RESERVING TO THEMSELVES: TREATIES AND THE POWERS OF INDIAN TRIBES

Vine Deloria, Jr.

The full impact of the Reagan-Bush judicial appointments is now clear. The federal judiciary is embracing the conservative, indeed, reactionary posture of the 1890s, and as the pendulum swings even further to the right, there is a danger that *Plessy v. Ferguson*[1] will once again become mainstream constitutional law. In Indian affairs the old reasoning of *Ward v. Race Horse*[2] has been dusted off in the *Ten Bear* case,[3] and the Indian Reorganization Act[4] has been successfully challenged[5] at the district court level as being constitutionally too broad in its delegation of congressional power to the executive branch; this reasoning in the face of the "plenary power" doctrine suggests no limit whatsoever on the actions of the federal government with respect to American Indians.

At least part of the problem originates in the scholarly work available to law clerks and judges and justices. Virtually nothing of substance has been published since Felix S. Cohen published his famous *Handbook of Federal Indian Law*. That volume, although admittedly a "handbook," became enshrined as a treatise and has been treated as such for more than a half century. It reflects a former time and different social attitude—an era when federal policy initiatives were experimenting with the idea that American Indians could and would abandon their old ways and adopt the political institutions and business practices of the white man. Since no Indians were participants in the writing of the *Handbook*, or even in gathering the data to be included in it, the work represents the white liberal perspective of what Indian rights might be more than half a century ago, assuming they were traveling on the path defined by John Collier, Felix Cohen and Nathan Margold. Any modern examination of Indian rights and powers, either as tribes or individuals, must therefore begin with a critique of the body of information, and most particularly its arrangement, given to us by Felix Cohen.

THE *COHEN HANDBOOK*

Few scholars know the background of the writing of the *Handbook* and consequently assume that it was produced harmoniously by objective scholars free from the turmoil of ordinary mortals. Originally it was to be a handbook

1. 163 U.S. 537 (1896).
2. 163 U.S. 504 (1896).
3. Crow Tribe of Indians v. Repsis, 73 F.3d 982 (10th Cir. 1995).
4. 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. § 461–479 (1994)).
5. South Dakota v. United States, 69 F.3d 878 (8th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3823 (U.S. Jun. 3, 1996) (No. 95–1956).

for litigation to be used by attorneys of the Justice Department *against* Indians. Cohen was borrowed from the Interior Department, given a small staff and funds for the compilation of documents, and then continually harassed and hassled by people in the Justice Department as he tried to produce a handbook that would be useful to everyone in the field of Indian law—but not particularly by Indians. Eventually Cohen returned to the Interior Department and finished the handbook with attorneys from that department and not the Justice Department, meanwhile being protected from internal federal politics by Nathan Margold.[6]

Supporting evidence behind the *Handbook*, but hardly ever seen by today's scholars, was a massive compilation of forty-six volumes published as *The Statutory Compilation of the Indian Law Survey: A Compendium of Federal Laws and Treaties Relating to Indians*, which covered case law, statutes, and opinions and rulings made by administrative officers during the course of dealing with Indians. Some 8,600 items were included in this compendium. It is a wonder, actually, that anyone was able to survey this mass of material and bring any orderly sense out of it. We can only suppose that some kind of philosophical framework had already been devised by people reviewing this material.

Even with more sympathetic Interior staff attorneys working with Cohen, the *Handbook* cannot be said to represent a neutral or even pro-Indian point of view. People in those days simply could not understand that racial minorities, especially Indians, would have their own interpretation of historical events and legal rights. A good deal of the most important interpretations of policy development, status, and case law has a definite federal bias in that no question is ever raised as to whether federal action were proper or whether or not the federal government violated previously agreed upon principles of the federal-Indian relationship. Thus, the historical fact of the allotment acts and agreements, for example, are reported as if what happened was legal and consistent with previous activities of Congress. No critical questioning of the legality or propriety of statutes, cases and opinions can be found in the *Handbook.*

Both Cohen and Margold gilded the lily in writing their short introductory comments. Cohen made it appear as if the *Handbook* had been created to serve Indian interests—a clever ploy to make the volume acceptable to lawyers working in the private area who would be representing Indian tribes. Margold spent almost as much space describing agreements in his introduction as Cohen had in explaining them in the text.[7] He suggested also that "federal Indian law" had four principles: (1) political equality of the races, (2) tribal self-government, (3) federal sovereignty in Indian affairs, and (4) governmental protection of Indians.[8] In reality the work strongly supported federal supremacy, paid lip service to self-government, dealt peripherally with

6. See generally Jill E. Martin, *A Year and A Spring of My Existence: Felix S. Cohen and the Handbook of Federal Indian Law*, 8 W. LEGAL HIST. No. 1, Winter–Spring 1995, at 34–60, for a fine discussion of the writing of the *Handbook*. My comments here are a summary of the discussion in this article.

7. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1941); *compare* pp. VIII *and* 67.

8. *Id.* at IX.

protection and could be said to be a complete farce insofar as it advocated political equality of the races.[9]

In 1958, the Interior Department, attempting to make it appear as if the termination policy was within the mainstream of the historical federal treatment of Indians, published an edited version of the *Handbook* that greatly reduced the clarity of the original work and shaded the text to make it seem as if Indians had few rights the government was bound to respect. Most people agreed that the 1958 edition was a hatchet job and continued to use the original work. Since the 1958 edition substantially reduced the compilations of cases and statutes, its value to practicing attorneys and scholars was reduced by the same magnitude and so demand increased for either a reprinting of the original or a major revision of it to include cases and statutes that had become law in the intervening decades.

