizens against the equally important right of the tribe to deal with events within its own territory in whatever manner it deems appropriate. Once again, in battles over

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121 *Id.* at 210-11 (quoting *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883)) (superseded by the Major Crimes Act as stated in United States v. Blue, 722 F.2d 383 (8th Cir. 1993)).

122 *Id.* at 210.

123 The passage of the Major Crimes Act was a direct result of this case. Congress did not consider the tribal punishment of the offender to be adequate and was outraged that such a crime could go "unpunished." CANBY, *supra* note 19, at 105. Thus, while the case upheld tribal jurisdiction, it actually resulted in the erosion of tribal sovereignty by mobilizing Congress to limit the jurisdictional authority of the Indian tribes.

matters of sovereignty, the weaker sovereign lost regardless of the equities.

3. Washington v. Confederated Tribes of the Colville Indian Reservation: *The Power of a State to Impose Taxes On Reservation Activities*

The authority to levy taxes is a critical power for any sovereign nation. Governments require large sums of money to operate. Thus, a tribal government, like any other government, will fail if it cannot raise enough revenue to enable it to exercise its sovereign powers and provide governmental programs and services for its citizens. In *Washington v. Confederated Tribes of the Colville Indian Reservation*[124] the Court addressed this critical taxation issue. Justice John Marshall's observation in *McCulloch v. Maryland*[125] that "the power to tax involves the power to destroy"[126] holds true in this case. The issue in *Colville* was whether the tribes could prevent the State of Washington from taxing on-reservation consumer sales to nonmembers of the tribes.[127] The Court held that the State could impose such taxes.[128]

The State of Washington levied a cigarette excise tax of $1.60 per carton.[129] This tax applied to the "sale, use, consumption, handling, possession or distribution" of cigarettes within the State.[130] Enforcement was implemented through tax stamps, but Indian tribes were allowed to possess unstamped cigarettes intended for resale to members of the tribes.[131] The State of Washington maintained that it was entitled to collect taxes on all cigarettes sold to non-Indians on the reservation and sought to enforce its tax by seizing cigarettes bound for the reservation.[132]

The tribes levied a much smaller tax on the cigarettes than did the State of Washington.[133] Indeed, the cigarettes sold on Indian reservations were a dollar less per carton than those sold off the reservations.[134] As a result, Indian tobacco dealers sold the majority of their

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124 447 U.S. 134 (1980).

125 17 U.S. (4 Wheat.) 316 (1819).

126 *Id.* at 431.

127 *Colville*, 447 U.S. at 138.

128 *Id.* at 160. Although this case dealt with several issues of taxation, for purposes of this Note, discussion of only the first is sufficient. *Id.* at 140-41 (listing the other taxation issues in this case).

129 *Id.* at 141.

130 *Id.* (quoting WASH. REV. CODE § 82.24.020 (1976)).

131 *Id.* The tribes were required to collect the tax on sales to nonmembers. WASH. REV. CODE § 82.24.260 (1976).

132 *Colville*, 447 U.S. at 142.

133 The Colville, Lummi, and Makah Tribes levied a tax of 40 to 50 cents per carton, while the Yakima Tribe levied a tax of 22.5 cents per carton. *Id.* at 144-45.

134 *Id.* at 145.

cigarettes to residents of nearby communities who travelled to the reservation for the savings.[135] If the State of Washington could not levy its tax on those sales, it would lose significant tax revenues.[136] All parties agreed that if the State were able to eliminate the one dollar differential, the Indians' business would fall off drastically.[137]

The tribes argued that because of the severe economic impact that state taxation would have on the tribes, federal statutes regulating Indian affairs pre-empted the state from levying such taxes.[138] They also argued that the taxes were inconsistent with the principle of tribal self-government and invalid under "negative implications" of the Indian Commerce Clause.[139] In its analysis, the Court first observed that "[t]he power to tax . . . is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status."[140] It then dismissed the Indians' pre-emption argument because the reservation smokeshops offered "solely an exemption from state taxation."[141] No federal statute, the Court held, "goes so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses in a State."[142]

The Court also dismissed the Indians' other two arguments. With respect to the principle of self-government, the Court noted that the State of Washington did not interfere with the right of the Indians to " 'make their own laws and be ruled by them' . . . merely because the result . . . will be to deprive the Tribes of revenues which they currently are receiving."[143] It went on to explain that "[t]he principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other."[144] This statement exemplifies the balancing approach employed by the Court to resolve conflicts of interest between a State and an Indian tribe. Applying the balancing test, the Court held in favor of the State of Washington.[145] Finally, the

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135 *Id.*

136 "From 1972 through 1976, the Colville Tribe realized approximately $266,000 from its cigarette tax; the Lummi Tribe realized $54,000 and the Makah Tribe realized $13,000. . . . In 1975, the Yakima Tribe derived $278,000 from its cigarette business." *Id.* at 144.

137 *Id.* at 145.

138 *Id.* at 154.

139 *Id.*

140 *Id.* at 152.

141 *Id.* at 155.

142 *Id.*

143 *Id.* at 156.

144 *Id.*

145 *Id.* at 157. It is doubtful whether a tribe could ever be victorious in a United States court that employed a balancing approach.

Court observed that the Indian Commerce Clause did not apply because the potential loss of Indian commerce existed only because the tribes ignored the disputed tax in the first place.[146] Therefore, the Court concluded that the State of Washington could legitimately impose its cigarette excise tax on sales made to non-Indians on reservation land.[147]

The Court analyzed this case entirely from the point of view of the purchaser, considering solely whether or not he or she could be taxed by the State. While it recognized that the power to tax is an inherent sovereign power,[148] the Court failed to recognize the significance that this fact held for tribal sovereignty. The relevant issue was not whether the non-Indian should have to pay taxes on cigarettes, but whether one sovereign can legitimately force the levying of a tax on purchases made within the territory of another sovereign entity. The imposition of such an obligation is inappropriate.[149] By upholding Washington State's tax on the reservation, the Court eviscerated one of the core tribal sovereign powers, and further diminished the sovereignty of Indian tribes.[150]

II
THE ILLUSION OF TRIBAL SOVEREIGNTY

The outcomes of *Lone Wolf*, *Oliphant*, and *Colville*, reveal that the current state of the law does not protect tribal sovereignty. In deciding these cases, the Court balanced the interests of the tribes, the state and the federal government. This calculus invariably results in the tribal interests losing out to the interests of the state and federal gov-

146 *Id.*

147 *Id.* at 159.

148 *Id.* at 152.

149 The imposition of the State of Washington's tax in this case would be similar to the government of Mexico forcing the collection of a tax on items sold to Mexican citizens within the borders of the United States. While it is surely within the authority of the Mexican government to impose a tax upon the Mexican citizens when they re-enter Mexico, it has no authority to order an official or citizen of the United States to collect the same tax. Such an extraterritorial application of laws would not be appropriate between sovereigns in international relations, and, by analogy, should not be appropriate in this case.

150 The Court argued that imposing the tax would not hurt a tribe's ability to govern itself because it was still free to impose its own tax. This freedom is irrelevant because the tribe's sovereignty has been invaded regardless of whether it can still impose a tax. Nevertheless, the imposition of the tax did threaten the ability of the tribes to govern themselves because any additional tax imposed by them would price them out of the market. Thus, it is absurd for the Court to argne that "each government is free to impose its taxes without ousting the other." 447 U.S. at 158. If a tribe places its tax on the cigarettes, in addition to the state-imposed tax, then non-Indian buyers will stop purchasing cigarettes on the reservation, and the State of Washington will gain the artificial advantage that it complained the Indians had. A relevant question then becomes: Can the Reservation force the State of Washington to levy the tribal cigarette tax on cigarettes sold off-reservation to members of the tribe?

ernments. This conclusion is supported by the fact that Indian sovereignty currently holds a weak position in the "courts of the conquerors."[151] Writing for the majority in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, Justice Scalia noted that "[t]he 'platonic notions of Indian sovereignty' that guided Chief Justice Marshall have, over time, lost their independent sway."[152] Thus, even the limited notions of sovereignty expounded in the Marshall cases are no longer viable in the context of tribal-federal and tribal-state relationships.[153]

There are two arguments commonly used to defend the current relationship between Indian tribes and the United States. The first is the familiar "trust" doctrine originally developed in the *Cherokee Cases*. This argument espouses the view that a sovereign entity does not cease to exist simply because it delegates certain aspects of its sovereign authority to another sovereign power.[154] As Justice John Marshall stressed in *Worcester*, "the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection."[155] The thrust of the argument is that the Indian tribes have delegated a necessary portion of tribal sovereignty to the federal government, but that they still posses inherent sovereign rights. Chapters XI and XII of the United Nations Charter, which establish a "trust" system for non-self-governing territories, provide support for this position.[156]

Acceptance of the "trust" relationship ignores the fact that the Indian tribes have not willingly delegated their sovereign authority to the degree that is normally assumed. The United States government simply seized control over the tribes.[157] Moreover, it is quite clear that

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151 *M'Intosh*, 21 U.S. at 588.

