LEARNING TO LIVE WITH THE PLENARY POWER OF CONGRESS OVER THE INDIAN NATIONS: An essay in reaction to Professor Williams' *Algebra**

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Some time ago, Professor Robert A. Williams, Jr., then of the University of Wisconsin and now of the University of Arizona, applied the techniques of the Critical Legal Studies scholar to the field of American Indian Law, the first such application that I know of. In a lengthy article called "The Algebra of Federal Indian Law", he proposed the "Americanization", that is to say the "de-Europeanization", of federal Indian law. He made this proposal in an attempt to bring federal Indian law into conformity with modern notions of international law and with the political philosophies of those against whom the law is applied.[1] The present essay is a reaction to that article and the *Algebra*[2] that is there proposed.

I begin with an honest admission: there is much in the *Algebra* that I do not understand. Justice Holmes is said once to have responded to a non-lawyer friend's query by observing that God did not intend that the friend ever know what a writ of certiorari is. I have the same feeling about my ability ever to fathom exactly what a "discursive game-space" is.[3] And be-

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* *Editors' Note*: The *Arizona Law Review* received this paper as an unsolicited manuscript. The paper is a reply to Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Jurisprudence*, 1986 WIS. L. REV. 219. The Editors of *Arizona Law Review* invited Professor Robert Williams to reply and also invited Professor Laurence to submit a final rejoinder. Williams' reply, "Learning Not to Live with Eurocentric Myopia," appears in this issue at page 439. Laurence's rejoinder, "On Eurocentric Myopia, the Designated Hitter Rule, and the 'Actual State of Things' " also appears in this issue at page 459.

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1. Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

2. Professor Williams calls his piece "The Algebra . . ." after Serres, The Algebra of Literature: The Wolf's Game, cited in Williams, *supra* note 1, at 284 n.249. My sad suspicion is that about 40% of the adult population of the United States, including most of my former math students, will avoid reading the *Algebra*, thinking that it has something to do with eighth grade mathematics. It does not.

3. Professor Williams writes at least twice about "the discursive game-space defined by contemporary United States Indian law", Williams, *supra* note 1, at 284 n.249, and references to games, strategies and game-spaces, in some cases "ancient game-spaces", *id.* at 285, are found throughout Part III. B. 2. of the *Algebra*:

> The principles of unity and hierarchy which are at the core of this European-derived and defined game-space thus reveal a strategy and a succession of moves that might escape the

yond game-spaces, the *Algebra* contains medieval history,[4] grammatology,[5] critical sociology[6] and things called "an archaeology of medical perception"[7] and "the presence of the now."[8] All of this is done, too, in a writing style that does not exactly foster page-turning; Professor Williams is not one who tries to make the going easy for his reader. The *Algebra*, in other words, left my head spinning and my poor Webster's exhausted and in tatters.

How does one become so presumptuous as to write a reaction to a piece he does not understand in full? It comes, I suppose, with the academic territory. One of the joys of the law professor's life is that we get paid to figure stuff like this out, so I read it again and now sit, not so much to respond, but to react, to propose a "middle way" between that which has come before and Professor Williams' fundamentally radical outlook. But I wanted to begin honestly so that those readers with something better to do than read the reactions of a semi-ignorant, and I suppose, Anti-Crit reactor—like, say, reading the Bankruptcy Reporter advance sheets—might choose to do so.

What spurred this reaction? Why spend several lovely spring afternoons doing battle with the *Algebra* and its discursive game-spaces when the beach beckons? Near the end of the article, Professor Williams asks: "Weaned from this narcotizing elixir, however, how will the white man confront an alien and seemingly chaotic vision of life without his comforting vision of law contained in the Doctrine of Discovery?"[9] This is not a flattering portrayal. One can almost see us white men-folk,[10] sitting in fear around our law libraries, freebasing the Cherokee cases,[11] toking John Marshall's dicta, buying and swallowing Dr. Rehnquist's *Oliphant* Tonic and *Rosebud* Snakeoil,[12] afraid to confront a chaotic future and unable to "just say 'no' " to the Discovery Doctrine. So I have gone "cold turkey" for three days and with shaky hands and bloodshot eyes, strong coffee nearby, sit at a keyboard to react, with any luck, before the opium-like haze descends again.

Working on the assumption that some of you may stumble upon this essay without having read the *Algebra*, I begin with a synopsis of the piece. The *Algebra* is one of those law review articles where the editors could have

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relative nature of the relationships within the game. To dominate all the relations within the game, one must supplement the embarrassing lack of plenitude and full presence of the structure's absolute limit, the sovereign interests of the United States. One must, in short, insinuate oneself into European legal discourse's epistemological project of maximization which has sought for a millenium to dominate all discourses.

Williams, *supra* note 1, at 285.

4. Williams, *supra* note 1, at 226-39.

5. *See* Williams, *supra* note 1, at 284 n.249, 285 n.253, 286 n.258.

6. Williams, *supra* note 1, at 224 n.11.

7. Williams, *supra* note 1, at 290 n.271.

8. Williams, *supra* note 1, at n.66 and accompanying text.

9. Williams, *supra* note 1, at 291.

10. Professor Williams indicates that his use of the male reference in the quoted sentence may be merely stylistic, in the pursuit of consistency in style and tone; the pursuit, maybe, of non-chaos. *Id.* at 223 n.10. But, as the same footnote makes clear, he also thinks that in the case of Indian law white male domination is represented far more than by mere pronoun gender. I conclude after reading footnote 10 that some of Professor Williams' best friends are women.

11. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

12. Reference is to Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

helped by including a table of contents, so that a reader could see at a glance the lay-out of the author's thoughts. Here it is, with my comments in brackets:

I. Introduction to an Americanized Scholarship of the White Man's Law.
   A. Goals [that is to say, the goals of the piece].
   B. Methods [that is to say, the methods of "Americanized" scholarship contrasted with the methods of "Europeanized" scholarship].

II. Infidels, Heathens and Christian Princes: The Mythological Structure of European Legal Theory and Discourse Respecting the Indian [this is the historical section of the piece].
   A. Specimen 1: The Pope and the Mongols.
      1. Mythologies [that is, the medieval roots of Indian law].
      2. The Mongol Mission [by emissaries of Pope Innocent IV to Guyak, Great Khan of the Mongol empire].
   B. Specimen 2: Lord Coke and the Infidel Savages of the New World.
      1. Against the Law of God and Nature [a discussion of *Calvin's Case*[13]].
      2. Regarding Such Barbarians [a discussion of the common law background at work in *Calvin's Case*].
      3. An Invasion of our Territory and an Act of Hostility [herein lies the discussion of two of John Marshall's landmark Indian law cases[14]].

III. The Reason of the Strongest is Always the Best [this is more than rank sarcasm, but is a reference to some poetic game theory[15]].
   A. The Development of Modern United States Colonial Legal Theory: 1900 through the Present.
   B. Specimen 3: Wild Bill and the Indians [the reference is apparently to the present Chief Justice of the United States[16]].
      1. Those Powers Inconsistent with Their Status.
         a. *Oliphant* [of course, a critique of *Oliphant v. Suquamish Indian Tribe*[17]].
         b. *Merrion* [v. *Jicarilla Apache Tribe*[18]].
         c. *Kerr-McGee* [*Corp. v. Navajo Tribe of Indians*[19]].

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13. 77 Eng. Rep. 377 (1608).
14. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) and Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
15. I'm not making this up. The poem is "the La Fontaine fable of the Wolf and the Lamb" and is quoted in full by Williams, *supra* note 1, at 288 n.265.
16. While Justice Rehnquist (now Chief Justice) was the author of Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), one of the three cases discussed in this section of the *Algebra*, Justice Thurgood Marshall wrote Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), and Chief Justice Burger wrote Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985). Nevertheless, I assume that "Wild Bill" is meant to refer to William Rehnquist.
17. 435 U.S. 191 (1978).
18. 455 U.S. 130 (1982).
19. 471 U.S. 195 (1985).

2. The Algebra of Federal Indian Law: The Wolf's Game [the pulling together of the old and the new, against a background of game theory].

IV. Americanizing the White Man: Ideas to Bow Down To [the reference is to a Joseph Conrad quotation from *The Heart of Darkness*].
   A. Bad Medicine between Us [to wit, the Discovery Doctrine and its roots in medieval political and clerical thought].
   B. The Two Row Wampum [that is to say, the American Indian alternative to the Discovery Doctrine].

For the newcomer to the *Algebra*, I offer the suggestion that you make your first reading in this order: I. A. and B., then IV. A. and B., then, if you are at all familiar with Indian law, III. B. 1., followed by III. A. At this point, I expect you will either be ready to tackle the section on early history, i.e. section II., or you will be ready to quit. In either case, finish up with III. B. 2. wherein the game theory lies.

From this reading, or perhaps one more—and let me make clear that, in spite of my criticisms, I believe the read to be worth the effort—the *Algebra*'s outlook on Indian law becomes clear. I called this outlook a few lines ago "radical" by which I mean one that goes back to the root of the thing studied. By taking Indian law back to medieval times, a favorite scholarly era of Professor Williams,[20] he is as radical as Indian law scholars come.[21]

The *Algebra* shows that at the heart of Indian law—at least the domestic, federal Indian law of the United States—lies the so-called Discovery Doctrine. This doctrine, the reaction by the European and United States legal systems to the inconvenient fact that the New World was inhabited by others when Columbus showed up, can be traced in two directions—past and future. Professor Williams first traces it into the past and finds that it originated centuries ago in the depths of medieval jurisprudence and religion. This is covered in part II. of the *Algebra*. In part II. B. 3., Professor Williams pauses to discuss John Marshall's formulation of the Discovery Doctrine for the new United States. He then traces the ramifications of the doctrine up to the present, ending with critiques of three Supreme Court opinions, two of which were commonly seen as victories for tribal interests.

I take the *Algebra's* thesis to be this: given that the roots of Indian law lie in the Discovery Doctrine, and that the roots of that doctrine lie in medieval ideas that no one with any sense would advance as acceptable principles today,[22] then Indian law must suffer a profound change.[23] Those

20. *See* Williams, The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought, 57 S. CAL. L. REV. 1 (1983).

