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Cohen's Handbook of Federal Indian Law

CHAPTER 6 TRIBAL/STATE RELATIONSHIP

1-6 Cohen's Handbook of Federal Indian Law § 6.01

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

[Go To Supp]

[1] Introduction

The foundational concepts of Indian lawn1 suggest that absent a controlling congressional statute, jurisdiction over persons, property, and events in Indian country is retained by tribes.n2 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.n3 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.n4

The general approach to determining which government has jurisdiction is relatively simple in the case of tribal member Indians in Indian country.n5 Unless there is a specific federal law stating otherwise,n6 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.n7

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 a conflict with federal laws and policies. The courts have recognized, however, "the State's legitimate interests in regulating the affairs of non-Indians"n8 when Indians or their property are not substantially affected.

In *Williams v. Lee*,n9 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.n10 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.n11 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.n12 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.n13

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.n14 The Major Crimes Actn15 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)n16 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.n17 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.n18

[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."n19 Accordingly, state lawn20 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.n21 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.
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> ... .
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> ... [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.n22

The state of Georgia did not carry out the mandate of the Supreme Court in that case,n23 and lower court decisions have occasionally strayed from *Worcester*'s principles.n24 Nevertheless, the Supreme Court repeatedly has affirmed the *Worcester* decision.n25 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.n26

The *Worcester* decision was based on two principles: First, that the Constitution delegated broad legislative authority over Indian matters to the federal government;n27 and second, that the Cherokee treaties reserved tribal self-government within Cherokee territory free of interference from the state.n28 The Supreme Court has consistently followed the first principle as a rule of constitutional law.n29 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.n30

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.n31 Indians have since become citizens of the United States, and this too has had some effect on the *Worcester* rule.n32 In other respects federal policy has generally adhered to the *Worcester* rule regarding tribal independence from the states.n33

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.n34 Settlement on, or survey of, Indian lands was a federal crime.n35 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.n36

Although the 1834 Trade and Intercourse Act repealed the passport requirement for travel through Indian country except for foreigners,n37 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.n38 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.n39 These provisions were geographic as well as jurisdictional, and provisions applicable to what is now Oklahoma endured for many decades.n40

The removal policy was gradually supplanted by a policy of locating Indians on reservations within organized territories and states.n41 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.n42 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,n43 where thousands of whites settled among the tribes.n44

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*,n45 and *The New York Indians*,n46 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*,n47 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.n48 The Supreme Court rejected these arguments, announcing principles that continue to have vitality:n49

> 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,n50 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.n51

The holdings of the Kansas and New York cases were reinforced by the decision in *United States v. Kagama*,n52 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.n53 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.n54

[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.n55 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 affect 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.n56 Nevertheless, federal circuit courts in two cases dismissed federal charges against whites accused of murdering whites in Indian country,n57 and the Supreme Court sustained a similar dismissal in *United States v. McBratney*.n58 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.n59 Another possibility is that concerns about constitutional limits on federal power influenced the decision.n60 The decision was likely influenced by the fact that federal Indian laws at the time were mostly focused on interracial problems.n61 Whatever the basis, it is unlikely that the same result would be reached today in a case of first impression.n62 Nevertheless, the rule of *McBratney* remains valid as precedent.n63

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*,n64 the Supreme Court rendered a decision consonant with the geographically-based exclusion of state authority announced in *Worcester v. Georgia*.n65 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."n66 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."n67 The Court thus held service of process on a non-Indian defendant within reservation boundaries to be "an unlawful act of the sheriff."n68

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."n69 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."n70 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.n71 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."n72

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*,n73 the Court permitted a Idaho territorial court to serve process for tax enforcement purposes on a railroad company that had a right-of-away 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.n74 In *Thomas v. Gay*,n75 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

[4] The Continuing Policy of Tribal Autonomy in Indian Country

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 Actn91 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 Actn97 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 leave 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.n108 With respect to events occurring outside Indian country, however, nondiscriminatory state laws have been held to apply unless federal law provides otherwise.n109 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.n110 These provisions of federal statutes and treaties ordinarily are interpreted in accordance with the Indian law canons of construction,n111 with ambiguities resolved in favor of the existence of Indian rights and the collateral preclusion of state authority.n112

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.n113 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,n114 as it has done in passing the Indian Child Welfare Act.n115

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.

