§ 6.01 General Principles Regarding Tribal and State Authority Over Indian Affairs

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[1] Introduction

The foundational concepts of Indian law suggest that absent a controlling congressional statute, jurisdiction over persons, property, and events in Indian country is retained by tribes. Congress, in the exercise of its constitutional power over Indian affairs, may alter tribal jurisdiction and allocate jurisdiction over particular matters expressly to the federal government, to states, or to be shared between the two. Moreover, in certain circumstances, the Supreme Court has held that a tribe's assertion of jurisdiction over non-Indians would be inconsistent with overriding national sovereignty interests.

The general approach to determining which government has jurisdiction is relatively simple in the case of tribal member Indians in Indian country. Unless there is a specific federal law stating otherwise, they are subject to exclusive tribal jurisdiction. Congress's plenary authority over Indian affairs and the tradition of tribal autonomy in Indian country combine to preempt the operation of state law.

When the subject matter is the property or activities of non-tribal members in Indian country, the basic rule is the same, but it is subject to more exceptions. States may not assert civil jurisdiction over the conduct or property of non-Indians in Indian country if it would cause interference with tribal self-government or conflict with federal laws and policies. The courts have recognized, however, "the State's legitimate interests in regulating the affairs of non-Indians" when Indians or their property are not substantially affected.

In Williams v. Lee, the Supreme Court held that an Arizona state court did not have jurisdiction over a non-Indian's lawsuit to collect a debt incurred by a reservation Indian at a trading post on the reservation. The Court held that allowing the suit to proceed would undermine the authority of the tribal courts and therefore infringe on the tribe's ability to govern affairs on the reservation. Thus, an exercise of state jurisdiction over a transaction by a non-Indian with an individual Indian in Indian country can infringe on tribal self-government. This same reasoning applies to issues of state regulatory jurisdiction as well as judicial jurisdiction.

The Supreme Court, however, has curtailed tribal civil jurisdiction over non-Indians when a dispute arises on non-Indian land, or its equivalent, in Indian country unless the interests of the tribe or member Indians are affected. For disputes involving nonmembers on non-Indian land, this rule reverses the ordinary presumption in favor of tribal jurisdiction. The Court recognizes that tribes retain inherent jurisdiction over non-Indians or non-Indian land, however, when the non-Indians are involved in consensual relations with the tribe or its members or when substantial tribal interests are threatened. By contrast, the Court has held that tribes, by being subjected to the overriding sovereignty of the United States, were divested of all their inherent power to try and punish criminal offenses committed by non-Indians in Indian country.
In the criminal area, congressional statutes have largely supplanted state jurisdiction, creating federal jurisdiction over certain crimes committed in Indian country by Indians or non-Indians. The Major Crimes Act allows federal courts to try serious crimes listed in the Act when they are committed by Indians in Indian country instead of leaving them solely to tribal law. The Indian Country Crimes Act (ICCA) subjects Indians to prosecution for a wide variety of federal crimes committed against non-Indians, leaving crimes between Indians, except the crimes covered by the Major Crimes Act, exclusively to tribal law. The ICCA also subjects non-Indians to federal jurisdiction for federal crimes committed against Indians in Indian country. Although the Act is silent on the question, the Supreme Court has held that the ICCA does not apply to a crime committed by a non-Indian against another non-Indian. That decision was based in part on the presumption that crimes in which the perpetrator and victim are both non-Indians do not affect Indians and, thus, Congress, in the exercise of its power over Indian affairs, did not intend to subject the matter to federal jurisdiction.

[2] Federal Preemption and the Policy of Tribal Independence from the States

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." Accordingly, state law generally is not applicable to Indian affairs within the territory of an Indian tribe, absent the consent of Congress. This proposition was first judicially recognized by the Supreme Court in *Worcester v. Georgia*, in which the Supreme Court held that the state of Georgia had no authority to imprison two white men residing within Cherokee tribal territory with the permission of tribal and federal authorities, who refused to conform to Georgia laws purporting to govern Indian affairs. Chief Justice Marshall stated for the Court:

> The Cherokee nation, then, is a distinct community, occupying its own territory... The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States.

> ... [T]he acts of Georgia are repugnant to the Constitution, laws, and treaties of the United States. They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the Union.

The state of Georgia did not carry out the mandate of the Supreme Court in that case, and lower court decisions have occasionally strayed from *Worcester*'s principles. Nevertheless, the Supreme Court repeatedly has affirmed the *Worcester* decision. Thus, as a general rule, matters affecting Indians in Indian country are excepted from the usual application of state law to the ordinary affairs of state inhabitants.