152 112 S. Ct. 683, 687 (1992) (quoting McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973)) (holding that the Indian General Allotment (Dawes) Act of 1887 permits the County to impose an ad valorem tax on reservation land patented in fee, but does not permit the Country to enforce its excise tax on sales of such land). Note that this holding draws upon the authority of the Dawes Act, the policies of which were supposedly no longer followed by the federal government. In doing so, the Court "rejuvenated the repudiated political policies of removal and assimilation." Borrero, *supra* note 45, at 938.

153 *See supra* notes 25-40 and accompanying text.

154 CRAWFORD, *supra* note 27, at 188; BROWNLIE, *supra* note 75, at 77; McCoy, *supra* note 19, at 363.

155 31 U.S. at 560-61.

156 *See* U.N. CHARTER arts. 73-85 (defining the trusteeship system).

157 The many treaties signed with various tribes usually included delegation of tribal sovereignty. Quite often, however, these treaties were the result of fraud and duress. Peter Nabakov provides the following account:

> To the Indians the practice of drafting a written agreement to settle political and territorial disputes was alien and unfamiliar, and as a result, it was used against them to great advantage. As Red Cloud, the Oglala Sioux leader, recalled, "In 1868 men came out and brought papers. We could not

the "trust" relationship between the federal government and the Indian tribes offers little, if any, protection for tribal sovereignty. One commentator noted that

> [a]s a direct consequence of European colonial expansion, indigenous peoples have been deprived of their independence, their land, and their right to choose their role in the modern state. They are at the mercy of governments that may claim to have their best interests at heart, but have been singularly unsuccessful at promoting or protecting those interests. After centuries of "enlightened" government policies, indigenous peoples are still among the most severely disadvantaged groups in their states. As a result, indigenous people doubt that national governments have the ability or the desire to provide a better future.[158]

Thus, given the "trust" doctrine's track record, can it really be viewed as a gnardian of tribal rights?

The second argument depends upon the assertion that sovereign authority is not necessarily absolute. Under this assertion, two sovereigns can share authority over the same subjects by dividing their respective jurisdictions. Thus, tribal governments and the federal government each have authority in separate areas; the tribal government over internal affairs, and the federal government over external ones. In his article *The Limits of Sovereignty*, A. Lawrence Lowell describes the nature of this "dual sovereignty":

> Now, definite limits may be set to sovereign power in either one of two ways. They may result from the rivalry of two independent rulers, which settle by negotiation questions concerning the boundaries of their respective jurisdictions . . . or they may be established by some formal declaration, which by sufficient precision enables the bulk of the society to have a general opinion about the extent of legislative authority, and to distinguish between those commands which fall within the boundaries prescribed and those which do not.
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> . . . It may not, perhaps, be always easy in such cases to define accurately the boundaries of each ruler's authority; but this difficulty . . . does not affect the proposition that two sovereigns with different spheres of activity may govern the same subjects.[159]

This approach explains the internal/external dichotomy that supposedly defines current tribal-federal relations. The current legal regime, however, does not contain the "sufficient precision" to determine the

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> read them, and they did not tell us truly what was in them. . . . When I reached Washington the Great Father explained to me what the treaty was, and showed me that the interpreters had deceived me.

PETER NABAKOV, NATIVE AMERICAN TESTIMONY, A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT, 1492-1992 118 (1991). For further accounts by Indians, see *id.* at 117-44.

158 Lawrey, *supra* note 57, at 762.

159 A. Lawrence Lowell, *The Limits of Sovereignty*, 2 HARV. L. REV. 70, 83-84 (1888).

boundaries of legal authority between the two sovereigns. While the dual sovereignty approach describes a system that might prove effective for tribal-federal relations, unfortunately it does not describe the current legal regime.

Both approaches assume two central requirements that the current legal regime lacks: consent and definition. The trust doctrine is useless without some defined method of application because its scope can be redefined at will by the more powerful sovereign and without the consent of the weaker sovereign. The dual sovereignty approach requires no consent whatsoever and also allows the more powerful party to define the scope of the sovereign authority possessed by all concerned entities. These two arguments might, taken together, offer a workable system for tribal-federal relations. Indeed, when combined they create a solution that is similar to the free association argument discussed in Part IV of this Note. Although on their face they appear to be reasonable accommodations of the complexities of Indian relations, they are not accurate representations of the current legal and political regime. In the first instance, any nation that delegates a portion of its sovereign powers to another nation must do so consensually. Otherwise, the term "trust" is simply a polite word for conquest and subjugation.[160] As the Supreme Court noted in *The Schooner Exchange*, all exceptions "to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source."[161] Clearly, the Indian nations did not consensually delegate the major portion of their sovereign authority. Rather, it was taken.[162]

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160 The sincerity of the "trust" doctrine is itself somewhat questionable. Vine Deloria notes:

> Of this great mass of some 4,300 distinct enactments, only a minuscule number tried to protect the Indians. The vast majority of these laws strip the tribes of their land, deny rations if they do not work, deny the right of free speech and freedom of religion, provide for the capture and transportation of Indian children from their homes, and even try to regulate the right to bestow personal goods on relatives and friends upon the death of the Indian. When similar versions of these laws were enacted by Nazi Germany they were not regarded as a clever way to protect the Jewish population of Europe.

Deloria, *supra* note 63, at 207.

161 The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812).

162 Professor Johnson asserts that "[i]t is absurd to argue that Aboriginal tribes knowingly and voluntarily gave up their claims to these lands," and asks:

> If the westward-bound settlers in either Canada or the United States had asked the indigenous occupants whether they would prefer (1) to be removed from ancient homelands, hunting, fishing, and food gathering grounds, forced often to live on distant, strange, hostile lands, be squeezed onto tiny reservations with other often incompatible tribes, made totally dependent on the white man for the most meager of rations, even survival, and have their cultures, customs, and religions ridiculed, prohibited, and debased, or (2) remain on their ancestral lands, continue their traditional

Definition is probably more important to the tribes in the long run. Both of the arguments described above implicitly assume some level of agreement between the entities involved. Such an agreement would set out the powers of the competing sovereigns and establish a defined relationship between them. The complexity of tribal-state and tribal-federal relations under the current system "renders impracticable any effort to set forth a general set of rules which precisely define the scope of tribal self-government."[163] Thus, the relationship between the tribes and the federal government is not as well defined as the above approaches assume.[164] Nor is there any certain division of tribal, state and federal jurisdiction.[165] As a result of the conflicts discussed in this Note, the United States government will continue to erode Indian tribal sovereignty unless a mutually defined structure is established.

Under the current system of Indian law, Indian sovereignty is an illusory concept.[166] The key to improving the current state of relations between the tribal, state and federal governments does not lie in the case law or legislation within the current legal structure. By clinging to the myth of sovereignty under the "trust" doctrine, the tribes will allow the erosion of tribal sovereignty to continue until there is nothing left.[167] To reestablish the sovereign base of the Indian Nations, an entirely new structure must be built for the management of affairs between the Government of the United States and the Indian tribes.[168]

> lifestyles, be treated with dignity and respect, and choose their own time, place, and method for adopting or rejecting industrialization and technological advances, does anyone doubt the answer?

Johnson, *supra* note 4, at 649-50 (footnotes omitted).

163 McCoy, *supra* note 19, at 389.

164 "[T]here is nothing in the whole compass of our laws so anomalous, so hard to bring within any precise definition, or any logical and scientific arrangement of principles, as the relation in which the Indians stand toward this government and those of the States." William W. Quinn, Jr., *Federal Acknowledgement of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331 (1990) (citing Hugh S. Legare, U.S. Attorney General (1841-43)).

