"DEPENDENT INDIAN COMMUNITIES": A SEARCH FOR A TWENTIETH CENTURY DEFINITION

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During the past decade, several equal protection and due process challenges have been made to congressional legislation which accords special treatment to Indians and Indian tribes.[1] These challenges have been consistently repulsed with the bland assertion that the "unique" position of Indians derives from consideration of their political status and not from any use of racial criteria.[2] In *Morton v. Mancari*,[3] the United States Supreme Court maintained that an allegation of racial discrimination by the Bureau of Indian Affairs was to be resolved by examining "the unique legal status of Indian tribes" based upon "the assumption of a 'guardian-ward' status"[4] governing relations between tribal Indians and the federal government. Yet, in describing "the origin and nature of the special relationship"[5] between the federal government and the Indian tribes, the *Mancari* Court came close to revealing the racial underpinnings of the relationship which it steadfastly maintained to be based solely on political concerns. According to the Court, the historical record of confrontation between non-Indians and Indians left the Indians:

> an uneducated, helpless and *dependent* people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform

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The late P. Barton Brown, Jr. made immeasurable substantive contributions to this article. His exhaustive critique reflected his genius and legal insight.

This article is dedicated to Bart—an enormously talented attorney and a treasured friend.

1. *E.g.*, Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 470 (1979); United States v. Antelope, 430 U.S. 641, 646 (1977); Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 77 (1977); Fisher v. District Court, 424 U.S. 382, 390 (1976); United States v. Mazurie, 419 U.S. 544, 557 (1975); Morton v. Mancari, 417 U.S. 535, 551 (1974).
2. See cases cited in note 1 *supra*.
3. 417 U.S. 535 (1974).
4. *Id.* at 551.
5. *Id.* at 552.

that obligation and to prepare the Indians *to take their place as independent, qualified members of the modern body politic*.[6]

The *Mancari* Court did not explain what it meant by labeling Indians a "dependent people," and aside from the unguarded reference to Indian "improvidence," the Court did not elaborate on what qualities Indians lacked which prevented them from becoming "*qualified* members of the modern body politic." Although the Court commented that the "unique legal status" of the Indian "is of longstanding,"[7] it could ill afford to examine the roots of that longstanding status in an opinion which sought to divorce the "unique legal statute" of the Indian from all racial considerations.

There is simply no ignoring the fact that historically the legal status of the American Indian is rooted in cultural imperialism. The "quasi-sovereign" or "dependent" status of the Indian tribe is inextricably linked to past concepts of the Indian as an uncivilized savage who was to be gradually elevated to the level of a civilized human being.[8] When first constructed, the legal status of dependency was designed to be temporary.[9] Once the process of civilizing the savage was completed, the status of dependency would be terminated; the assimilation of the Indian into the non-Indian melting pot would be accomplished. But if cultural imperialism is replaced with cultural respect, then assimilation of the Indian into the melting pot would cease to be a national goal. The status of dependency may be defended as a permanent status which should endure indefinitely.

A number of distinctly Indian cultural groups have survived into the twentieth century and co-exist with the technological and material advances of modern society. If we can adopt a new cultural respect for Indian ways of life, then courts may well recognize the existence of new urban "tribes" that have adopted some of the values of mainstream American society. To preserve tribal culture, we must continue to afford tribal communities a measure of political autonomy.

In exposing the racial roots of the Indian's legal status, we must begin with non-legal sources to describe the intellectual context of the American jurist of the late eighteenth and early nineteenth century. The prevailing anthropological, sociological, and philosophical concepts of those times contoured the legal heritage which now embarasses and to a certain extent imprisons twentieth century judges called upon to decide cases in the area of Indian law.

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6. *Id.*, *quoting* Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943) (emphasis added).
7. 417 U.S. at 555.
8. See text & notes 5-7 *infra*.
9. See text & notes 27-31 *infra*.

THE ENLIGHTENMENT'S VIEW OF CIVILIZATION, PROGRESS, AND THE SAVAGE

Natural Laws of Human Progress

Our twentieth century notions of progress were born and nurtured in the Enlightenment. The plethora of scientific advancements coupled with the discovery of a New World lacking civilization as Europeans understood it confirmed the inexorability of human progress. A linear model of human progress was regarded as a natural law; the accumulation of knowledge from one generation to the next ensured an elevation of mankind along a fixed scale of human progress.[10]

This theory was applied to the American Indian by William Robertson in his influential work, *History of America*, published in 1777:

> In America, a man appears under the rudest form in which we can conceive him to subsist. We behold communities just beginning to unite, and may examine the sentiments and actions of human beings in the infancy of social life, while they feel but imperfectly the force of its ties, and have recently relinquished their native liberty. That state of primeval simplicity, which was known in our continent only by the fanciful description of poets, really existed in the other. The greater part of its inhabitants were strangers to industry and labour, ignorant of arts, and almost unacquainted with property, enjoying in common the blessings which flowed spontaneously from the bounty of nature.[11]

An Edinburgh University professor commented in 1767 that the American Indian was a living illustration of the ancestors of civilized Europe. "It is in their present condition," Adam Ferguson remarked, "that we are able to behold, as in a mirror, the features of our own progenitors."[12] Thomas Hobbes "proved" that man existed in a state of nature, devoid of any social contract, by pointing to the American Indian:

> It may peradventure by thought, there was never such a time, nor condition or warre such as this; and I believe it was never generally so, over all the world: but there are many places where they so live now. For the savage people in many places of *America*, except the government of small families, the concord whereof, dependeth of natural lust, have no government at all; and live at this day in that brutish manner as I said before.[13]

John Locke readily agreed with Hobbes on this point, noting that "in the beginning all the World was America."[14]

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10. See text & notes 11-17 *infra*.

11. 1 W. ROBERTSON, THE HISTORY OF AMERICA 282-83 (1777), *quoted in* R. BERKHOFER, JR., THE WHITE MAN'S INDIAN 48 (1978). *See also* Hoebel, *William Robertson: An Eighteenth Century Anthropologist-Historian*, 62 AM. ANTHROPOLOGIST 648 (1960).

12. R. BERKHOFER, JR., *supra* note 11, at 47.

13. R. BERKHOFER, *supra* note 11, at 22, *quoting* T. HOBBES, LEVIATHAN, OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVIL 186-87 (1968) (emphasis in original).

14. J. LOCKE *Treatise II*, in TWO TREATISES OF GOVERNMENT § 49, at 343 (1963); *see* J. POLE, THE PURSUIT OF AMERICAN EQUALITY IN AMERICAN HISTORY 162 (1978):

> The views of Louis Agassiz, and of Darwin's successors who adapted the idea of the

Charles Darwin's concept of species evolution was seized by late nineteenth century anthropologists and an evolutionary history of civilization soon emerged as a refined version of the Enlightenment's view of human progress. Anthropologist Edward Tylor asserted that the "standard of reckoning progress" was the degree of "movement along a measured line from grade to grade of actual savagery, barbarism and civilization."

> The thesis which I venture to sustain, within limits, is simply this, that the savage state in some measure represents an early condition of mankind, out of which the higher culture has gradually been developed or evolved, by processes still in regular operation as of old, the result showing that, on the whole, progress has far prevailed over the relapse.[15]

Tylor's American disciple, Lewis Henry Morgan, applied Tylor's thesis to the American Indian, zealously searching for natural laws of human civilization as precise as the Newtonian laws of physics. In an attempt to develop a taxonomy of human societies that could be employed for international comparative analysis, Morgan invented a seven-runged ladder of human civilization, leading from lower, middle, and upper savagery, to lower, middle, and upper barbarism, and at last, to civilization.[16] Based on his research, he concluded that American Indians had "commenced their career on the American continent in savagery," and yet "the body of them had emerged from savagery and attained the lower status of barbarism; whilst a portion of them, the village Indians of North and South America, had risen to the middle status."[17]

The Jeffersonian View of the American Indian and the Civilizing Role of Agriculture

Thomas Jefferson's enthusiastic acceptance of the Enlightenment concept of man and progress, well-illustrated by his views on the American Indian. The ultimate goal was to "civilize" the Indian so as to prepare him for assimilation into the fabric of conventional American society. Jefferson tied this civilizing process to the replacement of a nomadic hunting way of life with an agricultural existence.[18] In a letter to a Federal Indian

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struggle for survival into a national, racial, or economic process, made it increasingly easy to regard 'primitive' persons, who were becoming better known as a result of the European and American scramble for overseas territories, but less attractive since the decline of the romances of the noble savage, as having been arrested in the stages of childhood or adolescence.