The *Worcester* decision was based on two principles: First, that the Constitution delegated broad legislative authority over Indian matters to the federal government; and second, that the Cherokee treaties reserved tribal self-government within Cherokee territory free of interference from the state. The Supreme Court has consistently followed the first principle as a rule of constitutional law. The second, being a matter of political policy and judicial interpretation, is subject to change by either Congress or the Supreme Court, but both branches have adhered to the basic holding of *Worcester* despite the vast changes that have taken place in American society since 1832.

The federal legislative and executive policy regarding Indians discussed in *Worcester* was premised on almost total separation of tribal Indians and their territory from the states. This policy has changed in one major respect, because many non-Indians now reside in Indian country. Indians have since become citizens of the United States, and this too has had some effect on the *Worcester* rule. In other respects federal policy has generally adhered to the *Worcester* rule regarding tribal independence from the states.

*Worcester* was decided in a legal and sociopolitical environment that took the separation of whites and Indians as a matter of course. Under the 1802 Trade and Intercourse Act, all persons other than federal government agents needed a passport to travel through Indian territory south of the Ohio River, or survey of, Indian lands was a federal crime. Treaties like the one concluded in 1791 with the Cherokees, discussed in *Worcester*, also provided expressly for the exclusion of United States citizens and allowed the Cherokees to punish non-Indian intruders.
Although the 1834 Trade and Intercourse Act repealed the passport requirement for travel through Indian country except for foreigners, the federal government’s new policy of removing all remaining Indians who lived east of the Mississippi River to the western frontier reinforced the doctrine of separation of Indian tribes from non-Indians. To induce eastern tribes to agree to move, a number of treaties expressly promised never to include the new western lands of the Indians within the limits or jurisdiction of any state or territory. These provisions were geographic as well as jurisdictional, and provisions applicable to what is now Oklahoma endured for many decades.

The removal policy was gradually supplanted by a policy of locating Indians on reservations within organized territories and states. In 1854, the federal government began regularly to seek and obtain treaty clauses providing for allotment of reservation lands to the Indians in severalty, a policy later imposed on most tribes. These changes resulted in lawful land ownership and residence by non-Indians within Indian reservations; non-Indians succeeded to allotments when they became transferable, and purchased or homesteaded "surplus" tribal lands opened to non-Indian acquisition. A parallel development occurred in the Indian Territory, where thousands of whites settled among the tribes.

These changes did not, however, extinguish the special protected status of Indians under federal law. Thus, in 1867, the Supreme Court in *The Kansas Indians* and *The New York Indians* invalidated efforts by two states to tax Indian lands. In each instance the Court relied on one of the principles announced in *Worcester v. Georgia* that state law had no force within the Indian country.

In *The Kansas Indians*, the affected Kansas counties argued that state law should apply because the Indians were no longer separate; the allotment of lands to individual Indians and the sale of "surplus" Indian lands had integrated the Indians with the whites, and the Indians who took allotments had become citizens of Kansas and enjoyed many rights under state law. The Supreme Court rejected these arguments, announcing principles that continue to have vitality.

If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a "people distinct from others," capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority.... This people have their own customs and laws by which they are governed. Because some of those customs have been abandoned, owing to the proximity of their white neighbors, ... but does not tend to prove that their tribal organization is not preserved.... Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization.... [T]heir property is withdrawn from the operation of State laws.

One of the grounds for the Court's decision in *The Kansas Indians* was a clause in the Kansas Statehood Act preserving Indian rights, but a like decision was reached in *The New York Indians* absent such a clause. The Court also discussed another provision in the Kansas Statehood Act, excluding from the boundaries and jurisdiction of Kansas any Indian lands that by the terms of a treaty were not to be included within a state without the Indians' consent. This clause arguably applied to the Shawnees; they had such a treaty provision, but its continuing validity was in doubt. But the Court declined to rely on the clause, which, in any event, had no application to the other tribes in the case.

The holdings of the Kansas and New York cases were reinforced by the decision in *United States v. Kagama* in which the Court sustained the validity of a prosecution of Indians in federal court for murder under the newly enacted Indian Major Crimes Act. The offense occurred on a reservation established in California after statehood by statute and executive order. The defendants argued that state jurisdiction was exclusive, but the Court indicated that even in the absence of federal jurisdiction under the Major Crimes Act, the state courts would lack jurisdiction.

[3] Expanding State Authority Over Non-Indians Within Indian Country

*Worcester v. Georgia* involved whites in Indian tribal territory, but the state laws at issue clearly conflicted with the Cherokee treaties and federal statutes. As the legal exclusion of non-Indians from Indian country was relaxed, the
courts were confronted with cases involving non-Indians in tribal territory but having no direct effect on Indians, their property, or federal policies regarding Indians.