The 1968 Indian Civil Rights Act[10] required that Kappler's *Indian Laws and Treaties* and Cohen's *Handbook of Federal Indian Law* be updated and reprinted. In 1970, the American Indian Law Center sponsored the reprinting of the original volume and in 1980 subcontracted with a group of law professors to do a revised and updated version. The reprinted editions of Kappler's and Cohen's original works quickly sold out and became hot items on the rare book market. The third edition of the Cohen volume produced by the law professors was published in 1982 amidst great fanfare and publicity.

Comparing Cohen's original work and the third edition is like seeing pictures of San Francisco before and after the earthquake. Although the authors were pure of heart and brimming with energy and sincerity, the edition they produced was a disaster from start to finish. No consistent use of the major concepts of federal Indian law graced these pages. The charts and tables at the back of the book were a hopeless jumble of data that was impossible to use. The index was wholly inadequate and the footnotes often made no sense at all. The authors tried to remain faithful to Cohen's framework and this loyalty produced artificial "periods" of policy that conflicted with actual historical events. "Incoherent" would have been high praise for this nonsense.

Today we have another effort to "update" the *Handbook* and again the editors seek to stand within the Cohen tradition and outline "federal Indian law." Like the last group of scholars, however, the current group has little experience in litigation or private practice and minimal knowledge of Indians. Some Indian attorneys and scholars are now included in this editorial group, but, for the most part, they have but recently entered the field and have not had the years of experience that is necessary to produce seasoned and reasoned analysis of the major doctrines and issues. The test of this new effort will be the extent to which their arrangement of materials reflects a realistic appraisal of

9. It is extremely curious why Margold would emphasize federal protection when it is mentioned in the *Handbook* only on pages 252–53 under a section entitled *Federal Legal Services* and that the explanation given is detrimental to the proposition that the United States is carrying out its responsibilities. The relevant language in the *Handbook* is: "A specific statutory duty to represent the Indian in all suits at law and equity is found in section 175, title 25, of the United States Code." The *Handbook* then cites the authority given by this section as follows: "In all States and Territories where there are reservations or allotted Indians the United States district attorney shall represent them in all suits in law and equity." The remainder of the *Handbook* discussion then admits the United States has not set policy for fulfilling these responsibilities.

10. 82 Stat. 77 (1988) (codified as amended at 25 U.S.C. §§ 1301–1303 (1994)).

the viewpoints of both the federal government and the Indian nations with whom the political relationship exists. The critical question facing them will be determining to what extent these materials are placed within their proper historical context so that their applicability can be honestly evaluated.

IS COHEN'S FRAMEWORK IMPOSSIBLE?

Lest it appear that this article is overly harsh with those who have tried to follow in Cohen's footsteps, it should be seen immediately that the succeeding groups of scholars who have tried or are now trying to update the *Handbook* have seen as their goal the need to remain faithful to the original Cohen vision while introducing a modern perspective which radically differs from the approach taken in 1941. This task is insurmountable because the *Handbook* should have a neutral rendering of interpretation, neither defending past actions of the United States nor incorporating new theories of interpretation which place Indian Nations within the popular political science schemata which seems to dominate much writing today.

We should really ask whether Cohen's framework is at all useful in serving as the structure for arranging the materials that represent the relationship between the United States and American Indians. What flaws can be found in this view that might have doomed everyone who has since sought to follow the trail? Several issues come to our immediate attention and highlight one flaw that Felix S. Cohen had in common with those who have succeeded him. Cohen was part of the educated elite, had no experience as an oppressed minority and could not understand what their experiences were at the grass-roots level where discrimination and injustice flourished. Like many academics he seemed to believe that law was an impartial process for reaching the truth, or at least a just solution to a problem. Today we are willing to admit that this belief is purely fantasy and propaganda promulgated by law professors. In Cohen's day only the very daring minds would have admitted it. So his version of federal Indian law is already oriented away from balance and rests more upon how law is articulated than how it is enforced. It is this hidden dimension that law professors often miss—how cases, statutes and opinions actually touch the lives of people.

Let us take some specific examples to illustrate the hidden assumptions that Cohen and his successors, fans and imitators have missed or avoided. In 1974, Judge Boldt handed down his famous decision in *United States v. Washington*[11] awarding half the fish catch to fourteen tribes who shared four treaties which contained language that preserved traditional fishing rights at usual and accustomed sites. Did this decision mean that other tribes had similar rights to fish in their states? No. The specific language of the treaty precluded application of the treaty language beyond the tribes who had signed the treaty. In 1990, the Supreme Court in *Duro v. Reina*[12] ruled that the tribal court of the Gila River reservation in Arizona had no jurisdiction over Indians who were not tribal members. Immediately the Bureau of Indian Affairs sought to apply the ruling to all tribes, regardless of whether or not their treaties provided

11. 384 F. Supp. 312 (1974).
12. 495 U.S. 676 (1990).

otherwise. Congress finally had to pass remedial legislation to return the law to its original state.[13]

Now why would people assume that the ruling applied to all tribes in one case and not to all tribes in the other case, unless hidden beneath all understanding of law was the assumption or unexamined belief that Indians should not have legal rights and/or that any rights they might have should be restricted? Here we find the negative attitude of the rank and file federal employees towards Indians that has destructively twisted every federal statute into instruments to be used against Indians. We find the belief that Indians have no rights, or should have no rights, in agents' annual reports, monthly reports from Army posts, territorial papers, and even in some private publications by "friends" of the Indians. Because this attitude has always been present in the federal relationship, special care should have been taken to make crystal clear, wherever possible, that laws must be interpreted and enforced with absolute fidelity to the intent of Congress.