165 There is, of course, the split along internal/external lines. However, cases like *Colville* demonstrate that even this division offers no certain answers. Some have argned that the mapping out of these separate areas must be done on an ad hoc basis in order to ensure that all relevant factors are considered in each case. McCoy, *supra* note 19, at 399 (treating jurisdictional issues in a manner similar to interest analysis in conflict of laws). This approach, however, does not protect the sovereign rights of the Indian tribes.

166 "Tribal self-government is a cruel fiction promulgated during the immediate past half-century with an eye toward improving the image of the government." Deloria, *supra* note 63, at 206.

167 "Indian tribes today are believed to be political sovereigns with a vast reservoir of undetermined powers. This belief is due more to the ranting of Indian militants than to scholarly research . . . ." *Id.* at 212.

168 *See* O'Brien, *supra* note 24, at 1494 ("The solution to this maze of contradictions and inconsistencies is for the United States to adopt definitions and procedures which

III

THE MEANING OF SELF-DETERMINATION FOR INDIAN TRIBES

The need for a mutually defined structure in the relationship between the Indian Nations and the federal government is simply another way to describe the need for the federal government to recognize the Indians' right of self-determination.[169] This right is well recognized in international law[170] and is a necessary aspect of the tribal-federal relation if the tribes are to maintain their cultural and physical existence. The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations[171] states that "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."[172] The International Court of Justice has also recognized the validity of the right to self-determination.[173] Ian Brownlie states that "[t]he present position [in international law] is that self-determination is a legal principle, and that United Nations organs do not permit Article 2, paragraph 7,[174] to impede discussion and decision when the principle is in is-

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more closely follow the standards and definitions currently being promulgated at the international level."); Kronowitz et al., *supra* note 20, at 622 ("In the federal context, the United States must recognize that the inherent political rights of Indian nations limit its authority over Indian peoples. Similarly, Indian-state relations must be based on negotiated agreements that recognize Indian self-government.").

169 Brownlie defines self-determination as "the right of cohesive national groups ('peoples') to choose for themselves a form of political organization and their relation to other groups." BROWNLIE, *supra* note 75, at 593. *See also* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 52 (1992) ("the right of a people organized in an established territory to determine its collective political destiny.").

170 Article 1 of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 173 (entered into force Mar. 23, 1976) states that "[a]ll peoples have the right of self-determination." This treaty has been ratified or acceded to by 113 states as of November 1991, and is probably binding on the other states as customary law. Franck, *supra* note 169, at 58. Some commentators argue, however, that the right to self-determination for indigenous peoples is not so well established. *See, e.g.*, Lawrey, *supra* note 57, at 707 ("[I]ts application outside the context of decolonization remains highly problematic, with no accepted application to indigenous peoples.").

171 G.A. Res. 2625, U.N. GAOR, 35th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970) [hereinafter Declaration on Friendly Relations]. The United States follows the principles of this Declaration, which was adopted without vote by the United Nations General Assembly. BROWNLIE, *supra* note 75, at 595.

172 Declaration on Friendly Relations. *See also* U.N. CHARTER art. 1, para. 2 ("To develop friendly relations among nations based upon respect for the principle of equal rights and self-determination of peoples. . . .").

173 *See, e.g.*, 1971 I.C.J. 16, 31 (Advisory Opinion of June 21); Western Sahara, 1975 I.C.J. 12, 31-33 (Advisory Opinion of October 16).

174 This provision states that

> [n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic juris-

sue."[175] Finally, the U.S. government itself has specifically recognized tribal self-determination of Indian peoples.[176]

Self-determination in colonial times meant that the tribes should be left alone to develop as they would. In the modern context, however, the right allows for an entire range of possibilities from secession to principles of nondiscrimination.[177] Between these two poles are the concepts of trust, free association, and increased governmental representation for the self-determination unit. Secession and full statehood are often viewed as the best examples of self-determination.

Statehood through secession might be the most decisive solution to the consent and definition problems of tribal-federal relations. Obviously, the tribes would no longer have a consent problem, from their perspective, if they seceded and formed their own international states. The definition problem would be solved because the tribes would be subject to international law, which is based on the concept of protecting state autonomy and sovereignty. In the case of the Indians, however, these options are neither the most practical nor the most desirable. Given the physical location of the tribes and the economic and military disparity between the two entities, secession is not a practical option nor even a distinct possibility. Although many tribes could handle statehood from an economic standpoint it is highly doubtful that they could operate effectively in the international arena. The problem is one of recognition by the nations of the world.

> diction of any state or shall require the Members to submit to such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. CHARTER art. 2, para. 7.

175 BROWNLIE, *supra* note 75, at 595.

176 *See, e.g.*, The Indian Self Determination and Education Assistance Act, 25 U.S.C. §§ 450(a)-450(n) (1988 & Supp. III 1991) (establishing an Indian "self-determination policy" that assures Indian participation in the administration of federal services to Indian communities).

177 Hannum notes that:

> The ultimate political status sought by indigenous groups through self-determination varies tremendously, reflecting the diversity of situations in which indigenous peoples find themselves and the diverse character of indigenous groups themselves. Some groups aspire to complete independence and statehood, while others demand autonomy or self-government only in specific areas, such as full control over land and natural resources.

Hurst Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649, 671-72 (1988). *See also* Kronowitz et al., *supra* note 20, at 619 ("[T]he right to political self determination can be expressed in many different ways, ranging from limited self government to secession."); Mary Ellen Turpel, *Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, 25 CORNELL INT'L L.J. 579, 592 (1992) ("The scope of the right to self-determination will necessarily differ from case to case . . . ."); BROWNLIE, *supra* note 75, at 593 ("The choice may be independence as a state, association with other groups in a federal state, or autonomy or assimilation in a unitary state.").

Article I of the Montevideo Convention on Rights and Duties of States sets out the following qualifications for statehood: (a) a permanent population, (b) a defined territory, (c) government, and (d) capacity to enter into relations with other states.[178] This fourth qualification poses the problem. Brownlie equates it with the concept of independence, and asserts that the "question is that of foreign *control* overbearing the decision-making of the entity concerned on a wide range of matters of high policy and doing so systematically and on a permanent basis."[179] The current "trust" relationship between the Indian tribes and the United States government brings the question of independence into serious doubt in the eyes of other nations. Thus, it is probable that other countries would not recognize the independent Indian nations, even if they were willing and able to declare themselves as states.[180]

The predominant view in current international law is that the non-recognition of a state by another state has no effect upon the legal status of the former.[181] "It would be naive, however, to deny that, in practice, recognition can have important legal and political effects."[182] If other nations did not recognize the Indian nations' claims of independent statehood, which would be likely given their relationship with the United States, then they would be unable to join the other nations of the world in the international arena. Furthermore, even if the tribes did have certain rights as states, if they were not recognized as such there would be no way of enforcing those rights. Thus, claims of statehood offer little hope for Indians tribes at the current time.

The international stance on the subject of secession makes it an even less attractive solution. Under current international law, seces-

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178 Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 3100, 165 L.N.T.S. 19. For discussion of the four basic criteria for statehood, see BROWNLIE, *supra* note 75, at 74-80; CRAWFORD, *supra* note 27, at 36-48.

179 BROWNLIE, *supra* note 75, at 76.

180 Beyond the question of independence and the requirements for statehood is the obvious matter of political fallout. Allies of the United States are not likely to take a position on the statehood of Indian tribes that contradicts the U.S. government's position. Therefore, they probably would not accept the secession as legitimate. This assumes, of course, that the United States would not accept a claim of full statehood by the Indian tribes. The situation would be quite different, however, if the United States did allow such a claim. Then it would simply be a matter of determining whether or not a tribe meets the requirements for statehood under international law. If it did, then the tribe could fully participate in international affairs. The question remains, however, whether full statehood would be the best solution for a tribe.

181 This view is known as the declarative view of recognition of states. *See, e.g.*, CRAWFORD, *supra* note 27, at 24.

182 CRAWFORD, *supra* note 27, at 24. *See also* Kronowitz et al., *supra* note 20, at 621 ("The enforcement of international law, however, often depends more on political than legal considerations, because political interests and pressures often determine the effectiveness of international legal norms.").

sion is not a favored method of self-determination.[183] The Declaration on Friendly Relations, while advancing the right of self-determination, provides:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity or [sic] sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[184]

This provision is a strong indicator that the member countries of the United Nations do not consider secession a viable option for self-determination of peoples.[185] Thus, regardless of the capability of individual tribes to declare themselves as states, the member nations of the United Nations would probably not allow them to secede.

