

Sovereignty, Citizenship And The Indian

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The American Indian historically was perceived by white society as essentially foreign, though he was resident within the borders claimed by that society and retained a right of occupancy recognized by that society. Today he holds a different social and legal status—that of a citizen of the United States. But, despite this new status as citizen, the Indian is still governed in accordance with treaties, statutes and judicial decisions which reflect his earlier condition.

Early in United States history, the Supreme Court ruled that Indian tribes were independent sovereign entities which, though reliant on the United States for external protection, retained their right of self-government.¹ Observing that the Constitution conferred upon the Congress all the powers required for the regulation of Indian affairs,² Chief Justice Marshall held that intercourse between the white nation and the tribes was to be controlled exclusively by the federal government.³ The Indian nations' "title to self-government" was recognized under the law of nations and treaties with Great Britain and the United States. Thus, the Indian tribe formed a distinct community within which a state's laws could have no force.⁴ This recognition established the solecistic relationship of *imperium in imperio*—a sovereign within a sover-

1. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). *Worcester* is the touchstone of Indian jurisprudence. A year earlier Chief Justice Marshall had voiced reservations that the exercise of jurisdiction in disputes between Indian tribes and states might be too political in nature. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 19-20 (1831). In *Worcester*, however, the Court entertained a writ of error brought by a Vermont missionary residing with the Cherokee Indians in Georgia. The missionary claimed that an act of the Georgia legislature requiring an oath of allegiance to Georgia and a license to remain in Indian country was repugnant to guarantees contained in treaties between the United States and the Cherokee nation.

2. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). The Court enumerated the Congress' powers to include "the powers of war and peace: of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes." (emphasis added) *Id.*

3. *Id.* at 561.

4. *Id.* at 560-61.

eign—which by perhaps all contemporary political theory, save that of the United States, was an unacceptable contradiction.⁵

With the passage of years since that decision, a period marked by the expansion of a vigorous new nation across the breadth of a continent and a corresponding decline in strength of the Indian tribes, this power distribution was modified. Today states may assert authority over Indian tribes in the absence of Congressional prohibition, provided that there is no interference with a recognized right of tribal self-government⁶ or the exercise of federal authority.⁷

5. See B. BAILY, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 223-29 (1967). One British spokesman described *imperium in imperio* as "a monster, a thing out of nature." *Id.* at 223 quoting from [JOSEPH GALLOWAY], *A REPLY TO AN ADDRESS TO . . . A CANDID EXAMINATION . . .* (1775).

6. See *Kennerly v. District Court*, 400 U.S. 423 (1971); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); *Williams v. Lee*, 358 U.S. 217, 220 (1959), noted in Davis, *Criminal Jurisdiction Over Indian Country in Arizona*, 1 ARIZ. L. REV. 62 (1959); cf. *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). See also Kane, *Jurisdiction Over Indians and Indian Reservations*, 6 ARIZ. L. REV. 237 (1965). The Supreme Court has not described the means by which this modification was accomplished, nor has it specified the constitutional source of its power to effect such a modification. Indeed, the cases cited by the Court to support this line of decision involved either *Indian actions off-reservation* or the *actions of non-Indians on-reservation*. With this as precedent the Court makes the surprising assertion that, "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). The Court further observed in *Williams* that Congress had acted consistently upon the assumption that the states had no power to regulate the affairs of Indians on a reservation, adding that "[s]ignificantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester v. Georgia* had denied." *Id.* at 221.

Organized Village of Kake v. Egan, 369 U.S. 60 (1962) contains dictum that purports to extend *Williams* beyond mere questions of jurisdiction of state courts to encompass the applicability of all state laws. The Court noted that it had rendered few decisions involving relations with the Indians which did not also involve acts of Congress. As in *Williams*, however, the Court said that the general notion of distinctness of the Indian tribe in *Worcester* "[h]as yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations." *Id.* at 72. "Thus," the Court said, "Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed in the time of Chief Justice Marshall." *Id.* at 74. Though Congress had modified this relationship, the Supreme Court was willing to extend congressional modifications; thus it created a new general rule.

The opinion in *Kennerly v. District Court*, 400 U.S. 423 (1971) further expanded upon the holding of *Williams*. At the time of the tribal resolution granting state courts concurrent jurisdiction of any suit against a member of the tribe, there was a governing act of Congress, the Act of August 15, 1953 ch. 505, §§ 6-7, 67 Stat. 590, as amended 25 U.S.C. §§ 1321-26 (1970), which set forth the procedures to be followed by states desiring to assume jurisdiction over an Indian reservation within its boundaries. Because this statute specified the procedures to be followed, the Supreme Court said that the states were precluded from asserting jurisdiction where the ceding tribe did not follow those procedures; in the face of that legislation, the tribe could not unilaterally cede such jurisdiction to the state. Justices White and Stewart, in dissent, argued that Congress could not have intended to prevent the tribes from authorizing state court concurrent jurisdiction. 400 U.S. at 430. See also *Crow Tribe v. Deernose*, 158 Mont. 25, 487 P.2d 1133 (1971); Sullivan, *State Civil Power over Reservation Indians*, 33 MONT. L. REV. 291 (1972).

Williams has been relied upon particularly in the area of state taxation of Indian individual income earned on a reservation. See, e.g., *McClanahan v. State Tax Comm'n*, 14 Ariz. App. 452, 484 P.2d 221 (1971), *rev'd*, 411 U.S. 164 (1973); *Commission of Taxation v. Brun*, 286 Minn. 43, 174 N.W.2d 120 (1970); *Ghahate v. Bureau of Revenue*, 80 N.M. 98, 451 P.2d 1002 (1969); Comment, *State Taxation of Indian*

Throughout the course of this development, the law governing Indian affairs has developed primarily in response to existing power relationships between the federal and state governments and the Indian rather than with reference to constitutional doctrine:

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.⁸

Indeed, the most likely basis of American Indian law was early set forth by Chief Justice Marshall when the Court ruled that the aboriginal tribes did not retain the power to alienate lands claimed by the European discoverers:

However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.⁹

In its most recent pronouncement, the Court followed what today's Justice Marshall described as the modern trend "to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power."¹⁰ Federal authority to define these limits, according to the Court, derives from the treaty power and federal responsibility for regulating commerce with Indian tribes.¹¹ Almost as an aside, the Court observed that

Income, 1971 L. & SOCIAL ORDER 355; Comment, *The Power of a State to Impose an Income Tax on Reservation Indians*, 6 WILLAMETTE L.J. 515 (1970). *Williams* has also been applied in a number of other tribe-state conflicts to invalidate state action. See, e.g., *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 685 (9th Cir. 1969), cert. denied, 396 U.S. 1003 (1970) (state extradition on an Indian reservation); *Whyte v. District Court*, 140 Colo. 334, 346 P.2d 1012 (1959) (divorce action on reservation); *Your Food Stores, Inc. (NSL) v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950 (1961) (annexation of a portion of reservation by a municipality); *Kain v. Wilson*, 83 S.D. 482, 161 N.W.2d 704 (1968) (civil action for wrongful use and possession of reservation land by an Indian); *State ex rel. Adams v. Superior Court*, 57 Wash. 2d 181, 356 P.2d 985 (1960) (unilateral state declaration that Indian children on reservation were deprived and dependent); cf. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

7. *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); see *Kennerly v. District Court*, 400 U.S. 423 (1971), discussed in note 6, *supra*.

8. *United States v. Kagama*, 118 U.S. 375, 384-85 (1886).

9. *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543, 591-92 (1823).

10. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973).

11. *Id.* at 172 n.7. The Court in *McClanahan* cited *Williams v. Lee*, 358 U.S. 217

[t]he extent of federal preemption and residual Indian sovereignty in the total absence of federal treaty obligations or legislation is therefore now something of a moot question The question is generally of little more than theoretical importance . . . since in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction.¹²

In the belief that neither a doctrine of "indispensability"¹³ nor reliance upon the federal commerce and treaty powers provide an adequate constitutional basis for the present distribution of powers among tribal, state and national governments, the ensuing inquiry develops a theory of these relationships consistent with American political thought. It begins by reviewing a number of fundamental premises, the ideological tenets upon which this nation's system of government was founded. Turning briefly to an historical analysis, it seeks to define the political status of the Indian as perceived by the framers of our constitutional system of government. Finally, concepts of citizenship and federalism are applied to the analysis to determine the current political and constitutional status of individual Indians and their tribes vis-à-vis the state and federal governments.

THE INDIAN UNDER THE CONSTITUTION

Core Theoretical Concepts

In 1818, John Adams observed that the American Revolution was truly effected before what we now term the Revolutionary War had even commenced.¹⁴ The American Revolution described by Adams essentially involved three fundamental, interrelating concepts: location of ultimate sovereignty in the people; representation and consent of the governed; and reduction of the governmental system to a written Con-

(1959) and *Perrin v. United States*, 232 U.S. 478 (1914) as support for this source of federal power. *Williams*, however, relied not only on *Perrin* (for the proposition that the commerce clause is one source), but also on *United States v. Kagama*, 118 U.S. 375, 384-85 (1886) which ascribed the federal power to the necessity of giving uniform protection to a dependent people. *Williams v. Lee*, 358 U.S. 217, 219 n.4 (1959).

Curiously, S. Doc. No. 39, 88th Cong., 1st Sess. 295-96 (1964) cited *Kagama* as rendering the commerce clause superfluous as a source of power over the Indian tribes and noted that in 1871 the Congress had forbidden the further making of treaties with them. See 25 U.S.C. § 71 (1970); cf. *Hearings on S. Res. 53 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 1, at 18-19 (1961):

Senator ERVIN.

And so we have gotten to a position now where we do not know exactly what our fundamental theory in this field is. Is that not true?