Congress itself in many instances, however, suggested by the manner in which it wrote laws, that it would not object if federal employees did not follow the laws precisely. In fact, the statute books are filled with laws that illustrate this point of view. The Seven Major Crimes Act[14] passed in 1885 reads as a general statute—"all Indians, committing against the person or property of another Indian or other person." But the law did not apply to the Five Civilized Tribes who maintained their court systems until they were abolished by the Curtis Act in 1898.[15] How is it that this statute, which in effect destroyed the Indians' ability to govern themselves, was not applied to the Five Tribes, but even more, how was it that Cohen and his co-authors did not mention that the Act was never applied to these tribes? Perhaps just as puzzling are the questions why the Revenue Act was applied to the Cherokees in *The Cherokee Tobacco*[16] in spite of treaty provisions supposedly exempting the Cherokees from taxation, and why the Seven Major Crimes Act was not applied to them. Readers, lawyers and judges need to be aware of this kind of inconsistency in the application of federal laws dealing with Indians, but they are not told a thing.

A final example/question will bring the question of the unarticulated assumption, containing significant bias, into better focus. Article One of the 1868 treaty at Fort Laramie with the Sioux provides that the Sioux retain their powers of self-government which include criminal jurisdiction. It was the exercise of those powers that triggered the Bureau of Indian Affairs' pressure to pass the Seven Major Crimes Act after the Supreme Court upheld the treaty provision in the *Crow Dog* case.[17] The so-called "Agreement of 1877"[18] had Article Eight which contained the promise that "Congress shall, by appropriate legislation, secure to them an orderly government."

Presumably these two articles were overruled, amended or nullified by the passage of the 1885 Major Crimes Act. We read in Cohen a long quotation from *The Cherokee Tobacco* which stated that "a treaty may supersede a prior

13. 105 Stat. 646 (1991) (codified as amended at 25 U.S.C. §1301 (1994)).
14. Ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (1994)).
15. 30 Stat. 495 (1898).
16. 78 U.S. 616 (1870).
17. *Ex parte* Kan-gi-shun-ca, 109 U.S. 556 (1883).
18. 19 Stat. 254, 256 (1877).

act of Congress, and an act of Congress may supersede a prior treaty."[19] Yet we find in the 1889 Agreement with the Sioux the following language:

> Sec 19. That all the provisions of the said treaty with the different bands of the Sioux Nation of Indians concluded April twenty-ninth, eighteen hundred and sixty-eight, and the agreement with the same approved February twenty-eighth, eighteen hundred and seventy-seven, *not in conflict with the provisions and requirements of this act, are hereby continued in force according to their tenor and limitation, anything in this act to the contrary notwithstanding.*[20]

Now it would seem logical, if there is a fair and impartial functioning of law, that Section Nineteen, bringing forward the treaty articles of 1868 and agreement article of 1877, would supersede the Seven Major Crimes Act and thereby return jurisdiction over these crimes to the Sioux Nation again.

The problem with this argument is that this precise issue has never been raised in court. So, of course, Cohen would not or should not be expected to comment on it as a major point. Nevertheless, when discussing powers of Indian tribes, self-government, jurisdiction, and several other topics, there is sufficient room in the *Handbook* to point out the inconsistencies when doctrines of interpretation are applied. It would certainly seem possible for Cohen to suggest that this is a point for further future consideration.

The *Handbook*, however, does not discuss conflicts and inconsistencies nor does it speculate on any area of law that might be tenuous. It simply pretends that many basic questions have already been foreclosed without explaining when, why or how. Never does the *Handbook* ask whether or not a statement makes sense. Let's take a classic example from *United States v. Sandoval*,[21] in which the Court, attempting to explain the power of Congress to recognize a community as Indian announces:

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized....[22]

It has always seemed to me that we have here a tautology worthy of the Supreme Court. In effect the Court says that Congress cannot recognize any community as Indian except Indian communities. Again we find profound silence from the *Handbook* when we should have some discussion of what this confused statement can possibly mean.

GENERAL OR SPECIFIC LAWS?

The *Handbook of Federal Indian Law* establishes the proposition that somewhere in the legal heavens there is a body of law with basic principles that can be called "federal Indian law," and in the various chapters we are informed about a variety of topics. As we reach the end of the volume, we come across a strange phenomenon. There are chapters on the Five Civilized Tribes, the New York Indians, the Pueblos of New Mexico, and the Alaska Natives. In the later

19. COHEN, *supra* note 7, at 35.
20. 25 Stat. 888, 896 (1889) (emphasis added).
21. 231 U.S. 28 (1913).
22. *Id.* at 46.

editions of the *Handbook* we see that Native Hawaiians are added. We are told that these groups must be handled separately due to their treaties and history. So we get a more precise discussion of the history and laws dealing with these special groups.

It never occurs to anyone to inquire why the *Handbook* separates these groups from the remainder of the tribes. Nor does anyone ask why, if case law dealing with these special groups is radically different from that of other tribes, cases dealing with them can be used in the general discussion of the law regarding treaties, tribal status, rights to property, jurisdiction and so forth. In other words, general propositions of law are articulated in the early chapters as if federal Indian law actually existed. The two Cherokee cases, *Cherokee Nation v. Georgia*[23] and *Worcester v. Georgia*,[24] are cited prominently in almost every chapter as forming the basic foundation of this field of law. Yet the Cherokees and certain tribes are separated out from the other tribes because their relationship with the United States is unique. Now if it is unique, why is not the relationship between the United States and the Navajos, Apaches, Shoshones, Sioux, Crow and so forth also unique, requiring special principles of their own in each case?