Finally, while the relationship between the Indian tribes and the federal and state governments has not always been optimal, it is a foundation upon which a new structure can be built. Given the geographic, economic, and political relationships, as well as the fact that Indian peoples, many of whom have developed definite and beneficial ties to the United States, are scattered throughout the nation, living both on and off reservations, it would be unproductive and inefficient to sever these relationships.[186] Also, demanding full statehood would likely cause a very negative reaction in the world community.[187] Indigenous peoples must look for solutions that will attract maximum international support; full statehood for Indian tribes may be too radical a

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183 Franck, *supra* note 169, at 58-59.

184 Declaration on Friendly Relations, *supra* note 171.

185 Indeed, it is the fear of secession itself that accounts for much of the reluctance among states with indigenous populations to support rights of self-determination.

> The concept of self-determination often provokes an immediate negative reaction that stems from self-determination's linkage with the creation of new states through decolonization or secession, and because some indigenous groups equate self-determination with full independence. This negative reaction overshadows the possibility of finding acceptable compromises on forms of internal self-determination that would not threaten the unity of the state, but that would provide indigenous groups with an effective degree of control over their own destinies.

Lawrey, *supra* note 57, at 763-64.

186 Since a lot of work has already been done to improve tribal-federal relations, it is not necessary to undo this work. What is needed is a new structure that will allow this work to take effect.

187 An example of the likelihood of such a reaction is the initial negative response of the U.N. to the breakup of Yugoslavia where the concept of territorial integrity was thought to prohibit secession. *See* Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992).

notion to garner such support.[188] Thus, a non-secessionist solution to the problem of Indian sovereignty erosion is the most reasonable. The question still remains, however, as to where within the range of possibilities this non-secessionist solution falls.

IV
BUILDING THE NEW STRUCTURE: A MODEL FOR TRIBAL SOVEREIGNTY

There have been many proposals to solve the sovereignty problems outlined above. Some examples include a constitutional amendment gnaranteeing the sovereign status of Indian tribes,[189] legislative enactments to undo the injustices of the past and provide for increased representation in the government,[190] and increased dependence on and control of the government "trust" relationship.[191] All of these approaches suffer, however, from the same basic flaw: they ground themselves in the current system of federal Indian law.[192] As

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188 Lawrey, *supra* note 57, at 761.

189 *See* R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 279-83 (1980) (suggesting an amendment recognizing tribes as similar to states). This particular solution may need to be a part of the free association system. The focus, however, must be on establishing the tribes as separate entities and requiring the United States to abide by the free association agreement.

190 The National Congress of American Indians (NCAI) recommends establishing an Inter-Departmental Council on Indian Affairs and producing a comprehensive federal American Indian and Native Alaskan policy through appropriate legislation. *See* NATIONAL CONGRESS OF AMERICAN INDIANS, DISCUSSION PAPER FOR NATIONAL TRIBAL LEADERS' MEETINGS: 1993 ADMINISTRATION TRANSITION PLAN AND 1993-97 CONGRESSIONAL INITIATIVES (Nov. 1992).

191 Wells, *supra* note 85 (calling for legislation constraining the plenary power of Congress and increased reliance on the "trust" doctrine).

192 Each of these proposals represents only a single step in defining a new and effective structure. By themselves, they are not enough. That is not to say, however, that they should not be part of the new structure. The transformation necessary to restore Indian sovereignty need not happen all at once. Individual steps grounded in current federal Indian law can lay the foundation for later change. For example, there is Supreme Court precedent that offers at least theoretical protection of tribal sovereignty. *See, e.g.*, Merrian v. Jicacilla Apache Indian Tribe, 455 U.S. 130, 137 (1982) (upholding the tribes right to levy a severance tax on oil and gas prices, stating that "The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."); United States v. Mazurie, 419 U.S. 544, 557 (1975) (Indian tribes "are unique aggregations possessing attributes of sovereignty over both their members and their territory."). There is also hope for greater respect of tribal institutions. *See, e.g.*, Iowa Mutual Insurance Company v. LaPlante, 480 U.S. 9 (1987) (upholding the authority of tribal courts to determine their own jurisdiction, requiring exhaustion of tribal remedies before turning to federal courts, and rejecting alleged incompetence of tribal courts as an exception to the exhaustion requirement).

In addition to promising judicial langnage, the United States Congress has attempted to increase tribal self-government by giving greater control of federal financial aid and programs to tribal government. The Tribal Self-Governance Demonstration Project may offer a brighter future for tribal sovereignty. For the text of the original program, see Title III of the Indian Self-Determination Act Amendment of 1988, Pub. L. 100-472. For a brief

the above discussion indicates, the current system does not adequately protect the rights of Indian tribes because it is not based upon their consent and it provides no defined method for dealing with the conflicts that threaten tribal sovereignty. Without addressing these two fundamental problems, approaches that merely doctor the injustices wrought by the system relieve the symptoms but fail to treat the disease.

Before discussing an approach that would address these problems, however, a very basic question must be answered. What incentive does the United States have to enter into a new arrangement with the Indian tribes?[193] The tempting answer is that, beyond the moral rightness of treating indigenous peoples with dignity, fairness and respect, there are none. Yet, the United States has at least two possible incentives, the first being international in nature and the second domestic.

In the international arena, the rights of indigenous peoples appear to be receiving greater attention than ever before. The development of international human rights law has created a climate favorable to action in the area of indigenous rights.[194] "It increasingly is difficult for governments concerned about their human rights image to ignore blatantly the problems of their indigenous peoples. . . . [T]he 1980s marked the beginning of an unprecedented period of international activity on the question of indigenous rights."[195] Among these rights is the right of self-determination.[196] As this right gains greater stature in the international forum, it will be more difficult for the United States to ignore its own violations of the principle of self-

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structural discussion of the Project, see Deanna Fairbanks, Taking Control of Federal Indian Programs: Selected Issues In Contracting Under the Indian Self-Determination Act, Self-Governance (presented at the Federal Indian Law Conference, April 1, 1993, Albuquerque, N.M.) (on file with the *Cornell Law Review*).

Thus, the current federal Indian law system may offer hope for tribal sovereignty. There must be a final goal, however, which is realistically based on an examination of the entire system. The free association approach described below offers such a final goal.

193 This question can be expanded to include the tribes as well. Both the federal and state governments and the Indian tribes lack the political will to change the current legal regime. The tribes are not willing to give up what has not been taken (this includes the trust doctrine which many tribal members see as the only thing standing between the tribes and complete extinction), and the state and federal governments do not mind maintaining the current state of affairs because they dominate the relationships. Both parties must abandon these attitudes if tribal-federal-state relations are to improve.

194 *See, e.g.*, Lawrey, *supra* note 57, at 716.

195 *Id.* An example of this recent activity is the establishment of the UN Special Working Group on Indigenous Populations in 1982. *Id.* at 720. One of the Group's goals is the development of a declaration on indigenous rights. *Id.* at 721.

196 *See supra* notes 169-85 and accompanying text (discussing the status of the right of self-determination in international law).

determination. The United States has a definite stake in maintaining its image as a supporter of international law.[197]

Arguably, the United States is already in violation of international law under the U.N. Charter. Article 73 provides in part:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
>
> a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
>
> b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement . . . .[198]

The United States maintains a "trust" relationship with the tribes, yet it has not fulfilled the requirements set out above. Whether the concern is international image, violation of international law, or both, the United States clearly has an incentive under international law to enter into an agreement that satisfies the self-determination rights of the Indian tribes, thereby bringing the United States into compliance with the modern trend of protecting indigenous rights.[199]

The United States government also has an incentive on the domestic front for the development of such an agreement. The current tribal-federal relationship is a source of great tension between the tribes and the people of the United States. In addition, the paternalistic approach that the government takes toward the tribes requires large amounts of federal money to implement. A mutually developed relationship between the tribes and the United States government

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197 If the right of self-determination ever attains the status of customary international law, the United States will not only have an image problem, but it will actually be in violation of international law. *See* Draft Declaration on the Rights of Indigenous Peoples in *Report of the Working Group on Indigenous Populations in its Tenth Session*, U.N. Comm. on Human Rights, E/CN.4/Sub. 2/1992/33, Annex I, pp. 44-52 (August 20, 1992). The U.S. has a strong interest in developing a relationship that will satisfy tribal self-determination without depriving non-Indian citizens of their rights. It may not have a chance to do so once the right of self-determination gains strength in international law.