The earliest reported cases involved attempted federal prosecution of whites for crimes against other whites on Indian tribal lands located within the boundaries of a state. These prosecutions were brought pursuant to the "Indian country crimes" statutes of 1817 and 1834, the terms of which included all crimes by non-Indians. Nevertheless, federal circuit courts in two cases dismissed federal charges against whites accused of murdering whites in Indian country. The Supreme Court sustained a similar dismissal in United States v. McBratney. Each decision held that the state courts had exclusive jurisdiction over the controversy. The McBratney opinion was brief and far from clear. It purported to be based on statutory interpretation, but it is difficult to arrive at the Court's result by any ordinary approach to statutory construction. Another possibility is that concerns about constitutional limits on federal power influenced the decision. The decision was likely influenced by the fact that federal Indian laws at the time were mostly focused on intrastate problems. Whatever the basis, it is unlikely that the same result would be reached today in a case of first impression. Nevertheless, the rule of McBratney remains valid as precedent.

Unlike issues involving criminal law, application of state civil laws to non-Indians within Indian country in matters not affecting Indians or their property does not conflict with any federal statute. The earliest Supreme Court cases arose in territories rather than states and involved service of judicial process on whites within Indian reservations at a time when service was considered to be restricted to the boundaries of a court's jurisdiction. In the first case, Harkness v. Hyde, the Supreme Court rendered a decision consonant with the geographically-based exclusion of state authority announced in Worcester v. Georgia. In Harkness, the Court held that the courts of the Territory of Idaho had no jurisdiction to serve process within the boundaries of an Indian reservation. The Court relied on the Idaho Organic Act, which proclaimed that any territory of an Indian tribe "shall be excepted out of the boundaries, and constitute no part of the Territory of Idaho, until the tribe shall signify its consent to the President to be included within the Territory." Finding that the Shoshone Tribe had not agreed to an extension of the Idaho territorial courts' jurisdiction into the boundaries of the tribe's reservation, the Supreme Court concluded that the reservation "was as much beyond the jurisdiction, legislative or judicial, of the government of Idaho, as if it had been set within the limits of another country, or of a foreign state." The Court thus held service of process on a non-Indian defendant within reservation boundaries to be "an unlawful act of the sheriff."

Two years after deciding Harkness, however, the Supreme Court permitted an Idaho territorial court to serve civil process on a non-Indian defendant within the boundaries of an Indian reservation. In Langford v. Monteith the Court held that because no treaty provision excluded the Nez Perce Reservation from the Territory of Idaho, and because "this is a suit between white men," the territorial court could serve process on the non-Indian defendants within reservation boundaries "if the subject-matter was one of which [the court] could take cognizance." The Court purported to qualify and explain its previous decision in Harkness as one in which the Court "inadvertently inferred that the treaty with the Shoshones ... contains a clause excluding the lands of the tribe from territorial or State jurisdiction." This explanation contradicts the stated reasoning of Harkness, in which the Court invalidated the territorial court's jurisdiction not because the Shoshone treaty expressly excluded the reservation from Idaho's boundaries, but because the treaty did not manifest the tribe's consent that the reservation be included within those boundaries. Notwithstanding the confusion in Langford's explanation for effectively altering the result in Harkness, the Court reiterated the exclusion of the Indians and their property from the reach of state or territorial law and process within reservation boundaries, stating that, absent a treaty-based prohibition, "process may run there, however the Indians themselves may be exempt from that jurisdiction."

In subsequent late-nineteenth and early-twentieth century cases, the Supreme Court continued to allow the civil authority of territorial and state governments to reach non-Indians on Indian reservations, but only to the extent the Indians themselves, and the Indians' interests, remained essentially unaffected. In Utah & Northern Ry. Co. v. Fisher, the Court permitted a Idaho territorial court to serve process for tax enforcement purposes on a railroad company that had a right-of-way across an Indian reservation. The Court explained that jurisdiction was valid because it did not interfere with federal protection of the Indians' own rights, and because the company's right-of-way had been "withdrawn from the reservation" by an act of Congress. In Thomas v. Gay, the Court allowed the government of Oklahoma Territory to apply a personal property tax to cattle-grazing by non-Indian lessees of tribal land within the boundaries of an Indian reservation. The Court upheld the tax because a treaty provision excluding the reservation from the limits of any territory or state without the Indians' consent had been repealed by the Oklahoma Organic Act, and because the tax was
"too remote and indirect to be deemed a tax upon the lands or privileges of the Indians."n76 Similar decisions in cases involving state governments soon followed.n77