It would seem to me that the only answer we can give to this question is simply that Cohen and his people wrote it up that way and people assume that our task is simply to repeat uncritically what they have given us. And each generation of scholars seems to do it—uncritically, and so we do not ask why the Cherokees are separated out by Cohen on the basis of their history and treaties and yet cases involving them form the foundation of "federal Indian law." Legal purists may scream that eliminating the definition of the tribe as a domestic dependent nation will reduce Indian status to naught. That is not the argument nor would such a result be produced by removing the Cherokee cases from the mainstream of federal Indian law.

The argument is that if history and treaties are sufficient to identify these groups as deserving special attention, why curtail the process—why shouldn't federal Indian law be severely restricted to a set of general doctrines based on treaty law and statutes universally applicable to all Indian nations representing deliberate efforts of Congress to fulfill its trust and/or protectorate responsibilities? After this section of articulating doctrines of universal applicability, substantial space can be allocated for the respective Indian nations and their history. There are some federal statutes that have a general applicability—the General Allotment Act, the Removal Act, the Indian Reorganization Act, and the Indian Civil Rights Act. But even within these general laws, numerous exceptions exist that are created by the separate histories of the respective tribes. As long as we emphasize the generalities, we do violence to the rights of Indians as they are articulated specifically in the history of the tribe with the federal government.

THE GENERAL HISTORICAL BACKGROUND

It was the practice of the imperialistic European countries, at least in North America, to use formal diplomatic procedures when dealing with the

23. 30 U.S. (5 Pet.) 1 (1831).
24. 31 U.S. 515 (1832).

small nations who inhabited the continent. Thus France developed the idea of a covenant to bind together its Indian allies in allegiance to the king. England, Spain, Russia, and later Mexico (even quite late in the last century) used the treaty as a means of establishing friendship, commercial relations, and military alliances with Indians. While Spain ruthlessly conquered the Indian empires in Central and South America, it relied upon the treaty as a means of establishing influence and encouraging settlement in North America.[25]

In the decades prior to the American Revolution, the colonies as representatives of the Crown in many instances, used the treaty to deal with Indian nations on their frontiers. Coalitions of the larger colonies, such as Virginia, Pennsylvania and New York, dealt with the Six Nations, Cherokees and Delawares, on their own initiatives and as representatives of the Crown. During the period of the Articles of Confederation, the former colonies, now states, sought to preserve their rights to deal with Indians on their borders or within their boundaries on local matters. Adoption of the United States Constitution made Indian affairs a wholly federal matter although New York insisted on preserving its right to deal with the Six Nations and did so until the late 1840s. Legislation in the colonial format was primarily aimed at controlling the behavior of colonists to prevent wars with Indians. Very rarely did the colonial powers attempt to control the activities of Indians as part of the domestic law of the colony. The exception, Massachusetts, did have some laws that dealt with the towns of "praying Indians" but these towns were organized under regular commonwealth provisions and consisted of individual converts who had left their people and had become state citizens. Otherwise the terms of the treaty defined the relationship and each party was responsible for the actions of its citizens and made rules or passed laws to control those actions.

THE NATURE OF THE TREATY

Although the Constitution did not specifically identify the Indian nations as political entities with whom the United States might treat, pressure from settlers on the frontier and traders who dealt with Indians, as well as competition from England and Spain, made it imperative that the new American nation recognize the Indians as capable of entering into diplomatic relationships. An early federal case attempting to establish the status of Indian treaties, *Turner v. American Baptist Missionary Union*[26] suggested that the Indian treaty had the same "dignity" as treaties with foreign nations, a conclusion honored more in the breach than the fulfillment. Practice thereafter indicated that Indian treaties had to be taken seriously even if courts constructed elaborate arguments to deny or invalidate their provisions.

In 1871, Congress severely restricted the power of the President to make treaties by declaring that he could no longer recognize Indian nations.[27]

25. Spain made treaties with Indian nations in the Southeast, in the Rio Grande region, and through local officials in California. Its provinces in northern Mexico also made treaties on their own with Indian nations now residing in the United States.

26. 24 F. Cas. 344 (C.C. Mich. 1852) (No. 14,251).

27. The debate in the Senate centered on the President's power to handle the affairs of the nation and not on the status of the Indians. A Senate Judiciary Report the previous year had established that Indians were to be regarded as separate nations and that the civil rights amendments did not apply to them because they were citizens of their own nation and subject to its jurisdiction.

Consequently "agreements" were made with the Indians in lieu of treaties, even though on the floor of Congress senators and representatives continued to call the commissions they authorized to conduct negotiations "treaty commissions."[28] Between 1911 and the early 1970s, congressional committees sought to obtain some kind of Indian consent for legislation they were considering even if it was an informal assent.[29] Beginning with the Alaska Native Claims Settlement Act[30] and continuing until the present, Congress has used the negotiated settlement, which it basically examines and approves, as the means of dealing with complex Indian problems. Thus quantification of water rights, settlement of claims, federal recognition of a community as Indian, child welfare and gaming have all become the subjects of some kind of negotiated agreement. Since negotiation is the essence of the treaty process, and today reflects the modern government-to-government policy, we have here a procedure that stands well within the historic tradition of the political give and take that once characterized the federal relationship. We can therefore see the treaty agreement settlement as a historic process that can form a new framework for understanding the body of information that forms present federal Indian law.