15. 1 E. TYLOR, PRIMITIVE CULTURE: RESEARCHERS INTO THE DEVELOPMENT OF MYTHOLOGY, PHILOSOPHY, RELIGION, ART AND CUSTOM 28 (1971).

16. *See generally* L. MORGAN, ANCIENT SOCIETY, chs. 1-2 (1964).

17. *Id.* at 41.

Mark Twain applied the scientific laws of human progress in an acerbic essay in which he concluded that the French were "among the partly civilized peoples of our globe" though they were clearly "the conspicuous inferiors of the Commanche." Just as the proponents of an "enlightened" Indian policy sought to "civilize" the Indian, Twain caustically called upon Americans to "civilize" the French. "Let us take to our hearts this disparaged and depreciated link between man and the simian and raise him up to brotherhood with us." M. Twain, *The French and the Commanche*, in LETTERS FROM EARTH 151 (1974).

18. That civilization through agriculture had, by 1803, become the handmaiden for Jefferson's policy of obtaining Indian land without war is made strikingly clear in three

agent, Jefferson confided:

> It is possible, perhaps probable, that this idea of agriculture leading to citizenship and amalgamation with the whites may be so novel that it might shock the Indians, were it even hinted to them. Of course, you will keep it for your own reflection; but convinced of its soundness, I feel it consistent with pure morality to lead them towards it, to familiarize them to meet that idea. . . .[19]

Jefferson's letter reflects his belief that the process of civilization accorded with the natural laws of human progression:

> In truth the ultimate point of rest and happiness for them is to let our settlements and theirs meet and blend together, to intermix, and become one people. Incorporating themselves with us as natural citizens of the United States, this is what the natural progress of things will of course bring on, and it will be better to promote it, than retard it.[20]

For Jefferson, the demography of the American nation, examined on a west-to-east axis, reflected the historical progress of human civilization. The Indians concentrated in the west were "in the earliest stages of association living under no law but that of nature"; next came the Indians living "on our frontiers in the pastoral state, raising domestic animals to supply the defects of hunting"; "then succeed our own semi-barbarous citizens, the pioneers of the advance of civilization"; and finally, came man in his "most improved state in our seaport towns."[21] For Jefferson, this west to east journey was "equivalent to a survey, in time, of the progress of man from the infancy of creation to the present day."[22]

THE BARGAIN: CIVILIZATION IN RETURN FOR LAND, AND THE HONORABLE ROLE OF THE FEDERAL GOVERNMENT

In many respects, the early history of the United States is the history of geographical expansionism and an incessant search for cheap land. The Jeffersonian model of civilization was founded on the belief that in a politically and economically healthy nation, the vocation of farming was the preferred lifestyle for the vast majority of the populace.[23] Only the farmer, as an economically independent citizen, was in a position to exercise polit-

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letters written early that year. He told Andrew Jackson flatly that the agents among the Indians had two objectives, the preservation of peace and the obtaining of lands, and stated, 'Towards effecting the latter object we consider the leading of the Indians to agriculture as the principal means from which we can exact much in the future.'

F. BINDER, THE COLOR PROBLEM IN EARLY NATIONAL AMERICA AS VIEWED BY JOHN ADAMS, JEFFERSON AND JACKSON 102 (1968), *quoting* X A. BERGH, THE WRITINGS OF THOMAS JEFFERSON 357-58 (1907) (letter of February 16, 1803).

19. VIII P. FORD, THE WORKS OF THOMAS JEFFERSON 215 (1892-1899) (letter of February 18, 1803, to Benjamin Hawkins).

20. *Id.* at 214.

21. XVI A. BERGH, *supra* note 18, at 74-75 (letter of W. Ludlow, Sept. 6, 1824); *see* R. PEARCE, SAVAGES OF AMERICA: A STUDY OF THE INDIAN AND THE IDEA OF CIVILIZATION 155 (1965).

22. XVI A. BERGH, *supra* note 18, at 74-75.

23. Here every one may have land to labor for himself, if he chooses . . . . Every one, by his property . . . is interested in the support of law and order. And such men may safely and advantageously reserve to themselves a wholesome control over their public

ical autonomy. The new republic was founded upon the principles that the protection of property rights guaranteed political liberty, and that diffuse patterns of ownership promoted social equality.[24]

The social and economic pressure for a supply of cheap land confronted a major obstacle: the occupation and use of vast tracts of land by Indians. Not only did Indian land claims obstruct white geographic expansionism, but the nonagricultural usage of Indian land was viewed as morally inferior to the white agrarian mode of existence.[25] John Quincy Adams remarked, "What is the right of a huntsman to the forest of a thousand miles over which he has accidentally ranged in quest of prey? . . . Shall the fields and valleys, which a beneficent God has formed to teem with the life of innumerable multitudes, be condemned to everlasting barreness?"[26]

Historian Robert Berkhofer notes that "the federal Constitution barely mentions the Indian."[27] Later judicial analysis would "discover" sources of power for federal dealings with Indians in those constitutional provisions concerning the power to declare war,[28] to make treaties,[29] and to control the disposition of federal lands.[30] The only explicit constitutional reference to Indians, however, states merely that Congress is empowered "to regulate Commerce with Foreign Nations, and among the several States, and with the Indian tribes."[31] This is hardly a bold, forceful statement of Federal Indian power. Nevertheless, perhaps the quiet, unpretentious phraseology of the commerce provision was its greatest virtue, for it provided a basis for a judicial pronouncement of power founded upon the absence of limiting clauses such as those previously found in the Articles of Confederation.[32] The familiar judicial technique of inferring

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affairs, and a degree of freedom, which, in the . . . cities of Europe, would be instantly perverted to the demolition and destruction of everything private.

D. BOORSTIN, THE LOST WORLD OF THOMAS JEFFERSON 228 (1960), *quoting* XIII A. BERGH, *supra* note 18, at 401(f) (letter to John Adams dated October 28, 1813).

24. *See* H. SMITH, VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH, chs. 11-12 (1950).

25. D. BOORSTIN, *supra* note 23, at 227.

26. Parsons, *'A Perpetual Harrow Upon My Feelings': John Quincy Adams and the American Indian*, 46 NEW ENGLAND Q. 339, 346 (1973).

27. R. BERKHOFER, *supra* note 11, at 141.

28. U.S. CONST. art. I, § 8, cl. 11.

29. *Id.* art. II, § 2, cl. 2.

30. *Id.* art. I, § 8, cl. 17.

31. *Id.* cl. 3.

32. The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated. . . .

ARTICLES OF CONFEDERATION, art. 9 (1781).

The power is there [in the Articles of Confederation] restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are deemed members of a State is not yet settled, and it has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the Articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the union with

substance from textual omissions thus accomplished what perhaps could not have been achieved by a forthright textual expression of a comprehensive federal power to deal with Indians.

The Supreme Court ultimately found that a guardian/ward relationship between the United States and the Indian tribes was implicit in the commerce clause.[33] The states did not protest this notion of guardianship because it was consistent with the prevailing conception of the Indian as an uncivilized savage, and because it offered a moral basis for the appropriation of Indian lands.

President Washington's Secretary of War, Henry Knox, advanced the view that the benefits of civilization which would be bestowed upon the Indian would constitute full compensation for lands taken by colonists.[34] Accepting the view that the advance of white settlements into Indian country was inevitable, and yet mindful of the need to keep the peace with tribes, Knox advocated a policy of conciliation which allocated to the federal government the key role in Indian land negotiations. Knox argued:

> No individual State could, with propriety, complain of invasion of its territorial rights. The independent nations and tribes of Indians ought to be considered as foreign nations, not as the subjects of any particular State. Each individual State, indeed, will retain the right of pre-emption of all lands within its limits, which will not be abridged; *but the general sovereignty must possess the right of making all treaties*, on the execution or violation of which depend peace or war.[35]

Although assuming that the power to deal with Indians belonged to the federal government, Knox recognized that federal supremacy in this area could be made politically acceptable to the states only if it were advertised as a federal campaign to acquire Indian land for white settlement.[36] At the same time, such a land acquisition program was morally acceptable because the United States offered American civilization to the Indian in return for his land.[37] Professor Berkhofer aptly labels this policy "expansionism with honor."[38]

Secretary Knox proposed the perfect bargain for all parties concerned: (1) Indian power would be lodged with the federal government; (2) the federal government would make national security provisions to guard against Indian attacks on white settlements; (3) Indian land would be dispensed to western settlers; and (4) the Indian would receive the benefits of instruction in the arts of civilization.[39] What could be better than a policy which "would redound to the future reputation of the nation at the same

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complete sovereignty in the States; to subvert a mathematical axiom by taking away a part and letting the whole remain.