21. Lewis Hanke's fine little book, ARISTOTLE AND THE AMERICAN INDIANS (2d ed. 1970) is radical in the same vein.

22. "In [the Discovery Doctrine's] form as articulated by European-derived legal discourse today, however, the peroration of this argument is no longer declaimed." Williams, *supra* note 1, at 290. I think this sentence supports the proposition in the text. I am more sure that the last sentence in the *Algebra* does: "Legal doctrines whose un-American premises, once revealed, would shame those who cite them, continue to be asserted today to deny respect to the Indian's vision and to assert its truths in a world which has not yet learned that freedom is built on my respect for my brother's vision and his respect for mine." *Id.* at 299.

who do not advance such a change are, wittingly or unwittingly, advancing instead medieval notions that are racist, ethnocentric, misinformed, and vulgar.[24]

I do not dispute Professor Williams' history. I have neither the skills nor the inclination to check whether he has provided the proper cast to the Papal decretal of Innocent IV in the thirteenth century.[25] I assume, in fact, that he has. His historical research seems exhaustive and creative, at least so far as a non-historian can understand. Furthermore, the ideas he finds embedded in history are so divinely and outrageously egotistical and ethnocentric that they certainly fit my non-scholarly impression of what times and thought were like back then. So, I accept his history, with only one off-beat observation: for my eye and taste, the art of Jackson Pollack shows more insight and vision than that of Leonardo de Vinci. It is another question entirely, I think, whether de Vinci may be taken to task for failing to see that the Mona Lisa might have been improved if he had only let the paint run a little bit.[26] But no; with the historical analog of this hesitation as my only hesitation, I accept Professor Williams' history.

Nor, really, do I mind Professor Williams' critique of the Discovery Doctrine itself.[27] It seems to me to have been a bad idea.[28] I hope that the

23. "Once it is recognized that such outmoded assumptions and choices hold little relevance to the legal issues raised by tribalism's challenge to the core values and traditional norms assertedly embodied in American legal thought today, it might then be possible to engage in the construction of a new 'Federal Indian Law.' " Williams, *Jefferson, the Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165, 166-67 (1987). This essay is a shorter, more recent and much more readable essay than the *Algebra*. It explores the politics and law at work in late 18th and early 19th century America that led to the decision in Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), a decision of Chief Justice John Marshall that placed the Discovery Doctrine into American jurisprudence. Professor Williams characterizes, and to my mind establishes, the Discovery Doctrine as a "*fait accompli*" before the decision, *id.* at 191, having much more to do with politics than law, *id.* at 166. While the two essays are separate pieces of work, and while I have many fewer criticisms of the later than I do the earlier, *Jefferson* cites the *Algebra* with regularity and I will refer to this second essay from time to time to clarify points made primarily in the *Algebra*.

24. "Whether from cupidity or shame, those European colonial sovereigns that continue to rely on European-derived legal principles as a shield against Indian assertions of abuses of fundamental human rights would conveniently have the world forget that the anachronistic premises at the core of their discursive practices once unquestioningly legitimated the use of the sword against indigenous peoples." Williams, *supra* note 1, at 297.

25. Williams, *supra* note 1, at 229-36.

26. Here I may find myself in uneasy agreement with Justice Rehnquist, in dissent in United States v. Sioux Nation of Indians, 448 U.S. 371, 435 (1980): "It seems to me quite unfair to judge by the light of 'revisionist' historians or the mores of another era actions that were taken under pressure of time more than a century ago." For a thoughtful treatment of the uses and abuses of history in litigation, see Clinton, *The Curse of Relevance: An Essay on the Relationship of Historical Research to Federal Indian Litigation*, 28 ARIZ. L. REV. 29 (1986).

The mention of modern art also allows me to note the apparent connection between Professor Williams, and with him the entire Critical Legal Studies school, and Post-Modernism in art. *See, e.g.*, ULMER, *The Object of Post-Criticism*, in THE ANTI-AESTHETIC: ESSAYS ON POST MODERN CULTURE (Foster, ed. 1983). Now, I encourage no one actually to read the work just cited, for it is written in harder-to-understand jargon even than the *Algebra*, and worse, to a much more esoteric end. It shows, if nothing else, that, when it comes to obfuscation, lawyers are Class AAA at best; the major leaguers are the art critics and English teachers of the country. But Professor Williams' jargon is suggested by Professor Ulmer's and the same sources are cited by both writers.

27. Here I think we are both talking about that part of the Discovery Doctrine which resulted in cases such as Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), and Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); the part, in other words that resulted in the power that the United States exerts over the Indian Nations. There is less objectionable about the rules that the Europeans generated to determine who amongst them would have the right to deal with the Indians of a certain

next time humans are presented with the problem we rethink just exactly what the rights of the newcomers are. I assume we shall, as we have rethought, in theory, at least, the legitimacy of war as a dispute settlement device.[29]

I depart from the *Algebra* only in its sharp criticism of the power that Congress has over the Indian nations, a power described by everyone as "plenary." This power, while seldom litigated,[30] is the object of a fairly steady stream of professorial musings,[31] a stream I now add to only with some reluctance. Here is my proposition, implicit in the title of this essay: I can live with the plenary power. I will now explain why.

1. *"Plenary" does not mean "absolute". Really. It means "without subject-matter limitation."*[32] A "plenary" ambassador has the power to negotiate any deal, but not to murder his counterpart; a "plenary" session of an organization may debate any topic, but it may not lynch the chair. To me, saying that Congress has "plenary" power over Indian activity is like saying that a state has "plenary" power over its residents,[33] or like saying that Congress has "plenary" power over national activity. We no longer read the word "commerce" in the Commerce Clause technically; ask Ollie's Barbecue.[34] Congress has the power, under its "plenary" power over Indian activity, to enact a criminal code for Indian Country,[35] or rules of criminal procedure,[36] or constitution-like guarantees for persons affected by the

territory. This, too, was part of the Discovery Doctrine. *See* Williams, *supra* note 1, at 252-58. *But see* the discussion of the determination that only governments, not individuals, could deal with the Indians, at least over land sales, in Williams, *supra* note 23, at 183-90.

28. "The amazing thing about this most amazing legal doctrine cited by Justice Marshall as support for the decision in *Johnson v. M'Intosh* is that it was, in essence, a fiction, admitted as such and turned to by the Court to legitimate the outcome of an intense political struggle." Williams, *supra* note 23, at 169.

29. U.N. CHARTER, art. 2, ¶¶ 3, 4. *See generally* Mushkat, *Who May Wage War?*, 2 AM. U. J. INT'L L. POL'Y 97 (1987).

30. For example, the power of Congress to enact the Indian Civil Rights Act, 25 U.S.C. §§ 1301-03 (1982) [hereinafter the I.C.R.A.], was assumed by all parties and the Supreme Court in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55, 58 (1978). The Supreme Court did uphold, in kind of an off-hand way, the legitimacy of a Congressionally-enacted criminal code for the Mississippi Choctaw reservation in United States v. John, 437 U.S. 634, 653 (1978).

31. The best discussion is Newton, *Federal Power over Indians: Its Sources, Scope and Limitations,* 132 U. PA. L. REV. 195 (1984).

32. On the definition of "plenary" in Indian law, see Newton, *supra* note 31, at 196 n.3.

33. Justice Thurgood Marshall reminded us that the power of the states over their residents is "plenary" in the first sentence of the landmark Indian law case of McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 165 (1973). In fact, as is implicit in that first sentence, a state even has plenary authority over Indians who are residents of the state, except to the extent that federal law provides otherwise. *McClanahan*, of course, and many other cases—Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) was the first—have identified such exceptions.

One recent commentator, Professor Milner S. Ball's disagreement with this approach is total, for he yearns for the days of the *Worcester v. Georgia* view that reservations are extraterritorial to the states within whose borders they lie. *See* Ball, *Constitution, Court, Indian Tribes*, 1987 AM. BAR FOUND. J. 1, 73.

34. Katzenbach v. McClung, 379 U.S. 294 (1964). Professor Milner Ball of the University of Georgia has recently written: "The Court has never held a congressional exercise of power over Indian tribes to be illegal, and there is no reason to think it ever will." Ball, *supra* note 33, at 12. Of course, the invalidation of acts of Congress as beyond the scope of the Commerce Clause are also few and far between these days, a development I do not disparage, and Professor Ball does not deny. *Id.* at 56.

35. United States v. John, 437 U.S. 634 (1978).

36. *See, e.g.*, 25 C.F.R. §§ 11.3-11.21 (1987).

exercise of tribal sovereignty,[37] but it does not have the power to deny due process or equal protection or the freedom of religion and speech. Not under *my* "plenary power" at any rate.[38]

Two historical developments that Professor Williams explores made one concerned, two decades ago, that the plenary power was destined to mean more than this. First, it was feared that challenges to the plenary power raised "political questions" that the courts would not review.[39] The "political question" doctrine was singularly unattractive when it was applied to questions of the exercise of the plenary power over Indians, as the Indian citizens whom the power most affected were a small minority population unable effectively to participate in the politics of the dominant society.[40] And it is probably just this citizenship that makes the difference. It is much easier to say that questions dealing with the propriety of United States activities in Chile or Iran are "political", at least in the government's own courts, than it is to say the same with respect to dealings with the Navajo or the Seminole Tribes.

Second, until recently it was unclear whether one of the most common exercises of the plenary power, to wit, the unilateral abrogation of an Indian treaty, gave rise to a right to compensation on the part of the breached party. It is now clear, however, that those abrogations which are not "political questions", will be the subject of federal court review and at least some of them will be compensated.[41] The largest judgment ever granted by the Court of Claims against the United States was for the abrogation of a treaty.[42]

A question still arises concerning the amount of the compensation. Professor Williams speaks of "meaningful reparations sufficient to enable the Indian to resume his own path."[43] One suspects that he would not find the $100,000,000 granted by the Court of Claims and affirmed by the Supreme Court in the *Sioux Nation* case to be "meaningful" by this standard and that the figure should be something more like the present value of the

37. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1979).

38. I, of course, retain the option, should the courts cause the power to evolve in a way I think wrong, to cease being its advocate and join Professor Williams' radical ranks, if he will have me. I only say in this essay that there is room in United States domestic law for a *legitimate* plenary power doctrine, but only for a legitimate one, that is to say one that meets the requirements that I am setting in the text.

39. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), had said this rather explicitly but later cases were not so definitive. *See, e.g.*, United States v. Shoshone Tribe, 304 U.S. 111 (1938).

40. *See* Newton, *supra* note 31, at 245-46.

41. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). Perhaps not all abrogations will be compensated. The test from the *Sioux Nation* case is whether Congress attempted with good faith to pay the Indians for the abrogation at the time the treaty was breached. If a court finds that it did, then it is assumed that the Congress was acting in its trustee capacity and will be liable only for breaches of that trust. Cases may arise in the future where a court will hold that Congress was acting as a trustee and "managing" the Indians' property, hence no "just compensation" is due and that the malfeasance did not rise to the level of breach of trust and hence no cause of action exists under that theory either. Professor Nell Jessup Newton, of Catholic University, wrote an unflattering critique of the *Sioux Nation* rule, Newton, *The Judicial Role in Fifth Amendment Takings of Indian Lands: An Analysis of the Sioux Nation Rule,* 61 OR. L. REV. 245 (1982).

42. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).

43. Williams, *supra* note 1, at 293.

western half of South Dakota.[44] See item 7 below.

2. *I do not feel myself bound by Professor Williams' history.* Here I may be sinning against the dogma of the critical legal studies movement and, more generally, with critical sociology, for at least twice in the *Algebra* Professor Williams indicates that this choice is not an option:

> To dismiss hastily the importance of legal discourse in the history of European colonialism would ignore the true role of legal ideology and its 'immunizing power', not only in the nascent imperialist consciousness of the Discovery era, but in the more mature form of that consciousness as it is experienced today.[45]

And again:

> It is clear, however, . . . that the discursive practices engendered by European-derived legal theory, expressed and refined in contemporary United States federal Indian law, rely upon the acceptance of a certain ordered political and legal structure as a factual necessity.[46]

Ever since I studied the *Algebra*, it seems as though everywhere I turn, I am reading the same point being made: Vine Deloria, Jr. makes it in the *Georgia Law Review*;[47] Adrienne Rich makes it in *Ms.* magazine;[48] William Pfaff makes it in *The New Yorker*.[49] This diverse set of authors, it seems to me, is not merely repeating the cliché that those who ignore history are destined to repeat it. Their message, and the *Algebra*'s, is more profound than the cliché. It is that the historical antecedents of today's policies still shape those policies and ought to shape our attitudes toward them. The *Algebra*, and these other authors, have done me a favor by focusing my attention on a new set of questions about Indian law and have reminded me that questions can determine answers; illegitimate answers come from culturally or racially biased questions. The critical "trashing" of federal Indian law that the *Algebra* represents reminds the reader that Indians are people, not legal entities and that the status of Indian tribes is not "the Indian problem" to be solved by the white man's law. One must think about the most basic questions and the *Algebra* serves the purpose of requiring that, and serves it well.

One basic question that I have had to think carefully about while writing this essay is this: can a stable and principled legal system stand today on

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44. Given the anti-Dakotaism common in the country today, it is probably fitting to note that the western half of South Dakota is worth a good deal more than $100,000,000.

45. Williams, *supra* note 1, at 224. A footnote to HABERMAS, THEORY AND PRACTICE (1973) is omitted. It is this source that uses the term "critical sociology." The literature on critical legal studies is enormous and somewhat forbidding to the newcomer. A primer is given in Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986).

46. Williams, *supra* note 1, at 284.

47. Deloria, *Minorities and the Social Contract*, 20 GA. L. REV. 917, 919 (1986): "Identifying the flaw in our philosophical roots requires that we move beyond the intellectual and emotional climate in which the Constitution was conceived and adopted."

48. Rich, *Resisting Amnesia*, Ms., March 1987, at 66: "History is not something we can take or leave: some representation of it is always being made to us under the guise of art or entertainment; some selected image of the past is always being delivered to our senses . . . ."

49. Pfaff, *Reflections (Nationalism)*, THE NEW YORKER, May 25, 1987 at 56: "The result is failure, repeated failure, caused by a pedestrian American belief in nearby cause and immediate effect, and a willful indifference to the long look, 'The backward look behind the assurance / Of recorded history, the backward half-look . . . towards the primitive terror,' to quote Eliot . . . ."

a foundation destroyed by time and the termites of enlightened thought? I think it may. The law is not a structure; the "foundation/termite" metaphor of the previous sentence is wrong. The law is a process and it evolves. From the slimy muck of Europe's middle ages came the Discovery Rule which, indeed, influenced the later creature of the plenary power. Early versions of that power were rather smelly and unattractive, but I see some hope of further evolution into a doctrine better than its precedents, a doctrine that may be applied with both brains and heart, a doctrine that works.[50]

Professor Williams may, to some extent, agree with this evolutionary metaphor, for he speaks of "[t]he artifacts retrieved from the detritus of European legal discourse. . . ."[51] But he sees little evolution, for he goes on:

> Whether in the papal ideology of the medieval Church, the desacralized Enlightenment vision of the Law of Nations, or 'modern' jurisprudential conceptions informing United States federal Indian law, American Indian Nations have been judged, and their legal status and rights determined by alien and alienating norms derived from the European's experience of the world. The white man's archaic, colonizing legal discourse denies respect to the Indian's vision of an Americanized way of life.[52]

Professor Ball draws on the same theme; calling European colonialism "the primordial crime that lies at the beginning of [our] society," he continues:

> I think we encounter here in the particular circumstances of federal Indian law some of the mysterious irrationality of much non-Indian response to Indians. Further examples will mount up on the pages that follow. They are some evidence of an incapacity for talking openly and honestly about the injury in our origin. Unless it is acknowledged and transcended, this original wrong can only be extended into the present and so be augmented, as I judge happened in *Oliphant.*[53]

I discuss *Oliphant* in the text at notes 93-108. My position set out there is that the case should have been decided not under federal common law, but under the Indian Civil Rights Act, a blatant example of the exercise of the plenary power by Congress. The result, then, would have been less intrusive into tribal affairs, as Professor Ball recognizes.[54] The irony of *Oliphant*—that the acceptance of the plenary power as embodied in the I.C.R.A., theoretically legitimate or not, would have worked a limitation on that very power and a consequent protection of tribal sovereignty—is the centerpiece of the present essay.

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50. This evolution is due in no small part to the recent and hard-fought infiltration of Indians into the ranks of lawyers and law professors. As I learn to live with the plenary power, I gain considerable optimism for its continued friendly evolution from the vigorous advocacy of Indian rights by these fine lawyers. Indeed, some of *my* best friends are Indians, *see supra* note 10.

51. Williams, *supra* note 1, at 290.

52. *Id.*

53. Ball, *supra* note 33, at 43. Professor Ball gives credit to HANNAH ARENDT, ON REVOLUTION (1965) for the notion that societies begin with a violent crime. The case reference in the quotation is to Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

54. Ball, *supra* note 33, at 125.

One last thought on the history behind the Discovery Doctrine: while I do not find myself bound to the *Algebra*'s history, in that I can support a doctrine whose roots I disrespect, I do think I am *responsible* for the history. "The iniquity of the father," reports a "wise grandfather" of my culture, "[will be visited] upon the children to the third and fourth generation . . . ."[55] This has always seemed sensible doctrine to me and I am not much more than four generations beyond John Marshall's Cherokee decisions. I accept responsibility for the Discovery Doctrine and when the revolution comes, I do not expect the revolutionaries to have the patience to hear my protestations that I found it (or *Plessy v. Ferguson*[56] or *Korematsu v. United States*[57]) repugnant. I will fall, I expect, alongside the worst racist, and, since these were my "father's" iniquities, that will somehow be just. But bearing the responsibility for the sins of Discovery does not mean that I must forsake all of its modern ramifications; I think I can support today's principled embodiment of yesterday's tarnished policy.

3. *The plenary power is acceptable, but only in direct proportion to the extent that it is counterbalanced by a conflicting, and inconsistent, recognition of inherent tribal sovereignty.* Success in law school, we are told, requires a tolerance for ambiguity. I teach Indian Law—last year I taught it to first year students—as much as anything to teach that lesson. Indian law recognizes, and *must* recognize, in my view, the co-existence of two absolutely contradictory tenets: the sovereign status of Indian tribes and the plenary power of Congress over them. Either has the potential to destroy the other, and law students must fight to see that the law may be flexible enough, in this area and in others, to accommodate such contradictions.

I note, at this point, that I do not attempt to smooth over, with cool logic, what are actually contradictory tenets at work in federal Indian law. Such superficial parsing of cases is a common front of attack by the Critical Legal Studies school and its scholars. But I do not seek to disguise or otherwise remove the contradictions; I relish them. The strength of Indian law, it seems to me, lies in the tension brought about by the contradictory forces: the metaphor is a piano which must be tightly and carefully strung with strong conflicting tensions to produce music.[58]

Professor Williams, in the *Algebra*, finds that the plenary power is an unprincipled embodiment of the Discovery Doctrine and urges the uncontradicted recognition of tribal sovereignty. In the first place, I am not sure that such a system is achievable in today's legal and political world. See item 7, below. Even if it is, I am not sure it is the wisest system. In my view, the most serious deviations from principles have come when one of those contradictory forces has seriously out-weighed the other. Allotment and termination resulted when the principle of tribal sovereignty was neglected.

55. *Exodus* 20:5. This is part of the Ten Commandments and hence Moses is the "wise grandfather" mentioned.

56. 163 U.S. 537 (1896).

57. 323 U.S. 214 (1944).

58. *See* A. SULLIVAN, THE SEVENTH DRAGON: THE RIDDLE OF EQUAL TEMPERAMENT (1985). How can one ridicule a citation to "An Archaeology of Medical Perception", *see* text accompanying *supra* note 7, and then cite to a book on piano tuning? How indeed? *Sic transit mundus academicus.*

For the United States to cut the Turtle Mountain Chippewa Tribe loose to sink or swim as an independent sovereign would be just as neglectful.