198 U.N. CHARTER art. 73.

199 There is also an obvious prestige value that the United States would receive if it were among the first nations to establish and provide for the full self-determination of indigenous peoples within its territory.

would address both of these concerns to a significant degree. By creating enforceable expectations for the federal government, the individual states, and the tribes, a mutually developed relationship reduces conflict because all parties have some understanding of their standing on particular issues. Also, a mutually developed relationship allows for greater economic development of the tribes, with the ultimate goal being economic self-sufficiency.[200] The United States government could only benefit from such a state of affairs. Because the needs of both sides could be adequately addressed, a more harmonious and efficient relationship could be developed to the mutual benefit of the tribes and the United States. Thus, the United States has both international and domestic incentives to develop a mutually defined and established relationship between the individual Indian tribes and itself.

The remainder of this section discusses a model for tribal-federal relations that respects the sovereignty and interests of all concerned parties. Its basic structure is that of a "free association" patterned, in part, after the compact of free association between the United States and the governments of the Marshall Islands and the Federated States of Micronesia.[201] The value of building a system with this structure is three-fold. First, a free association agreement will comprehensively define the relationship between the two sovereigns, as well as establish methods for dealing with possible disputes. Second, the structure of this relationship comes from international law, and so, brings with it many aspects of a system that already addresses sovereignty concerns similar to those plagning the tribal-federal relationship. Finally, the Micronesia Agreement came out of the trustee relationship that originally existed between the two parties. The progression from trust to free association is analogous to the instant situation.

The complete structure of such an arrangement would be quite complex, and is beyond the scope of this Note. The following discussion will, however, introduce some of the basic concepts and requirements of this form of governmental relationship.

A. The Nature of the Association Agreement

The United Nations' standards on free association, while not binding on the present situation, are instructive as to the nature of the potential relationship between the tribes and the United States. Principle VII of General Assembly Resolution 1541 sets down the requirements for free association:

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200 If not self-sufficiency, a greater degree of inter-dependency could replace the almost total dependence of the current relationship.

201 Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986) [hereinafter Micronesia Agreement].

> (a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes.
>
> (b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.[202]

These requirements, which stress that the association of the parties must be voluntary, implicitly recognize the sovereign authority of the associating state.[203] Thus, the nature of the agreement starts with both sides having equal sovereign rights, and then allows for the limitation and bounding of those powers through negotiation.[204] This approach is far more protective than the current ad hoc methods employed under federal Indian law.[205] A free association agreement creates a structure and a process for addressing the concerns of all parties involved, and thus allows for a mutually derived solution, rather than a solution imposed by the more powerful sovereign.

B. Who are the Parties?

One of the first structural questions that must be answered is: Who are the parties to the agreement? The answer depends on whether each tribe is going to make its own agreement or whether, perhaps, there will be some new governmental body speaking for the tribes. Either approach would work, but each would require different dynamics. For example, the tribes could form a new governing body

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202 Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1541, U.N. GAOR, 15th Sess., Annex, Supp. No. 16, at 29-30, U.N. Doc. A/4684 (1960).

203 In some ways, this system is similar to the internal/external approach set down by Chief Justice Marshall. *See supra* notes 21-41 and accompanying text. The difference is, as this Note discusses, that Marshall's system was imposed upon the tribes and it did not define the relationship adequately, allowing it to be modified by years of judicial and Congressional manipulation.

204 This is, of course, an assumption. As is discussed above, the Indian tribes do not currently possess sovereign authority equal to that of the United States. The negotiation of such an agreement, however, would require that the parties start from a point of equality.

205 "The government's inability to acknowledge or rectify these inconsistencies in administering its relationship with American Indians has led to inequitable treatment among tribes and Indian peoples, has resulted in the courts continuing divestment of tribal authority in an era of self-determination, and has placed the United States in the position of violating evolving international legal norms of indigenous rights." O'Brien, *supra* note 24, at 1463.

that would operate along the same lines as the United Nations, with representatives from each member tribe forming a general legislative body. The United States could then sign a free association agreement with that legislative body, thereby streamlining the system. The downside to this approach, however, is that the legislative body could not guarantee adequate representation of each tribe's interests at all times.[206] Furthermore, the agreement would have to cover a large number of vastly different cultures with various individual needs, and would thus not be specific enough to meet the needs of the different tribes. This problem could be partially resolved by including a clause in the agreement to address the changing needs of the various member tribes.[207]

Individual free association agreements for each tribe, on the other hand, would allow each tribe to negotiate its own deal and protect its individual interests. Unfortunately, this approach would increase the complexity of the system and weaken the position of the smaller tribes. A small tribe with few resources might not be able to negotiate as good an arrangement as a tribe with larger numbers and greater resources. This approach also has the disadvantage of making it difficult for unrecognized tribes to take part in the system.[208]

A compromise solution might be the best approach. Tribes with adequate resources and governmental structure could make individual agreements with the United States. Additionally, tribes could form a federation of Indian States whose purpose would be to facilitate relations between the United States government and the tribes. Part of its role as facilitator would be to assist in the development of those tribes without a self-governing status adequate for individual relations with the federal government.[209] This organization would have its own charter and free association agreement, and would consist of representatives from all member tribes.[210] Such a structure would

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206 There would also be severe problems with respect to that body's ability to bind the individual tribes. It is doubtful that any tribe would be willing to grant that much authority to such an organization. This problem is the same as that encountered in the United Nations.

207 The following is one possible example of such a provision:

> The various member tribes may, in recognition of the different and changing needs of the individual nations, make separate agreements on matters of mutual concern with the federal and state governments. These separate agreements are valid only insofar as they do not conflict with the general language and purposes of this Compact.

208 The United States government would probably be unwilling to negotiate agreements with tribes that it no longer recognizes as separate governmental entities.

209 Thus, the federation would take on a protectorate role by assuring the rights and interests of those tribes that lack adequate resources, governmental structure, or formal recoguition by the federal government.

210 An important question at this point is: Who will represent each tribe? It is unclear in many cases what governmental body leads an individual tribe. Various factions may

combine the strengths of both systems and could greatly further the interests of Indian peoples.

C. What Should the Agreement Cover?

The specifics of each free association agreement would vary according to the needs of the tribe. Several items, however, would be central to all of them. In the case of the agreement between the proposed federation of Indian states and the federal government, the agreement would cover some of the basic items that are appropriate to all tribes.[211] The following are some of the issues that should be addressed in all free association agreements.[212]

A Statement of Voluntary Association. All agreements would begin with a statement of the sovereign status of the tribe and its voluntary entrance into the agreement. This item is of great importance because it forces both sides to acknowledge the status of the tribe. It is through this section of the compact that the consent of the tribes would be injected back into the system, for without consent, there is no sovereignty. This statement would establish the government-to-government nature of the agreement.

A statement of voluntary association would be most effective as the preamble to the entire agreement. While the body of the agreement would map out the boundaries of tribal and federal sovereignty, the preamble would set the tone of the entire relationship. In the long run, as the tribes and the United States government adjust the terms and specifics of their relationship, it will be this statement of sovereignty that continues to provide the framework of sovereignty and the tribal-federal relationship. The following is one example of a preamble to a free association agreement.

PREAMBLE

The Government of the United States of America and the Government of the [Name of Tribal Nation];

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represent very different views on the needs and future of the tribe. This situation is often the result of federal control over tribal life. In the end, this is a question that each tribe must answer.

211 For example, the agreement might include a provision defining the citizenship of all Indian peoples under this new regime. Another appropriate provision for this agreement would be a section discussing the terms and methods for bringing unrecognized or underdeveloped tribes into the new system. One very important provision which would be quite appropriate in the association agreement of the federation of Indian States, would determine the meaning and scope of the term "tribal land." For example, would the term mean trust land held by the tribe itself, tribal and allotted trust land, or all land within reservation boundaries?

212 This Section discusses sample provisions that suggest possible answers to the issues presented. Given the highly complex and varying needs of the different tribes, it would be completely unproductive to propose actual provisions for these free association agreements.