THE FEDERALIST No. 42 (J. Madison).

33. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 558-59 (1832).

34. R. BERKHOFER, *supra* note 11, at 143, *quoting* Report of July 7, 1789, 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 53 (1832).

35. *Id.* (emphasis added).

36. *See* R. BERKHOFER, *supra* note 11, at 143-44.

37. *Id.*

38. *Id.*

39. *Id.* at 142-45.

time that it contributed to the acquisition of native land?"[40] It is important to note, however, that this formula for making the civilization of the Indian a federal responsibility rested on the belief that the Indian would inevitably abandon his inferior culture and become incorporated into the fabric of American society. The dependent status of the American Indian was viewed as a way station on the road to civilization, and not as a permanent status of Indian political separatism.

The Knox strategy was accepted by Chief Justice Marshall, and became the foundation of American Indian law.[41] But the unique political status of the Indian was premised on cultural inferiority, dependency, and a need for instruction in the arts of civilization. It was not based upon respect for permanent Indian independence or true political autonomy.

THE LEGAL STATUS OF DEPENDENCY

The principles of federal law that govern Indian affairs were shaped by Chief Justice Marshall. Virtually no other province of constitutional law has been so completely dominated by the ideas of one man. The legal handiwork of Marshall continues in full force, yet the sociological ideas of the late eighteenth and early nineteenth centuries, upon which Marshall relied so heavily, are today discarded or greatly revised. Every modern judicial opinion in the realm of Indian law pays lip service to the rule that Indian tribes have the status of "dependent" or "semi-sovereign" nations,[42] yet no modern judge has taken the intellectually honest approach of conceding the culturally imperialistic origins of that status.

The Rights Of The Conqueror

When first called upon to integrate the Indian into the American legal framework in *Johnson v. McIntosh*,[43] Marshall was faced with the issue of whether the Indians had the power to alienate legal title to their lands. In the course of holding that the Illinois and Piankeshaw tribes had no power of alienation, Marshall affirmed the principle that the European colonial powers had obtained legal title through discovery and conquest, and yet simultaneously upheld the Indians' right to possession and occupancy of their lands.[44] Steering a middle course between two extremes, Marshall denied that the Indians held no title and no right while also refusing to conclude that the Indians held fee title to their lands. The latter result would have invalidated countless federal land grants and wholly disrupted the chain of legal title to millions of acres of land.

Marshall justified his decision solely on practical grounds.[45] The concept of discovery and conquest as the basis for vesting legal title in the

40. *Id.* at 144.
41. *See generally* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 589 (1823).
42. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978); United States v. Wheeler, 435 U.S. 313, 323 (1978); United States v. Mazurie, 419 U.S. 544, 557 (1975); Morton v. Mancari, 417 U.S. 535, 544 (1974).
43. 21 U.S. (8 Wheat.) 543 (1823).
44. *Id.* at 573-74.
45. *Id.* at 591.

federal government was a principle that had simply been around too long to abandon. Marshall concluded, "the principle has been asserted in the first instance, and afterwards sustained," the "country has been acquired and held" on the basis of the principle, and the "property of the great mass of the community" traces its title to that principle; thus, the principle "becomes the law of the land and cannot be questioned."[46]

While perhaps forced to this conclusion by the dictates of practical necessity, Marshall refused to comment on the proposition that the citizens of the United States could justifiably assert a moral right to appropriate Indian lands based on their cultural superiority:

> We will not enter into the controversy, whether agriculturalists, merchants and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.[47]

Noting that "the character and religion" of the Indians "afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy," Marshall observed, "[T]he potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing upon them civilization and Christianity."[48]

While critical of the treatment of the Indians, Marshall's opinion in *Johnson v. McIntosh* contained harbingers of the doctrine of dependency and the guardian/ward relationship he would soon impose upon the Indians and the federal government. The usual historical practice, Marshall observed, was for a conquered people to be "incorporated with the victorious nation, and [to] become subjects or citizens of the government with which they are connected. The new and the old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people."[49] While lamenting that such integration appeared impossible at that time, Marshall left little doubt that the eventual incorpo-

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46. *Id.*

47. *Id.* at 588.

48. *Id.* at 573. One American historian vividly described the religious imperialism which characterized the American concept of the civilization of the American Indian:

> America had to be planted so that sub-humans could be made human. This was one of the civilized Englishman's greatest burdens. In Letters Patent issued in 1606 for the colonizing of Virginia, the King urged the furtherance of a work 'which may, by the Providence of Almighty God, hereafter tend to the Glory of His Divine Majesty, in propagating of Christian religion to such people, as yet live in darkness, and miserable ignorance of the true knowledge and worship of God, and may in time bring the Infidels and Savages living in those parts of human civility and to a settled and quiet Government . . . .' The practical problem of bringing savages to civilization was to be solved by bringing them to Christianity which was at its heart. Success in empire-building and trade was to be measured by success in civilizing and Christianizing; success in civilizing and Christianizing would assure success in empire-building and trade. Meantime, the Indian, in his savage nature, stood everywhere as a challenge to order and reason and civilization.

R. PEARCE, *supra* note 21, at 6.

49. 21 U.S. (8 Wheat.) 543, 589 (1823).

ration of the Indian into American society would be the preferred result.[50] Regardless of the outcome of any attempted enculturation, however, Marshall opined that "[h]umanity . . . acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest."[51] In the short space of a decade, these negative restrictions imposed by the dictates of humanity blossomed into an affirmative duty on the part of the federal government to protect the Indian.[52]

Domestic Dependent Nations

In the first of the Cherokee cases to come before the Marshall Court,[53] the proposition that the Indian would eventually become incorporated into American society was reiterated. The legal position of the Indian tribes was denominated as that of "domestic dependent nations,"[54] and yet this status was acknowledged as temporary, to be terminated when the Indian was absorbed into the societal mainstream:

> They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession *when their right of possession ceases. Meanwhile, they are in a state of pupilage.* Their relation to the United States resembles that of a ward to his guardian.[55]

The use of the terms "guardian" and "ward" forsaw a future date of emancipation, when the state of "pupilage" would no longer be necessary and the Indian would "graduate" to take his position in ordinary American society.

While Justice McLean joined Marshall and recognized Indian tribes as "domestic, dependent nations,"[56] the other justices of the Court took

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50. *Id.*

51. *Id.* In a letter to Joseph Story, Marshall elaborated on this theme:

> The conduct of our Forefathers in expelling the original occupants of the soil grew out of so many mixed motives that any censure which philanthropy may bestow upon it ought to be qualified. The Indians were a fierce and dangerous enemy, whose love of war made them sometimes the aggressors, whose numbers and habits then made them formidable, and whose cruel system of warfare served to justify every endeavor to remove them to a distance from civilized settlements.
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> It was not until after the adoption of our present government that respect for our own safety permitted us to give full indulgence to those principles of humanity and justice which ought always to govern our conduct towards the aborigines when this course can be pursued without exposing ourselves to the most afflicting calamities. This time, however, is unquestionably arrived; and every oppression now exercised on a helpless people depending on our magnamity and justice for the preservation of their existence, impresses a deep stain on the American character. I often think with indignation of our disreputable conduct—as I think of it—in the affair of the Creeks of Georgia; and I look with some alarm on the course now pursuing in the Northwest.

L. BAKER, JOHN MARSHALL: A LIFE IN LAW 731-32 (1974) (John Marshall to Joseph Story, October 29, 1828).

52. *See generally* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

53. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

54. *Id.* at 17.

55. *Id.* (emphasis added).

56. *Id.*

differing views.[57] Justices Johnson and Baldwin refused to concede that Indian tribes possessed any attributes of sovereignty whatsoever.[58] On the other hand, dissenters Thompson and Story concluded that the tribes were foreign nations possessing full sovereignty.[59] Anticipating the perplexing problem of how to decide when a particular tribe had either lost its semi-sovereign status through political degeneration or by absorption into white society, Justice Johnson demanded to know where Chief Justice Marshall's proposed rule of semi-sovereignty would stop. "Must every petty kraal of Indians designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a State?"[60] To this query Marshall offered no reply, though Justice McLean took the next opportunity in the second Cherokee case, *Worcester v. Georgia*,[61] to respond to Justice Johnson's concerns.