Mr. CARVER [Assistant Secretary of the Interior].

I think that is a very accurate analysis, Mr. Chairman.

12. 411 U.S. at 172 n.8.

13. See text accompanying note 9 *supra*.

14. Letter from John Adams to Hezekiah Niles, 1818, in B. BAILYN, *supra* note 5, at 160.

stitution.¹⁵ It is upon these concepts that American constitutional law is founded.

1. *Sovereignty*. The distribution of the attributes of sovereignty and the location of ultimate sovereignty were ideological keystones of early American political thought.¹⁶ The concept of sovereignty current in the British world of the 1760's was a notion that "single, undivided, final power" resided in the Parliament—monarch, lords and commons.¹⁷ This Parliamentary sovereignty was justified by the theory that ultimate sovereignty resided in the people but normally was exercised only at the moments of rebellion against the body exercising the attributes of sovereignty.¹⁸ The American colonists, living in vastly different circumstances and communicating with England only at great delay, sought conceptual grounds for limiting Parliament's power in the colonies. Accordingly, they developed the idea that the attributes of governmental sovereignty could be distributed among a number of governing bodies while remaining subject to the ultimate sovereignty of the people.¹⁹

Thus, the development of Indian law has taken place against the background of a constitutional "blueprint for a federal system of government, dividing authority between the nation and the States and distributing the national authority among branches of the national govern-

15. These were not, of course, the sole ideological concepts influencing the framing of the Constitution. Nor can it be said that the Constitution was framed without regard to considerations other than ideological—the economic, sociological, and international conditions of the day were undeniably strong influences. Still, while these other factors may change, the core ideological concepts remain constant. Indeed, one of the strengths of the Constitution is its unique ability to preserve the fundamental principles of American government while allowing flexibility in the face of economic, social and political change.

16. B. BAILYN, *supra* note 5, at 198-229. See also Guggenheim, *The Modern Conception of the Sovereign State*, 1971 U. TOLEDO L. REV. 203 *passim*.

17. B. BAILYN, *supra* note 5, at 198-202.

18. *Id.* at 201.

19. See *id.* at 198-229. Professor Bailyn notes that the theory was an attempt to "express in logical form . . . the truth of the world they knew." *Id.* at 204. The colonists initially distinguished "internal" and "external" powers of government—the "internal" to be exercised by the colonies and the "external" by Parliament. Later, they argued that the colonies derived their authority from the Crown and hence constituted with England "an imperial federation" under the English monarch. *Id.* at 224. See 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 168-70 (1858).

While the distribution of powers among tribe, state, and nation bears superficial resemblance to this notion, the crucial difference lies in the fact that Indians were not among the people who committed their sovereignty to the federal system. The retention of a claim of tribal sovereignty antedating the Constitution precludes the kind of unqualified participation required by the principles of constitutional sovereignty. See text & notes 135-40, *infra*.

Professor Bailyn observes that the federal system which the Constitution established—the national government as one sovereign and the state government as another, neither possessing total power—has been haunted by the lingering belief that *imperium in imperio* is a solecism and that the sovereignty of the people and the government are coextensive. B. BAILYN, *supra* note 5, at 228. Determination of the proper relationships and distribution of powers between the national and state governments remains a task never fully completed. *Id.* at 229.

ment."²⁰ The unprecedented nature of this relationship, compounded by the thitherto unknown position of aboriginal tribes within a new nation, doubtless has contributed to the confusion which has surrounded the theoretical bases of states and federal dealings with Indian tribes and individuals.

2. *Representation and Consent.* Intimately related to the idea of sovereignty in the American political system is the concept of representation and consent of the governed. This notion took shape during the Stamp Act controversy over taxation of the American colonies by Britain. Because they had developed relatively independently of Parliament, the colonies were not sympathetic to taxation imposed by a body in whose selection they had no voice. Nor would they accept the view that members of Parliament, though *selected* by the handful of qualified electors in their respective boroughs, *represented* the entire nation and not the particular interests of their boroughs.²¹ The corollary to the British view, of course, was that actual representation of the colonists was not necessary because, by the very nature of Parliament, all subjects of the crown benefited from "virtual" representation.²²

To support their demand for representation, the colonial theorists developed the belief that representatives to a legislative body are attorneys or agents of their constituents and accountable for the use of the power which is delegated to them.²³ Representation so viewed implied the continuous day-by-day consent of the governed. "Government," according to Professor Bailyn, "had no separate existence apart from them, it was *by* the people as well as *for* the people; it gained its authority from their continuous consent."²⁴ Thus developed the view "that the only reason why a free and independent man was bound by human

20. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 3 (1972) (footnote omitted). But as Professor Henkin acknowledges, the Constitution "must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is." *Id.* at 287 n.2, quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

21. The British concept espoused by Edmund Burke characterized the Parliament as "a *deliberative* assembly of *one* nation, with *one* interest, that of the whole," rather than "a *congress* of ambassadors from different and hostile interests . . ." B. BAILYN, *supra* note 5, at 163, quoting Burke's speech to the electors of Bristol, 1774.

22. B. BAILYN, *supra* note 5, at 167.

23. *Id.* at 171.

24. *Id.* at 173.

Alexander Hamilton speaking of the consent of the governed declared that "[t]he fabric of the American Empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure original fountain of all legitimate authority." Hamilton further noted that one of the weaknesses of the *Articles of Confederation* was that it had never been ratified by the people. THE FEDERALIST No. 22, at 145-46 (J. Cooke ed. 1961) (A. Hamilton).

laws was this—that he bound himself.”²⁵ To be bound otherwise than by one’s own consent was to be reduced to slavery.²⁶

3. *Written Constitution.* The third core concept which departed from contemporary political theory was a belief that the distribution of the attributes of sovereignty ought to be reduced to a written document. Placing such faith in a written document was, like the first two concepts, a novel one. A constitution previously had been viewed as the constituted—that is existing—arrangement of governmental institutions, laws and customs together with the goals that animated them.²⁷ Under this revolutionary political theory, the constitution was to be the physical embodiment of the delegation of governmental authority by all those consenting to be governed.

Subsequent discussion of Indian status in the United States will be based on these tenets: first, that resident within every political community is a single, undivided, and final source of political power, from which all specific political powers are derived;²⁸ second, that in the United States, this sovereignty resides in the citizenry,²⁹ those persons who have consented³⁰ to be governed, who in their collective capacity possess the powers of sovereignty and exercise them through their chosen representatives;³¹ third, that while ultimate sovereignty resides in the citizenry, the organic and fundamental law of the United States is embodied in a written constitution which establishes the character and conception of its government.³²

25. B. BAILYN, *supra* note 5, at 174 (citations omitted). See also *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 456 (1793) (Wilson, J., *seriatim*).

26. To the framers, slavery referred to a specific political condition applying equally to the condition of the peoples of contemporary Europe and the Negro slave in America. “The degradation of chattel slaves—painfully visible and unambiguously established in law—was only the final realization of what the loss of freedom could mean everywhere; for there was no such thing ‘as partial liberty’: he who has authority ‘to restrain and control my conduct in any instance without my consent hath in all.’” B. BAILYN, *supra* note 5, at 234; cf. A. MEIKLEJOHN, *POLITICAL FREEDOM-THE CONSTITUTIONAL POWERS OF THE PEOPLE* 14-16 (1965).

27. B. BAILYN, *supra* note 5, at 175-98.

28. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 455 (1793) (Wilson, J., *seriatim*); *City of Bisbee v. Cochise County*, 52 Ariz. 1, 10-12, 78 P.2d 982, 985-86 (1938); B. BAILYN, *supra* note 5, at 198-99; C. MCILWAIN, *CONSTITUTIONALISM AND THE CHANGING WORLD* 26-30 (1939); cf. F. HINSLEY, *SOVEREIGNTY* 232-36 (1966).

29. U.S. CONST. amend. XIV, § 1. See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 456 (1793) (there are citizens, but not subjects); *Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857) (the “sovereign people” and “citizens” are synonymous). But see *State v. Manuel*, 4 Dev. & Bat. 20, 26 (1838), quoted in *United States v. Wong Kim Ark*, 169 U.S. 649, 664 (1898) (“citizen” is analogous to “subject”).

30. “Consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side.” 1 J. STORY, *EQUITY JURISPRUDENCE* § 222 (1870). “There is a difference between consenting and submitting. Every consent involves a submission; but a mere submission does not necessarily involve consent.” BLACK’S LAW DICTIONARY 377 (rev. 4th ed. 1968).

31. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1856); 4 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 137 (Library of Congress ed. 1906) [hereinafter cited as JOURNALS].

32. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1789).

Historical Relationships

When Europeans discovered and began colonizing the New World, the Indian tribes populating this continent were "numerous, powerful, and truly independent."³³ Although the Europeans continued to recognize tribal independence, Indians were not believed to possess those attributes of statehood recognized as necessary by Europeans to sustain claims to the soil on which they lived. Most significantly, the Indians were considered uncivilized or unchristian—perhaps necessarily both.³⁴ Because of this, European nations were able to assert their power in the New World under the international law doctrine that discovery of ungoverned soil gave the discovering nation sole title and rights over the soil and the right to regulate relations with the aborigines.³⁵

Britain established several different types of colony in North America,³⁶ but one legal characteristic was common to all—the entire soil which was eventually to become the United States was granted to the colonies by the Crown subject to the unextinguished right of occupancy of the Indian tribes.³⁷ The Crown retained title to all lands occupied by the Indian tribes, a limited sovereignty over the tribes, and the exclusive right to extinguish the tribal right of occupancy.³⁸

The British made no attempt to regulate the internal affairs of the Indian tribes. Contact between Indians and Europeans initially was regulated by the individual colonies, but in 1755 the Crown began to remove control of Indian affairs from the colonists and vested two British superintendents with full responsibility for regulating political relations with the Indians.³⁹ By the *Proclamation of 1763*, lands beyond the Appalachians were reserved as "Indian Country."⁴⁰ In 1764, a plan

33. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831).