The better position, I think, lies between the two; stability and strength lie in the counterbalancing of contradictory forces. The plenary power may be lived with, but the recognition of tribal sovereignty must be made an equal tenet of federal Indian law.[59] The necessary tension between inherent tribal sovereignty and Congress's plenary power will give federal Indian law the strength it needs to face the next century, even as it means that neither the power nor the sovereignty will carry the full force it might were the other not recognized.[60]

Professor Williams rejects this approach. After discussing *Merrion* and *Kerr-McGee*, and finding indications there that tribal actions affecting whites will be upheld the more those actions look Anglo-American,[61] he writes (I note in advance that the quotation marks around the words "leaders" and "traditional" are his):

> Increasingly, both Indian and non-Indian "leaders" are preaching the necessity of aggressively pursuing this strategy of accommodating tribal sovereignty and governmental decisions to forms similar to those of the dominant sovereign. . . . It is an inevitable and necessary trail, [these "leaders"] argue, which the first Americans must follow if they are to express any type of self defining vision at all, even if it is a vision which they would not have chosen were they truly free. Many of the most "traditional" of Indian people pay little attention to their "leaders" who have helped implement such strategies. For them, the game is not worth playing.[62]

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59. Professor Newton has argued persuasively that the due process clause of the Constitution protects against rejection of tribal sovereignty, although she admits that Washington v. Confederated Tribes and Bands of the Yakima Indian Nation, 439 U.S. 463 (1979), casts doubt on the theory. Newton, *supra* note 31, at 261-67. Messrs Barsh and Henderson find that the protection lies in the ninth amendment. R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 257-69 (1980).

60. Professor Ball writes:

> Congress, the states and the Court have expanded their powers over Indians at the expense of the tribes; but the tribes have wrested some significant victories from the law. That fact and an uncanny tribal capacity for survival have provided Indian nations with a contemporary residual vitality notwithstanding the general compacting suffered by their legal prospects.

Ball, *supra* note 33, at 12. The view that I am advancing here in the text is not far different from this statement, only with a different emphasis. Tribal victories are a part of the law, not apart from it. Tribal capacity for survival is no more uncanny than federal law's ability to recognize both tribal sovereignty and a contradictory plenary power. The vitality of tribal sovereignty is no longer its 15th century whole, but it is more than residual and it stands, an important tenet of American Indian law, creating the tension that will resist another reign of plenary power terror.

61. Williams, *supra* note 1, at 282-83, 286-88.

62. *Id.* at 288-89. I have omitted the two footnotes which follow the words "sovereign" and "strategies." Both footnotes are to V. DELORIA & C. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 232-43 (1984). Interestingly enough, on the same page numbers in another book by the same authors, V. DELORIA & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE (1983) (the readers of this essay are free to speculate on how I happened upon these pages), Deloria and Lytle speak of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 as one of the principal places where Anglo-American and Indian laws merge, *see* discussion *infra* at notes 71-84. After noting that certain Navajo tribal ordinances restrict the right of members of the Native American Church to use peyote, and the pre-I.C.R.A. litigation that denied First Amendment protection against that tribal action, Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959), the authors write:

Professor Williams clearly aligns himself with the "traditional" people, and the *Algebra* is his statement of the game that should be played.

4. *I have some faith in the ability of the United States Congress and federal court system to exercise the plenary power with a delicate touch.* The best evidence, of course, is to the contrary. Professor Williams recounts that evidence in Part III. A. of the *Algebra*. But while the title of that section mentions the dates "1900 through the present", most of the news therein is old news; nearly all of the discussion relates treaty abrogations early in this century.[63] As Professor Williams recognizes, many of the latest developments of the plenary power, in reaction, I think, to the growing strength of tribal sovereignty, are to limit the plenary power.[64]

In the last paragraph of Part III. A., Professor Williams lists a number

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> If the Constitution cannot be used to protect Indian religious freedoms on the reservation, how can Indians be guaranteed the right to worship as they see fit? The answer rests with Congress. Congress, through its plenary power, can enact laws that provide individual Indians with protection against tribal government interference. Congress did specifically protect individual religious freedoms in the 1968 Indian Civil Rights Act, which prevents tribal governments from making or enforcing any law prohibiting the free exercise of religion. Thus, while tribal members are not afforded the religious freedom guaranteed by the First Amendment of the Constitution [against tribal actions], they can invoke the Free Exercise Clause of the 1968 Indian Civil Rights Act.

V. DELORIA & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE, at 233.

The discussion of the I.C.R.A. in the text that Professor Williams cites is much more critical. *See* V. DELORIA & C. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 213 (1984).

63. Williams, *supra* note 1, at 258-64. The abrogation of treaties with the Indians was one of the most common exercises of the plenary power late in the last century and early in this one. The latest case cited in this discussion of "1900 through the present" is United States v. Sandoval, 231 U.S. 28 (1913). Four more recent cases are cited later in the section, but all four of these, discussed *infra* in notes 64 and 68, resulted in the limitation of the plenary power from its maximum reach early in the 1900's. Professor Williams might have discussed United States v. Dion, 476 U.S. 734 (1986), a very recent case dealing with the abrogation by various environmental protection statutes of a treaty-protected right to hunt eagles.

64. It was not until the late 1970's that the Court finally gave indications that 'the breadth of the plenary power rule is shrinking and that tribes may now be able to obtain judicial review of federal Indian legislation'. In Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977) . . . the Court flatly rejected the notion that federal legislation concerning Indians is immune from judicial scrutiny. . . . Then, in United States v. Sioux Nation, 448 U.S. 371 (1980), the Court, while not abandoning the concept of plenary power, effectively jettisoned *Lone Wolf*'s conclusive presumption of congressional good faith in Indian legislation.

Williams, *supra* note 1, at 263 n.150.

All of this is my point exactly, but I would stress it in the text rather than bury it in a footnote. *See also* Newton, *supra* note 31, at 228-36, 261-88. Professor Newton is neither as optimistic as I nor as pessimistic as Professor Williams. She notes that:

> [t]he Plenary Power Doctrine may have faded as the explicit analytical theory for justifying the exercise of congressional power, but its doctrinal emanations are still present. Whatever Congress wants, Congress gets, and [Morton v.] Mancari [417 U.S. 535 (1974)] and its progeny are now increasingly impressed to serve that end.

Id. at 284-85. *See also* Ball, *supra* note 33, at 55-56. Professor Newton calls Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979), "a low point in the efforts of tribal advocates to convince the Court to apply more than minimal scrutiny to individual and tribal claims of equal protection violations." Newton, *supra* note 31, at 284. (*Yakima* upheld the constitutionality of Washington's piecemeal assumption of Indian country jurisdiction under Public Law 280.) Nevertheless, she seems to accept that some power, a carefully constricted power, but still unlimited in subject matter, will be a part of federal Indian law: "Neither the morality of promise-keeping nor the value of cultural diversity can create an absolute right to tribal sovereignty . . . ." *Id.* at 265, discussing the I.C.R.A. and Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

of exercises of the plenary power other than the abrogation of treaties that would indicate anything but a light Congressional touch:

> Violent suppression of Indian religious practices and traditional forms of government, separation of Indian children from their homes, wholesale spoliation of treaty-guaranteed resources, forced assimilative programs and involuntary sterilization of Indian women, represent but a few of the practical extensions of a false and un-Americanized legal consciousness that at its core regards tribal peoples as normatively deficient and culturally, politically and morally inferior to Europeans.[65]

This is enormously serious stuff, and, on the chance that it does not go without saying, I support none of it. I have three reactions. First, in an article in which we are given a full-page-long footnote detailing the whereabouts of John Cabot in the late fifteenth century[66] and in which multi-paragraph footnotes are common, it seems fair to call a one-line, one-resource footnote showing the United States government's policy of the involuntary sterilization of Indian women "skimpy."[67] Likewise, the other depredations listed.[68] Second, when the charges are so serious, the "but a few" language

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65. Williams, *supra* note 1, at 265. Citations are omitted, but see the discussion immediately below in the text.

66. *Id.* at 248-49 n.98.

67. *Id.* at 265 n.159. The resource is an article in Akwesasne Notes. In fairness, Professor Williams' footnote signal is "*see, e.g.*" It does not seem to be too much to ask that the "*e.g.*" be detailed a bit when the charge is so serious.

68. The claim of "violent suppression of Indian religious practices and traditional forms of government" is supported by two references. First, Professor Williams lists two pages in the American Indian Policy Review Commission's Final Report, *Williams, supra* note 1, at 265 n.155. These two pages recount the suppression of the Ghost Dance religion, culminating in the massacre at Wounded Knee in 1890, a dreadful enough tale in American history, but outside the "1900 to the present" time period covered by Professor Williams' text. Second, the same footnote cites the entire several hundred pages of the Federal Agencies Task Force's report exploring violations of the American Indian Religious Freedom Act. *Id.* Many of these pages, as Professor Williams surely knows, are agency transmissions reporting no known violations, and many other pages report violations which, while not innocuous, are hardly "violent suppressions."

Support for "separation of Indian children from their homes" is found in one law review comment, *id.* at 265 n.156, *citing* Comment, *American Indian Child Welfare Crisis: Cultural Genocide or First Amendment Preservation?*, 7 COLUM. HUM. RTS. L. REV. 529 (1976). This comment was written before the passage of the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963, and urges constitutional protections such as those the I.C.W.A. provides by statute. One suspects that the student who authored the comment, and others, would not be wholly satisfied that the protection is merely statutory, but would not be wholly unsatisfied with the Congressional action either.

"Wholesale spoliation of treaty-guaranteed resources" garners Professor Williams' citation of two cases, one of which awarded $100,000,000 to the Sioux for a treaty abrogation, United States v. Sioux Nation of Indians, 448 U.S. 371 (1980), and the other of which permitted, albeit reluctantly, the United States to be sued in the Court of Claims for the mismanagement of timber resources, United States v. Mitchell, 463 U.S. 206 (1983). An earlier opinion in the same case, in which one of the plaintiff's theories of recovery, and, in fact, the broader theory, was held barred by sovereign immunity, is also cited, United States v. Mitchell, 445 U.S. 535 (1980). Williams, *supra* note 1, at 265 n.157.