THE TREATY PROCESS

What exactly does the treaty do? How could it be used as the structure within which a new alignment of legal and political data can be arranged? The treaty is the means whereby two sovereign entities exchange rights, responsibilities and powers, and in the case of American Indians, tracts of land with ownership and political control passing as well. The best description of what actually takes place in Indian treaty negotiations was articulated by the Supreme Court in *United States v. Winans*.[31] Interpreting the 1859 treaty with the Yakimas, the Court said that "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose."[32]

There is but one other similarly worded expression of the reserving of powers in American law and that occurs in the Tenth Amendment to the Constitution. To prevent the national government from gathering all political power to itself, thereby stifling state and local government, the Bill of Rights was adopted shortly after the Constitution was ratified. The Tenth Amendment reads as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

28. JAMES MCLAUGHLIN, MY FRIEND THE INDIAN (1989). James McLaughlin, the United States Indian Inspector who negotiated with numerous tribes in the 1890s, devoted two chapters of his book to treaties. The chapters are entitled "Of the Making and Breaking of Treaties" and "Modern Treaty Making," with the first subtitle of this chapter entitled "Fourteen Years of Indian Diplomacy." He certainly thought he was making treaties.

29. Senator Arthur Watkins, for example, reported to the Joint Subcommittee that the Menominees had held a meeting and approved termination of their status even though the gathering was an informal rump session. *See* NICOLAS C. PEROFF, MENOMINEE DRUMS 55–56 (1982). Peroff writes that the meeting was called a General Council but reports that less than 200 out of a membership of about 4,000 actually attended and voted to instruct the officers to proceed to negotiate with Watkins. *Id.*

30. 85 Stat. 688–715 (1991) (codified as amended 43 U.S.C. §§ 1601–1629e (1994)).

31. 198 U.S. 371 (1905).

32. *Id.* at 381.

respectively, or to the people."[33] In both instances, the States and the Indian nations sought to preserve as much of their original sovereignty, powers and rights as could be done in the face of grasping federal ambitions. As the commerce and welfare clauses became vehicles for federal intrusion on state government, so the trust doctrine became the means of radical federal invasion of Indian political rights. Nevertheless, the treaty performs the same function for Indian nations as does the Tenth Amendment for states.

This comparison fairly represents the relationship of both Indian nations and the individual states to the federal government. But the treaty merely connects Indian nations to the federal government while the Constitution makes states an integral part of the organic union of the national government. Indeed, in *Native American Church v. Navajo Tribal Council*[34] a lower federal court stated that "Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have been expressly required to surrender them by the superior sovereign, the United States."[35] This statement fits perfectly with the doctrine announced in *Talton v. Mayes*[36] that Indian nations originated prior to the establishment of the United States, and therefore, unless they had accepted a modification of their political powers, they were not subject to the limitations of the Constitution—even when it had extended the federal power over its constituent states.

Since the treaty preserves the political status of the Indian nation, not as a "ward" of the government, but as an equal contracting party, once this concept is stabilized, the vast amount of data composing federal Indian law then falls naturally into three comfortable categories: (1) external sovereignty, (2) internal sovereignty, and (3) property.

EXTERNAL SOVEREIGNTY

If we can imagine sovereignty as a bundle of powers, then the Indian nation arrives at the treaty-making process with every power possessed by any other nation in the world. Our task then is to trace the loss of the different attributes of external sovereignty—the power to contract with any larger or smaller power. Legal scholars have insisted that the choice of contracting disappeared—or perhaps even that it had never existed because the Doctrine of Discovery had preempted it. Historically such an argument falls flat. Spain made a series of treaties with the tribes of the South shortly after the Revolution[37] and continued making treaties with the Indians of the Southwest until it was removed as a presence in North America by the Mexican Revolution. A significant number of Indian nations supported Great Britain in the War of 1812 and the Treaty of Ghent required the two warring parties to make peace treaties with the Indians who had opposed them.[38] Thus Article

33. U.S. CONST. amend. X.
34. 272 F.2d 131 (1959).
35. *Id.* at 134.
36. 163 U.S. 376 (1896).
37. *See, e.g., American State Papers*, 1 FOREIGN AFFAIRS 278–79 (1832) for a treaty made May 31–June 1, 1784 at Pensacola with the Talapuches. See *id.* at 280 for treaty with Choctaws and Chickasaws at Natchez.
38. Article the Ninth of the Treaty of Ghent reads as follows:

Three of the 1815 series of treaties on the upper Missouri read: "The undersigned chiefs and warriors, for themselves and their said tribe, do hereby acknowledge themselves and their aforesaid tribe *to be under the protection of the United States of America, and of no other nation, power, or sovereign, whatsoever.*"[39]

Here is a limitation on the Indian nations' ability to contract with other nations. Despite this restriction, however, some Indians continued to favor the British. Black Hawk's band of Sac and Fox, for example, maintained their trade with the English and were nicknamed the "British" band of Sacs because they did not recognize the United States as their superior. The limitations of the 1815 treaties were only in regard to establishing alliances with other powers than the United States. It was not until the 1825 treaties on the Missouri River that these Indian nations entered into commercial treaties with the United States. In the interim they traded with representatives of the Hudson's Bay Company on a regular basis.

In 1835, the Caddoes ceded their lands to the United States and agreed

> to remove at their own expense out of the boundaries of the United States and the territories belonging and appertaining thereto within the period of one year from and after the signing of this treaty and never more return to live settle or establish themselves as a nation tribe or community of people within the same.[40]

A month later at Camp Holmes in the Muskogee nation, the United States with and on behalf of the Cherokee, Muskogee, Choctaw, Osage, Seneca, and Quapaw nations met with representatives of the Comanche and Witchetaw nations. The purpose was to secure peace with these two nations who controlled

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> The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification; and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities: Provided always, That such tribes or nations shall agree to desist from all hostilities, against the United States of America, their citizens and subjects, upon the ratification of the present treaty being notified to such tribe or nations, and shall so desist accordingly. And his Britannic majesty engages, on his part, to put an end immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom he may be at war at the time of such ratification, and forthworth to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to, in one thousand eight hundred and eleven, previous to such hostilities, Provided always: That such tribes or nations shall agree to desist from all hostilities against his Britannic majesty, and his subjects, upon the ratification of the present treaty being notified to such tribes or nations, and shall so desist accordingly."