34. *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543, 572-74 (1823); cf. Truyló y Serra, *The Discovery of the New World and International Law*, 1971 U. TOLEDO L. REV. 305. See also 1 J. STORY, *supra* note 19, at § 5.

35. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

Chief Justice Marshall observed in *McIntosh* that the power of the federal government to grant Indian lands had formerly resided in the Crown or its grantees. 21 U.S. (8 Wheat.) at 587. See also p. 987 *infra*.

36. The three types of colony—provincial, proprietary and charter governments—exercised varying degrees of self-government. 1 J. STORY, *supra* note 19, at § 159. By the time of the Revolution, however, all the colonies maintained that their authority to govern themselves derived from the British Crown. Therefore, they argued, they were subjects of the King rather than of Parliament, which they claimed could not rightfully interfere with internal affairs of the colonies. B. BAILYN, *supra* note 5, at 224-25.

37. *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543, 576-79 (1823).

38. *Id.* at 588, 596; cf. F. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 4-25* (1962). See also Guggenheim, *supra* note 16, at 207-08.

39. See F. PRUCHA, *supra* note 38, at 6-25.

40. See *United States v. McGowan*, 302 U.S. 535, 537-39 (1938). See also F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW 5-8* (1942). Noting that the term "Indian

was proposed whereby the Indian trade would be removed from the control of the colonies and placed in the hands of officers appointed by the Crown. Though the plan was never formally adopted, it was used by the British superintendents until 1768, when the regulation of trade was returned to the colonies.⁴¹ Britain was still attempting to devise a workable plan to regulate Indian affairs when the Revolutionary War began.

Even before the *Declaration of Independence*, the Continental Congress recognized that relations with the Indian tribes could not effectively be maintained at the level of the separate states. On the contrary, it was felt that peace with the Indians was only possible if the power to govern relations with the tribes were vested in the national government.⁴² As the proposed drafts of the *Articles of Confederation* and debates in the Continental Congress indicate, the United States considered the internal affairs of the Indian tribes to be largely beyond the control of either the central or state governments.⁴³

Exactly what power the central government of the Confederation had to deal with the Indians is not clear. The final copy of the *Articles of Confederation*, accepted by the Continental Congress in November 1777, contained the ambiguous provision that Congress had 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"⁴⁴ The Articles also provided that, without

country" is used in many senses, Cohen suggests that the most useful definition is the "country within which Indian laws and customs and federal law relating to Indians are generally applicable." *Id.* at 5.

41. F. PRUCHA, *supra* note 38, at 23.

42. *See id.* at 6-25. One of the greatest concerns of the Continental Congress was to secure and preserve the friendship of the Indian nations. While the Congress did not expect to gain allies among the tribes, it did hope to keep them neutral in the struggle with Britain. 2 JOURNALS, *supra* note 31, at 178, 182 (1905). As early as July 1775, the Continental Congress appropriated funds for commissioners to regulate Indian affairs through treaties and presents. These commissioners were to operate three departments for Indian affairs, delineated by tribal location rather than state boundary. *Id.* at 175.

43. *See, e.g.,* note 44, *infra*.

44. 9 JOURNALS, *supra* note 31, at 919 (1907). In Madison's view, Indians not members of any state were those "who did not live within the body of the Society, or whose Persons or property form no objects on its laws." Further, the legislative right not to be infringed was the state's right of preemption of the lands from the Indians, since "[i]f this proviso be taken in its full latitude, it must destroy the authority of Congress altogether, since no act of Cong[ress] within the limits of a State can be conceived which will not in some way or other encroach upon the authority [of the] State." Letter from James Madison to James Monroe, Nov. 27, 1784, in 2 THE WRITINGS OF JAMES MADISON (1783-1787) 91-92 (G. Hunt ed. 1901). *See also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 574 (1832) (McLean, J., concurring).

Debate on an earlier provision illustrates the diversity of opinion regarding the status of the tribes at the time (July 26, 1775). The members from South Carolina were opposed to the grant of power to the central government because the Indian trade was profitable. One member, however, was willing to allow the central government

the consent of Congress, no state could make treaties or alliances or engage in war with the Indians, unless actually invaded or in great danger of being invaded.⁴⁵

Throughout the Revolution, the assertion by the Continental Congress of exclusive authority to regulate Indian affairs was not wholly accepted by the states.⁴⁶ For this reason, a committee of the Congress appointed to study the problem of state claims to land in the Indian country established by the *Proclamation of 1763* reasserted that

the sole right of superintending, protecting, treating with, and making purchases of the several Indian nations situate and being without the bounds of any of the different states in the union, is necessarily vested in the United States in Congress assembled, for the benefit of the United States, and in no other person or persons whatever within the said states.⁴⁷

Though it was not clear from the Articles whether the purchase of Indian land *within* the borders of a state was vested solely in the Congress, the central government's authority over Indian affairs was sufficiently recognized that Pennsylvania felt compelled to instruct its delegates to inform the Congress of its intent to negotiate with the Indians.⁴⁸ The Congress responded that, upon cessation of hostilities, it would "cheerfully *consent* to the negotiation proposed . . . for the purchase of the Indian claim to lands within the limits of that state."⁴⁹ The Congress likewise asserted its right to regulate trade with the Indians in instructions to the federal superintendents of Indian affairs.⁵⁰

Constitutional Provisions Relating to the Indian

The first mention of Indian status during the Constitutional Con-

to regulate trade provided that it indemnified the state for the expense of keeping peace with the Indians. The Virginia members would have allowed the grant of power to the central government except as to Indians "tributary" to any state. Thomas Jefferson explained this relationship as one in which Indians living within a state were subject to its laws "in some degree." James Wilson, the member from Pennsylvania who later sat on the Supreme Court, asserted that the states had *no* rights over the Indian tribes, whether within or without the real or pretended limits of any state, as the tribes would not submit to classification by state boundary. Lasting peace, he believed, was only possible if the United States alone met with the Indian tribes. 6 JOURNALS, *supra* note 31, at 1077-79 (1906).

Note that all the concern expressed in this debate regarded the regulation of trade or managing of affairs *with* the Indian tribes. Only Braxton and Jefferson asserted a state right or interest in managing the affairs *of* the Indians, and they referred only to those Indians already subject to state power.

45. Compare this provision with U.S. CONST. art. I, § 10, cl. 3. See also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 545 (1832).

46. F. PRUCHA, *supra* note 38, at 26-40.

47. 22 JOURNALS, *supra* note 31, at 230-32 (1914).

48. 25 JOURNALS, *supra* note 31, at 591-95 (1922).

49. *Id.* at 596 (emphasis added). See also 28 JOURNALS, *supra* note 31, at 118-20 (1933).

50. See, e.g., 31 JOURNALS, *supra* note 31, at 490-91 (1934), as implemented at 32 JOURNALS, *supra* note 31, at 66-69 (1936).

vention came in response to a proposal that suffrage in the House of Representatives be according to "some equitable ratio of representation."⁵¹ One proposed ratio of representation was "in proportion to the whole number of white and other free Citizens and inhabitants of every age, sex and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes in each State."⁵² There was no recorded discussion of the reason why Indians not taxed were placed in the category of persons not "white" or "free." It is interesting to note, however, that this provision, after committee action, accomplished the same result of excluding Indians not taxed from the formula for representation only *after* placing them in the category of "free persons" and then excluding them.⁵³

The records of the Constitutional Convention disclose other features of governmental relations with the Indians under the proposed Constitution. James Madison urged the Convention to grant Congress the power "[t]o regulate affairs with the Indians as well within as without the limits of the United States."⁵⁴ The Committee of Detail reported a provision recommending that the commerce power previously granted to Congress be extended to read "and with Indians, within the limits of any State, not subject to the laws thereof."⁵⁵ This addition was subsequently reported out of committee and agreed upon by the Convention to read "and with the Indian tribes."⁵⁶ Unfortunately there is no record whether the incorporated wording was viewed as modifying the scope of Madison's initial proposal. In view of debates that indicated that for the most part the states did not assert a great interest in Indian affairs within their boundaries, save for trade and the Indians who were actually members of their states,⁵⁷ the change of wording does not appear to have been intended to narrow the effect of Madison's proposal. Thus, "Indians not taxed", "Indians not subject to the jurisdiction" of a state, and "Indian tribes" are synonymous.

51. 1 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 192 (rev. ed. 1966).

52. *Id.* at 193.

53. 2 M. FARRAND, *supra* note 51, at 590. This categorization was continued in the Constitution. U.S. CONST. art. I, § 2, cl. 3. It is not clear from the records of the convention, however, what was contemplated by the description "Indians not taxed." One commentator suggests that the probable meaning then was "Indians resident on reservations, that is, on land not taxed by the states . . ." Rice, *The Position of the American Indian in the Law of the United States*, 16 J. COMP. LEG. & INT'L L. (3rd ser.) 78, 80 (1934).

54. 2 M. FARRAND, *supra* note 51, at 321, 324.

55. *Id.* at 367.

56. *Id.* at 493, 495; see U.S. CONST. art. I, § 8, cl. 3.

57. See note 44 *supra*.

Indians and The Federalist

During the controversy over ratification of the Constitution, a remarkable series of essays was published in New York extolling the advantages of the proposed Constitution. Despite the role of advocate which it performed initially, *The Federalist* has been accorded great weight by the United States Supreme Court as a contemporaneous exposition of the Constitution.⁵⁸ Accordingly, in view of the dearth of debate in the Convention over the status of the tribes and the cryptic references to the tribes in the document itself, some insight may be gained from these essays.