Finally, Professor Williams' reference to "forced assimilative, programs" is supported with citation to three discussions of the Termination policy of the 1950's. *Id.* at n.158. Termination was admittedly a failed exercise of the plenary power and one that President Nixon was right to reject. *See* Special Message to the Congress on Indian Affairs, [1970] Pub. Papers 565 (President Nixon, July 8, 1970), H.R. Doc. No. 363, 91st. Cong., 2d Sess. (1970). Professor Williams does not mention the rejection, at least not in footnote 158.

My criticism of Professor Williams' authorities in footnotes 155 through 159 should not be seen as my attempt to prove that the depredations he lists in the text at page 265 do not—or did not—in fact, take place. It would take much more than this footnote to prove the negative, if I were inclined

is especially suggestive and a reader is entitled, I think, to ask whether the rest of the list is of the same nature and what exactly those further depredations are.[69] And finally, as set out in a later point below, if these practices exist, the plenary power is not to blame. If the body of the Constitution does not protect against involuntary sterilization and violent infringements of religion, then there is no hope for any of us. This is not to say that the Constitution has always in the past been used to its full measure to protect Indians; indeed the evidence is that it has not been.[70] But, as I mentioned above, a plenary power is acceptable to me only if tempered both with a recognition of inherent sovereignty and the full protection of the Constitution. A plenary power that destroys these two is a monster I will not support. But I think it is to the benefit of the health and stability of Indian law to advocate a "middle way", which accepts the plenary power, and to work to control the exercise of it.

So why do I trust that the plenary power will be handled with care by Congress and the courts? I find optimism in the history of the Indian Civil Rights Act.[71] The power to impose upon Indian tribes constitution-like restrictions must flow from the plenary power of Congress. While Professor Williams does not discuss the I.C.R.A., I assume that he would challenge its legitimacy, its roots lying as they do in the Discovery Doctrine and a cultural egotism which holds that the notions of due process, equal protection and the like ought to be honored even by governments which had no say in their evolution.

In enacting the I.C.R.A., Congress went considerably less far than it might have in imposing Anglo-American standards on the way tribes do business. There is, for example, no Establishment Clause in the I.C.R.A., nor any right to a jury in civil trials, and this in spite of the fact that these protections are held dear by a large portion of the dominant society. There is also no nineteenth amendment analog, although it has never been clear to me whether that was Congressional deference to tribal ways[72] or mere

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to do so, which I am not. Nor should I be seen to say that limited First Amendment protection for Indian religion, treaty and trust violations resulting in the diminishment of tribal resources, flaws in the protections given by the Indian Child Welfare Act and so forth are unimportant technicalities. My point here is only that, based on the thinness of the resources in Professor Williams' footnotes, made patent by his much more careful research on clerical thought in the Middle Ages, he has overstated his case in the text on page 265 by several orders of magnitude. And I go to this length to make that point precisely because the legitimacy of the plenary power that I advocate depends on the ability of the Constitution to control such depredations and that, in turn, depends on his being wrong about the egregiousness of the depredations.

69. In Professor Williams' more recent essay he adds to the list ". . . and all the other usual forms of genocide perpetrated upon Indian people by European-derived 'civilization'. . ." with citations to two law journal articles. Williams, *supra* note 23, at 169, accompanying text and note 19.

70. *See* V. DELORIA & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 216-46 (1983). *See also* Newton, *supra* note 31, at 274-81, discussing Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976); Fisher v. District Court, 424 U.S. 382 (1976); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977) and United States v. Antelope, 430 U.S. 641 (1977).

71. 25 U.S.C. §§ 1301-03 (1982).

72. Without an Establishment Clause in the I.C.R.A., tribes may have theocratic governments without running afoul of its terms. Some do. And, of course, it is not Indian religions alone that impose certain gender qualifications on supplicants and holy persons. Hence it is conceivable, though I know of no specific examples, that a tribe might wish to limit the access of one sex or the other to certain activities that Anglo-American society would consider governmental. Congress

oversight.[73]

The lower federal courts in a decade of doing battle with what exactly Congress meant when it passed the I.C.R.A., were also, on the whole, I think, rather sophisticated and respectful of tribal ways in interpreting the act. While there were cases that read the act as if Congress had applied the Constitution in whole to the tribes,[74] most courts used a balancing test, weighing the interests of the individual plaintiff against tribal interests of tradition and self-government.[75] Such a balance, of course, is the common law court's way of recognizing the conflicting and contradictory forces that pull at a statute like the I.C.R.A. Congress had in mind, those courts realized, *both* the strengthening of tribal government and the protection of individual rights.[76] The I.C.R.A. shows the plenary power, in other words, as exercised by a Congress respectful of tribal sovereignty.

Finally, the Supreme Court in *Santa Clara Pueblo v. Martinez*[77] took

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might have been aware of this possibility, found it a proper divergence of tribal from Anglo-American ways and omitted the 19th Amendment analog.

73. In another spasm of honesty, I must admit that I regularly forget that there is a 19th Amendment and the corresponding toil that was required for its ratification. I tend to forget, in other words, that the Equal Protection Clause was once thought insufficient to protect the right of women to vote.

74. *See, e.g.*, United States v. Alberts, 721 F.2d 636, 638 n.1 (8th Cir. 1983).

75. This balancing test is seen most dramatically displayed in a side-by-side comparison between the two lower court opinions in the *Martinez* case, Martinez v. Santa Clara Pueblo, 402 F. Supp. 5 (D.N.M. 1975), *rev'd*, 540 F.2d 1039 (10th Cir. 1976).

Commenting on the *Martinez* case, Professor Ball writes: "Reflecting its commitment to traditional values, the Pueblo granted tribal membership to the children of male and not of female members who married outside the tribe. The Supreme Court upheld the Pueblo's practice." Ball, *supra* note 33, at 123. Neither of these statements is entirely accurate. The two lower court opinions just cited split on the very issue of whether the Pueblo's gender-based membership regulation reflected a "traditional value", the Circuit Court favoring the view that the "value" advanced was Washington's, not the Indians'. *Martinez*, 540 F.2d at 1047. The Supreme Court's holding was strictly on jurisdictional grounds, and it "upheld" the practice only insofar as holding that it could not be challenged before a federal judge. On whether the discriminatory practice was within the ambit of the I.C.R.A., which remains an active question of federal law before the tribal court, the Supreme Court expressed no opinion.

76. *See Martinez*, 436 U.S. at 61-66.

77. 436 U.S. 49 (1978). Professor Williams does not discuss *Martinez*. Such a discussion seems to me to be especially apropos to his footnote 280. There he mentions the trouble that the government of Canada has had before the International Human Rights Committee:

> Canada has already been advised by the Committee that its treatment of Sandra Lovelace violated the Human Rights Covenant. Lovelace presented a complaint based on a provision of Canada's Indian Act that denied Indian status and resultant benefits to an Indian woman who married a non-Indian. The Act did not deny Indian status to an Indian man who marries a non-Indian.

Williams, *supra* note 1, at 293 n.280.

In *Martinez* it was a regulation of the Santa Clara Pueblo that denied membership in the Pueblo and resultant benefits to the children of a Santa Claran woman who married a non-Santa Claran. The regulation granted membership to the children of a mixed marriage in the opposite gender direction. Now, if this sex-discriminatory Santa Clara membership regulation was imposed on the Pueblo by Congress, then Ms. Martinez and her children have an argument much like Ms. Lovelace's. If the regulation is the result of Santa Claran tradition, then perhaps the sex discrimination complaint belongs before the Human Rights Committee against the Pueblo. The United States government might be brought into that action for having the power to stop the sex discrimination but, by staying its hand, not doing so. The Committee would then have to determine whether the United States in fact has the plenary power necessary to pass the I.C.R.A. and prevent the sex discrimination within its borders but undertaken by an Indian tribe. Professor Williams, I assume, would argue that it does not. It should be noted that the lower federal courts divided over the question whether the Pueblo's regulation was a long-standing, pre-Columbian patrilineal, patrilocal tradition

the final steps in deference to tribal autonomy and held that, first, the tribe itself was sheltered by sovereign immunity[78] and, second, no private, civil cause of action existed under the law to allow a plaintiff to bring suit in federal court against a tribe.[79] Civil enforcement of the I.C.R.A. will be before the tribal court. Ten years have passed since that decision and Congress has not moved to open the federal court house doors to welcome those with complaints against tribal action, nor to waive sovereign immunity, both of which would fall within the plenary power.[80] So we see the plenary power being exercised with restraint both by the courts and Congress.

Now it is true, of course, that Ms. Martinez is an Indian[81] and a few lower courts have taken the position that *Martinez* is a decision that applies only to Indian plaintiffs.[82] There is little in *Martinez*, though, that would limit its reach in that racist way and most courts in the decade since the case have refused to so limit it.[83] The I.C.R.A. in its enactment, its lower court construction, its Supreme Court construction and the subsequent Congressional reaction shows the plenary power exercised with an encouraging restraint.[84] With the work of tribal advocates, in court and out, I have some, but admittedly not unlimited, optimism of continued restraint.

5. *I have little faith in the ability of public international law to protect any valuable rights. I have no faith in the ability of public international law to put bread on American Indian tables.* It is not clear whether Professor Williams would disagree, for he equivocates a bit over whether international recognition of tribal sovereignty is necessary. He argues that "an unfettered access to international domestic legal forms could provide tribes with the political leverage needed to force their colonizers to defend their abusive, anachronistic and racist vision of Indian status and rights before the world community,"[85] but later admits that: "this type of leverage would have little

(the District Court's view, 402 F. Supp. 5 (D.N.M. 1975)) or a new-fangled Anglo-American idea (the Circuit Court's view, 540 F.2d 1039 (10th Cir. 1976)). *See supra* note 75.

78. 436 U.S. at 58-59.

79. *Id.* at 61.

80. *Oliphant*, 435 U.S. at 208; *Martinez*, 436 U.S. at 72.

81. In fact, most of the plaintiffs in most of the pre-*Martinez* I.C.R.A. cases were Indians, like Ms. Martinez, suing their own tribes.

It is also true that Ms. Martinez is a woman and there is a feminist critique of the decision, which finds not insignificant that it was a charge of sex discrimination that the Supreme Court referred so effortlessly back to tribal court.