8 Stat. 218 (Dec. 24, 1814). Clearly this article contemplates the continued independent existence of the Indian nations and certainly belies the Supreme Court statement of *Lone Wolf* that Congress always had plenary powers over Indians.

39. Treaty with the Teton, July 19, 1815 *in* CHARLES J. KAPPLER, 2 INDIAN AFFAIRS: LAWS AND TREATIES 112 (1975) (emphasis added) [hereinafter 2 KAPP.]; *see* Treaty with the Sioux of the Lakes, July 19, 1815 *in* 2 KAPP., at 113; *see also* Treaty with the Sioux of St. Peter's River, Yankton Sioux, Omaha, July 9, 1815*in* 2 KAPP., AT 14. But it is worth noting that other treaties made under the same auspice, with the Potawatomi, Piankashaw, Kickapoo, Wyandot, Osage, Sauk and Foxes, merely re-establish previously existing relationships which have been violated.

40. Treaty with the Caddoes, 7 Stat. 470, 471 (1835).

the trade routes into New Mexico and to secure safe passage to the Mexican Provinces. Article Nine gives evidence that the Comanche and Witchetaw Nations continued to have complete external sovereignty:

> The Comanche and Witchetaw nations and their associated bands or tribes, of Indians, agree, that their entering into this treaty shall in no respect interrupt their friendly relations with the Republic of Mexico, where they all frequently hunt and the Comanche nation principally inhabit; and it is distinctly understood that the Government of the United States desire that perfect peace shall exist between the nations or tribes named in this article and the said republic.[41]

The independence of these Southwestern Indian nations from the supervision, jurisdiction, and reach of the United States stands as incontrovertible evidence negating the mythology used by the Supreme Court in *Lone Wolf v. Hitchcock*, which stated that: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning...."[42] Indeed, considerable time would pass, the Republic of Texas would achieve its independence and then merge into the United States, and several wars would be fought with these Indian nations before Congress would possess anything like plenary powers over their relations.

In the Pacific Northwest, in 1854–56, Isaac Stevens negotiated a series of treaties with the Indian nations west of the Cascade Mountains. Article Twelve of the Medicine Creek Treaty with the Nisqually, Puyallup and other neighboring Indian nations stated: "the said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent."[43] Here we have an agreement for the limitation of foreign trade, an attribute of external sovereignty. These provisions are repeated in several other treaties of the period. Finally, in 1875, the Commissioner of Indian Affairs reported that some Apache bands were that year making new treaties with Mexico.[44]

Instead of being historical curiosities, these treaty provisions take on real significance in helping us trace the surrender of powers of external sovereignty by Indian nations. Today when different Indian nations are sending delegations to various committees and subcommittees of the United Nations, and to other world organizations, important questions of external sovereignty are emerging. Can Indian nations have import-export licenses? Can the World Bank invest or loan money to an Indian nation? We have just entered the realm of complicated international relations as far as Indians are concerned.

INTERNAL SOVEREIGNTY

When we enter the field of internal sovereignty we are again faced with historical events and precedents. Originally it must be assumed that Indian

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41. *Id.* at 474, 475 (emphasis added).
42. 187 U.S. 553, 565 (1903).
43. 10 Stat. 1132 (1854).
44. *See* 1873 COMM'R OF INDIAN AFFAIRS ANN. REP. 169 [hereinafter AR CIA]; 1875 AR CIA 35 for references to possible treaties between Chihuahua and Coahuilla with Kickapoos, Potawatomis and Mescaleros.

nations possessed all the attributes of any other nation, since by pledging to perform certain actions in the treaty, the Indian nation offered the guarantee that it had control of its membership and had procedures for resolving internal disputes. The question then becomes one of examining which powers have been surrendered or modified and which remain reserved to the Indian nation. *Talton v. Mayes*, as we have already seen, stated that the Cherokee nation had originated prior to the adoption of the Constitution and therefore did not derive its powers from a delegation by the United States.[45] The original argument raised by Talton was whether the United States Constitution had pre-empted tribal institutions making the Cherokee court system an exercise of powers delegated by Congress. The dispute, then, is between delegated and inherent powers of an Indian nation.

In 1934, John Collier offered a bill to grant self-government to Indian reservations.[46] Title One—Self-Government—would have delegated a set of municipal powers to reservation governments so that they could organize for business purposes. The effect of that original bill would have been to create a mini-federal type of government to represent reservation residents. Title Four—Court of Indian Affairs—would have created a new federal court that would have been responsible for hearing all cases involving Indians that also involved federal statutes and treaties. But the bill was very controversial because of the land consolidation provisions which bordered on outright confiscation of allotments in favor of the reservation government. So Congress, particularly the Senate Indian Committee, gutted the bill, eliminated the four titles, and created a bizarre "Christmas tree" kind of statute dealing with Papago (now Tohono O'odham) mineral rights, Sioux benefits and a few sections vaguely describing self-government.

Only three sections—Sixteen, Seventeen and Eighteen—dealt with self-government in anything resembling the original bill. Section Sixteen read:

> *In addition to all powers vested in any Indian tribe or tribal council by existing law*, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State and local Governments.[47]

Presumably the Indian nations already possessed two of these three powers—the power to employ counsel and the power to negotiate with the federal government. Exactly how the reservation government was supposed to prevent loss of lands, particularly when federal law was designed to accomplish the final dismemberment of the trust lands, remained to be seen.