> Affirming that their Nations are founded upon respect for human rights and fundamental freedoms for all, and that all peoples have the right to freely determine their own destinies and to enjoy self-government;[213]
>
> Affirming the common interests of the United States of America and the [Name of Tribal Nation] in creating close and mutually beneficial relationships through free and voluntary association of their respective Governments;
>
> Affirming the interest of the Government of the United States of America in promoting the economic advancement and self-sufficiency of the people of the [Name of Tribal Nation];
>
> Recognizing that the [Name of Tribal Nation] have and retain their sovereignty and their sovereign right to self-determination and the inherent right to adopt and amend their own Constitutions and forms of government;
>
> Recognizing that the approval of the entry of their Government into this Compact of Free Association by the people of the [Name of Tribal Nation] constitutes an exercise of their sovereign right to self-determination;[214]
>
> NOW, THEREFORE, AGREE to enter into a relationship of free association which provides a full measure of self-government for the peoples of the [Name of Tribal Nation]; and
>
> FURTHER AGREE that the relationship of free association derives from and is set forth in this Compact; and that during such relationsbip of free association, the respective rights and responsibilities of the Government of the United States and the Government of the [Name of Tribal Nation] in regard to this relationship of free association derive from and are as set forth in this Compact.

Terms of Economic Relations and Assistance. The various tribes will require economic assistance to further their development. Currently, most tribes receive federal funding for various projects and needs. The purpose of this section would be to transfer the economic relationship to the new system.[215] In this section, detailed descriptions of the rights and obligations of both parties with respect to economic matters such as powers of taxation,[216] methods of economic develop-

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213 This paragraph is an explicit recognition of the tribes' right of self determination. With this statement in place, the status of the right of self-determination in international law is irrelevant. The rights of the tribe under this principle are guaranteed by United States domestic law.

214 This paragraph operates as an admission by the tribe that their act of entering into this agreement satisfies their rights of self-determination. Thus, it protects the United States government from claims of violation of that right.

215 This section might also contain provisions for modifying the terms of economic assistance as the tribe becomes more self-sufficient.

216 A provision on taxation would be crucial to the success of a free association agreement. Tribes would have to be completely certain of their rights and obligations in order to develop viable economic development plans.

ment, and business regulations,[217] would also be included. For example, the following taxation provision might be appropriate:

> All tribal lands, activities and peoples will be immune from any state taxation not specifically provided for in this Agreement or in a Tribe-State Compact[218] established under the procedures set forth in this Agreement.[219]

Legislative Jurisdiction. The agreement must set forth in detail the rights and obligations of both parties with respect to criminal codes, governmental regulations, statutes, and other legislation. Without these specifications, the sovereign power of the parties would be undefined. For example, in order to avoid future conflict, the agreement must state whether a tribe can prosecute a nonmember. Another example is the question of whether a tribe has foreign sovereign immunity. These matters could be solved simply by adopting current federal law, or they could be individually negotiated. Implicit in this idea is the fact that the agreement must include a provision which holds that all previously applicable federal and state law not explicitly incorporated into the agreement would be void. This provision is absolutely necessary if the parties are to start with a clean slate between them.[220] Consider the following example of such a provision.

> The parties to this Agreement recognize the sovereign status of the various Native American Nations. Therefore, except as may be specifically provided for in this Agreement, all previous sources of legal authority between the [Name of Tribal Nation] and the United States of America are rendered null and void. This provision in-

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217 *See, e.g.*, Micronesia Agreement, *supra* note 201, § 177(c), 99 Stat. at 1812 (providing a $150 million grant to the government of the Marshall Islands). Other provisions necessary for the Indian Agreement would be yearly appropriations for each tribe, guarantees of services, and standards for assistance requests.

218 The purpose of this exception is to allow the tribes and the states to enter into mutually beneficial arrangements when such opportunities present themselves. For example, tribal members might opt to pay state income taxes in return for full state services on the reservation.

219 Federal taxation of Indian tribes would be a complex question under this type of agreement. One solution would be to agree upon dual tribal-federal citizenship of Indians. These individuals would then be subject to federal taxation but could get credit for any taxes paid to the tribal government.

220 *See, e.g.*, Micronesia Agreement, *supra* note 201, § 171, 99 Stat. at 1810 providing that

> Except as provided in this Compact or its related agreements, the applications of the laws of the United States to the Trust Territory of the Pacific Islands by virtue of the Trusteeship Agreement [the prior arrangement between the parties] ceases with respect to the Marshall Islands and the Federated States of Micronesia as of the effective date of this Compact.

This is not to say, of course, that all of the hard won tribal-state agreements must be eliminated. Appropriate state law could be reincorporated into the new system through tribal-state compacts.

cludes any and all federal and state common law, legislation or other agreements not specifically provided for herein.[221]

The parties further recognize that the above statement requires that the government of the United States of America affirmatively renounce the plenary power of the federal government over Indian Affairs, and that the individual states possess no power whatsoever over the tribes unless the tribe agrees to such power in a tribe-state compact.[222]

The parties further agree that no new legislation affecting any of the rights or obligations established herein or under any further agreement or compact provided for under the procedures of this Agreement will take effect without a formal mediation between the parties.[223]

The parties further acknowledge that the rights and obligations created by the Agreement are self-executing. The parties accept the jurisdiction of the courts of either party with respect to disputes arising under this Agreement or any collateral agreement provided for in this Agreement.[224]

In the event that a judgment in the courts of either party is offensive to the rights of either sovereign, that party may resort to the dispute resolution methods provided for herein.

Dispute Resolution and Modifications. It is inevitable in a contract of this scope that there will be disputes over ambiguous or omitted provisions. Additionally, there will always be new matters of mutual concern that require either modification of the agreement or creation of a collateral agreement. Therefore, a method of dispute resolution must be established. The best approach would be a system of conference and mediation. Although the details of such mediation should be negotiated, it is clear that a mediation method would help insure that the parties meet as equals.

The content of this section would vary greatly with each agreement. The differing cultural, economic, and political systems of the

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221 The implications of this provision would be far reaching. It would void not only laws which were detrimental to the tribes but also those which were favorable. This situation would force both sides to completely re-examine the relationship and to negotiate those points which each felt were important.

222 This clause, while a logical outcome of the previous clause, should be explicitly stated in all agreements so as to assure that the plenary power doctrine can never be interpreted back into the relationship.

223 This provision is primarily aimed at the United States government. It is an attempt to provide some assurance that the federal government will not unilaterally alter the agreement. A free association between the tribes and the United States will operate properly only if all parties agree to be bound.

224 It is likely that neither party would want collateral agreements to be self-executing in all circumstances. This provision should allow for explicit statements in collateral agreements disallowing self-execution of that agreement or parts thereof. Another concern that might be addressed by this section would be whether individuals had standing to raise claims under the Free Association Agreement.

various tribes would require each agreement to adopt a different approach. There would be, however, some structural similarities. Each agreement would have to address the selection of a facilitator for the mediation and would have to establish a system for the development of collateral agreements and amendments. Any sample provision in this section would be totally speculative. Although they may or may not be directly applicable, the following provisions, taken directly from the Micronesia agreement, are instructive.[225]

> The Government of the United States shall confer promptly at the request of the Government of the Marshall Islands or the Federated States of Micronesia and any of those Governments shall confer promptly at the request of the Government of the United States on matters relating to the provisions of this Compact or of its related agreements.
>
> In the event the Government of the United States, or the Government of the Marshall Islands or the Federated States of Micronesia, after conferring pursuant to Section 421, determines that there is a dispute and gives written notice thereof, the Governments which are parties to the dispute shall make a good faith effort to resolve the dispute among themselves.
>
> If a dispute. . . cannot be resolved within 90 days of written notification in the manner provided in Section 422, either party to the dispute may refer it to arbitration in accordance with Section 424.
>
> Should a dispute be referred to arbitration as provided for in Section 423, an Arbitration Board shall be established for the purpose of hearing the dispute and rendering a decision which shall be binding upon the two parties to the dispute unless the two parties mutually agree that the decision shall be advisory.[226]

Tribal-State-Federal Relationships. Because the Indian nations are located throughout the various states of the union, it will be necessary to establish the scope of authority at the tribal, federal, and state levels. For example, the agreement could provide for compacts with the state in which a tribe resides. These compacts should be separate agreements, negotiated with the individual states, that govern relationships that are best left between the state and the tribe.[227] For example, a

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225 A central aspect of the dispute resolution agreement provision is fairness. The agreement would have to establish methods for assuring that the United States did not dominate the negotiations because of its superior position. The parties might request United Nations supervision of all proceedings. This would help to assure that all parties involved acted in good faith.

226 Micronesia Agreement, *supra* note 201, §§ 421-424, 99 Stat. at 1827-28. Other provisions include instructions for selecting an arbitration board, voting guidelines, allowance for reference to international law, and cost provisions.