These decisions, criminal and civil, are confined to activities that do not affect Indians, as the Supreme Court has repeatedly sustained federal and tribal authority over non-Indians in cases involving Indians or Indian property.n78 In Donnelly v. United States, n79 the Court affirmed the federal conviction of a white man for the murder of an Indian within a reservation pursuant to the same Indian country crime statute held inapplicable in McBratney to a crime by one non-Indian against another.n80 State laws have been held inapplicable to non-Indian traders selling to Indians in Indian country.n81 In some cases, state laws have been held inapplicable to non-Indian activities outside Indian country which interfered with protected Indian property rights.n82 In general, non-Indians within Indian country today are therefore subject to ordinary state laws except when Indians, their property, or tribal self-government are affected.n83


The tribal lands involved in Worcester v. Georgia, were aboriginal Cherokee lands reserved by the tribe in treaties, n84 but tribal reservations frequently have been established by other means. n85 As part of the removal process, a number of tribes exchanged their aboriginal lands for other lands, usually farther west. n86 Tribes have also purchased lands, n87 and the federal government has unilaterally established Indian reservations by statute, executive order, and purchase. The policy of tribal autonomy identified in Worcester has generally been applied to any lands set aside by federal authority, by whatever means, for the residence of tribal Indians. n88

There have been many other changes in the governing federal laws and treaties since 1832, but all have assumed the continued force of Worcester's principle of Indian self-government within tribal territory. Beginning with Wisconsin in 1836, n89 the congressional practice in most organic acts establishing new territories was to include clauses expressly preserving Indian rights and federal control over tribes. n90 A similar policy was followed in the Kansas Statehood Act 91 and in the enabling acts for states admitted between 1889 and 1959. n92 As a general matter, these clauses were not necessary, since the Supreme Court has sustained the same federal and tribal authority in states admitted without such clauses. n93 The disclaimer clauses may nonetheless have significance in certain kinds of cases, n94 and are a strong indication of congressional policy. n95

Moreover, when Congress has authorized state authority over Indians within Indian country, it has done so expressly, indicating its understanding that state authority is otherwise lacking. n96 In addition, the General Allotment Act 97 purported to extend state jurisdiction over allottees once the trust period on their allotments expired. n98 The Supreme Court held, however, that the General Allotment Act did not confer state jurisdiction over Indians on fee-patented lands. n99 In fact, Congress has acted in some instances to strengthen and assist tribal self-government directly, most notably by the Indian Reorganization Act. n100 Actions of the executive branch similarly manifest the federal government's continuing policy of supporting tribal autonomy in Indian country. n101

In modern decisions, the Supreme Court has reviewed federal statutes governing Indian affairs and concluded that Worcester v. Georgia's principle of tribal self-government has been maintained. Williams v. Lee n102 involved attempted state-court jurisdiction over an action on a debt arising on the Navajo Reservation, brought by a non-Indian against an Indian couple. The Supreme Court, relying on Worcester, held that the Navajo tribal courts had exclusive jurisdiction over the case. The Court reviewed the changes since Worcester, acknowledging the modifications in federal policy, but held that "the basic policy of Worcester has remained." n103 The Court concluded that "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." n104

In McClanahan v. Arizona State Tax Commission, n105 the Court relied on the rule of Worcester to invalidate a state income tax levied on the earnings of an Indian employed on her reservation. The state argued that the tax did not "infringe" on tribal self-government, referring to Williams v. Lee. n106 The Court held, however, that the activity was "totally within the sphere which the relevant treaty and statutes reserve for the Federal Government and for the Indians themselves," despite the lack of any specific conflict with tribal law. n107

[5] Tribal and State Authority Outside Indian Country
In Indian law, the pervasiveness of tribal governing authority and the preclusion of state jurisdiction are manifested primarily within Indian country. With respect to events occurring outside Indian country, however, nondiscriminatory state laws have been held to apply unless federal law provides otherwise. Contrary federal laws include special provisions authorizing tribal activity outside Indian country, such as treaties that secure off-reservation fishing rights and effectively preclude or restrict state regulation of Indians engaged in exercising those rights. These provisions of federal statutes and treaties ordinarily are interpreted in accordance with the Indian law canons of construction with ambiguities resolved in favor of the existence of Indian rights and the collateral preclusion of state authority.

In some instances, tribal jurisdiction, particularly over members, may extend beyond Indian country. Courts have upheld jurisdiction with respect to child custody disputes, tribal property, and off-reservation treaty rights. Pursuant to its constitutional authority over Indian affairs, Congress may enact policy in particular subject areas broadly determining the respective spheres of tribal and state authority outside Indian country as it has done in passing the Indian Child Welfare Act.