In *Federalist No. 3*, John Jay observed that wars were far more likely to occur if the power to make war lay with the individual states rather than with the national government. In support of his argument, Jay noted that there had not been a single Indian war caused by the national government under the *Articles of Confederation*, while the improper conduct of individual states had triggered several such conflicts.⁵⁹ Again, in *Federalist No. 24*, Alexander Hamilton cited the presence of the Indian tribes as reason for keeping a national defense force. Hamilton described "the savage tribes on our western frontier" as natural enemies of the United States and natural allies of the British and Spanish, because they had the most to fear from the United States and the most to gain from more distant powers. Hamilton pointed to the historical necessity, before and after the Revolution, of keeping small garrisons on the frontier.⁶⁰ Indeed, in *Federalist No. 25* Hamilton raised the specter of the territories of Britain, Spain, and the Indian tribes encircling the Union from Maine to Georgia as a common danger.⁶¹

The most instructive of the essays is *Federalist No. 42* where James Madison specifically dealt with the powers lodged in Congress to regulate commerce with the Indian tribes. Referring to the restrictions placed on the power of the Continental Congress to deal only with Indians not members of any state and not to infringe on the legislative right of any state within its own limits, Madison asserted that the Congress' power was "properly unfettered" from these limitations which "render[ed] the provision obscure and contradictory."⁶² Madison observed that a determination of what Indians could be described as mem-

58. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418 (1821); *Wheeling, P. & C. Transp. Co. v. City of Wheeling*, 99 U.S. 273, 280 (1878).

59. *THE FEDERALIST* No. 3, at 16-17 (J. Cooke ed. 1961) (J. Jay).

60. *THE FEDERALIST* No. 24, at 156 (J. Cooke ed. 1961) (A. Hamilton). These garrisons, he noted, could also become the keys to trade with the Indian tribes.

61. *THE FEDERALIST* No. 25, at 158, 161 (J. Cooke ed. 1961) (A. Hamilton).

62. *THE FEDERALIST* No. 42, at 284 (J. Cooke ed. 1961) (J. Madison).

bers of a state had not even then been decided, having been "a question of frequent perplexity and contention in the federal councils."⁶³ He described as "absolutely incomprehensible" how trade with Indians residing within a state might be regulated by an external authority "without . . . intruding on the internal rights of legislation"⁶⁴

Nation, State and Tribe

While the constitutional provisions relating to Indian affairs are few, they may be read together with the colonial experience, the records of the Continental Congress and the Constitutional Convention, and *The Federalist* as indicating that the Indian tribes and their members were considered nonparticipating inhabitants of the United States, standing outside the framework of the Constitution. By virtue of this nonparticipation, and in accordance with the core theoretical concepts underlying United States constitutional law, the internal affairs of the Indian tribe were beyond the authority of the federal government. First, members of the Indian tribes ("Indians not taxed") were expressly excluded from individual state populations for the purposes of national representation and direct taxation. Moreover, the only constitutional provision mentioning the Indian tribes, the commerce clause, treats the tribes as units distinct from the states. This commerce power was unfettered even by considerations of the states' legislative powers. Finally, all the *Federalist* writers make clear that the Indian was considered to be a national threat, every indication of *The Federalist* being that national forces, both military and political, were supposed to face and contain that threat. In short, from the inception of the union, the national government had dealt with the Indian tribes as autonomous nations.⁶⁵ In the words of Professor Thayer, "[i]t was a dealing with separate nations; if not a foreign people, yet a separate one."⁶⁶

This constitutional view of the Indian was consistent with the core theoretical concepts discussed above.⁶⁷ The written Constitution, reflecting the fundamental assumption that the ultimate source of governmental authority is all those consenting to be governed, placed Indians outside the governmental framework in terms of representation and taxation, leaving no doubt that they were without participatory rights. While excluded from representation, they were nonetheless classed as "free persons," demonstrating that had they not been speci-

63. *Id.* See, e.g., 9 JOURNALS, *supra* note 31, at 844 (1907). See also *United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 194 (1876); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

64. THE FEDERALIST No. 42, at 284 (J. Cooke ed. 1961) (J. Madison).

65. A. KELLEY & W. HARBISON, THE AMERICAN CONSTITUTION 301 (1963).

66. J. THAYER, *A People Without Law*, in LEGAL ESSAYS 104 (1908).

67. See text accompanying notes 14-32 *supra*.

fically excluded they might have been able to consent to be governed as a part of the class comprising the ultimate sovereign. Accordingly, the Indian was not seen to be in the same class as the chattel slave, who was subject to the internal laws of the United States without his consent or participation.

Since the Indian was not included among the citizens who were forming the new federal nation, the problem remained of how to control the Indian. The citizens of the United States were to govern themselves but this right was not extended to the Indian. The Indian was not a member of the new national community; he was a threat to it and had to be controlled.⁶⁸ How this function was to be distributed among the different governing bodies established by the citizenry remained to be solved.

1. *Federalism.* Under the American system of government, internal powers not expressly granted to the national government are generally reserved to the states unless a broader power is implied by the "necessary and proper" clause of the Constitution. One possible theory of how to govern the Indian, therefore, is that except for the enumerated constitutional powers which may involve relations with the Indian—the commerce powers, the power to manage lands in the public domain, or the treaty power—the states have plenary authority over Indians resident within their borders. Closer analysis shows that this is not so.

Where foreign affairs are involved, affirmative grants in the Constitution are not required to vest in the federal government those powers inherent in national sovereignty as necessary concomitants of nationality. In *United States v. Curtiss-Wright Export Corp.*,⁶⁹ the Supreme Court observed that notions of express or implied powers of the federal government are "categorically true only in respect to our internal affairs."⁷⁰ Under the *Articles of Confederation*, Justice Sutherland asserted, the national government had possessed full responsibility for external relations. The Constitution assumed this, so it was unnecessary to enumerate these powers except where there had been some change from the Articles as to the distribution of powers within the federal government or there had been controversy or compromise in the adoption of a particular provision of the Constitution.⁷¹ Accordingly, though some such powers are explicitly lodged in the federal government, they are not "enumerated" powers in the sense of a delegation

68. See text & notes 59-61 *supra*.

69. 299 U.S. 304 (1936).

70. *Id.* at 315-16. See also L. HENKIN, *supra* note 20, at 19-36.

71. *Id.* at 22-23.

of some of the internal powers of the states to the national government.⁷²

Though Indian affairs are not strictly "foreign" affairs, they are in a constitutional sense "external" affairs. Power over the Indian tribes and tribal land had always been retained exclusively by the British Crown or exercised by the individual colony at the Crown's sufferance. Upon separation from Great Britain, the power over Indian affairs retained by the British Crown passed to the confederation subject to the self-imposed restrictions that the power could neither be exercised over Indian members of a state nor infringe upon a state's legislative rights within its own boundaries. Both of these restrictions are reservations of *internal* powers of the state, so the essentially national aspect of the power over Indian affairs was unaffected.

If the power over Indian affairs is properly characterized as external in nature, to be exercised as an attribute of national sovereignty, then it rests in the federal government even in the absence of an affirmative constitutional grant. In the language of *Curtiss-Wright*, the authority of the federal government vis-à-vis the Indian tribes was another of the powers "vested in the federal government as necessary concomitants of nationality."⁷³ Whatever authority may be asserted over the Indian tribes—that is, to the extent that they are recognized as a separate, though dependent, people—is properly asserted *exclusively* by the national government.⁷⁴

2. *Scope of Federal Authority.* It has been observed that the paramount issues in constitutional law are no longer questions of the relative scope of federal and state authority; rather, they deal with the relation of government at any level to the individual.⁷⁵ However true this may be in general, it is not the case in Indian affairs, despite the recent extension of civil rights to the Indian.⁷⁶ Substantial issues relating to the interaction of exclusive federal authority and state police powers are raised where the attributes of external sovereignty are exercised over persons residing within a state's borders. At the same time, the precise relationship which the federal government maintains with the Indian remains a lively issue.

72. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). L. HENKIN, *supra* note 20, at 22-23. Professor Henkin discusses the rather large number of objections which have been raised to Sutherland's opinion but notes that the opinion has been consistently affirmed. *Id.* at 23-26.

73. 299 U.S. at 318.

74. Cf. O'Toole & Tureen, *State Power and the Passamaquoddy Tribe: "A Gross National Hypocrisy?"*, 23 MAINE L. REV. 1, 18-23 (1971).

75. Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637, 640 (1961).

76. See text & notes 125-32 *infra*.

Exclusive federal jurisdiction over Indian affairs is predicated upon the Indian's nonparticipation in our constitutional system of government and the concomitant recognition of a tribal right of self-government. It is the presence of an Indian tribe within a state's borders which triggers the operation of the federal government's authority over Indian affairs within that state. The federal authority is exclusive, a national power similar to the foreign affairs power. Yet even in foreign affairs an exclusive federal authority has not until recently been held to bar state impingement where the federal government had not acted.⁷⁷

In 1968, the Supreme Court said in *Zschernig v. Miller*⁷⁸ that the Constitution itself preempted the field of foreign affairs to the federal government, thereby precluding the exercise of otherwise valid state authority which might impinge upon the federal authority. While the precise holding in *Zschernig* is by no means clear,⁷⁹ at a minimum it establishes that even in the exercise of traditional state powers a state may not sit in judgment of foreign governments, that being exclusively a federal activity. As previously noted, the Court has held that the exercise of federal authority in Indian affairs preempts the field from state regulation.⁸⁰ A further limitation upon the exercise of traditional state authority has been the right of the tribes to govern themselves absent governing acts of Congress.⁸¹ These two doctrines dovetail neatly with the holding in *Zschernig*. Thus, the Supreme Court's holding in *Williams v. Lee*,⁸² read in the light of *Zschernig*, stands for the proposition that the Constitution itself preempted the field of Indian affairs to the federal government, so that states might not exercise their normal, valid powers where to do so might impinge upon the federal authority. The significance of *Williams v. Lee*, then, lies not in the proposition that state action may not infringe upon the right of the reservation Indians to make their own laws and be ruled by them, but rather that state impingement is constitutionally preempted by the federal government absent a delegation of such power by Congress.