(n8)Footnote 8. *McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973)* .

(n9)Footnote 9. *Williams v. Lee, 358 U.S. 217 (1959)* .

(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.

(n11)Footnote 11. *See, e.g., Strate v. A-1 Contractors, 520 U.S. 438 (1997)* ; *Montana v. United States, 450 U.S. 544 (1981)* ; *see* Ch. 4, § 4.02[3].

(n12)Footnote 12. *Montana v. United States, 450 U.S. 544, 565-566 (1981)* .

(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].

(n17)Footnote 17. *United States v. McBratney, 104 U.S. 621 (1882)* .

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

(n19)Footnote 19. *Rice v. Olson, 324 U.S. 786, 789 (1945)* .

(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].

(n22)Footnote 22. *Worcester v. Georgia, 31 U.S. 515, 561-562 (1832)* .

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

(n24)Footnote 24. *See, e.g., United States v. Cisna, 25 F. Cas. 422 (C.C.D. Ohio 1835)* (No. 14,795); *State v. Doxtater, 2 N.W. 439 (Wis. 1879)* . The most direct illustration of this point is the fact that leading Supreme Court decisions reaffirming *Worcester* have often involved reversal of lower courts. *See, e.g., McClanahan v. Ariz. State Tax Comm'n, 484 P.2d 221 (Ariz. App. 1971)* , *rev'd, McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973)* ; *Williams v. Lee, 319 P.2d 998 (Ariz. App. 1958)* , *rev'd, Williams v. Lee, 358 U.S. 217 (1959)* .

(n25)Footnote 25. *See, e.g., Montana v. Blackfeet Tribe, 471 U.S. 759 (1985)* ; *United States v. Mazurie, 419 U.S. 544 (1975)* ; *McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973)* ; *Williams v. Lee, 358 U.S. 217 (1959)* . *But see Nevada v. Hicks, 533 U.S. 353, 361-362 n.4 (2001)* (dicta; suggesting limitations on *Worcester*'s holding), discussed at Ch. 4, § 4.02[3][c][ii].

(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. Lowe, 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.

(n27)Footnote 27. *Worcester v. Georgia, 31 U.S. 515, 558-560 (1832)* .

(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.

(n29)Footnote 29. *See, e.g., United States v. Lara, 541 U.S. 193 (2004)* ; *United States v. John, 437 U.S. 634 (1978)* ; *United States v. McGowan, 302 U.S. 535 (1938)* ; *United States v. Sandoval, 231 U.S. 28 (1913)* ; *United States v. Kagama, 118 U.S. 375 (1886)* ; *see* Ch. 5, §§ 5.01, 5.02.

(n30)Footnote 30. *See, e.g., Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993)* ; *New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)* ; *United States v. Mazurie, 419 U.S. 544 (1975)* ; *McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973)* ; *Williams v. Lee, 358 U.S. 217 (1959)* ; *see* § 6.01[4].

(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.

(n33)Footnote 33. *See* § 6.01[4].

(n34)Footnote 34. Act of Mar. 30, 1802, § 3, *2 Stat. 139.* Section 3 authorized state governors, among others, to issue passports, although other provisions make clear that these passports were for travel only, not for settlement or trade.

(n35)Footnote 35. Act of Mar. 30, 1802, § 5, *2 Stat. 139.*

(n36)Footnote 36. Treaty with the Cherokees, 1791, art. 8, *7 Stat. 39, cited in Worcester v. Georgia, 31 U.S. 515, 556 (1832)* .

(n37)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].