FOOTNOTES:

(n1)Footnote 1. See Ch. 2, § 2.01.

(n2)Footnote 2. See Ch. 4, §§ 4.01, 4.02[1].

(n3)Footnote 3. See Ch. 5, §§ 5.01, 5.02.

(n4)Footnote 4. See, e.g., Johnson v. M’Intosh, 21 U.S. 543 (1823) (power to alienate land except to so-called "discovering" nations); Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (power to enter into treaties with foreign nations); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (power to try and punish non-Indian criminals). See Ch. 4, § 4.02[3].

(n5)Footnote 5. After United States v. Lara, 541 U.S. 193 (2004), it is unclear whether the appropriate distinction for applying general jurisdictional rules in Indian country remains the distinction between tribal members and nonmembers, which the Supreme Court first asserted in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 160-161 (1980), or whether courts should revert to the Indian/non-Indian distinction articulated initially in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978). See Ch. 4, § 4.03.

(n6)Footnote 6. See § 6.04[3].

(n7)Footnote 7. See § 6.01.


(n10)Footnote 10. Williams v. Lee, 358 U.S. 217, 223 (1959). In a later case involving taxation of an Indian on the reservation, the Court stated that the Williams test applies "principally to situations involving non-Indians." McClanahan v. Ariz. State Tax Comm’n, 411 U.S. 164, 179 (1973); see § 6.03.


(n13)Footnote 13. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); see Ch. 4, § 4.02[3][b].

(n14)Footnote 14. See Ch. 9, Criminal Jurisdiction.

(n15)Footnote 15. 18 U.S.C. § 1153. See Ch. 9, § 9.02[2].

(n16)Footnote 16. 18 U.S.C. § 1152. See Ch. 9, § 9.02[1].


(n18)Footnote 18. See Ch. 9, § 9.03[1].

(n20)Footnote 20. "State law" is used in this chapter in the broad sense, to include legislative enactments, judicial jurisdiction, and executive authority. The term "state" includes political subdivisions, such as cities and counties.

(n21)Footnote 21. Worcester v. Georgia, 31 U.S. 515, 562-563 (1832); see also Ch. 4, § 4.01(1).


(n23)Footnote 23. See Williams v. Lee, 358 U.S. 217, 219 (1959); see Ch. 1, § 1.03(4)(a).


(n26)Footnote 26. Some legal rules governing federal enclaves such as military bases, national parks, and the like are similar to those applicable to tribal territories. See David E. Engdahl, State and Federal Power Over Federal Property, 18 Ariz. L. Rev. 283 (1976). The closest analogy is probably military bases under exclusive federal jurisdiction, where military personnel are separately governed in many matters. Parker v. Levy, 417 U.S. 733, 743 (1974). However, while state consent is customarily obtained for exclusive federal jurisdiction over military bases, Fort Leavenworth R. Co. v. Love, 114 U.S. 525 (1885); see also Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938) (federal parks), state consent is not required to establish Indian country. See Ch. 3, § 3.04. In addition, although state laws continue to govern many of the private relationships of persons on military reservations, internal matters among Indians on reservations are governed wholly by tribal law. Compare Pac. Coast Dairy v. Dep't of Agric., 318 U.S. 285, 294 (1943), with Fisher v. Dist. Ct., 424 U.S. 382 (1976). The most significant difference is the distinct retained sovereignty of the tribes, which provides an independent source of legal rules. The pervasive presence of tribal governing authority on Indian reservations makes drawing analogies to legal rules applicable to military reservations especially hazardous.


(n28)Footnote 28. Worcester v. Georgia, 31 U.S. 515, 551-557 (1832). Some past conflicts between Indian rights and local law arose in territories rather than states. The constitutional issue in the case of territories differs from that in the case of states, because territories are subject to the direct legislative control of Congress. U.S. Const. art. IV, § 3, cl. 2. The policy of Indian autonomy, however, has been generally the same in both situations. See, e.g., Ex parte Crow Dog, 109 U.S. 556 (1883); see Ch. 9, §§ 9.02(2), 9.04. Because there are no longer territories subject to Indian policy as such, this chapter discusses the territorial cases only when they bear on the law regarding the states.


(n31)Footnote 31. See § 6.01(3).