The Temporary Independence Of Dependent Nations

In *Worcester*, the Supreme Court reversed the criminal conviction of a Vermont missionary who went to live among the Cherokee Indians without first obtaining a license as required by Georgia state law.[62] After reviewing the historical treatment of Indian tribes at great length, Chief Justice Marshall concluded that the Cherokee tribe constituted "a distinct political community . . . in which the laws of Georgia have no force. . . ."[63] "[S]ettled principles of our Constitution" mandated that the management of all relations between whites and the Cherokee tribe was "committed exclusively to the government of the Union."[64]

In elaborating upon the status of Indian tribes as "domestic, dependent nations," Marshall found himself adopting Justice Thompson's political analysis that tribes were sovereign,[65] a view he had held at arms length in the first Cherokee case. Yet as soon as Marshall conceded that the Indian tribes had placed themselves under the protective shield, first of the European powers and then of the United States, he was forced to explain the seeming paradox that a dependent nation could yet remain independent with its internal sovereignty intact.

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57. *See id.* at 20-79.

58. *Id.* at 20-21, 29, 46-47.

59. [A] weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of self-government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority is left in the administration of the state.

Id. at 53 (Thompson, J., dissenting).

60. *Id.* at 25 (Johnson, J., concurring).

61. 31 U.S. (6 Pet.) 515 (1832).

62. *Id.* at 561-62.

63. *Id.* at 561.

64. *Id.* Though the Supreme Court's disposition of *Worcester* was clear and unambiguous, strident opposition to the Court's ruling prevented the enforcement of the Court's decree. *See generally* D. VAN EVERY, DISINHERITED: THE LOST BIRTHRIGHT OF THE AMERICAN INDIAN (1966).

65. Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 STAN. L. REV. 500, 558 (1969).

History demonstrated, according to Marshall, that the Indian tribes had relied upon the European powers and the United States federal government to protect them from European subjects and American citizens who disregarded their rights to possession of their lands and who subjected them to acts of aggression.[66] Yet such an alliance did not constitute a forfeiture of the Indian right of self-government:

> [T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of self-government and ceasing to be a state. Examples of this kind are not wanting in Europe . . . .
>
> At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.[67]

Marshall concluded that the States were barred from interferring with the Cherokee's right of self-government.[68] This conclusion, however, was actually nothing more than a decision that the "bargain" earlier proposed by Secretary Knox must be kept. The promise of "expansion with honor" had to be fulfilled. The dictates of humanity, mentioned in passing in *Johnson v. McIntosh*,[69] now were invoked against the State of Georgia.[70] The principle that "the conquered shall not be wantonly oppressed and that their condition shall remain as eligible as it is compatible with the objects of the conquest"[71] was put into action. In application that principle became simply: The right of self-government shall not be denied the Cherokee tribe by the State of Georgia.

Justice McLean agreed with Chief Justice Marshall. Though often overlooked by commentators, McLean's concurrence in *Worcester* repeatedly affirmed an Indian tribal right to self-government.[72] Tribes "have always been admitted to possess many of the attributes of sovereignty. All of the rights which belong to self-government," McLean noted, "have been recognized as vested in them."[73] "In the management of their own internal concerns they are dependent on no power."[74]

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66. [T]he strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggression on them. . . . It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving that protection without involving a surrender of their national character.

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 552 (1832).

67. *Id.* at 560-61. Compare this language with that of Justice Thompson's dissent in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 53 (1831) (quoted at note 49 *supra*).

68. 31 U.S. (6 Pet.) at 561.

69. 21 U.S. (8 Wheat.) 543, 589 (1823).

70. *See generally* the discussion of federal executive policy toward the Cherokees in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 554-57 (1832).

71. *Id.*

72. *Id.* at 580 (McLean, J., concurring).

73. *Id.*

74. *Id.* at 581.

In addition, McLean's opinion made explicit the proposition that Marshall's opinion left implicit: The Indian right of self-government is temporary and shall cease when the Indians reach that level of civilization that will permit them to be incorporated into non-Indian society.[75] "Must every petty kraal of Indians . . . be recognized as a State?" Justice Johnson had asked in *Cherokee Nation v. Georgia*.[76] "No," answered Justice McLean, one year later:

> But the inquiry may be made, is there no end to the exercise of this power over Indians within the limits of a state, by the general government? The answer is, that in its nature, it must be limited by circumstances. . . . *The exercise of the power of self-government by the Indians within a State, is undoubtedly contemplated to be temporary*.[77]

The task of pin-pointing the endpoint for the termination of self-government, McLean observed, was linked to the process of civilizing the Indian, but it was not bound or determined by the success of that "civilizing" program.[78] Chief Justice Marshall noted in his opinion that the European colonial powers all accepted the goals of "the civilization of the Indians and their conversion to Christianity"[79] as paramount governmental concerns. The State of Georgia had the audacity to suggest that since the policy of Indian civilization had worked so well with respect to the Cherokee Nation, the termination point of the guardian/ward relationship had been reached, and the temporary era of Indian self-government should be judicially pronounced dead.[80] This argument failed to move McLean, although a similar argument did gain a brief acceptance by the Supreme Court at a later date.[81]

While rejecting Georgia's argument that a "civilized" tribe consequently lost its right to self-government, McLean simultaneously provided the states with a legal rationale for asserting jurisdiction over tribes that were no longer politically viable—over tribes that were no longer "tribes" in the constitutional sense of the word.[82] While a state could not assume legislative jurisdiction over a politically viable tribe such as the Cherokee Nation, a state could assume jurisdiction over the "remnants,"[83] "fragments,"[84] or "remains"[85] of such tribes which had "lost the power of self-government."[86] McLean illustrated his point with references to tribes in "some of the old states, Massachusetts, Connecticut, Rhode Island and others" where the remnants of tribes were "surrounded by white popula-

75. *Id.* at 593.
76. 30 U.S. (5 Pet.) 1, 25 (1831) (Johnson, J., concurring).
77. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 593 (1832) (McLean, J., concurring) (emphasis added).
78. "Would it not be a singular argument to admit, that, so long as the Indians govern by the rifle and the tomahawk, their government may be tolerated; but that it must be suppressed, as soon as it shall be administered upon the enlightened principles of reason and justice?" *Id.* at 590.
79. *Id.* at 546.
80. *Id.* at 590.
81. *See* United States v. Joseph, 94 U.S. 614 (1876).
82. Worcester v. Georgia, 31 U.S. (6 Pet.) at 590.
83. *Id.* at 580 (McLean, J., concurring).
84. *Id.* at 590.
85. *Id.*
86. *Id.*

tion."[87] He implied that the circumstances of the Indian tribes of New York differed from those of Georgia,[88] yet the guidelines he offered for distinguishing tribal fragments from active tribes were less than lucid. "If a tribe of Indians shall become so degraded or reduced in numbers as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them."[89] McLean also did not distinguish between cases where the power of self-government was willfully abandoned and those where attempts at self-government were forcibly suppressed.[90] McLean noted that "a contingency" such as "moral degradation or a reduction of their numbers" could render a tribe "incapable of self-government."[91] He first implied,[92] and then explicitly stated that the tribal rights of self-government were to end when the Indian had been culturally assimilated into non-Indian society: "[A] sound national policy does require that the Indian tribes within our States should exchange their territories [*i.e.*, leave and go west of the Mississippi] upon equitable principles, or *eventually consent to become amalgamated into our political communities*."[93]

Having opened the door for states to claim their tribes had lost the power of self-government, McLean himself led the way. In *United States v. Cisna*,[94] McLean overcame his earlier doubts as to whether the courts were competent to pass on the issue of tribal assimilation[95] and concluded that the Wyandott Tribe of Ohio had become so assimilated into white society that it should no longer be viewed as a tribe with which Congress maintained a guardian/ward relationship.[96] Opening the door to the jurisdiction of territorial courts, McLean appeared to accept the same argument that he had rejected when it was offered by the State of Georgia in *Worcester*:

> The Wyandotts have made rapid advances in the arts of civilization. Many of them are very intelligent, their farms are well improved, and they generally live in good houses. They own property of every kind, and enjoy the comforts of life in as high a degree as many of their white neighbors.[97]

Once a federal judge had charted the path, state court judges were quick to follow, and the "tribal fragments" theory ushered in an era of state ousters

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87. *Id.* at 580.

88. *Id.* at 590.

89. *Id.* at 593.