82. The leading case taking this position is the infamous Dry Creek Lodge v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980). For a tremendously insightful analysis of *Dry Creek Lodge*, see Gover & Laurence, *Avoiding Santa Clara Pueblo v. Martinez: The Litigation in Federal Court of Civil Actions under the Indian Civil Rights Act*, 8 HAMLINE L. REV. 497, 499-515 (1985).

83. *See* Gover & Laurence, *supra* note 82, at 512-15. *See also* cases cited in Williams, *supra* note 1, at 247 nn.93-95.

84. Professor Ball, no fan of the I.C.R.A., refers to "[t]he serious, complex damage inflicted upon tribes by the liberally motivated Indian Civil Rights Act . . . ." Ball, *supra* note 34, at 124, *citing* V. DELORIA & C. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 213 (1984). With Senator Sam Ervin of North Carolina as the Act's chief sponsor, there are reasons to be suspicious of its liberal motivation, but that's another story; at least the I.C.R.A. *reads* as if it were so motivated.

85. Williams, *supra* note 1, at 297. I am not really sure I know what an "international domestic legal form" is. While I am reluctant to rework the phrases of a wordsmith as scholarly as Professor Williams, perhaps the quoted phrase was abused by the typesetter and should read "international *and* [or, perhaps, *as well as*] domestic legal forums." This change would serve to emphasize that

direct sanctioning power . . . ."[86]

The *Algebra*'s direct proposals are two, found in Part IV. B.:

1. Abandonment of the Discovery Doctrine, the plenary power and the trust responsibility.[87] This would principally be a change in United States domestic law.

2. Settlement of disputes between the tribes and the United States before international tribunals.[88] This would require, to some extent at least, recognition of tribal sovereignty under international law, and the establishment of a United States policy to accept international jurisdiction over such disputes.

With respect to the role of international law, Professor Williams' bottom line appears to be contained in a footnote quotation that "world opinion is a force to be reckoned with."[89] Perhaps. I only know this: as I sat before McNeil and Lehrer a few years ago listening to debates on the international legality of the Grenada invasion/liberation, an act of my government that I found most offensive, it occurred to me that all of the people in the nation truly interested in whether the invasion/liberation was legal or not could fit comfortably in a small seminar room, and that neither Ronald Reagan nor I would be in attendance.[90] Professor Williams notes that:

Professor Williams is not necessarily putting all of his eggs in the international basket and, indeed, there is no reason to do so; international jurisdiction need not be exclusive jurisdiction.

If this change is made, then with respect to domestic legal forums, Professor Williams' emphasis must be on the word "unfettered". Indian Tribes have access to both federal courts, 28 U.S.C. § 1362 (1982), and state courts, Three Affiliated Tribes v. Wold Engineering (I), 467 U.S. 138 (1984); Three Affiliated Tribes v. Wold Engineering (II), 106 S. Ct. 2305 (1986), and to some extent, this access is enormously unfettered; the New York Oneidas are litigating a cause of action nearly 200 years old, with no statute of limitations barrier to worry about, County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985). On the other hand, much of the litigation with which Professor Williams is concerned would be against the federal government where sovereign immunity is a substantial—though not necessarily insurmountable—barrier. *See* Mitchell v. United States, 591 F.2d 1300 (Ct. Cl. 1979) (en banc), *rev'd*, 445 U.S. 535 (1980), *on remand*, 664 F.2d 265 (Ct. Cl. 1981) (en banc), *aff'd*, 463 U.S. 206 (1983).

86. Williams, *supra* note 1, at 297. At this point in the *Algebra*, Professor Williams also urges that "the principle of exclusive jurisdiction over Indian legal controversies in the white man's own courts violates the most basic principle of justice. . . ." *Id.* The reference is to controversies between a tribe and the United States, which are sued over in the courts of the United States and not in international courts. Indian courts, of course, retain jurisdiction over many disputes between tribes and individual non-Indians, with no appeal into the white man's court. The question of tribal civil jurisdiction over a non-Indian defendant is the issue in National Farmers' Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985).

87. Williams, *supra* note 1, at 293.

88. *Id.* at 293-94.

89. *Id.* at 297 n.283, *quoting* one Dr. Abram, a former United States representative to the Commission on Human Rights.

90. Professor John Norton Moore of the University of Virginia *would* be in attendance. *See* J. MOORE, LAW AND THE GRENADA MISSION (1984). His scolding that "reasonable observers unfamiliar with [certain] legal fallacies . . . commonly react by denigrating the role of law [in international affairs]" could apply to my dismissal of the importance of international law in the text, along with the source he cites, *id.* at 4 n.4. His conclusion is that the Grenada "mission" was "lawful and in full compliance with the Charters of the United Nations and the Organization of American States." *Id.* at 2.

Professor Moore prefaces his discussion by noting that "[i]n the long run *only* a principled policy rooted in law can ensure the international peace and justice so importantly a part of the national interest of the United States and of all nations," *id.* at 1 (emphasis in the original). Professor Williams certainly agrees, as he castigates that "our contemporary Indian law is not a reflection of either rationality or the 'Rule of Law,' but rather of politics." Williams, *supra* note 23, at 172. It

> [a]n equal voice on the world stage for Western tribal nations would certainly not necessarily guarantee the continued protection and preservation of their centuries-old-vision. Denying that voice, however, would most assuredly assist the efforts of those who seek the silent liquidation of America's tribal peoples.[91]

Both of these sentences are true. I do not seek to deny Indians an international forum and I hope that removes any suspicion that I am a silent liquidator. However, I am not optimistic that international forums hold any real promise of protection of American Indian rights. Perhaps I should be more hopeful; surely I do not hope the opposite. But the active involvement of the international community in a restructuring of the legal and political relationship between the United States and the Indian nations that lie within its borders would be a change from the 1988 world as I know it, a change so profound as to be breathtaking in its implications, and I do not expect to see it soon. I am convinced, in fact, that a recognition of tribal sovereignty under domestic law—for which the contradictory recognition of the plenary power of Congress is, in my view, the price—is the best hope of improving the lot of Indian peoples in the United States.[92] To the extent that advocating a place for the Indian nations among the states of the world distracts tribal advocates from the vigilance that this balance of contradictory forces at work in the domestic law requires, I think it to be folly.

6. *Most of the depredations that Professor Williams enumerates do not flow from exercises of the plenary power.* I have already mentioned above my view of his list of the enormously inhumane injustices worked on American Indian peoples and my view that the application of fundamental constitutional protections and the principle of compensation for bad faith treaty abrogations must protect against such unjust applications of the plenary power. What about exercises of the plenary power that limit the reach of tribal sovereignty? Let me mention here our disagreements over the trio of recent Supreme Court cases Professor Williams discusses in Part III. B. 1., disagreements which are basic.

We equally dislike *Oliphant v. Suquamish Tribe*[93] but for profoundly

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is difficult to imagine, though, that these two scholars would agree on much else about either international or domestic law.

91. Williams, *supra* note 1, at 297.

92. To this end, I have spent some time in Scandinavia advancing the view to the Sami people that more effective protection may come from an enlightened, though moderate, domestic legal role, than from a more expansive international one. I believe this to be true, even though respect for international legal principles is more firmly a part of Scandinavian law and politics than it is American.

93. 435 U.S. 191 (1978). As Professor Williams relates, *Oliphant* is a much criticized opinion. Williams, *supra* note 1, at 268 n.174. I am not sure, though, that he has been entirely fair to Professor Richard Collins of the University of Colorado by listing his article, Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479 (1979), among the "[fierce] critici[sm]". Williams, *supra* note 1, at 268. Professor Collins is surely a tribal advocate, a rubric that has always been broad enough to encompass both Professor Williams and me, but he also has a long commitment to the protection of the rights of individuals. As a tribal advocate, he represented Ms. McClanahan in her suit against Arizona, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) but he was also Ms. Martinez's lawyer in her suit against her Pueblo, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Professor Collins' bottom line on *Oliphant* is this:

> The Supreme Court's holding in *Oliphant* is reasonably convincing as applied to persons in tribal territory under federal authority but is less certainly applied to illegal intruders and

different reasons. Professor Williams sees *Oliphant* as the fruit of a long, long branch of common law decisions with roots in the middle ages. He scolds us latter-day critics, writing that "*Oliphant* cannot be so easily exorcised from the heritage of European-derived legal discourse on the rights of normatively divergent peoples, of which contemporary United States colonial legal theory is so clearly a part."[94] I, on the other hand, dislike the case because it was not decided under the statute that I consider to be a legitimate exercise of the plenary power, that is, the Indian Civil Rights Act.[95]

Mark Oliphant, a white man, was arrested by tribal authorities for violating certain tribal ordinances. The Supreme Court sprung him from tribal custody, holding that the Suquamish Tribe did not have the power to punish non-Indians. And thus was launched a seemingly endless series of cases in which white plaintiffs allege a lack of tribal power over them.[96] Justice, now Chief Justice, Rehnquist wrote: "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indians except in a manner acceptable to Congress."[97] Professor Williams dislikes the jurisprudence contained in the words "by . . . non-Indians"; I think that the I.C.R.A. was exactly "the manner acceptable to Congress." Had I been on the Court, I would have required Mr. Oliphant to allege precisely what provisions of the I.C.R.A. were being violated: was he being treated differently because he was white? How so? Had he not received due process? Why not, exactly? Is it true, as has been informally alleged, that when one is tried before a Suquamish court, one almost always gets the same jury? Is an all-Indian jury to try a white defendant consistent with the I.C.R.A.?[98] In other words, I would have required Mr. Oliphant to show exactly how the exercise of Suquamish tribal power contravened the Indian Civil Rights Act and would have granted the habeas corpus petition only upon such proof. And, remember, I and most courts would interpret the substantive provisions of the I.C.R.A. with a healthy respect for tribal ways. The Court allowed instead a broad-based and imprecise attack on the existence of jurisdiction and gave us an imprecise and troubling decision in

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is doubtful as to non-Indians who became members of tribes. The *Oliphant* defendants were neither intruders nor members, however, so the decision seems correct in its result.

Collins, *supra* note 93, at 528. He does criticize the opinion:

> The *Oliphant* holding aside, the Court's opinion is unsatisfactory in several respects. The marshalling and use of precedents is selective and at times inaccurate and misleading. . . . It is the logic of the Court's reasoning about due process of law, tribal dependence on federal protection and the federal criminal statutes which rescues the opinion.