(n32)Footnote 32. At the time of Worcester, very few Indians were United States citizens, but citizenship was gradually extended to Indians born in the United States until a 1924 statute categorically made all Indians citizens. Act of June 2, 1924, 43 Stat. 253 (codified as carried forward at 8 U.S.C. § 1401(b)(2)). For a long period, the grant of citizenship to Indians was accompanied by at least partial removal of federal protection. Both Congress and the Supreme Court, however, have settled that citizenship is not incompatible with continued federal protection over Indians and their property, or with the policy of protecting tribal self-government. See McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172-173 (1973). On the other hand, citizenship has enabled reservation Indians to participate in state programs, and this participation makes state laws applicable to them in certain instances. See Ch. 14, § 14.01.
Footnote 33. See § 6.01[4].

Footnote 34. Act of Mar. 30, 1802, § 3, 2 Stat. 139. Section 3 authorized state governors, among others, to issue passports, although other provisions made clear that these passports were for travel only, not for settlement or trade.


Footnote 37. Act of June 30, 1834, § 6, 4 Stat. 729; cf. id. § 29, 4 Stat. 729, 734 (retaining prior Act for tribes residing east of the Mississippi); see also Ch. 1, § 1.03[4][b].

Footnote 38. See Act of May 28, 1830, § 2, 4 Stat. 411; see also Ch. 1, § 1.02[4][a].


Footnote 40. See Ch. 4, § 4.07[1]. Some of the areas set aside by these treaties were in what is now eastern Kansas. The Organic Act establishing the territories of Nebraska and Kansas respected "extraterritorial" treaty provisions by expressly omitting any such treaty areas from the territories, both geographically and legally. Act of May 30, 1854, §§ 1, 19, 10 Stat. 277. The Act contained two provisions concerning Indians: One respecting the treaty provisions referred to, and another preserving Indian rights and the right of federal control over Indians of all tribes within the territories. Id. § 37, 10 Stat. 277. The same two provisions appeared in clauses of subsequent territorial organic acts (despite the absence of any applicable treaty provisions). Act of Feb. 28, 1861, § 1, 12 Stat. 172 (Colo.); Act of Mar. 2, 1861, § 1, 12 Stat. 209 (Nev.); Act of Mar. 2, 1861, § 1, 12 Stat. 239 (Dakota); Act of Mar. 3, 1863, § 1, 12 Stat. 808 (Idaho); Act of May 26, 1864, § 1, 13 Stat. 85 (Mont.). The provisions were also repeated in the act admitting Kansas as a state. Act of Jan. 29, 1861, § 1, 12 Stat. 126.

Footnote 41. See Francis Paul Prucha, American Indian Policy in Crisis 103-131 (Okla. Press 1976); see also Ch. 1, § 1.03[6][a].

Footnote 42. See Ch. 4, §§ 1.03[6], 1.04; Ch. 16, § 16.03.

Footnote 43. See Ch. 4, § 4.07[1][a].

Footnote 44. See Rennard Strickland, Fire and the Spirits 175-182 (Okla. Press 1975); see also Ch. 4, § 4.07[1].

Footnote 45. The Kansas Indians, 72 U.S. 737 (1867).


Footnote 49. The Kansas Indians, 72 U.S. 737, 755-757 (1867).

Footnote 50. The Kansas Indians, 72 U.S. 737, 754 (1867).

Footnote 51. The Kansas Indians, 72 U.S. 737, 755 (1867).


Footnote 53. Act of Mar. 3, 1885, § 9, 23 Stat. 362 (codified as amended at 18 U.S.C. §§ 1153, 3242); see Ch. 5, § 5.01[4]. Kagama was the earliest Supreme Court decision applying Worcester's principles to a reservation established by unilateral federal action and within a state.


(n56) Footnote 56. Act of June 30, 1834, § 25, 4 Stat. 729; Act of Mar. 3, 1817, 3 Stat. 383. The principal terms of these laws remain in force as 18 U.S.C. § 1152; see Ch. 9, § 9.02[1].

(n57) Footnote 57. United States v. Ward, 28 F. Cas. 397 (C.C.D. Kan. 1863) (No. 16,639); United States v. Bailey, 24 F. Cas. 937 (C.C.Tenn. 1834) (No. 14,495). Bailey held that the Commerce Clause did not give the United States authority over a white-against-white murder in the Cherokee territory in Tennessee, and the 1817 Indian territory crimes statute was thus unconstitutional as applied.


(n59) Footnote 59. The Court wrote that the Colorado Enabling Act repealed "the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith." United States v. McBratney, 104 U.S. 621, 623 (1882). But the opinion did not specify what laws it held repealed and why. If the statute repealed was the 1834 Indian Country Crimes Act as applied to a crime by a non-Indian against a non-Indian victim within the state, it was a departure from the usual rules on repeals by implication, because the Enabling Act did not address the subject of Indian affairs. See Ex parte Crow Dog, 109 U.S. 556, 570-572 (1883) (applying presumption against repeal by implication to another provision of the same statute). The McBratney Court emphasized the "equal footing" language in the Colorado Enabling Act, but that could not sustain the repeal by implication argument unless constitutional considerations came into play.