The Constitution is silent as to the ultimate goal of Indian policy. The young, expanding nation could have chosen to perpetuate the dependent sovereignty of the tribes. Instead the federal government historically pushed toward termination of tribal status and eventual absorption of individual Indians into American society. This policy,

77. For a detailed discussion of state intrusion in foreign affairs, see L. HENKIN, *supra* note 20, at 238-44.

78. 389 U.S. 429 (1968).

79. See, e.g., L. HENKIN, *supra* note 20, at 240-41; Maier, *The Bases and Range of Federal Common Law in Private International Matters*, 5 VAND. J. TRANSNAT'L L. 133 (1971).

80. See text & notes 7, 10-11 *supra*.

81. See text & note 6 *supra*.

82. 358 U.S. 217 (1959); see note 6 *supra*.

while in keeping with international law,⁸³ has been modified in recent years.⁸⁴

Unless the tribes were to remain separate entities, the national authority over Indian affairs had to include a general superintendence over the assimilation of the individual Indian. Accordingly, the relationship which Chief Justice Marshall described as resembling that of a guardian to his ward,⁸⁵ must eventually come to be recognized as an essentially personal one between the guardian federal government and the Indian individual. Implicitly, the scope of federal authority as to guardianship follows the individual and need not be limited to either tribal rights or tribal boundaries.

The limits of this national authority as guardian over the dependent Indian, therefore, is not limited to the boundaries of "Indian country;" it is not founded on residual sovereignty of the tribe but rather on the independent duty of the federal government to its wards. If, in the exercise of this guardianship, the national government chooses to exercise that power beyond reservation boundaries, it may properly do so.⁸⁶ In practical effect, were an Indian to leave his tribe, he would retain his status both as a national and as a ward of the national government.⁸⁷

THE INDIAN TODAY: THE CITIZEN-WARD

Although the theory of the Indian as a federal ward seems to depict accurately the status of the American Indian as viewed by the

83. International law recognizes the protective nature of the relationship between sovereign and aborigine. A. SNOW, *THE QUESTION OF ABORIGINES IN THE LAW AND PRACTICE OF NATIONS* 29-30 (1921). Accordingly, the modern practice is "to discourage tribal organization and to deal with the aborigines as individuals under guardianship." *Id.* at 55. This international law doctrine developed largely from the nineteenth century British and American experiences. *Id.* at 57-113. Hence it cannot be said to form a part of the historical base of the Constitution at the time of its adoption.

84. The policy of assimilation and detribalization can be traced through such statutes as the General Allotment Act of 1887 (Dawes Act), ch. 119, 24 stat. 388, and the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984. In 1953, an official policy of terminating federal support for reservations was instituted. H. CON. RES. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953). This policy was repudiated by President Nixon in 1970. R. NIXON, *THE AMERICAN INDIAN—MESSAGE FROM THE PRESIDENT OF THE UNITED STATES*, H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970).

85. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 18, 20 (1831). See also *Chouteau v. Molony*, 57 U.S. (16 How.) 203, 237-38 (1853) (under Spanish law, Indians were considered in a state of tutelage).

86. See *Ruiz v. Morton*, 42 U.S.L.W. 4262 (U.S. Feb. 19, 1974), *aff'g*, 462 F.2d 818 (9th Cir. 1972) which interpreted the Snyder Act, 25 U.S.C. § 13 (1970) to authorize general assistance benefits to nonreservation Indians. The Supreme Court limited the extension of such benefits to those unassimilated Indians residing near a reservation within an Indian community and maintaining economic ties with the reservation. The Ninth Circuit had expressed no opinion as to the power of Congress to limit general assistance benefits to reservation Indians. 462 F.2d at 824. See generally Sclar, *Participation by Off-Reservation Indians in Programs of the Bureau of Indian Affairs and the Indian Health Service*, 33 MONT. L. REV. 191 (1972).

87. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962).

framers of the Constitution, the Indian today is not the person he was in 1789. Though still considered a ward of the national government, every Indian has through one of a variety of means been declared a citizen of the United States and of the state in which he resides. This changed status naturally raises the question whether the federal government retains the exclusive power to exercise authority as guardian of these citizen-Indians. An examination of the political bases for the American concept of citizenship together with analysis of how the Indian has obtained the status of citizen sheds considerable light on this question.

The Significance of Citizenship

Citizens of the United States are the members of the geographic community who have established the constitutional government for the promotion of their general welfare and the protection of their individual and collective rights. They may confer upon that government whatever powers they choose.⁸⁸ The citizens comprise the ultimate sovereign from which the government derives its limited authority. *Persons* may claim rights under the Constitution, but only *citizens* may properly claim to be the ultimate sovereign by whom the Constitution itself was created, and from whom it continues to derive its authority.

Some doubt has been raised that citizenship has, or indeed ever had, any significance in American constitutional law.⁸⁹ Professor Bickel suggests that the concept of citizenship plays only the most minimal of roles. Pointing to the original absence of a definition of citizenship in the Constitution and judicial failure to treat citizenship as a condition precedent to assertion of rights under the Constitution, he concludes that the Constitution prescribes *individual* rights without regard to citizenship and "subsumes important obligations and functions of the individual, which have other, more complex sources and foundations, moral, political and traditional, than the simple contractarian notion of citizenship."⁹⁰

There are, however, two levels of consideration of the significance of citizenship. Professor Bickel's outstanding essay is concerned with the necessity of citizenship as a condition precedent to asserting rights under the Constitution. He correctly concludes that most rights are afforded *persons*, not merely citizens. In reaching this conclusion, however, he denigrates the importance of citizenship as a basic concept of American constitutional law. This more fundamental (though per-

88. *United States v. Cruikshank*, 92 U.S. 542, 549 (1875).

89. Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369 (1973).

90. *Id.* at 387.

haps more metaphysical) level of consideration views the citizenry as the ultimate sovereign from whom the government derives its authority and whose consent to be governed is limited to the provisions of the Constitution. That the Constitution does not afford rights in terms of citizenship, in no sense lessens the importance of the citizenry as the source of governmental power. Though the noncitizen may enjoy rights conferred by the Constitution, he has no direct voice in the process of changing that Constitution—including perhaps the revocation of those rights.

While Bickel interprets the Supreme Court holding that involuntary expatriation statutes are unconstitutional as a reaffirmation of "the traditional minimal content of the concept of citizenship, the minimal definition of allegiance," he rejects as rhetoric what is instead a reaffirmation that the citizenry is the ultimate sovereign from whom the government derives its powers.⁹¹ In response, one might ask as did Chief Justice Warren:

What is this Government, whose power [to expatriate] is here being asserted? And what is the source of that power? The answers are the foundation of our Republic. To secure the inalienable rights of the individual, 'Governments are instituted among Men, deriving their just powers from the consent of the governed.' I do not believe the passage of time has lessened the truth of this proposition. It is basic to our form of government.

. . . .

The people who created this government endowed it with broad powers. They created a sovereign state with power to function as a sovereignty. But the citizens themselves are sovereign, and their citizenship is not subject to the general powers of their government. [A] government of the people cannot take away their citizenship simply because one branch of that government can be said to have a conceivably rational basis for wanting to do so.⁹²

Accordingly, the consent of the governed ought not lightly to be presumed,⁹³ though it has been suggested that "the meaning we attach to consent is dominantly negative. It is tolerant rather than eager Consent we may, but only because we must."⁹⁴ The first portion of this comment was particularly concerned with the theory of sovereignty; this portion is founded on the theory of consent. The principal issue

91. Compare *Perez v. Brownell*, 356 U.S. 44 (1958) with *Afroyim v. Rusk*, 387 U.S. 253 (1967) and *Schneider v. Rusk*, 377 U.S. 163 (1964). But see *Rogers v. Bellei*, 401 U.S. 815 (1971).

92. *Perez v. Brownell*, 356 U.S. 44, 64-65 (1957) (footnotes omitted) (Warren, C.J., dissenting).

93. M. WALZER, *OBLIGATIONS IX-X* (1970).

94. D. MEIKLEJOHN, *FREEDOM AND THE PUBLIC* 19 (1965).

is whether a self-governing people can be made citizens of the United States by the unilateral fiat of the federal government without rejecting the notion of the limited sovereignty of that people.

A theory equating consent with citizenship raises a substantial procedural question which must be answered for the phrase "consent of the governed" to have any but a ritual meaning. While for the natural-born citizen a notion of tacit, tolerant consent might be acceptable,⁹⁵ some further evidence will be sought where collective naturalization by legislative fiat is involved.