227 The Indian Gaming Regulation Act (IGRA), 25 U.S.C. § 2710(d)(3)(A) (1988), offers a good example of how these compacts might work:

tribe might make a compact with the state to establish mutual local law enforcement.[228] The agreement would need to establish a

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> Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

25 U.S.C. § 2710(d)(3)(A) (1988). The IGRA sets out the scope of the Tribal-State compact as follows:

> (C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—
> (i) the application of the criminal and civil laws and regulations of the Indian Tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe . . . ;
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activities;
> (iv) taxation by the Indian tribe of such activity . . . ;
> (v) remedies for breach of contract;
> (vi) standards for the operation of such activity . . . ;
> (vii) any other subjects that are directly related to the operation of gaming activities.

Id. at § 2710(d)(3)(c)(i-vii). These provisions allow for a compact which completely describes the obligations and rights of all interested parties with respect to the issue of gaming. The negotiations would reflect the various interests of the state and the tribe. Similar compacts could be arranged in other areas including: social services, law enforcement, education, and medical services.

The IGRA mandates a compact between the tribe and the state before gambling can take place. There is some question as to the scope of a state's authority to make agreements with tribes absent a congressional mandate or subsequent congressional approval. *See* Kronowitz et al., *supra* note 20, at 584-85. In addition, the IGRA requires a compact before tribes can carry out class III gaming, and thus mandates an abrogation of tribal sovereignty. These matters of state and federal authority would be eliminated, however, under a free association agreement. The federal government could explicitly allow for compacts in the agreement and, if necessary, set down requirements for their validity. It would be up to Congress and the states to work out how to implement such a system by enacting legislation. One example of how this could be set up is the Tribal-State Compact Act, introduced, but not passed, in Congress in 1978. *See id.* (citing Tribal-State Compact Act of 1978: Hearings on S.2502 before the Senate Select Comm. on Indian Affairs, 95th Cong., 2d Sess. 3-11 (1978)) ("The Tribal-State Compact Act was intended to provide clear federal authorization to Indian nations and the states . . . to enter into agreements which would apply civil, criminal and regulatory laws of the tribe or the state government over Indians or non-Indians as the parties saw fit to agree.").

For a discussion of other examples of compacting, see Michael Minnis, Tribal-State Compacting In Oklahoma (presented to the Federal Bar Association's Annual Indian Law Seminar, April 2, 1993) (on file with author).

228 There are many areas in which states and Indian nations have found their jurisdictional authority in conflict and they are discovering areas in which the mutual advantage of each is potentially served by entering into negotiated agreements. Such cooperative agreements between states and tribes have already been negotiated in an effort to address daily problems that both governments face such as law enforcement, delivery of social services, and hunting and fishing regulation. For example, in the area of law enforcement, cross-deputization of law officers has been used as an efficient and economical initiative in many areas.

method for making these compacts and determining their allowable scope. The agreement could also provide for collateral agreements with the federal government, as previously discussed. A clause allowing for tribal-state compacts might state as follows:

> The State in which the tribe resides shall have no governmental authority over the tribe and its laws shall have no effect within the boundaries of tribal land absent a specific provision in this agreement.[229]
>
> The Tribe and the State in which it resides may make separate compacts with respect to matters of mutual concern provided that it does not conflict with the language or purposes of this Free Association Agreement or other tribal-federal collateral agreements.[230]
>
> The procedures for making a Tribal-State Compact will follow the agreement-making procedures set down in this Agreement. Furthermore, such Compact will be self-executing as between the tribe and the state subject to any express provision to the contrary.

These compacts would have the important effect of allowing the tribes and the states to develop mutually beneficial working relationships. These relationships would enable the individual tribes to assume greater control over their destiny. Mutually beneficial relationships would also help to lessen the tension between the tribes and the states, creating a more cooperative co-existence. When conflicts did occur, the tribe and the state would be in a better position to create a solution acceptable to all parties.

These are only some of the areas that would have to be covered in individual free association agreements. By fully elaborating the rights, duties and obligations of the tribal, state and federal entities, free association agreements would protect tribal authority from arbitrary modification by the United States government. As a result, the tribes would exercise greater control over their own destiny. In addition, the Indian peoples brought under this legal regime would have a greater affinity for the new system because it would be the result of their own efforts, rather than the fiat of a greater power. Thus, the system would be both consensual and well-defined. It would re-establish the sovereign base of the tribes, which, in turn, would provide the platform for a stronger, more fruitful relationship, less prone to resentment and ideological conflict, between the Indian tribes and the people and government of the United States of America.

Kronowitz et al., *supra* note 20, at 584-85 (citations omitted).

229 This provision is necessary to establish the independence of the tribe from the state. Thus, any dealings between the tribe and state will be on an equal basis.

230 This provision recognizes the pre-emptive effect of federal law with respect to the states. Federal arrangements with the tribes take priority over state arrangements.

D. How Would The System Work?

There is no doubt that setting up a free association agreement and creating a federation of Native American tribes would be a monumental task. Once in place, however, it would produce beneficial results for the tribes and the United States when conflicts arise. The effect of a free association agreement within the context of tribal-federal relations would be to establish a system of dual sovereignty, as described by A. Lawrence Lowell.[231] The difference between the current system and the proposed one is that the boundaries of authority for both parties would be specifically delineated by a free association agreement. In addition, for the first time in the history of modern tribal-federal relations, the boundaries of authority between the tribes and the federal government would be mutually established and accepted. Thus, all relations between the tribal government and the federal and state governments would have a fixed starting point. From this known point of departure, the parties could launch into the mutual development of solutions to problems that arise. The three cases discussed above offer excellent examples for exploring the operation of a free association agreement. How would these matters have been decided if a free association agreement had been in place?

Under a free association agreement, the situation in *Lone Wolf*[232] would have been much different. This case provides an example of a situation in which the United States government and the Kiowa and Comanche Tribes would have to establish a collateral agreement with respect to the land concerned.[233] Because a free association agreement explicitly denies the plenary authority of Congress, the collateral agreement would have to be freely and fully negotiated and could not be unilaterally modified. Thus the agreements over land and monetary allocations could not have been changed by Congress without the express consent of the tribe. The argument that the "dependent nature" of the tribes gave Congress the power to abrogate agreements would fail. Under the free association agreement, the parties would have negotiated on an equal basis, so neither party would have been able to unilaterally change the collateral agreement without nullifying it.

The sequence of events necessary to establish a collateral agreement in these circumstances provides insight into the radical difference between the current legal regime and a system based on free

231 *See supra* note 159 and accompanying text.

232 *See supra* notes 84-103 and accompanying text.

233 With a free association agreement in place, the focus of this dispute would have been the acquisition of tribal lands for non-Indian settlement and the compensation of the tribes. Internal organization, allotment of lands to individuals, and other matters of tribal governance would be under the explicit control of the tribes.

association. The United States government would first have to recognize the need for more land for settlement. It would then have to request negotiations with the tribe for the sale of the desired land. The negotiations might stop at that point because it is reasonably possible that the tribes would not wish to sell the land. Indeed, unlike under the current regime, the tribes would have the power to make that choice. At this juncture, the only options for the U.S. would be to take the land by force or abrogate the entire free association agreement. Given the probable negative reaction in U.S. society and the world, the United States would be unlikely to take such drastic measures. If, on the other hand, the tribes wished to sell the land, the parties could reach a mutually acceptable agreement.

Oliphant[234] and *Colville*[235] offer good examples of situations in which the tribes and the state and federal governments would assign jurisdiction in the original association agreement or in subsequent compacts. In *Oliphant*, the decision would turn on whether the agreement discussed tribal jurisdiction over nonmembers. If it had, the matter would be resolved simply by reference to the language of the agreement. If the agreement did not cover the matter, the tribe, as a sovereign power would have jurisdiction because the free association agreement voids all previous laws not explicitly adopted. If this outcome concerned the federal government, then it could request negotiations for an amendment or collateral agreement.

The situation in *Colville* would be dealt with under the provision in the free association agreement that allowed compacts between the states and the tribes. The actual decision in this matter could go either way. If Washington wanted a tax, it would negotiate with the tribe. For example, in exchange for the tribe allowing the State of Washington to collect the revenue, Washington could provide road maintenance services on specified reservation highways. A simpler agreement might be to share the tax revenues. The critical idea is that the tribe would be negotiating a mutual agreement instead of having a rule unilaterally imposed upon it by the federal government. It is quite possible that Washington would still collect the tax. It would be collected, however, with the agreement of the tribe and in exchange for some valuable consideration. This outcome would be an exercise of sovereign authority by the tribe, not an affront to or an abridgment of tribal sovereignty by an outside force. Thus, the process would assure that in reaching a solution the rights of all concerned sovereigns would be protected.