At any rate, having been deprived of specific instructions on how to devise reservation governments and to instruct them in the municipal powers they might enjoy and exercise, Collier turned to his friend Nathan Margold and asked for a Solicitor's Opinion on the phrase "in addition to all powers vested in any Indian tribe or tribal counsel by existing law." The result, an exhaustive

45. 163 U.S. 376 (1896).
46. 48 Stat. 984 (1934).
47. *Id.* at 987 (emphasis added).

opinion in October 1934, entitled *Powers of Indian Tribes*, shows the invisible but fine hand of John Collier since it was to his advantage, in selling the program of reorganization as a federal corporation, to reservation residents. Margold's review of relevant law produced a list of "powers" that vary widely since these powers were the only exercises of internal sovereignty that had been identified in litigation and statutes at that point. They are:

> 1) Power to adopt a form of government
>
> 2) Power to define membership, grant or withhold suffrage
>
> 3) Power to regulate domestic relations of members
>
> 4) Power to prescribe rules of inheritance except for allotments
>
> 5) Power to levy dues, fees, and taxes on members
>
> 6) Power to remove non-members from the reservation
>
> 7) Power to regulate use and disposition of property
>
> 8) Power to administer justice for other than ten major crimes
>
> 9) Power to prescribe duties of federal employees where powers of supervision are delegated to them....[48]

It is important to note here that the list contains a mixture of delegated and inherent powers and that this list is certainly not complete since it was compiled prior to the collecting of materials for the *Handbook.*

In the decades since Margold's opinion there has been a radical expansion of the powers of reservation governments. The social legislation of the 1960s made Indian governments eligible to be sponsoring agencies for a bewildering variety of programs. The phrase "and Indian tribes" was inserted into the eligibility sections of a number of these laws, making it possible for reservation governments to operate programs over a designated area of land on a non-discriminatory basis. Did this participation in nationally applicable programs change the status of Indian governments or merely add more functions to an already acknowledged political status?

In 1965, at Fort Belknap, Madeline Colliflower was arrested and confined in a country jail under a working arrangement with the county. Suing on a writ of habeas corpus to the federal district court, Colliflower prevailed in a ruling that significantly quickened the pace of Congress in considering the Indian Civil Rights Act. The district court said that:

> [I]t is pure fiction to say that the Indian courts functioning in the Fort Belknap Indian community are not in part, at least, arms of the federal government. Originally they were created by the federal executive and imposed upon the Indian community, and to this day the federal government still maintains a partial control over them.[49]

So in the eyes of this court the history of the Fort Belknap people is such that a hybrid court system can be inferred. Again in *United States v. Mazurie*,[50] the Supreme Court examined the problem of zoning by the Wind River reservation government which in effect placed a tract of land held in fee simple by a non-Indian under the control of the Indians. An important part of the reasoning was the idea that Congress, under its plenary power over Indians,

48. 55 I.D. 14 (1934).
49. Colliflower v. Garland, 342 F.2d 369, 378–79 (1965).
50. 419 U.S. 544 (1975).

could control liquor and could delegate the power to control the sale of alcohol. From the beginning of the republic, Congress had made provisions for restriction of alcohol when its sale or use involved Indians—and this power derived from the commerce clause. While admitting that there were limitations on Congressional delegation of its powers, "those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter."[51] As with many Indian cases decided by the Supreme Court, the reasoning here is a little bit puzzling. Basically, rather than simply recognizing Indian internal sovereign rights, the justices hedged their bets by describing the tribal ordinance as the exercise of both federal and Indian powers.

Scholars have not paid much attention to the distinction between inherent and delegated powers of Indian governments. It has been easy simply to avoid the question, confident that it is only necessary to argue that the reservation government has the power, regardless of how it originated. Perhaps for that reason one of the earliest casebooks on federal Indian law, authored by Monroe Price, sought merely to trace the "flow of power" from the federal government to the tribal governments. If these governments have inherent political powers to perform certain functions, why is it that Congress insists on delegating these powers to them? Some major studies need to be conducted to determine what set of powers are actually brought with aboriginal sovereignty in the area of internal sovereignty, and what specific powers have since been delegated by Congress.

PROPERTY RIGHTS

The majority of the Indian treaties are concerned with the transfer of land titles because they occur at the end of political and military crises in which the respective Indian nations have been forced to surrender tracts of land. But even here there are many anomalies so that law with respect to property is never clear. In C.C. Royce's *Indian Land Cessions*, for example, some very large areas of land are classified as being ceded in unratified treaties.[52] If we follow a rigorous logic in law it causes us to wonder how the United States can become owner of vast acreages under a document that has no legal standing. More to the point, however, is understanding how the Five Civilized Tribes can receive their lands in Oklahoma in fee simple and yet have Congress pass laws distributing these lands in allotments. Here, words seem to twist and turn as the need arises.

Laws and cases dealing with allotments compose most of the materials we would find in a property section of federal Indian law, and if the so-called trust doctrine were restricted to this topic alone without being applied in the

51. *Id.* at 556–57.

52. *See, e.g.*, C.C. ROYCE, INDIAN LAND CESSIONS IN THE UNITED STATES 1896–97, 1899 BUREAU OF AMERICAN ETHNOLOGY ANN. REP., pt. 2, Tracts 449, 450, 451, 452, in Utah I map [hereinafter AR BAE]. A significant number of purported land cessions listed here involve Indian refusal of a treaty or agreement provision and the United States then claiming the lands anyway. Examples are Tract 397 in Oregon map 1, at 1812–13; Plate 51 involving several treaties made by Joel Palmer between August 11 and September 8, 1855; Tract 540A, in Indian Territory map 1; Plate 21, involving an agreement with the Wichita and Affiliated Tribes of October 19, 1872; and Tract 553, in Idaho map and Washington map 1, at 869; and Tract 553, in Idaho map and Washington map 1, at 869, involving the Coeur d'Alene agreement of 1873.

haphazard manner it is today, the law dealing with allotments would be greatly simplified. But a good percentage of the allotments came into being as a result of agreements made with Indian nations which allowed the United States to purchase "surplus" lands. The lands were not, of course, surplus. The formula used—160 acres for the head of the family, eighty acres for older children and wives, and forty acres for minor children, did not look even five years down the road to the future of the tribe. If an adult man were capable of supporting his family on 160 acres, did that mean that his eighteen-year-old son could do so on eighty acres, and a decade later his twelve-year-old, now twenty-two, on forty acres?