Citizenship by Birth

The original Constitution did not expressly define citizenship, but it did refer to both national⁹⁶ and state citizenship⁹⁷ and empowered Congress "[t]o establish a uniform Rule of Naturalization."⁹⁸ The fourteenth amendment later provided that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."⁹⁹ Thus the Constitution now incorporates the British common law doctrine of *jus soli*, defining citizenship at birth by situs rather than ancestral nationality. This doctrine developed from the feudal notion that one owed lifelong allegiance to the sovereign within whose realm he was born.¹⁰⁰

In *United States v. Wong Kim Ark*,¹⁰¹ the Supreme Court was presented with the question whether a child born in the United States of noncitizens was a citizen of the United States by virtue of the fourteenth amendment. Neither the majority nor the dissenting opinion appear to have accepted the fourteenth amendment alone as being dispositive of the issue. Rather (and unfortunately), both opinions chose as their reference point not concepts of sovereignty or consent to be governed but whether after the Revolution the common law or international law was to be utilized in construing the Constitution. The majority relied upon the common law of Britain.¹⁰² The very concept of sovereignty, embodied in the common law of citizenship, which was denied by the colonists in order to legitimize their demands for internal self-government was applied by the United States Supreme Court to identify natural born members of this nation's ultimate sovereign.¹⁰³

95. M. WALZER, *supra* note 93, at xi; see note 103 *infra*.

96. U.S. CONST. art. I, § 2, cl. 2; art. I, § 3, cl. 3; art. II, § 1, cl. 5.

97. U.S. CONST. art. IV, § 2, cl. 1.

98. U.S. CONST. art. I, § 8, cl. 4.

99. U.S. CONST. amend. XIV, § 1.

100. *United States v. Wong Kim Ark*, 169 U.S. 649, 654-58 (1898).

101. *Id.*

102. *Id.*

103. *Id.* at 655. The logic of the dissent, especially when prefaced by emphasis upon the concept of the consent of the governed, is more in keeping with the ideologi-

Despite its acceptance of citizenship as a function of one's place of birth, the Court held in *Elk v. Wilkins*¹⁰⁴ that an Indian born within the United States was excluded from achieving citizenship upon birth or by subsequently renouncing his allegiance to his tribe. The Court said that the tribal Indian owed allegiance to the tribe from birth and therefore was not born "subject to the jurisdiction" of the United States.¹⁰⁵ Justice Gray wrote that the constitutional provision excluding Indians not taxed for purposes of representation in the Congress was "wholly inconsistent with their being considered citizens."¹⁰⁶ Thus, citizenship by virtue of birth within the United States alone was denied the Indian.

Citizenship by Naturalization

The alternative method of achieving the status of citizen is, of course, through naturalization. Congress has adopted two principal methods of naturalization—through a uniform statutory rule of naturalization of individuals, and by treaty or statute under which a group of individuals could be collectively naturalized.

cal concepts upon which this nation was founded.

Chief Justice Fuller, in a dissenting opinion in which Justice Harlan concurred, asserted that, upon the overthrow of the British sovereign by the colonies, those parts of the British common law which were in derogation of the principles of the new government were abrogated. *Id.* at 709. This should be true particularly as regards citizenship, since one of the fundamental concepts of the American Revolution was that the sovereign power in the former colonies was not the government but the people of the United States who had through their representatives consented to the rule of the new government. A common law which provided for citizenship derived from indissoluble allegiance to the sovereign based upon feudal society should have been readily seen as being in derogation of the Constitution. Indeed, if consent of the governed has any meaning at all today, the British common law incorporated by the majority in *Wong Kim Ark* remains in derogation of the Constitution.

Chief Justice Fuller would have applied the international law doctrine that nationality was determined by descent (*jus sanguinis*):

The true bond which connects the child with the body politic is not the matter of an inanimate piece of land, but the moral relations of his parentage. . . .

The place of birth produces no change in the rule that children follow the condition of their fathers, for it is not naturally the place of birth that gives rights, but extraction.

Id. at 708. Fuller's opinion drew from the writings of international law publicists, particularly the Swiss Emmerich de Vattel. Recognizing that any rule of citizenship by birth cannot reflect the wishes of the child, Vattel believed that the child was a citizen by tacit consent until upon reaching the age of discretion he should renounce his right to citizenship. 1 E. DE VATTEL, *THE LAW OF NATIONS* § 212 (J. Chitty trans. 1863).

This doctrine appears to be far more consistent with the framers' notion of the consent of the governed than does the British common law notion of citizenship derived from a feudal duty of allegiance to the sovereign. A more consistent reading of the import of the fourteenth amendment would be that it *supplements* the earlier doctrine of *jus sanguinis* with *jus soli* to accommodate the situation of the newly freed slaves after the Civil War—specifically to overrule the *Dred Scott* decision. Cf. H. PRITCHETT, *THE AMERICAN CONSTITUTION* 759-61 (1968). But cf. *Rogers v. Bellei*, 401 U.S. 815 (1971).

104. 112 U.S. 94 (1884).

105. *Id.* at 102.

106. *Id.*

Since the first naturalization act in 1790,¹⁰⁷ Congress has required that the individual petitioner take an oath of allegiance to support the Constitution of the United States.¹⁰⁸ In addition, the petitioner must (a) be able to read, write and speak the English language, (b) understand the fundamentals of the history, principles and form of government of the United States,¹⁰⁹ and (c) be well disposed to the good order and happiness of the United States.¹¹⁰ In short, Congress has provided that those who wish to become United States citizens must manifest a knowing consent to be governed under the Constitution. Since 1795, moreover, Congress has required that the petitioner "renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whereof such alien may, at the time be subject."¹¹¹

Consent to be governed is not so clearly manifested where collective naturalization is involved. Under a collective naturalization procedure, the individual cannot be said to have individually manifested his consent to be governed. Thus, there should be serious doubt as to the constitutionality of a legislative fiat collectively conferring citizenship on a group of individuals. In bestowing citizenship without receiving individual manifestation of consent, the Congress may be *compelling* individuals or an entire people to consent to its government—a result entirely at variance with the principle that the citizenry, as the ultimate sovereign, is composed only of those persons who have consented to be governed under the Constitution.

In *Boyd v. Nebraska*,¹¹² the Court considered the variety of means whereby Congress had collectively naturalized both non-Indians and Indians. One such collective naturalization described by the Court was accomplished by statute upon the admission of a new state on an equal footing with the original states.¹¹³ Though the individual did not manifest his personal consent to be governed in accordance with the Constitution, the *body* of individuals which achieved citizenship comprised the political community which applied for admission to the Union.

107. Act of March 26, 1790, ch. 3, 1 Stat. 103.

108. See J. CABLE, *DECISIVE DECISIONS OF UNITED STATES CITIZENSHIP* 56-63 (1967). Today the oath of allegiance also requires that the petitioner declare in open court that he will bear arms in behalf of the United States, perform noncombatant service in the Armed Forces, or perform work of national importance under civilian direction. 8 U.S.C. § 1448(a) (1970). See *Girouard v. United States*, 328 U.S. 61 (1946).

109. 8 U.S.C. § 1423 (1970).

110. *Id.* at § 1427.

111. See Act of January 29, 1795, ch. 20, § 1, 1 Stat. 414; Act of April 14, 1802, ch. 28, 2 Stat. 153; Act of June 29, 1906, ch. 3592, § 4, 34 Stat. 596, 597; Act of October 14, 1940, ch. 876, § 335, 54 Stat. 1137, 1157; 8 U.S.C. § 1448(a) (1970).

112. 143 U.S. 135 (1891).

113. *Id.* at 163.

Thus, they may be said to have collectively manifested their consent to be governed through their representatives.¹¹⁴

Another means of collective naturalization was through treaty whereby subjects of another sovereign, upon request or cession of the territory within which they resided, automatically became citizens after a certain period of time unless they declared their intention to remain subjects of the former sovereign.¹¹⁵

The other instances of collective naturalization described by the Court in *Boyd*, involved treaties and statutes collectively naturalizing members of Indian tribes.¹¹⁶ Of the two treaties and three statutes cited by the Court, all but one treaty contemplated the extinction of the tribe as a sovereign or the relinquishment on the part of the individual Indian of his allegiance to the tribe. The sole exception allowed the Indian to retain the "privilege of a Choctaw citizen," but provided that citizenship was to be extended to the head of the family who, "desirous to remain and become a citizen of the [United] States,"¹¹⁷ was to reside upon his own reservation for 5 years at which time a grant in fee simple should issue. Since the eventual removal of the Choctaw nation west of the Mississippi was implied in the treaty, it too may be seen to require the eventual relinquishment of tribal allegiance.¹¹⁸

In each of these types of collective naturalization, the sovereign to which the naturalized individual had formerly owed allegiance either disclaimed dominion by treaty or was incorporated as a state of the Union. Further, consent to be governed was presumed in the absence

114. *Id.* at 170. This collective consent is binding even on the dissenting individual through his prior consent to be bound by the will of the majority. He retains the right of voluntary expatriation, of course.

115. *Id.* at 163.

116. *Id.* at 162. The Court cited the Choctaw Treaty of September 27, 1830, 7 Stat. 335; Cherokee Treaty of December 29, 1835, 7 Stat. 483; Stockbridge Tribe Act of March 3, 1843, ch. 101, 5 Stat. 647; Brothertown Indians Act of March 3, 1839, ch. 83, 5 Stat. 349 and the General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388, as examples of collective naturalization of Indians. All Indian treaties are compiled at 2 C. KAPPLER, *INDIAN AFFAIRS: LAWS AND TREATIES*, S. DOC. NO. 319, 58th Cong., 2d Sess. (1904). See also F. COHEN, *supra* note 40, at 153-54. Cohen observes that implicit in such treaties and statutes was the thought that citizenship was incompatible with continued participation in tribal government or tribal property. *Id.* at 153. He argues, however, that this incompatibility should not be accepted as a general rule and points to the consistent Supreme Court doctrine rejecting assertion of the incompatibility and upholding the federal government's power of guardianship over the Indians. *Accord*, *Hallowell v. United States*, 221 U.S. 317 (1911); *Tiger v. Western Invest. Co.*, 221 U.S. 286 (1911). Compare *In re Heff*, 197 U.S. 488 (1905) with *United States v. Nice*, 241 U.S. 591, 598 (1916).