90. That distinction was well delineated in Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 587 (1st Cir. 1979).

91. Worcester v. Georgia, 31 U.S. (6 Pet.) at 594 (McLean, J., concurring).

92. *See id.* at 582:

> Every state is more or less dependent on those which surround it, but, unless this dependence shall extend so far as to merge the political existence of the protected people into that of their protectors, they may still constitute a state. They may exercise the powers not relinquished, and bind themselves as a distinct and separate community.

93. *Id.* at 593 (emphasis added).

94. 25 F. Cas. 422 (C.C.D. Ohio 1835).

95. "The point at which this exercise of power by a state would be proper, need not now be considered: *if indeed it be a judicial question*." Worcester v. Georgia, 31 U.S. (6 Pet.) at 593 (McLean, J., concurring) (emphasis added).

96. United States v. Cisna, 25 F. Cas. 422, 424 (C.C.D. Ohio 1835).

97. *Id.* at 423.

of federal jurisdiction.[98]

In summary, both Marshall and McLean concurred in accepting the prevailing sociological theory which reflected the Enlightenment's faith in human progress: The savage Indian had to be civilized. In the interim, the federal government would protect the Indian and recognize a tribal right of internal self-government. But the status of dependency was to be a temporary one. The status would cease when the Indian attained the same level of civilization as that attained by non-Indian society. Thus, the very independence of the Indian tribe was dependent upon its historical progression to a "civilized" status. The constitutional borders of this status of "limited" or "dependent independence" remained to be surveyed by future judicial decisions.

THE CONSTITUTIONAL BORDERS OF THE STATUS OF DEPENDENCY

Over the course of the century following the decision in *Worcester*, the Supreme Court repulsed a series of attacks on federal legislation touching Indian affairs. The Court rejected the contentions that (1) the status of dependency was limited to the realm of Indian commerce;[99] (2) the extension of citizenship to the Indian terminated dependency;[100] and (3) dependency was geographically restricted to the situs of Indian tribal land or to Indian reservations.[101] In rejecting each of these contentions, the Court adhered firmly to the philosophy of the Enlightenment. Not citizenship, or the ownership of land in fee simple, or the commission of criminal acts by an Indian altered the assumption that the Indian remained uncivilized and in need of continued federal guardianship.[102]

Beyond The Bounds of Commerce: Criminal Jurisdiction

In 1883, in *Ex parte Crow Dog*,[103] the United States Supreme Court reversed the murder conviction of a Sioux Indian, finding that Congress had expressly declined to permit territorial courts to try offenses committed by one Indian against another Indian of the same tribe.[104] The Court's

98. *See, e.g.*, Moor v. Veazie, 32 Me. 343, 366 (1850); State v. Foreman, 16 Tenn. 256, 349-50 (1835). *See also* the opinion of Chancellor Kent, preceding *Worcester v. Georgia*, in Goodell v. Jackson, 6 N.Y. 1164 (1823). In Elk v. Wilkins, 112 U.S. 94, 108 (1884), two Massachusetts cases asserting state jurisdiction over tribal "fragments" were cited with approval by the Supreme Court, Danzel v. Webquish, 108 Mass. 133 (1871), and Pells v. Webquish, 129 Mass. 469 (1880).

99. *See* United States v. Kagama, 118 U.S. 375, 378-79 (1886); *Ex parte* Crow Dog, 109 U.S. 556, 561 (1883).

100. *See* United States v. Waller, 243 U.S. 452, 459-60 (1917); United States v. Nice, 241 U.S. 591, 598 (1916); United States v. Celestine, 215 U.S. 278, 290 (1909).

101. *See* Johnson v. Gearlds, 234 U.S. 422, 438-39 (1914); Heckman v. United States, 224 U.S. 413, 437 (1912); Dick v. United States, 208 U.S. 340, 357 (1908); United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 194-95 (1876); United States v. Holliday, 70 U.S. (3 Wall.) 182, 186 (1866).

102. See notes 99-101 *supra*.

103. 109 U.S. 556 (1883).

104. The Intercourse Act of 1834 exempted such crimes from federal enclave law, but an 1868 treaty with the Sioux contained a proviso that the Sioux would "deliver up" any "bad men among the Indians" to the federal government for criminal trial and punishment. The Court rejected the contention that either the 1868 treaty or a later 1877 agreement had repealed the exemption contained in the Intercourse Act. *Id.* at 564.

unanimous opinion reflected the then prevailing view of the Indian as an uncivilized savage in a state of pupilage, in need of tutoring in the arts of civilization.[105]

Justice Matthews linked together the concepts of self-government and independence with the concepts of racial inferiority and savagery.[106] Chief Justice Marshall earlier had simultaneously asserted the Cherokee Indians' right to exercise the power of self-government as a domestic dependent nation and their status as a temporary ward of the federal government.[107] In a similar manner, Justice Matthews in *Crow Dog* linked the Sioux's right to self-government, which included a right to punish intra-tribal criminal offenses according to their own laws and customs, with the Sioux's alleged primitive state of civilization.[108] The application of the laws of a civilized society to a savage was both impractical and unjust. Thus, even in the realm of criminal jurisdiction, tribal self-government remained a necessary, albeit temporary phenomenon.[109] Matthews rejected the attempt by South Dakota territorial courts to assume criminal jurisdiction

> over the members of a community separated by race, tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning, which judges them by a standard made by others and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.[110]

Two years after the *Crow Dog* decision Congress overturned the Court's holding by enacting the Major Crimes Act.[111] The moral objections raised by Justice Matthews against the application of the laws of a civilized society to Indians did not similarly trouble Congress. Debate now centered on the constitutionality of a congressional assertion of jurisdiction over tribal Indians. Since the only textual reference to Indians in the Constitution was within the commerce clause, the Supreme Court was hard pressed to find authority for the Major Crimes Act. Thus, in *United*

105. *Id.* at 568.
106. *Id.* at 571.
107. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560 (1832).
108. 109 U.S. at 568-69. Justice Matthews relied on Justice Miller's holding in United States v. Joseph, 94 U.S. 614, 617 (1876), that the Intercourse Act of 1834 applied to "those semi-independent tribes whom our government has always recognized as exempt from our laws." 109 U.S. at 572.
109. 109 U.S. at 571.
110. *Id.*
111. Act of March 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified at 18 U.S.C. § 1153 (1976)).

States v. Kagama,[112] the Court sustained a murder conviction of an Indian tried in a federal court, yet expressly disavowed reliance on the commerce clause.[113] Instead, the Court relied upon the accepted practice of permitting the federal government to act as a protector and guardian of tribal Indians, and upon a moral imperative: A federal power of protection over tribal Indian wards must exist, for in its absence, the Indians would be left at the mercy of the state governments, who were historically "often their deadliest enemies."[114] In a remarkable turnabout, the *Kagama* Court found the federal government morally obligated to assert criminal jurisdiction over tribal Indians in order to protect them from the states,[115] whereas the *Crow Dog* Court had found it morally reprehensible for the federal government to seek to apply the criminal laws of a "civilized" society to the "uncivilized" Sioux.[116]

This turnabout is even more stunning when one examines the strident language of necessity with which the *Kagama* Court justified its conclusion that the powers of the federal government as the guardian of tribal Indians extended beyond the limits of commercial activities:

> [T]he power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.[117]

The Compatability of Citizenship and Wardship

Prior to the Citzenship Act of 1924,[118] the majority of Indians were not United States citizens. Treaty provisions and statutes, however, had conferred citizenship in a piecemeal fashion upon some Indians,[119] and the question arose repeatedly as to whether citzenship was compatible with wardship status. For instance, the General Allotment Act of 1887 conferred citzenship on all Indians who received allotments.[120] The Act was modified by a 1906 amendment which deferred the receipt of active citizenship status until expiration of the twenty-five year allotment trust

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112. 118 U.S. 375 (1886).

113. *Id.* at 378.

114. These Indian tribes *are* the wards of the nation. . . . They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

Id. at 383-84 (emphasis in original).

115. *Id.* at 384.

116. 109 U.S. at 571.

117. 118 U.S. at 384-85.

118. 8 U.S.C. § 1401(a)(2) (Supp. 1981).

119. *See, e.g.*, Act of March 3, 1865, ch. 127, 13 Stat. 541, 562, *discussed in* Oakes v. United States, 172 F.2d 305 (8th Cir. 1909).