Indian poverty was deliberately planned and as predictable as the seasons. Almost before the ink was dry on the General Allotment Act the statute was amended so that the Bureau of Indian Affairs could manage the lands of those Indians who, "by reason of age or other disability" could not "personally and with benefit to himself occupy or improve his allotment or any part thereof."[53] When this Act was followed by the Burke Act in 1907,[54] which allowed the Bureau to simply declare certain Indians competent and take their land out of trust, the farce became complete. Obviously we should have an entirely different sense of the trust responsibility and more serious corresponding liabilities when dealing with Indian property and its treatment by the federal government. But if treaty, trust and other doctrines are intermixed, no clear sense of the issue is possible.

Fortunately, hunting and fishing rights, perhaps the primary property rights reserved by Indians in treaties, would naturally come under treaty rights because they are, as a rule, provided for in separate articles. That these rights are also property would place them under federal property law only on those occasions when Indians suffered irretrievable loss such as flooding of an area. Even here, however, the loss could be negotiated and alternative sites could be agreed upon.

Water rights would probably not appear much different because they derive in part from the federal government's initiative in creating, as well as setting aside, reservations. In creating a reservation it is simply common sense that the land would have all the rights and privileges to enable the government to fulfill the purpose of establishing it. In setting aside lands, primarily as a result of treaty or agreement, the water and other property would be assumed to have come with the land as part of the aboriginal estate. Thus it would not be a change in federal property law dealing with Indians so much as a re-orientation of the perspective which often pretends that taking property from Indian nations, merely because it has been created and reserved by the federal government, is not really affecting their rights.

Taxation inevitably plays a part in the property allotment because land has value and/or produces income, and taxing authorities are vigilant about taxing income from whatever possible source. Today in Indian country we have much litigation concerning income from trust property, exemption from state and local taxation, the power of Indian nations to tax non-tribal members or businesses on the reservation, in lieu payments for gaming concessions, and the status of fee simple lands owned by tribes within the reservations. States have

53. 26 Stat. 794 (1891).
54. 34 Stat. 1221 (1907).

been very aggressive in recent decades in seeking to extend their taxing power to Indian reservations and over Indian activities.

Recent successes for Indians in the property rights area are due to the confusion that the original Cohen book encourages. Upon admission to the Union, many of the western states had to agree not to tax Indians,[55] and judicial sympathy for states' rights should not be used to erode what are clear federal mandates—conditions to which states had to agree in order to become admitted as states. But yet another and perhaps better argument comes out of *McCulloch v. Maryland*.[56] When Maryland attempted to tax the Second Bank of the United States, the Supreme Court ruled that "the power to tax involves the power to destroy,"[57] and since the pledge of protection derived from both treaties and the doctrine of discovery is one of preservation, state taxes of any kind within the reservations would be a clear violation of federal policy and responsibilities.

CONCLUSION

To talk about new issues in federalism suggests that from the mainstream traditional concepts, the times and technologies may have created problems that have not been encountered before. Indeed, the expansion of population, the prevalence of drugs, the existence of fringe terrorist groups, and the invasion of privacy via electronic media all pose significant threats to our sense of justice and the social order. Events and movements are certainly forcing us to change our conception of what law and government are supposed to do.

With the conservative swing in the federal judiciary, we are now seeing the resuscitation of old ideologies and concepts that were once commonly accepted a century ago. The reigning slogan, as yet unproven, is that returning governmental program functions to the state governments is by definition more efficient. If this philosophy was reflected in a return of political powers to Indian nations there would be cause for celebration. The trend, unfortunately, is one of reviving old anti-Indian lines of thinking that seek only to deprive tribes of their rights.

The tendency of lawyers working with Indian governments is to rush to the *Handbook of Federal Indian Law* searching for counter arguments. The *Handbook*, however, was designed to present a homogenous body of law in which few questions remained. Newer versions of the *Handbook* have simply built upon old and weak foundations, failing to articulate either Indian rights or federal responsibilities clearly. The prospect for the future is simply one of repeating the arguments of the past century using doctrines that are wholly inappropriate in this day and age. Conservative judicial activism now threatens to create a new set of criteria limiting what Congress can do for or on behalf of Indians. We can see no effort to limit the power of Congress to deprive Indians of their rights because the judicial system is already at work on that problem.

Clearly it is time for major treaties to be written in the field of Indian law that are not handbooks and that pay attention to the conditions under which the relationship of the federal government and the Indian nations have taken

55. *See* Enabling Acts for the following states: North Dakota, 25 Stat. 676 (1889); Oklahoma, 34 Stat. 267 (1889); South Dakota, 25 Stat. 676 (1889); Montana, 25 Stat. 676 (1889); Washington, 25 Stat. 676 (1889); Wyoming, 26 Stat. 222 (1890).

56. 17 U.S. (4 Wheat.) 316 (1819).

57. *Id.* at 431.

place. The treaties should be neutral but should take into account the Indian perspective instead of simply presenting law from the federal perspective. And they should ground themselves in the actual facts of history, not in a sanitized mythological account that echoes Lake Wobegon where everyone is above average.