(n60) Footnote 60. The opinion made no direct reference to any constitutional issue. But it relied on the standard clause in the Colorado Enabling Act admitting Colorado "upon an equal footing with the original States," United States v. McBratney, 104 U.S. 621, 623 (1882). The only logical relevance of that view would be the implication that federal jurisdiction was lacking over such crimes in the "original States" as a matter of constitutional law. For a critique of this constitutional assessment, see Robert N. Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503, 526 n.103 (1977).

(n61) Footnote 61. The Indian Trade and Intercourse Acts of 1790-1834 dealt almost exclusively with interracial matters in Indian country. See Ch. 1, § 1.03.


(n64) Footnote 64. Harkness v. Hyde, 98 U.S. 476 (1878).


(n70) Footnote 70. Langford v. Monteith, 102 U.S. 145, 147 (1880).

(n71) Footnote 71. See Harkness v. Hyde, 98 U.S. 476, 478 (1878) (explaining that Idaho territorial court lacked jurisdiction because "[n]o assent was given by [the Shoshone] treaty that the territory constituting the reservation should be brought under the jurisdiction, or be included within the limits of, Idaho").


right-of-way across Indian reservation because company's rights "were taken out of the reservation" by congressional statute).


(n76)Footnote 76. *Thomas v. Gay*, 169 U.S. 264, 270-274 (1898); see also *Wagoner v. Evans*, 170 U.S. 588, 591 (1898) (a territorial tax on non-Indian cattle-grazing activity on Indian reservation does not interfere with tribal rights or federal policies).

(n77)Footnote 77. *See, e.g., Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 127, 129-130 (1906) (rejecting a claim of federal question jurisdiction based on argument that state taxation of on-reservation cattle-grazing by plaintiff missionary society was federally precluded by virtue of society's devotion "to purposes of charity among the Indians").

(n78)Footnote 78. See § 6.02[2][a]. *But see Nevada v. Hicks*, 533 U.S. 353 (2001) (tribal court lacked jurisdiction over state conservation officers sued for allegedly committing tribal torts and federal civil rights violations in course of searching tribal member's on-reservation property for evidence of alleged off-reservation crime); *see also Ch. 4, § 4.02[3][c][ii]*.


(n80)Footnote 80. Both cases involved the Indian Country Crimes Act, 18 U.S.C. § 1152. See *Ch. 9*, § 9.02[1].


(n82)Footnote 82. See *e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *United States v. Winans*, 198 U.S. 371 (1905); *see § 6.01[5]*.


(n85)Footnote 85. See *Ch. 3, § 3.04[c][ii]*, Ch. 15, § 15.04.


(n87)Footnote 87. *See Sac & Fox Tribe v. Licklider*, 576 F.2d 145 (8th Cir. 1978) (describing Sac and Fox Reservation in Iowa); *United States v. Wright*, 53 F.2d 300 (4th Cir. 1931) (describing Eastern Cherokee Reservation).

(n88)Footnote 88. See *e.g., Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993); *United States v. John*, 437 U.S. 634 (1978); *Arizona v. California*, 373 U.S. 546 (1963); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975); *see Ch. 3, § 3.04*. The Indian Reorganization Act (see *Ch. 4, § 4.04[3][a]*) was submitted to all reservation tribes regardless of the method by which the reservations were established. Theodore H. Haas, Ten Years of Tribal Government Under the IRA (1947) (Tribal Relations Pamphlet, U.S. Indian Svc. [currently the BIA]). Congress, by enacting Public Law 280, 18 U.S.C. § 1162; 25 U.S.C. §§ 1321-1326; 28 U.S.C. § 1360, followed the same policy. For example, a principal state in which the Act applies is California, where all reservations were set aside by federal statute, executive order, or purchase.

(n89)Footnote 89. *Act of Apr. 20, 1836*, § 1, 5 Stat. 10 (Wis.).


(n91)Footnote 91. *Act of Jan. 29, 1861*, § 1, 12 Stat. 126 (Kan.).