120. Act of February 8, 1887, ch. 119, 24 Stat. 388.

period.[121]

In *United States v. Nice*,[122] the Court specifically held that "[c]itizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection."[123] The Court observed that the "education and civilization of the allottees" remained under the direction of Congress under the terms of the Allotment Act.[124] Since Congress did not mean to terminate the process of civilizing the Indians when it granted them allotments, it remained clear that Indian allottees were still dependent wards of the United States in spite of their citizenship.[125] The allegation of incompatibility between citizenship and dependency was repeatedly rejected by the Supreme Court.[126]

Land And Wardship

Just as wardship and dependency could extend beyond the subjects of commerce and the status of citizenship, Congress's constitutional authority as the guardian of Indian tribes was also extended to include the power to assume jurisdiction over all Indian land, whether held communally, in fee simple by the tribe, or in allotments by individual Indians.[127] The constitutional power extended over non-Indian land as well, so long as the land was in such proximity to Indian land as to warrant the extension of protective federal legislation.[128]

The most straightforward enunciation of this principle of the irrelevance of the ownership or locus of the land at issue is found in the Supreme Court's opinion in *United States v. Holliday*:[129]

> [I]f commerce, or traffic, or intercourse is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a State. *The locality of the traffic can have nothing to do with the power*. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on.[130]

Ten years after the decision in *Holliday*, the Supreme Court forcefully

121. *See* United States v. Celestine, 215 U.S. 278, 291 (1909). "Congress, in granting full rights of citizenship to Indians, believed that it has been hasty." *Id.*

122. 241 U.S. 591 (1916).

123. *Id.* at 598.

124. *Id.*

125. *Id.* at 600.

126. United States v. Waller, 243 U.S. 452, 459-60 (1917). "Conferring citizenship is not inconsistent with the continuation of such guardianship, for it has been held that even after the Indians have been made citizens, the relation of guardian and ward may continue." *Id. See also* Winton v. Amos, 255 U.S. 373, 392 (1921); Tiger v. Western Inv. Co., 221 U.S. 286, 313 (1911).

127. See text & notes 128-40 *infra*.

128. For a recent reaffirmation of this principle, *see* United States v. Mazurie, 419 U.S. 544, 554-55 (1975).

129. 70 U.S. (3 Wall.) 182 (1866).

130. *Id.* at 186 (emphasis added).

restated its conclusion that the constitutional power to legislate with respect to Indian tribes is "not confined to any locality; that its existence necessarily implied the right to exercise it, whenever there was a subject to act upon. . . ."[131] In *United States v. Celestine*,[132] the Court held that Congress had the constitutional power to maintain guardianship over Indian allottees despite the absence of tribal ownership of allotments.[133] And, in *Heckman v. United States*,[134] although the Court noted the crucial importance of land ownership to the survival of the tribe at issue,[135] the Court also expressly disavowed the contention that the federal government's interest in protecting the tribe was limited to the defense of property rights.[136] The government's interest extended to all matters affecting the fiduciary relationship between the federal government and the tribe.[137]

The federal guardianship power over tribal Indians extends "not only [to] lands reserved for their special occupancy, but also lands outside of the reservation to which they may naturally resort; and . . . this may be done with the respect to lands lying within the bounds of a State . . . ."[138] So long as congressional legislation stems from the federal government's "regard for their material and moral well being," the locus or character of the land to which the law has application is irrelevant.[139] The fact that the Pueblo Indians owned their lands in fee simple was similarly irrelevant to the exercise of federal criminal jurisdiction over crimes committed on their lands.[140] The character of land ownership, like the presence or absence of citizenship, is a legal nicety that does not influence the status of dependency.

THE LEGACY OF *SANDOVAL*: CONTINUING UNCERTAINTY

At this stage, the reader may be left with two puzzling questions. First, if dependency is not coincident with (1) commerce, (2) citizenship, or (3) land ownership, then what does give rise to dependent Indian status? And second, so long as the Supreme Court sees fit to brush aside

131. United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 194-95 (1876).
132. 215 U.S. 278 (1909).
133. *Id.* at 287.
134. 224 U.S. 413 (1912).
135. "If these Indians may be divested of their lands, they will be thrown back upon the nation, a pauperized, discontented and, possibly, belligerent people." *Id.* at 438, *quoting* United States v. Allen, 179 F. 13, 17 (1910).
136. 224 U.S. at 437.
137. *Id.*

> While relating to the welfare of the Indians, the maintenance of the limitations (on the Indians' power of alienation) which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States. . . .
>
> Out of its peculiar relation to these dependent peoples sprang obligations to the fulfillment of which the national honor has been committed. . . . *This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust.*

Id. (emphasis added).

138. Johnson v. Gearlds, 234 U.S. 422, 438-39 (1914). *See also* Perrin v. United States, 232 U.S. 478, 483 (1914); Dick v. United States, 208 U.S. 340, 357 (1908).
139. Dick v. United States, 208 U.S. 340, 357 (1908).
140. United States v. Sandoval, 231 U.S. 28, 48 (1913). *See also* United States v. McGowan, 302 U.S. 535, 538-39 (1938); United States v. Candelaria, 271 U.S. 432, 440 (1926).

constitutional challenges against Federal Indian legislation with the boilerplate response that such legislation is directed toward the unique political status of tribes as semi-sovereign entities (ignoring the fundamentally racial foundation of this doctrine), then does it even matter that the determinants of Indian dependency are not clearly delineated?

Statutes that employ terms such as "dependent communities" or "wards" to refer to the subjects of Federal-Indian legislation create recurring and murky legal problems. One such statute increasingly has been the focus of litigation. It defines "Indian country" for the purposes of federal criminal jurisdiction as including "all dependent Indian communities within the borders of the United States whether within the original or the subsequently acquired territory thereof, and whether within or without the limits of a state. . . ."[141] This particular statute is a codification of the Supreme Court's decision in *United States v. Sandoval*.[142] Therefore, that ambiguous decision deserves close inspection.

Dependent Indian Communities

The subject of *Sandoval* was a criminal prosecution under federal law for introducing liquor into the Santa Clara Pueblo in New Mexico.[143] The United States District Court dismissed the indictment against Sandoval on the grounds that the application of federal law to the Santa Clara Pueblo was an unconstitutional usurpation of state police power beyond the limits of the congressional Indian power.[144] The United States Supreme Court reversed the District Court, holding that the mere fact that the Pueblo Tribe held all the Indian land in fee simple absolute had no bearing on the issue of whether Congress could constitutionally assert jurisdiction over the community.[145]

The Court noted that the Pueblos adhered "to primitive modes of life, largely influenced by superstition and fetishism, and chiefly governed according to crude customs inherited from their ancestors."[146] The Court concluded, "[T]hey are essentially a simple, uninformed and inferior people."[147] To prove that the Pueblo Indians were "true" Indians, the *Sandoval* Court recited countless examples to prove that although "industrially superior" to "reservation Indians in General," they were nevertheless "intellectually and morally inferior to many of them; and . . . easy victims to the evil and debasing influence of intoxicants."[148]

The *Sandoval* Court concluded:

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian *tribes*, but long continued legislative and executive usage and an unbroken current of judicial decisions

141. Act of June 25, 1948, ch. 645, 62 Stat. 758 (codified at 18 U.S.C. § 1151 (1976)).
142. 231 U.S. 28 (1913).
143. *Id.* at 36.
144. *Id.*
145. *Id.* at 48.
146. *Id.* at 39.
147. *Id.*
148. *Id.* at 41.

> have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over *all dependent Indian communities* within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.[149]

As the italicized words indicate, the Court apparently equated the term "tribes" with the phrase "dependent Indian communities." But the Court declined to set forth a definition of what constituted either a tribe or a dependent Indian community. While leaving the terms undefined, the Court observed that it was for Congress to say at what point federal guardianship over a group of Indians should cease.[150] Though the exercise of such congressional judgment was not totally immune from judicial review, the Court intimated that Congress had considerable discretion to act as it saw fit:

> Of course, it is not meant by this that Congress may bring a *community* or *body* of people within the range of this power by arbitrarily calling them an Indian *tribe*, but only in respect of *distinctly Indian communities* the questions whether, to what extent, and for what time they shall be recognized as *dependent tribes* requiring the guardianship and protection of the United States are to be determined by Congress and not by the courts.[151]

The structure of the sentence above again intimates that "tribes," "distinctly Indian communities," and "dependent tribes" are equivalent terms, yet the Court gave no hints as to what characteristics of a community justify these labels and thereby warrant imposition of federal guardianship power. It has been left to modern courts to struggle with the task of deciphering *Sandoval* and unearthing a workable definition of that peculiar phrase now transplanted into federal statutory law: dependent Indian community.