117. Treaty with the Choctaw Nation of September 27, 1830, art. XIV, 7 Stat. 335. While it is not entirely clear that this refers to United States citizenship, the margin notes and at least one commentator assert that it does. A. DEBO, *THE RISE AND FALL OF THE CHOCTAW REPUBLIC* 55 (2d ed. 1961). See also A. DEROSIER, *THE REMOVAL OF THE CHOCTAW INDIANS* 125-26, 150-51, 162-63 (1970).

118. See generally A. DEBO, *supra* note 117; A. DEROSIER, *supra* note 117.

of certain specified declarations or was actually manifested through the representatives of the individuals naturalized. In other words, all these collective grants of citizenship envisioned the relinquishment of allegiance to any other sovereign unless that sovereign were incorporated into the United States as a constituent state.

The Indian occupied an anomalous position in the naturalization process. Indians were classed as "nationals," so they could not fall within the provisions established by Congress to naturalize "aliens." Separate procedures had to be established for individual naturalization, either by treaty or special legislation. To the extent that such procedures were established, they consistently required that the individual Indian manifest his consent to be governed in accordance with the United States Constitution; such an individual was subsequently to be excluded from tribal membership or his tribe was to be dissolved.¹¹⁹ Since consent to be governed was individually manifested, that fundamental concept remained intact.

Naturalization of the Indian

The collective naturalization to which many tribal Indians trace their American citizenship is a 1924 act of Congress¹²⁰ providing that all Indians born within the United States were thereby granted citizenship; it required neither the tribal leadership nor the individual members to manifest consent to be governed.¹²¹ Unlike earlier treaties and statutes, which had granted citizenship with the implicit premise that citizenship was incompatible with tribal membership, the 1924 act did not require relinquishment of the individual Indian's allegiance to the tribe or dissolution of the tribe itself.

Supreme Court decisions, moreover, have held that citizenship is not inconsistent with the Indian's status as a ward of the federal government. The Court has said that the federal guardianship "arises from [the Indians'] condition of tutelage or dependency" and that "the mere grant of rights of citizenship" was not sufficient to terminate this relationship.¹²²

However, under the above-developed constitutional theory¹²³ the effective grant of citizenship to the individual Indian demonstrates his consent to be governed and signals his inclusion into the body consti-

119. See, e.g., *Elk v. Wilkins*, 112 U.S. 94, 103-05 (1884).

120. 8 U.S.C. § 1401(a)(2) (1970).

121. *Id.* This act naturalized 125,000 native-born Indians. Rice, *supra* note 53, at 78, 86. It has been estimated that approximately two-thirds of the Indians in the United States had already acquired citizenship. F. COHEN, *supra* note 40, at 153.

122. *Winton v. Amos*, 255 U.S. 373, 391-92 (1921). See also *Hallowell v. United States*, 221 U.S. 317 (1911); *Tiger v. Western Invest. Co.*, 221 U.S. 286 (1911).

123. See text & notes 88-94 *supra*.

tuting the ultimate sovereign. As citizens of the United States, Indians no longer would be outside the Constitution—they would be participating, consenting members of the ultimate sovereign. As such, they will have submitted themselves to the constitutionally established governmental system, as to both the national and state governments. Both the government of the United States and the Indian would be bound to the rights and duties inherent in United States citizenship. By the fourteenth amendment, the Indian would be a citizen of the state within which he resides and entitled to exercise the rights of citizenship and subject to the obligations placed upon all citizens.

To reach any other conclusion is to subvert the very foundations upon which this nation was established. If the citizenry is the ultimate sovereign from which the government of the United States derives its authority, then consent must be an integral element in any description of the citizenry. Since the written Constitution of the United States sets forth the compact which established the government by which the citizens consent to be governed, this consent may not be subject to reservations in derogation of the provisions of that document. Though tacit consent might perhaps be cognizable where the individual Indian asserts the rights and assumes the duties of citizenship, consent cannot be inferred while both he and the Congress recognize a tribal right of self-government existing independently of the Constitution.

THE CONTRADICTION IN INDIAN LEGISLATION

The 1924 law conferring citizenship on Indians could be construed as a manifestation of Congressional belief that the status of tribes had declined to the point where Indians born after that date were in fact born "subject to the jurisdiction" of the United States and therefore were citizens under the doctrine of *jus soli*.¹²⁴ Such an interpretation would seem to mandate the conclusion that the Indian is now part of the sovereign citizenry from whose consent the federal government draws its power to rule. The government's actions since that date, however, are inconsistent with such a premise. In particular the continued recognition of tribal authority as a legitimate limitation on individual constitutional rights is untenable in a strict constitutional sense, and further, is inconsistent with the notion of citizenship envisioned by the original architects of our government.

The Development of "Indian Civil Rights"

Even after the 1924 Act conferring citizenship on the Indian, the

124. See text & notes 96-106 *supra*.

sovereignty of the tribes was considered to foreclose constitutional restraint of tribal self-government.¹²⁵ The internal sovereignty of the tribes was dispositive; no consideration was given to the tension between the Indians' right to protection of individual rights under the Constitution and the disregard of these rights by an extra-constitutional sovereign (the tribe) within the boundaries of the United States. Without such consideration, the Constitution was described as the supreme law of the land but binding upon the tribes only where it expressly binds them or is made binding by treaty or act of Congress.¹²⁶

The precedence of extra-constitutional tribal powers over individual constitutional rights was first questioned in *Colliflower v. Garland*,¹²⁷ in which the Ninth Circuit held that an Indian sentenced to confinement by a tribal court might petition to a federal district court to grant a writ of habeas corpus. Treating the tribal court as a federal instrumentality originally created and still partially controlled by the federal government,¹²⁸ the court of appeals ruled that district court jurisdiction included the power to grant the petition. The court expressly noted, however, that its decision did not require that the tribe comply with every constitutional restriction. That determination was left to the district court.¹²⁹

Congress responded to a growing concern over the lack of constitutional restraint on tribal action¹³⁰ by enacting *Title II of the Civil Rights Act of 1968*.¹³¹ This legislation selectively incorporates portions of the Constitution as a Bill of Rights for Indians. Although the Act constitutes a limitation upon the tribes' exercise of powers of

125. See *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529 (8th Cir. 1967) (neither fifth nor fourteenth amendments applicable to Indian tribe); *Native American Church of North America v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959) (neither first nor fourteenth amendments applicable to Indian tribes); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958) (neither fifth nor fourteenth amendments applicable to Indian tribe); *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (10th Cir. 1957) (fifth amendment inapplicable to incorporated Indian tribe). But see *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965); text & notes 127-29 *infra*. See also *Talton v. Mayes*, 163 U.S. 376 (1896) (fifth amendment inapplicable to Indian tribe); F. COHEN, *supra* note 40, at 124, 181, 267.

126. See, e.g., *Native American Church of North America v. Navajo Tribal Council*, 272 F.2d 131, 134-35 (10th Cir. 1959). This holding was questioned in *Colliflower v. Garland*, 342 F.2d 369, 377 (9th Cir. 1965), though the Ninth Circuit resolved *Colliflower* on other grounds. See text & notes 127-29 *infra*.

127. 342 F.2d 369 (9th Cir. 1965).

128. *Id.* at 378-79.

129. *Id.* at 379. See also *Settler v. Yakima Tribal Court*, 419 F.2d 486 (9th Cir. 1969).

130. See S. REP. NO. 721, 90th Cong., 2d Sess. 21 (1968) (Additional Views of Mr. Ervin). "[The proposed Indian legislation] reflects a theory of government which would apply the guarantees of law to all citizens regardless of race, creed, color, or national origin. It also recognizes that no individual should stand, as does the American Indian, beyond the reach of the Constitution." *Id.*

131. 25 U.S.C. §§ 1301-03 (1970).

self-government, it also serves as an affirmation of inherent, though dependent, tribal sovereignty. While extending most of the Bill of Rights, the fourteenth amendment, and the prohibitions against bills of attainder and ex post facto laws, the Act omits some constitutional guarantees including the prohibition against laws respecting the establishment of religion and the right to indictment by a grand jury. It also limits other guarantees: the right to counsel is available only at one's own expense and the right to jury trial is limited to those accused of crimes punishable by imprisonment.¹³²

Title III of the same act directs the Secretary of the Interior to draft and recommend to the Congress a model code governing courts of Indian offenses. The code is to "assure that any individual being tried for an offense by a court of Indian offenses shall have the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen of the United States being tried in a Federal Court for any similar offense . . ."¹³³ Commendable as such legislation may be, it reaffirms the contradiction between Indian citizenship and tribal sovereignty. Not only is the code not to be binding on tribal courts,¹³⁴ but the very fact that such legislation was thought necessary shows that the tribal government was viewed as remaining outside the full reach of the Constitution.

132. See Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 HARV. J. LEGIS. 557 (1972); Lazarus, *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D. L. REV. 337 (1969); Reiblich, *Indian Rights Under the Civil Rights Act of 1968*, 10 ARIZ. L. REV. 617 (1968); Note, *Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights*, 3 COLUM. SURVEY HUMAN RIGHTS L. 49, 91-93 (1971); Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969); Note, *An Analysis of the Indian Bill of Rights*, 33 MONT. L. REV. 255 (1972).