In all three of the cases discussed above, it is possible that the negotiated outcomes under the free association agreement would be

234 *See supra* notes 104-23 and accompanying text.
235 *See supra* notes 124-50 and accompanying text.

the same as the judicial decisions reached under the current regime.[236] The free association approach, however, is preferable because it leaves the sovereign authority of the Indian nations intact and provides them with a means of exercising freedom of choice with respect to decisions about their future. Mutual agreement is the hallmark of relations between states. While any single agreement might be more advantageous to one party than the other, the value in maintaining tribal control over Indian affairs, in the long run, would outweigh the disadvantages of individual agreements. Indeed, the compromise necessary to reach a consensus offers the best proof that the sovereignty of all concerned parties remains intact. No party may simply impose its will upon the other. Under such a regime, Justice Marshall's assurance that a state does not give up its sovereignty simply because it delegates some of its authority to a stronger state[237] becomes more than empty rhetoric.

E. Would the System Work?

Regardless of the actual form, content or impact of these agreements, their adoption would result in a voluntary relationship that balances the needs of both parties. There are, however, some major difficulties with such a system. One possible complaint is that the system is too complex to implement in any satisfactory way. Another problem is that once the system is implemented there is no way of assuring that the United States will not use its powerful position to dominate the relationship, as it has in the past.[238] Indeed, there would seem to be no way of assuring that the United States could not unilaterally modify the agreement, or simply abrogate it entirely. There are no easy answers to these problems. That does not mean, however, that the attempt to make tribal-federal relations more equitable should be abandoned.

The first problem is less troublesome than the second. Complexity alone would not necessarily preclude the implementation of such a system. It would be comparable to the complexity that currently exists in the system of agreements governing relations between the United States and other nations.[239] The development should be gradual, with small steps laying the foundation for later developments. For exam-

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236 Except, of course, the power of Congress to unilaterally change an agreement would not be recognized.

237 *Worcester*, 31 U.S. at 560-61, discussed *supra* notes 35-39 and accompanying text.

238 One can question whether this power imbalance will even allow the initial development of an equitable system.

239 Actually, one of the reasons that this proposal represents such a monumentally complex task is that the current system is so inadequate that it is difficult to see where one must start in dismantling it. If the parties were starting fresh and on equal footing, then the path to an agreement would be much clearer.

ple, the first task might be to set up a federation of Native American nations.[240] With such an organization in place, negotiations could take place with the United States government while the federation helps tribes to prepare for individual negotiations.[241] Although this process would be slow, it would allow for the formation of a solid sovereign base upon which the rest of the system could stand. With a solid foundation in place, the rest of the system would simply require negotiation and organization. Tools for these processes already exist in international relations, providing excellent models for development.[242]

The second problem can be restated as follows: How can we make sure that the United States will act in good faith with respect to the Indian tribes, or, how will the agreement be enforced? Given the history of Indian-federal relations, this is a valid concern. In some respects, there is no good answer to this problem. There is little that the tribes could do if the United States decided that it no longer wished to abide by its agreements.[243] There are, however, several ways of attempting to assure that the parties abide by the agreement.

First, the agreement itself would have a dispute resolution mechanism.[244] This provision offers a system for enforcing the agreement internally. The system assumes, however, that the parties will abide by the agreement. If they do not, the agreement cannot enforce itself. Beyond internal mechanisms, there is an international method of enforcement available. The parties could issue unilateral declarations of intent to be bound by the agreement and that the agreement will not

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240 There is already at least one organization of this nature in existence. The National Congress of American Indians (NCAI) is an inter-tribal organization established in 1944 to promote and advance the interests of its member tribes as sovereign nations. Under the current regime, it can act only as a lobbying organization. The NCAI has no real power over Indian affairs. It does, however, represent a first step towards establishing a system for the efficient organization of the tribes, such as the one described. The NCAI could take on a greater role if the individual tribes would vest it with more authority and provide more support for its operations. *See* NATIONAL CONGRESS OF AMERICAN INDIANS, DISCUSSION PAPER FOR NAITONAL TRIBAL LEADERS' MEETINGS: 1993 ADMINISTRATION TRANSITION PLAN AND 1993-97 CONGRESSIONAL INITIATIVES 1-2 (1992).

241 The most important first task of this organization might be to facilitate the development of an agenda acceptable to all of the member tribes. Such a clear statement of the purposes and goals of Indian peoples would be crucial to an endeavor of this magnitude. The NCAI has already begun the development of an action plan for the Clinton administration. *Id.* at 3-10.

242 Australia is currently grappling with the problems of establishing a treaty relationship with the aboriginal populations of that country. For an insightful analysis of the problems inherent in this situation, see Lawrey, *supra* note 57 at 753-61 (discussing the Australian attempts to establish a treaty between the government and the aboriginal peoples).

243 A new constitutional amendment which recognizes and assures the sovereign status of Indians would, of course, restrict Congress from violating the principle of tribal sovereignty.

244 *See supra* notes 225-26 and accompanying text.

be modified or abrogated unilaterally. Such a declaration, if made by a representative of the United States before the United Nations General Assembly, would be binding under international law.[245] Thereafter, if the United States violated the agreement, there would be grounds for international action.[246] While there may be other possible international enforcement methods,[247] this would be the most effective approach.[248]

The problem of enforcement is difficult in the context of this type of agreement.[249] Even if the United States made the agreement internationally binding through a unilateral declaration, it is questionable whether there would be any real means of enforcing it. This argument, however, is available whenever there is an agreement between nations. At some point, it becomes necessary to assume that a nation will keep its promises.[250] Without this assumption, there can be no international relationships, nor can there ever be any relationship between the United States and the Indian tribes that is not

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245 In *Nuclear Tests* (Austl. v. Fr.), 1974 I.C.J. 253 (Sec. 20), the International Court of Justice held:

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations . . . . When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not within the context of international negotiations, is binding.

Id. at 267.

246 There is some question, however, whether a third party would have standing to bring an action against the United States in the International Court of Justice. *See* Lawrey, *supra* note 57, at 775-77 (discussing grounds to decline jurisdiction based on the standing of the party initiating the action).

247 Some other methods could include: inviting scrutiny by the U.N. Working Group on Indigenous Populations, international arbitration, and requesting the "good offices" of international authorities to assist with dispute resolution. *See generally* Lawrey, *supra* note 57, at 769-76 (discussing various methods for generating international scrutiny to enforce an agreement such as the one recommended in this Note).

248 In reality, the most effective enforcement would come from continuing negotiations and discussions between the parties. Thus, a combination of many enforcement techniques would be necessary.

249 In this way, the legal system proposed in this Note may not seem very different from the early treaties between the Europeans and the Indian tribes. The modern legal environment, however, is less accepting of the total abrogation of all duties under treaties and international agreements.

250 The presumption that a nation will abide by its agreements is contained in the international legal principle of *pacta sunt servanda*: "[a] treaty in force is binding upon the parties and must be performed by them in good faith." BROWNLIE, *supra* note 75, at 613 (citing the Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, U.N. Doc. A/CONF. 39/27).

grounded in conquest. There is hope in the words of Justice Black: "Great nations, like great men, should keep their word."[251]

CONCLUSION

This Note challenges the traditional manner of viewing Indian sovereignty. Indeed, it recognizes that as long as a more powerful sovereign is able to redefine the concept at will, Indian sovereignty is an illusion. The conflicts inherent in the current relationship between the United States and the Indian nations are the result of the placement of one nation under the authority of another without defining the resulting relationship and without the consent of the "dependent nation." The sovereignty of the weaker nation exists merely at the sufferance of the stronger nation. Because of the nature of that relationship, the current system cannot provide the structure for the reestablishment of Indian sovereignty.

While the solution to this problem does not lie within the immediate legal regime, it also does not lie completely outside of current legal boundaries. The needs of the Indian nations will not be met by attempting to establish separate and independent nations. The answer lies in a system that will allow the United States government and the Indian tribes to interact in a manner that is neither totally separate nor totally united. A new structure must be built and mutually enacted to rebuild the sovereignty base of the tribes and grant them greater autonomy. It must also create a bond between the tribes and the United States that will enable them to work for their mutual benefit. This structure can be achieved through free association agreements.

James A. Casey†

251 Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

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