Modern Interpretations of Sandoval

There exist relatively few cases construing the codification of *Sandoval*. During the 1970s four major decisions were handed down, one by the Tenth Circuit[152] and three by state supreme courts.[153]

In *United States v. Martine*,[154] the Tenth Circuit addressed itself to the proper definition of a "dependent Indian community." The Navajo defendant was driving a pickup truck in a "checkerboard" area of western New Mexico when a fatal car accident occurred.[155] Some of the land was owned by the Navajo Tribe and some was not. The area, known as the Ramah community, was wholly outside the boundaries of any Indian res-

149. *Id.* at 45-46 (emphasis added).
150. *Id.* at 46.
151. *Id.* (emphasis added).
152. *See* United States v. Martine, 442 F.2d 1022 (10th Cir. 1971).
153. *See* State v. Dana, 404 A.2d 551 (Me. 1979), *cert. denied*, 444 U.S. 1098 (1980); State v. Cutnose, 87 N.M. 307, 532 P.2d 896 (1974); C.M.G. v. State, 594 P.2d 798 (Okla. Crim. 1979).
154. *Id.*
155. *Id.* at 1023.

ervation.[156] The land where the automobile accident occurred was purchased with Navajo tribal funds from a corporate owner. In affirming the trial court's holding that the area was a "dependent Indian community," the Tenth Circuit noted with approval that the trial court "received evidence as to the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area."[157] Martine argued that the trial court's holding "implies that wherever a group of Indians is found, *e.g.*, in Los Angeles, there is a dependent Indian community."[158] The Tenth Circuit disagreed:

> The test we are applying here is not so simple. Only after considering all of the various factors we have noted, as well as any other relevant factors, can the trial court determine the status of a particular area. The mere presence of a group of Indians in a particular area would undoubtedly not suffice.[159]

The *Martine* court, however, offered little guidance for recognizing "dependent Indian communities." The nature of the area in question was the first criterion cited.[160] Did the court mean to refer to the pattern of land ownership, in this case tribal ownership of land held in fee simple? If so, this would conflict with several decisions of the United State Supreme Court that held that the character of land ownership has no bearing on the issue of dependency.[161]

The other two factors cited by the *Martine* court are difficult to distinguish. The "relationship of the inhabitants of the area to Indian Tribes and to the federal government" would appear to encompass "the established practice of government agencies toward the area."[162] Furthermore, the Supreme Court has recently held that the established practice of federal agencies does not control the determination of whether a tribe retains a guardian/ward relationship with the United States.[163] Conceding that "there have been times when Mississippi's jurisdiction over the Choctaw's and their lands went unchallenged," the Supreme Court held that the fact that federal supervision over the Choctaws "has not been continuous" did not destroy the federal power to assert jurisdiction over the Choctaw Tribe.[164]

Thus, the factors set forth in *Martine* as the indicia of a dependent Indian community seem both vacuous and in partial conflict with decisions later rendered by the United States Supreme Court. Though it takes something more than the mere presence of Indians in Los Angeles to make

156. *Id.*
157. *Id.*
158. *Id.* at 1024.
159. *Id.*
160. *See id.*
161. See text & notes 128-40 *supra*.
162. 442 F.2d at 1024.
163. United States v. John, 437 U.S. 634, 652 (1978).
164. *Id.* at 652-53. On the other hand, *John* seems to conflict with the decision in Rosebud Sioux Tribe v. Kneip, 420 U.S. 425, 442-43 (1975), where the Court noted that a state's jurisdiction over the tribe at issue had gone unchallenged for many years. The *Rosebud* concept of "jurisdictional history" appears to be at loggerheads with the thrust of *John*.

Los Angeles a dependent Indian community, the *Martine* court did not indicate clearly what that something is.

In *State v. Cutnose*,[165] the New Mexico Supreme Court affirmed the conviction of defendant Cutnose for aggravated assault and criminal trespass.[166] The offenses were committed on the grounds of a United States Public Health Service Hospital, the Gallup Indian Medical Center in Gallup, New Mexico.[167] Cutnose contended that the hospital grounds constituted a "dependent Indian community" and, therefore, New Mexico state courts had no jurisdiction over these offenses.[168] Recognizing that most of the patients of the hospital were Navajos, the *Cutnose* court rejected the defendant's claim by relying on the *Martine* court's observation that it takes more than the mere presence of Indians to constitute a "dependent Indian community" under section 1151.[169] Yet, like the *Martine* court, the *Cutnose* court provided no guidance as to what did constitute a "dependent Indian community."

In *C.M.G. v. State*,[170] the Oklahoma Court of Criminal Appeals reversed a state court murder conviction for lack of jurisdiction, finding that an Indian school built on land specifically reserved for the resettlement of "friendly" Indians was a dependent Indian community.[171] The Oklahoma court concluded that the fundamental test for a "dependent Indian community" was whether the land on which the school was built was validly set apart for the use of Indians under the guidance of the federal government.[172] Answering this question in the affirmative, the court found that the Chilocco Indian School was a dependent Indian community.[173]

Finally, in *State v. Dana*,[174] the Supreme Judicial Court of Maine reversed and remanded the arson convictions of two Passamaquoddy Indians.[175] The alleged crimes were committed in the Peter Dana Point Indian Township.[176] The trial court was directed to determine (1) whether the Passamaquoddy Tribe held aboriginal title to the Peter Dana Point Township[177] and (2) whether the Passamaquoddy Tribe was a "bona fide tribe

165. 87 N.M. 307, 532 P.2d 896 (1974).
166. *Id.* at 310, 532 P.2d at 899.
167. *Id.* at 309, 532 P.2d at 898.
168. *Id.* at 308, 532 P.2d at 897.
169. *Id.* at 309, 532 P.2d at 898.
170. 594 P.2d 798 (Okla. Crim. 1979).
171. The court noted that (1) the Chilocco Indian School had 266 enrolled students, all of whom were at least one quarter Indian; (2) 82 of the school's 102 employees were Indian; (3) the school was not associated with any particular tribe; (4) the students belonged to various tribes with whom they maintained relations; (5) the school was funded through the Bureau of Indian Affairs through the Anadarko Oklahoma Area Office; and (6) the school was built on land owned by the United States and reserved for "friendly Indians" in an Executive Order of President Chester A. Arthur on July 22, 1884. *Id.* at 799-800.
172. *Id.* at 803.
173. *Id.* at 804.
174. 404 A.2d 551 (Me. 1979).
175. *Id.* at 562. The Maine court seemed oblivious to possible double jeopardy issues arising out of a remand for further fact-finding in a criminal case. The remand ordered by the Supreme Judicial Court of Maine would appear to be barred by the double jeopardy clause of the United States Constitution. *See generally* United States v. Burks, 437 U.S. 1, 5 (1978).
176. 404 A.2d at 553.
177. *Id.* at 562.

of Indians." The existence of aboriginal title was critically important to the decision of the Maine Supreme Judicial Court. After a lengthy examination of the *Sandoval* and *Kagama* opinions, the *Dana* court concluded that "the primary factor underlying the conception" of Indian tribes as "wards of the United States" was the existence of aboriginal title subordinated to the title of the federal government of the United States.[178] The *Dana* court was concerned with the character of the legal title to the land upon which the crime was committed. As previously noted, several United States Supreme Court decisions have refuted the contention that dependency or the existence of a guardian/ward relationship depends solely upon the character of the legal title to the land at issue.[179]

The *Dana* court's second prerequisite of dependency, however, is one which no other appellate court seems to have mentioned. By drawing attention to the test of tribal existence,[180] the *Dana* decision breaks new ground and marks a significant advance in modern dependency analysis.

Tribal Existence As The Sine Qua *Non of Dependency*

In *Montoya v. United States*,[181] the Supreme Court defined a tribe of Indians as a "body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[182] The *Dana* court recognized that the Supreme Court, in *Sandoval*, "seemed to use 'communities' interchangeably with 'tribes'."[183] In addition, the *Dana* court noted that in order to avoid "equal protection problems," the definition of "dependent Indian communities" should be limited to "Indian 'communities' having the 'tribal' feature mentioned in *Montoya* . . . of being 'under one leadership or government.' "[184]

This "tribal feature"—unified leadership or government—is the sine *qua* non of dependency. If an Indian community constitutes a tribe, and thus possesses a unified government, then it is per se a "dependent Indian community." Political existence as a tribe is the key determinant of dependency. A re-examination of the earliest judicial statements concerning the nature of dependency reveals that virtually all nineteenth century judges linked dependency to the political existence of a tribe and to the power of self-government.[185]

The very phrase which marked the birth of dependency as a legal concept—"domestic dependent nations"—contains the politically charged

178. *Id.* at 559. *See also* Note, *The Meaning and Implications of "Indian Country": State v. Dana*, 31 ME. L. REV. 171, 186-87 (1979).