The applicability of constitutional limitations upon the tribes notwithstanding, the tribes were long considered to be immune from direct suit, absent congressional authorization, as sovereign entities. *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940) (sovereign immunity retained as to tribal property after tribal dissolution); *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (8th Cir. 1967); *Dicke v. Cheyenne-Arapaho Tribes, Inc.*, 304 F.2d 113 (10th Cir. 1962). Though the only federal court jurisdiction specified in *Title II of the Civil Rights Act of 1968* is in habeas corpus actions, 25 U.S.C. § 1303 (1970), an impressive body of decisions has developed assuming subject matter jurisdiction without denying the existence of inherent tribal sovereign immunity. Observing that the Act would be unenforceable without federal court powers broader than that expressly granted, the federal courts have treated the Act as an implied waiver by Congress of Indian tribal sovereign immunity. *Daly v. United States*, 483 F.2d 700 (8th Cir. 1973); *Luxon v. Rosebud Sioux Tribe*, 455 F.2d 698 (8th Cir. 1972); *McCurdy v. Steele*, 353 F. Supp. 629 (D. Utah 1973); *Seneca Const. Rts. Org. v. George*, 348 F. Supp. 48 (W.D.N.Y. 1972); *Solomon v. LaRose*, 335 F. Supp. 715 (D. Neb. 1971); *Loncession v. Leekity*, 334 F. Supp. 370 (D.N.M. 1971); *Spotted Eagle v. Blackfeet Tribe*, 301 F. Supp. 85 (D. Mont. 1969); *Dodge v. Nakai*, 298 F. Supp. 17 (D. Ariz. 1968) (non-Indian may invoke provisions of the Act).

133. 25 U.S.C. § 1311 (1970).

134. Title III is designed to effectuate the replacement of the current model code governing the courts of Indian offenses. S. REP. No. 721, 90th Cong., 2d Sess. 31-32 (1968) (Additional Views of Mr. Ervin). The current model code, 25 C.F.R. pt. 11 (1973), is not binding on the tribes. *Id.* at § 11.1.

Constitutional Questions Raised by Contemporary Indian Legislation

If the citizen is one manifesting consent to be governed in accordance with the Constitution, citizenship is inconsistent with assertions of tribal sovereignty. Though the tribes are expressly mentioned in the Constitution, they are described as the *object* of constitutional power, not entities which might *exercise* constitutional power subject to the full range of constitutional limitations. Where Indian tribes govern subject only to such constitutional limitations as Congress or the tribal government choose to extend, there arises the incongruity of the federal government purporting to confer citizenship unilaterally on all Indians born in this country while continuing to recognize a domestic sovereign which is not bound by the supreme law of the land.

In large part this incongruity has escaped Congress, the courts and the commentators. For example, where one commentator discusses the power of Congress to extend some guarantees of the Constitution to Indians while omitting others, no question of the constitutional propriety of the action is perceived:

Indeed, Indians and Indian tribes can only derive federally protected rights through federal legislation. In as much [*sic*] as the rights were not enjoyed in the past and would not be today were it not for Title II [of the Civil Rights Act of 1968], [this portion of the legislation] cannot fail for not extending to Indians rights commensurate with those of non-Indians.¹³⁵

Another commentator goes to great lengths to suggest a basis for interpreting the congressionally extended rights to avoid a serious undermining of the tribes' cultural autonomy.¹³⁶ The writer concludes that "the scope of these individual rights is to be determined by balancing them against the interests of the tribe in maintaining its cultural autonomy."¹³⁷ This confusion of constitutional rights with the desirability of maintaining the cultural integrity of the tribes was reflected in a decision of the Eighth Circuit where the court expressed its desire "to protect and preserve individual rights of the Indian peoples, with the realization

135. Note, *An Analysis of the Indian Bill of Rights*, 33 MONT. L. REV. 255, 260-61 (1972). Thus, this commentator concludes that the Civil Rights Act is a blatant imposition of white values on a different culture. Even if it is assumed the Indian culture has been reduced through interaction with the white culture . . . this imposition still violates the right of self-government derived from the concept of tribal sovereignty enunciated so long ago by Chief Justice Marshall.

Id. at 264 (footnote omitted).

136. Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969).

137. *Id.* at 1360.

that this goal is best achieved by maintaining the unique Indian culture and necessarily strengthening tribal governments."¹³⁸

In no other area of constitutional law does there exist a doctrine recognizing the preservation of cultural autonomy as a justification for limiting individual civil rights. Even disregarding notions of inherent tribal sovereignty, the actions of the tribe which affect individual civil rights still constitute the kind of governmental action found by the Supreme Court in arguably private actions performed in an environment of state inaction or merely nominal governmental support.

The closest analog is *Marsh v. Alabama*,¹³⁹ in which a privately owned "company town" was found to perform sufficiently "governmental" functions to be subject to the fourteenth amendment. Balancing the first amendment freedoms of the nonresident against the constitutional rights of property owners, Justice Black concluded that the first amendment freedoms occupied the preferred position. Further, there is no indication that the nonresident status of the appellant was dispositive. The Court has been zealous in the protection of individual civil rights against infringement by private action far less governmental than that of the Indian tribe.¹⁴⁰

CONCLUSION

As the foregoing study illustrates, the "grant" of citizenship to Indians, who still owe at least partial allegiance to the pre-constitutional sovereign tribes, is at odds with the framers' concept of membership in the American political community. Nor does it accord with the fourteenth amendment's prerequisites for citizenship. Congressional and judicial reluctance to attach the emotion-laden label of "non-citizen" to the first Americans probably explains why challenges to this obvious contradiction have not met with success. It is nonetheless clear that, to the extent he asserts an inherent right of tribal self-

138. *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1144 (8th Cir. 1973) (footnote omitted).

139. 326 U.S. 501 (1946).

140. Besides the "company town," a variety of private actions have been considered state or governmental actions subject to constitutional limitation. See, e.g., *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968); *Evans v. Newton*, 382 U.S. 296 (1966); *Bell v. Maryland*, 378 U.S. 226 (1964); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Terry v. Adams*, 345 U.S. 461 (1953); *Public Util. Comm'n v. Pollak*, 343 U.S. 451 (1952); *Shelley v. Kraemer*, 334 U.S. 1 (1948). But see *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). See also *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). In *Columbia Broadcasting*, Chief Justice Burger, speaking for Justices Stewart and Rehnquist, concluded that a broadcast licensee's refusal to accept a paid editorial advertisement did not constitute governmental action. A majority of the Court concluded that, the governmental action issue notwithstanding, the broadcast licensee's refusal was not proscribed by the first amendment.

government, the Indian has not truly manifested his consent to be governed wholly under the internal government set forth in the Constitution.

The exclusive federal authority of guardianship over the Indian is properly maintained so long as he remains a dependent person. This is a personal relationship between the national government and the individual Indian; the national government may implement whatever programs it deems appropriate in the exercise of that authority whether the Indian resides within the reservation or chooses to enter society. But if the Indian is considered to have manifested his consent to be governed under the Constitution of the United States, then he must join the ranks of the citizenry: his wardship will have come to an end.

It appears that we have placed cosmetic egalitarianism and our sense of national guilt about past maltreatment of the Indian above adherence to constitutional principles. In our haste to assimilate the Indian and rectify the wrongs he has suffered during the pursuit of our "manifest destiny," we have handled Indian affairs in derogation of the Constitution. This conclusion is reached not because the Indian is not worthy of citizenship, but because governmental action has been taken with the implicit acknowledgement that perhaps the government does not truly derive its authority from the consent of the governed.¹⁴¹

Taking some solace from Justice Holmes that theory is not to be feared as impractical,¹⁴² this examination has been presented with full understanding that, because its conclusions logically demand a great break with the past, its value may be reduced to a rather esoteric theoretical exercise.¹⁴³ Perhaps the solution lies in recognizing the

141. Cf. A MEIKLEJOHN, *POLITICAL FREEDOM—THE CONSTITUTIONAL POWERS OF THE PEOPLE* 9-10 (1965):

We Americans think of ourselves as politically free. We believe in self-government. If men are to be governed, we say, then that governing must be done, not by others, but by themselves. . . . Governments, we insist, derive their just powers from the consent of the governed. If that consent be lacking, governments have no just powers.

Now, this political program of ours, though passionately advocated by us, is not—as we all recognize—fully worked out in practice. Over one hundred and seventy years have gone by since the Declaration of Independence was written. But, to an unforgivable degree, citizens of the United States are still subjected to decisions in the making of which they have had no effective share. So far as that is true, we are not self-governed; we are not politically free. We are governed by others. And, perhaps worse, we are, without their consent, the governors of others.

142. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

143. But see *Shirley v. Superior Court*, 109 Ariz. 510, 513 P.2d 939 (1973) cert. denied, 42 U.S.L.W. 3468 (U.S. Feb. 19, 1974). In that case, the Supreme Court of Arizona held that the immunity from service of process and tax exempt status of a reservation Indian did not disqualify him from holding a county elective office.

Shirley, however, represents merely the tip of the iceberg of the very real problems

contradictions and amending the Constitution to reflect the realities of contemporary society. The anachronistic exclusions of "Indians not taxed" and the Congressional power to control commerce "with the Indian tribes" might be amended from the Constitution. In their place a provision recognizing the Indian tribe as a dependent sovereign entity could be enacted. Such a provision might provide that the tribal governments be unencumbered by constitutional limitation to whatever degree deemed appropriate and categorize the individual Indian as occupying the status of citizen-ward.

raised in the State of Arizona by the presence of a large body of tribal Indians. Recently, a citizens' group announced plans to divide an Arizona county into two counties, the reservation Indians to occupy one. Unlike Justice Marshall's assertion in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), that Indian affairs are completely regulated by statute and treaty, see text & notes 10-12, the issue is joined and debated on more basic grounds. Speaking for the Committee Against Taxation Without Representation, in favor of dividing the county, one spokesman states:

If we don't [divide the county], we face taxation without representation and representation without taxation. . . .

Arizona Daily Star, Feb. 13, 1974, § A, at 14, col. 9. The Navajo Tribal Chairman, opposed to division of the county, responds:

In spite of the rhetoric, we Navajos are American citizens, and not as some have argued, part-time citizens.

Id.

In the background, the Justice Department has noted the discrepancy between the Indian district having 23,994 residents and the remaining two county districts which have a combined total of less than 6,000. A reapportionment suit has been filed. *Id.*