Id. at 529.

94. Williams, *supra* note 1, at 268.

95. I don't mean to suggest that the legitimacy of the I.C.R.A. goes without saying, but this short essay is not the place to discuss challenges to it in detail. Professor Newton lays out with care the required analysis when an exercise of the plenary power limits tribal sovereignty and is attacked as unconstitutional. Newton, *supra* note 31, at 261-71, 281-88. As powerful tribal advocates as Vine Deloria and Clifford Lytle seem to find the I.C.R.A. a legitimate exercise of the plenary power. V. DELORIA & C. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 233 (1983).

96. These cases are discussed in detail in Gover & Laurence, *supra* note 82, at 515-23.

97. *Oliphant*, 435 U.S. at 210.

98. Justice Rehnquist noted in *Oliphant* that it was apparently consistent with the I.C.R.A. that the Suquamish had all-Indian juries. *Id.* at 194 & n.4. If true, that to me is an exercise of power in a manner permitted by Congress. To Justice Rehnquist it was a reason to deny the tribe criminal jurisdiction.

return.[99]

What would Professor Williams have done? It is clear that he dislikes Justice Rehnquist's analysis, but, as Professor Richard Collins has shown, it is possible to criticize the rationale, or at least part of it, and still find the holding acceptable.[100] My view, outlined in the last paragraph may be similar; given the right showing, I would have released Mark Oliphant under the I.C.R.A. Most of the discussion in Part III. B. 1. a. of the *Algebra* criticizes the rationale of *Oliphant*: "This subordination of Indian sovereignty reveals the clear substantive links between Rehnquist's form of analyses . . . and the archaic analytical premises grounding the long heritage of European-derived legal discourse respecting normatively divergent peoples." But what should the analysis have been? What is the bottom line? Are there any circumstances in which Mark Oliphant's petition should be granted?

The *Algebra*'s answer to this question is apparently "no". Here is the long passage that contains the answer:

> *Oliphant* . . . demonstrates the determining impact of a discursive practice which seeks to contain and erase the radical difference presented by the Indian's self-defining vision. *Oliphant* identifies the Indian's radically divergent vision through deployment of mediative textual strategies. Once identified, that difference is then subsumed within the universalized, hierarchical structures of United States political and legal theory. Tribal nations . . . are placed within a highly rationalized and legitimating framework that concedes limited recognition to the Indian's self-defining vision. That vision is recognized, however, only as long as the tribes' desires are consistent with the interests, expressed or implied, of the European-derived vision of the superior sovereign.
>
> Thus, the ancient discursive practice employed in *Oliphant* marginalizes those Indian's demands which the eurocentrically conceived superior vision cannot accommodate. Attempts at too divergent an expression of the Indian's self-defining preferences are regarded as unreasonable, or in *Oliphant*'s words, 'unwarranted,' within a fictively derived pluralistic consensus to which the Indians must defer.[101]

I take this to be a flat rejection of the legitimacy of the Indian Civil Rights Act, a "eurocentrically conceived superior vision," I suspect, if Pro-

99. Why is it that the Court saw *Oliphant* not as an I.C.R.A. case, but as one involving tribal power? Help with this question comes in Professor Williams' discussion of "beginnings," Williams, *supra* note 1, at 269, 284 n.249. To me, this discussion is one of the most useful parts of the *Algebra*. He mentions "beginnings" from a law review author's viewpoint, *id.* at 284, while his emphasis on page 269 is jurisprudential, touching on *stare decisis* and Justice Rehnquist's "beginning" of the *Oliphant* analysis. For me the importance of the idea lies in practical lawyering. The advocate's task must be first to get the court to see the case from the proper perspective; to see *Oliphant* as an I.C.R.A. case; to see United States v. Montana, 450 U.S. 544 (1981), as an Indian, not a navigable stream, case; to see United States v. Dion, 476 U.S. 734 (1986), as an Indian, not a bald eagle, case. So often, it seems, an appellate court's initial—"beginning"—orientation to a case determines its outcome and makes crucial those first words, "May it please the court, the issue before you today is *this* . . . ."

100. *See* Collins, *supra* note 93.

101. Williams, *supra* note 1, at 273-74.

fessor Williams ever saw one.[102] And *Martinez's* placement of I.C.R.A. civil enforcement in tribal court is not nearly enough to make it acceptable to Professor Williams:

> Tribes must exercise their "rights" to self-determination so as not to conflict with the interests of the dominant sovereign. In effect, this form of discourse enforces a highly efficient process of legal auto-genocide, the ultimate hegemonic effect of which is to instruct the savage to self-extinguish all troublesome expressions of difference that diverge from the white man's own hierarchic, universalized worldview.[103]

There is enormous ground between my view that the I.C.R.A., if interpreted sensitively to tribal ways, is legitimate, and Professor Williams' view that it is "a highly efficient process of legal auto-genocide." It is unlikely that this ground will be closed by an exchange of essays. Apparently, under the *Algebra*, nothing the Suquamish would do to Mark Oliphant could be "too divergent an expression of the Indian's self-defining preferences." " 'Unfair' ", he says, is a "relativistic, value-laden term"[104] and he objects to its imposition on Indian power, even in dicta, in *Merrion*.

So, while Professor Williams does not discuss the I.C.R.A., I assume that he finds no principled basis for Congressional power to enact such a law.[105] And it is certainly his position that neither Congress nor the courts of the United States have the power, except in the rawest form of "strength",

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102. In what I take to be a unflattering description of the federal Constitution, Professor Williams calls it "that vaunted document." Williams, *supra* note 23, at 170. He speaks more kindly of the document later in the same article. *Id.* at 177.

103. Williams, *supra* note 1, at 274. I admit that this quotation from the *Algebra* does not mention the I.C.R.A. and I am only assuming that its application to that statute is as clear as it appears to me.

104. *Id.* at 278. Professor Ball makes a similar point when he questions the propriety of applying concepts of "equality" to tribal governments: "To the degree that it has been subsumed under individualism, equality is a foreign concept in tribalism. This is not because tribes deny equality to their members but because individualism is not a relevant category." Ball, *supra* note 33, at 122 n.641. Explain that to Julia Martinez and her children.

There are probably those who question Ms. Martinez's "Indian-ness"; her challenge in federal court, with a white attorney, *see supra* note 93, and the support of the American Civil Liberties Union, *see* Ball, *supra* note 33, at 123, surely raised some eyebrows in the Indian community. At the other extreme, there are just as certainly those radical Indians and others who see tribal councils and courts as modern-day Vichy governments, propped up by the dominant society and unworthy of much protection at all. I have too much respect for tribal government to accept that view. But I do not have enough respect, nor the right to question Ms. Martinez's motives, to give the Pueblo *carte blanche* in its treatment of her.

None of this, of course, does any more than beg the question involved in the present debate over the *Algebra*; I expect the word "give" in the last sentence to jump off the page at Professors Williams and Ball. Why, exactly, do I (or the United States government) feel that the Santa Clara Pueblo's treatment of the membership rights of one of its members is an occasion for me to give or withhold *carte blanche*? I do not have that right with respect to the government of, say, Chile, and I concede that white men have a nasty record when they get to thinking they do. *See* the discussion in the text, *infra* at notes 106-09.

105. In the more recent essay, Professor Williams notes, still without mentioning the I.C.R.A.:

> The ability of Congress to unilaterally determine the self-governing powers that tribal governments shall or shall not exercise, an ability clearly sustained and legitimated by the Discovery Doctrine, acts efficiently and effectively in chilling any exercises of tribal sovereign powers that might be perceived as too radical or normatively divergent from the majority society's wishes or whims.

Williams, *supra* note 23, at 169. The due process of law is, for me, too grand a notion to be called a "whim" and if I should for that reason be skewered and roasted over the coals of ethnocentrism, so be it.

to limit Suquamish sovereignty. The result, then, must be that Mr. Oliphant may object only before the tribal court, with no appeal into the federal system, or before international tribunals, and then only if he can allege a substantial infringement of his human rights under some convention to which the Suquamish are signatories. Short of that, he must keep himself off the reservation, much as if the Suquamish Nation were Bolivia.

And does the Suquamish Nation retain the full measure of sovereignty that Bolivia has? *Oliphant*'s famous formulation is this: tribes retain their inherent sovereignty except to the extent that they give it up, it is taken away by Congress or it is "inconsistent with their status." At this point a side-by-side comparison of the positions of Williams, Laurence and Collins is instructive. Professor Collins thought that concerns for Mark Oliphant's fundamental due process rights supported *Oliphant*'s holding and did, in fact work an implied limitation of Suquamish sovereignty.[106] I do not like the "inconsistent with their status" language; it is too loose and allows a court too much opportunity for *ad hoc* decision making. If nothing else, the "unspoken assumption" of the first half of the *Oliphant* opinion shows this *ad hocism* at work.[107] But, I think, the more precise I.C.R.A. is a legitimate exercise of the plenary power and is, I admit, a forced limitation on Suquamish sovereignty. Finally, Professor Williams feels that Suquamish sovereignty can be limited only in the way first mentioned by *Oliphant*, that is, by a voluntary surrender of it.

Who is right? A student of mine once observed, with some insight, I thought, that all of Indian law was contained in one statement and one question: "They were here first." and "So what?" Questions of the limits of Suquamish sovereignty must be answered with reference to this formulation. The *Algebra* begs my student's question, though no more seriously than this essay does. Professor Nell Jessup Newton's article[108] does better, I think, but no one yet has answered it for me in an entirely satisfactory way. How much is proved by a tribe's indigenous status and why, exactly? *Oliphant*'s answer is profoundly unsatisfying, and on this Professor Williams and I agree.

In *Merrion* and *Kerr-McGee*, tribal power to tax non-Indians was upheld, in the former with Congressional approval of the tribal tax and in the latter without. I applaud those decisions, though, if *Oliphant* had been decided my way, these two would have been I.C.R.A. cases, perhaps with no federal forum under *Martinez*.[109] Professor Williams mistrusts these deci-

106. Collins, *supra* note 93, at 529.

107. *Oliphant*, 435 U.S. at 195-206.