The equal footing doctrine mandates that the enabling act protective clauses not reserve any greater federal constitutional power over new states than over the original states. In Pollard's Lessee v. Hagan, 44 U.S. 212 (1845), the Court held that the Constitution mandates constitutional equality of new states with the original thirteen states. Therefore, the enabling act clauses have only legislative force. Application of the equal footing doctrine to Indian cases has a rather tortured history. Compare, e.g., United States v. 43 Gallons of Whiskey, 93 U.S. 188, 197 (1876) (sustaining a federal Indian country liquor prohibition prosecution, reversing a lower court dismissal based expressly on the equal footing principle), with United States v. McBratney, 104 U.S. 621 (1882) (relying on the doctrine to deny federal jurisdiction over certain crimes); and Ward v. Race Horse, 163 U.S. 504 (1896) (relying on the equal footing as an alternative basis to hold that an off-reservation treaty hunting right had been extinguished). After much confusion, it is now established that the equal footing doctrine cannot be invoked to bar the exercise of tribal rights. See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204-205 n.7 (1999) (rejecting application of the doctrine to bar off-reservation Indian treaty rights) (collecting cases); Dick v. United States, 208 U.S. 340, 359 (1908) (rejecting equal footing as a basis to find abrogation of Indian rights sub silentio upon admission of a new state); Winters v. United States, 207 U.S. 564, 577-578 (1908) (same). See generally Ch. 18, § 18.07[4]; Ch. 19, § 19.02. These decisions recognize that the federal power over Indian affairs is sufficient to render the laws of the original states invalid in Indian country. See Worcester v. Georgia, 31 U.S. 515 (1832) Indian rights depend on determination of the scope of federal treaties and laws, and the equal footing doctrine should be irrelevant to that determination. But see Ch. 15, § 15.05[3][b] (discussing the Court's use of equal footing principle in cases addressing title to reservation lands under navigable waterways).

(n94)Footnote 94. When the issue is whether a later act of Congress confers jurisdiction on the state, but the later act does not expressly refer to these statutory disclaimers, the act could be held inapplicable to states having such clauses. See State v. Lohnes, 69 N.W. 2d 508 (N.D. 1955); cf. 25 U.S.C. § 1324 (allowing states to remove legal impediments in state constitutions or statutes to assumption of jurisdiction over Indians, notwithstanding provisions of enabling acts).

(n95)Footnote 95. See, e.g., Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g', P.C., 467 U.S. 138, 142 (1984) (observing that principle that Indian territories are "beyond the legislative and judicial jurisdiction of state governments" is reflected in enabling act for North Dakota).


(n97)Footnote 97. See Ch. 1, § 1.04; Ch. 16, § 16.03.


(n100)Footnote 100. 25 U.S.C. §§ 461-479; see Ch. 1, § 1.07.

(n101)Footnote 101. See, e.g., Memorandum on Government-to-Government Relationship with Tribal Governments, 40 Weekly Comp. Pres. Doc. 2106 (2004) (memorandum of President George W. Bush affirming that executive branch "is committed to continuing to work with federally recognized tribal governments on a government-to-government basis and strongly supports and respects tribal sovereignty and self-determination for tribal governments in


(n104)Footnote 104. Williams v. Lee, 358 U.S. 217, 220 (1959); see also § 6.03[2][a].


(n108)Footnote 108. See Ch. 3, § 3.04.


(n110)Footnote 110. See Ch. 18, § 18.04[3][b].

(n111)Footnote 111. See Ch. 2, § 2.02.

(n112)Footnote 112. See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196, 200, 206 (1999); Antoine v. Washington, 420 U.S. 194, 199-200 (1975); United States v. Winans, 198 U.S. 371 (1905); cf. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 465 (1995) (in determining whether treaty provision precludes application of state tax to tribal members residing outside Indian country, Supreme Court is "mindful that treaties should be construed liberally in favor of the Indians"). But see Mescalero Apache Tribe v. Jones, 411 U.S. 145, 156-157 (1973) (not mentioning Indian law canons and instead applying canon requiring "clear statutory guidance" before exemption from nondiscriminatory state tax will be implied in off-reservation setting, but limiting this approach to special context in which statutory provisions of 1934 Indian Reorganization Act were "designed to encourage tribal enterprises to enter the white world on a footing of equal competition") (citation omitted).

(n113)Footnote 113. See John v. Baker, 982 P.2d 738 (Alaska 1999) (child custody dispute); Chilkat Indian Village v. Johnson, 870 F.2d 1469 (9th Cir. 1989) (dispute over ownership of tribal property); Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974); United States v. Shappy, 770 F.2d 816, 819 (9th Cir. 1985) (regulation of off-reservation treaty rights). See also § 6.02[1], Ch. 18, § 18.04[3][a].

(n114)Footnote 114. See, e.g., United States v. 43 Gallons of Whiskey, 93 U.S. 188 (1876) (affirming Congress's power under Indian Commerce Clause to enact preemptive federal regulations prohibiting liquor trade outside Indian country).

(n115)Footnote 115. See Ch. 11, Indian Child Welfare Act.