179. See text & notes 127-40 *supra*.

180. See 404 A.2d at 562-64.

181. 180 U.S. 261 (1901).

182. *Id.* at 266. An excellent analysis of trial strategy concerning the proof of tribal existence can be found in St. Clair & Lee, *Defense of Nonintercourse Act Claims: The Requirement of Tribal Existence*, 31 ME. L. REV. 91 (1979).

183. 404 A.2d at 556 n.7.

184. *Id.*; *see* United States v. Antelope, 430 U.S. 641, 646 n.7 (1977).

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

word "nations." Marshall's opinion in *Worcester v. Georgia* referred to "the settled doctrine of the law of *nations*" and "the right to self-government" which, he concluded, is not surrendered when a weaker state associates with a stronger state for the purpose of obtaining protection.[186] Justice McLean, in his concurrence, affirmed the tribal right of self-government, and made the demise of self-government the test of the demise of federal guardianship.[187] And Marshall's historical review of the treatment of Indians by European powers began with the observation that "[t]he Indian nations had always been considered as distinct independent *political communities* . . . ."[188]

The First Circuit's decision in *Mashpee Tribe v. New Seabury Corp.*[189] provides judicial elaboration of the determinants of tribal existence. The First Circuit approved the trial court's jury instructions on the meaning of the phrase "united in one community under one leadership or government."[190] These instructions included the following remarks:

> There has to be a leadership or government . . . . Clearly, there was an area in which it could exercise control over its own internal relations, to control the relationship . . . among its own members . . ., between the management and the others and among all of the members of the group. . . . [S]poradic leadership is not what is meant by "united in a community under one leadership or government."
>
> You can have that any time in a fire or flood in the neighborhood where some people will emerge and organize a rescue or organize boats or a bucket brigade, whatever is needed. That is not the kind of leadership we are talking about. We are talking about something that goes on, has continuity. Continuity of leadership in which leadership is passed in some orderly way. . . .
>
> For the leadership to be such as qualifies the group as a tribe, there must be followers . . . . You've got to find that the leadership, whatever it is, has a significant effect upon at least a majority of the claimed group.[191]

If a tribe is per se a dependent Indian community and if a tribe is characterized by a group of Indians living in "a united community under one leadership or government," then dependent Indian communities may exist or emerge in unusual settings.

In *Blue Jacket v. Board of County Commissioners*,[192] the Supreme Court reviewed the validity of state taxes assessed on property held by members of the Shawnee, Wea, and Miami Tribes. The Kansas Supreme Court had held that the assimilation of the Indians into the white community had deprived them of their immunity from state taxation.[193] As evidence of assimilation, the Kansas court noted that the Indians held lands

186. 31 U.S. (6 Pet.) at 560-61 (emphasis added).
187. *Id.* at 592 (McLean, J., concurring).
188. *Id.* at 559 (emphasis added).
189. 592 F.2d 575 (1st Cir. 1979).
190. *Id.* at 582.
191. *Id.* at 582-83.
192. 72 U.S. 737 (1866).
193. *Id.* at 738.

that were interspersed among non-Indian lands; were subject to the governance of school districts, road districts, and Kansas municipal governments; that they sold their lands to and intermarried with whites; were dependent on state courts for the protection of their property rights; were entitled to school funds and made use of the public schools; and probated their estates in Kansas courts and engaged in commerce in white business centers.[194]

Despite this overwhelming evidence of cultural assimilation in many areas, the United States Supreme Court noted that the Indian tribes still functioned as tribal governments.[195] The sine *qua* non of dependency, a self-governing political community, remained active. Justice Davis identified several factors that supported a finding that the tribal organization yet endured:

> They have elective chiefs and an elective council; meeting at stated periods; keeping a record of their proceedings; with powers regulated by custom; by which they punish offenses, adjust differences, and exercise a general oversight over the affairs of the nation. This people have their own customs and laws by which they are governed.[196]

The Supreme Court concluded, "they are . . . a distinct people with a perfect tribal organization,"[197] and therefore they remained wards of the federal government with their immunity from state taxation yet intact.[198] The urban Indian, although clearly quite different from the classical Indian of antiquity, was still entitled to his unique legal status so long as tribal self-government flourished.[199]

The Persisting Dangers of Cultural Bias

In adopting the *Montoya* definition of tribal existence as the key determinant of a dependent Indian community, there is an ever present danger that courts may lapse into a new form of cultural imperialism by insisting that tribal governments reflect traditional Anglo-American political structures. A tribal government can be markedly different from the traditional non-Indian form of government. It need not be democratic or republican in nature. It need not be based on concepts such as majority rule or separation of powers. It need not recognize minority rights, equality of the sexes, or equal protection under the law.

If there is any reason to preserve a special legal status for Indians, it is because Indians and non-Indians alike believe that the preservation of Indian autonomy is a worthwhile goal. A requirement that there be an Indian community "united under one leadership or government" may, in and of itself, contain an Anglo-American cultural bias. Tribal Indian

194. 3 Kan. 294, 298-300 (1865).
195. 72 U.S. at 756.
196. *Id.*
197. *Id.*
198. *Id.* at 757.
199. The decision in Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 469 (1976), indicates that the Supreme Court continues to require more than social integration before a forfeiture of tribal status is recognized.

"governments" have not always been characterized by unity or permanence. The fluidity of form that characterizes tribal governments distinguishes many traditional Indian governments from traditional Anglo-American governments. The *Montoya* definition of a tribe may well favor those Indian groups that have chosen to organize tribal governments pursuant to the terms of the Indian Reorganization Act of 1934.[200] The danger always exists that in attempting to preserve Indian autonomy by recognizing a tribal government modeled after non-Indian political entities, we may be forcing Indian communities into political straitjackets that are thoroughly inconsistent with their own Indian political heritage.

For example, the experience of the traditional members of the Hopi Tribe of northeastern Arizona indicates that the constitutional model of government, adopted pursuant to the Indian Reorganization Act, was entirely inappropriate.[201] The Hopi Constitution granted broad powers to one central tribal council,[202] although traditionally most Hopi decisions had been made by the religious leaders at the village level.[203] Moreover, Hopi religious beliefs precluded the more traditional Hopi Indians from participating in political activity.[204]

But for all practical purposes, if the doctrine of dependency is to survive, the federal government must be able to deal with one unified leadership. One cannot realistically expect the federal government to have a separate guardian/ward relationship with every village in the Hopi nation. It would be equally unfeasible for the federal government to have a direct relationship with every township in Connecticut.

In seeking to preserve Indian autonomy by adhering to the doctrine of Indian semi-sovereignity, we thus run the risk of imposing incompatible non-Indian political structures upon Indian communities. But the fact that dangers of cultural imperialism persist should not lead us to abandon the goal of preserving Indian tribal independence. Moreover, the desire for Indian political autonomy remains strong. The American Indian Policy Review Commission, after two years of study, considered the most important element of American Indian policy to be protection of the right of Native Americans "to exist as separate tribal groups with inherent autonomy to rule themselves."[205]

The challenge ahead of us is to attain a new definition of Indian dependency that preserves Indian autonomy, discards the heritage of racism, and eschews the pitfalls of cultural imperialism. It might well be easier, from an administrative point of view, to jettison the entire doctrine of tribal sovereignty and push for total assimilation of the Indian into the non-Indian world. But it surely would not be the wiser course.

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200. 25 U.S.C. §§ 476-77 (1963).

201. *See generally* Kelley, *The Indian Reorganization Act: The Dream and the Reality*, 44 PAC. HIST. REV. 291-312 (1975).

202. *Id.*

203. *Id.*

204. *See* Lomayaktewa v. Hathaway, 520 F.2d 1324, 1325-26 (9th Cir. 1975), *cert. denied sub nom.* Susenkenwa v. Klepee, 425 U.S. 903 (1976).

205. 1 AMERICAN INDIAN POLICY REVIEW COMM'N, FINAL REPORT 622 (1977).