108. Newton, *supra* note 31.

109. Mark Oliphant clearly was entitled to a federal forum under § 1303 of the I.C.R.A., as he was being detained by the Tribe's criminal justice system (though he was, in fact, out on bail at the time of the habeas corpus petition). Julia Martinez was not subject to detention, and thus, the Court held, was not entitled to a federal court forum.

This state of affairs may suggest a connection between the holdings in *Oliphant* and *Martinez*. With *Martinez* reading the reach of the I.C.R.A. so narrowly and denying, I think, Merrion a federal forum to challenge any unfairness of the tribal tax, a court may be more receptive to *Oliphant*-like, broad-based challenges to the tribe's sovereignty. Hence, I have argued elsewhere, were *Oliphant* to be overruled, I could accept as well the overruling of *Martinez* to put the federal courts back in the civil I.C.R.A. business. *See* Gover & Laurence, *supra* note 82, at 523. Please note that, while Kevin

sions; they are spoiled for him because they both recognize the legitimacy of the plenary power of Congress that threatens in theory, and perhaps in practice, that power to tax.[110] A tax, he notes, will be more likely to be upheld, the more a tribe acts like an Anglo-American government.[111] If a tribe were to act in a truly different way, then he fears the tax would be stricken, although he gives no example of a tax that he thinks might fall. Suppose a tribe were to double the tax against a taxpayer that refused to undertake an Indian hiring program. Suppose it halved the tax if the board of directors had an Indian on it. Suppose it tripled the tax if the board had a Jew on it. Suppose it imposed a tax but did not reduce the imposition to writing. Suppose the amount of the tax was determined on an *ad hoc* basis, week-to-week, by consensus amongst the tribal elders. Would these be legitimate taxation schemes for a tribe to undertake? For me, they are I.C.R.A. questions. For Professor Williams they are inquiries for the tribal decision-makers alone. That is our disagreement. Our agreement is that in no case does the inquiry center on the existence of the power of the tribe to tax.

7. *We are talking here about "the actual state of things."*

In *Worcester v. Georgia*,[112] an opinion considered by Justice Black to be one of John Marshall's "most courageous and eloquent,"[113] the Chief Justice paused to ponder the legitimacy of the Discovery Doctrine:

> Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator

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Gover and I wrote that article together and agreed to stand with each other's conclusions, it is not clear that he would wish to single out that one bit of the article for special mention here, and I represent it now as my position alone.

110. *Merrion* and *Kerr-McGee* are discussed at Williams, *supra* note 1, at 274-84.

111. The Court confronts comforting similarity in the *Merrion* tribe's exercise of jurisdiction rather than the threatening difference it encountered in *Oliphant*. The 'civilized' Jicarillas operate under the same set of normative criteria as their governmental counterparts in the non-Indian world. Even more importantly, the exercise of this tribal taxing power is totally contained by the governing supervisory apparatus of the colonial sovereign which possesses the unquestioned right to condition or "take away this power."

Id. at 278, *quoting Merrion*, 455 U.S. at 141.

112. 31 U.S. (6 Pet.) 515 (1832).

113. Williams v. Lee, 358 U.S. 217, 219 (1959). Williams v. Lee comes in for unaccustomed attack in Ball, *supra* note 33, at 71-76, for example: "[Justice Black] thereby set in motion the process of dismantling tribes by judicial decree unaided by Congress." *Id.* at 76 n.371. In Williams v. Lee the Court held that the state courts of Arizona had no subject matter jurisdiction to hear a suit by an Arizona creditor against a Navajo debtor over a contract entered into on the reservation. Note that the issue was not *in personam* jurisdiction, and note, too, that there are precious few other suits over which the courts of Arizona have no subject matter jurisdiction. In fact, and assuming personal jurisdiction, I suppose that an Arizona plaintiff can sue a Bolivian defendant in an Arizona court over a Bolivian transaction, though there may be limits—even federal constitutional limits—on which law the Arizona court must choose. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). Thus, in a way, Williams v. Lee can be seen as a case extraordinarily protective of Indian sovereignty. Professor Ball dislikes the case because it does not conform to his view that the Navajo Nation lies outside the state of Arizona and is a place to which Arizona power never runs, even if, in Justice Black's words, the exercise of power does not "[infringe] on the right of the reservation Indians to make their own laws and be ruled by them." *Williams*, 358 U.S. at 220. The Navajo Nation, in Professor Ball's view, is very much like a state, *see* Ball, *supra* note 33, at 104, analogizing the Flathead reservation of the Salish and Kootenai Tribes to the state of Georgia.

> of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?[114]

I have always been able to read a bit of sarcasm into this quotation and assumed that Chief Justice Marshall, in common with Professor Williams, thought there to be something tremendously self-indulgent about the Discovery Doctrine.[115] "But power, war, conquest, give rights, which, after possession, are conceded by the world,"[116] Chief Justice Marshall continued, taking the position, of course, in direct opposition to Professor Williams, the *Algebra* and the Charter of the United Nations. The more modern view is the correct one: war and strength ought not determine legal rights. But the Chief Justice went on, "[w]e proceed, then, to *the actual state of things*, . . ."[117] and it is here that I move into agreement with Marshall. Professor Williams ends the *Algebra* with a discussion of the "Two Row Wampum":

> [The] two rows will symbolize two . . . vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian

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114. *Worcester*, 31 U.S. (6 Pet.) at 543.

115. Professor Williams' later essay provides wonderfully rich detail and fascinating historical insight—all in very readable form, I might add—into the early American political background against which John Marshall's Discovery Doctrine is set. He concludes, "[f]or Marshall, the Doctrine of Discovery presented itself as a convenient fiction, one which masked the Revolutionary era political struggle by which Indian Nations were denied rights and status in their lands. As Marshall himself stated in a fitting feudally-inspired *coda* to his opinion, 'Conquest gives a title which the courts of the Conqueror cannot deny.'" Williams, *supra* note 23, at 191 (quoting from Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588 (1823)).

Note the very different view of *M'Intosh* that Professor Ball enunciates: "[Chief Justice Marshall] proposed a theory that seems to limit tribal power but that actually poses little or no restriction on the tribes. It has the look and feel of property law esoterica and has the function of settling a certain class of non-Indian title conflicts. . . . A close look at the opinion reveals that Marshall's version of the Doctrine of Discovery has small consequence for the tribes." Ball, *supra* note 33, at 25. *But see id.* at 29 n.133 where Professor Ball agrees with Professor Williams that the Discovery Doctrine was a fiction, and "[m]inor though it is, it is illegitimate."

The *Algebra* overall takes a very different view of Indian legal history than does Professor Ball's article. The latter admires Marshallian doctrine—*John* Marshallian; Thurgood Marshall comes in for fairly steady attack from Professor Ball, *see, e.g., id.* at 77 and 103 (McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973)); 106 (White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)); 123 (Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)). Of John Marshall's famous cases, Professor Ball writes:

> The story of origins told in *Cherokee Nation* and *Worcester* is not one of mighty invaders who landed conquering armies to make war upon the resident nations. It is a story of supplicants bearing gifts and seeking alliance. Whatever changes may be detected from *Fletcher v. Peck* [10 U.S. (6 Cranch) 87 (1810)] to *Worcester* . . . one theme remains consistent throughout: there had been no conquest and no succeeding incorporation.

Ball, *supra* note 33, at 33. This, of course, is a much different picture of the early days than Professor Williams paints in the *Algebra*. I shall let the two of them fight that battle. (The *Algebra* was published too late to have any real impact on Professor Ball's work; he acknowledges this and calls the *Algebra* "one of the most creative and illuminating pieces in the field of Indian law." Ball, *supra* note 33, at 24 n.110.) It is certainly clear that Professor Ball sees the evolution of Indian law since the early 1800's as distressingly downward, and employs an "At one time . . . Today . . ." rubric, against the baseline of Marshallian doctrine, to demonstrate that downward spiral. For example, Professor Ball dislikes the case of Williams v. Lee, 358 U.S. 217 (1959), in part because its so-called "infringement test" is less protective of tribal sovereignty than Marshall's Worcester v. Georgia had been. Ball, *supra* note 33, at 72-76 and *supra*, this article, at note 113. In spite of this difference, Professor Ball ends up decrying the plenary power with vigor equal to Professor Williams, *id.* at 60-61, for example, and I imagine that they are kindred spirits with some disagreements over historical exotica.

116. *Worcester*, 31 U.S. (6 Pet.) at 543.

117. *Id.* (emphasis added).

> people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.[118]

This is a charming vision, one that has much to recommend it, one that, were we to start from the beginning, would be worthy of pursuit. But this is soon to be the twenty-first century, and what is "the actual state of things?" The stream is small, as we have seen from space. And the white man navigates aircraft carriers and super-tankers and twelve meter yachts along its course. The canoe, I am afraid, may be swamped.

Professor Williams uses the "wise grandfather" image effectively throughout the *Algebra*.[119] I assume he has no intention of preempting the field for wise Indian grandfathers, for I will match the wisdom of one of mine, who raised one child and lost another, and earned his living working in the rubber mills of Akron during the depression, with anyone's. Part of his wisdom was this: he told of a friend in another county who owned a horse that could sing. People would drive from miles around to listen to this wonderful horse. Once a city fellow came by, listened for a while and said, "Shoot, that's not so wonderful. That horse can hardly carry a tune." And my grandfather's friend said, "What is wonderful is not how well the horse sings, but that it sings at all."

And perhaps I will end with this wise tale, which captures a bit of my feeling about Indian law, tribal sovereignty and the *Algebra*. Given the historical record that Professor Williams exhibits, and given the treatment of indigenous peoples in so many other countries around the world where they must protect their rights only as individuals, not as self-governing groups, I am tempted to say, "What is wonderful is not the extent that tribal sovereignty is recognized in the United States, but that it is recognized at all." That remnant is wonderful indeed and must be defended with vigor. I hope nothing in this essay suggests that I feel otherwise. But for me, the *actual* choice is between a domestic legal system that recognizes both a plenary power and tribal sovereignty and one that does not recognize tribal sovereignty at all. If I am right, then the choice is easy, and I can live with the plenary power.

118. Williams, *supra* note 1, at 291, quoting a report of a special committee studying Indian self-government in Canada.

119. *Id.* at 222, 291-92.