(n38)Footnote 38. *See* Act of May 28, 1830, § 2, *4 Stat. 411; see also* Ch. 1, § 1.02[4][a].

(n39)Footnote 39. *See, e.g.*, Treaty with the New York Indians, 1838, art. 4, *7 Stat. 550* ; Treaty with the Cherokees, 1835, art. 5, *7 Stat. 478;* Treaty with the Ottoways, 1831, art. 9, *7 Stat. 359.*

(n40)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.*

(n41)Footnote 41. *See* Francis Paul Prucha, American Indian Policy in Crisis 103-131 (Okla. Press 1976); *see also* Ch. 1, § 1.03[6][a].

(n42)Footnote 42. *See* Ch. 1, §§ 1.03[6], 1.04; Ch. 16, § 16.03.

(n43)Footnote 43. *See* Ch. 4, § 4.07[1][a].

(n44)Footnote 44. *See* Rennard Strickland, Fire and the Spirits 175-182 (Okla. Press 1975); *see also* Ch. 4, § 4.07[1].

(n45)Footnote 45. *The Kansas Indians, 72 U.S. 737 (1867)* .

(n46)Footnote 46. *The New York Indians, 72 U.S. 761 (1867) . See also Fellows v. Blacksmith, 60 U.S. 366 (1856)* (interpreting rights under same treaty at issue in *The New York Indians*).

(n47)Footnote 47. *Worcester v. Georgia, 31 U.S. 515 (1832)* .

(n48)Footnote 48. *The Kansas Indians, 72 U.S. 737, 738-751 (1867)* (abstract of the evidence); *Blue Jacket v. Bd. of Comm'rs, 18 L. Ed. 667, 669-671 (1867)* (abstract of respondents' brief).

(n49)Footnote 49. *The Kansas Indians, 72 U.S. 737, 755-757 (1867)* .

(n50)Footnote 50. *The Kansas Indians, 72 U.S. 737, 754 (1867)* .

(n51)Footnote 51. *The Kansas Indians, 72 U.S. 737, 755 (1867)* .

(n52)Footnote 52. *United States v. Kagama, 118 U.S. 375 (1886)* .

(n53)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.

(n54)Footnote 54. *United States v. Kagama, 118 U.S. 375, 384-385 (1886)* .

(n55)Footnote 55. *See Worcester v. Georgia, 31 U.S. 515, 561-562 (1832)* .

(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.

(n58)Footnote 58. *United States v. McBratney, 104 U.S. 621 (1882)* .

(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 assist 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.

(n62)Footnote 62. For a view that Congress has authority to overrule *United States v. McBratney, 104 U.S. 621 (1882)* , see H.R. Rep. No. 94-1038, 94th Cong., 2d Sess. 2-3 (1976); *see also United States v. Mazurie, 419 U.S. 544, 553-556 (1975)* (sustaining congressional authority to delegate Indian country liquor licensing authority to Indian tribe over non-Indian tavern on fee-patented land); *cf. United States v. Lara, 541 U.S. 193 (2004)* (sustaining congressional power to relax judicially imposed restrictions on scope of inherent tribal sovereignty in Indian country).

(n63)Footnote 63. *See, e.g., United States v. Wheeler, 435 U.S. 313, 324 n.21 (1978)* ; *United States v. Antelope, 430 U.S. 641, 644 n.4 (1977)* ; *New York ex rel. Ray v. Martin, 326 U.S. 496 (1946)* ; *Draper v. United States, 164 U.S. 240 (1896)* .

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

(n65)Footnote 65. *Worcester v. Georgia, 31 U.S. 515 (1832)* .

(n66)Footnote 66. *Harkness v. Hyde, 98 U.S. 476, 477 (1878)* (quoting Act of Mar. 3, 1863, *12 Stat. 808).*

(n67)Footnote 67. *Harkness v. Hyde, 98 U.S. 476, 478 (1878)* .

(n68)Footnote 68. *Harkness v. Hyde, 98 U.S. 476, 478 (1878)* .

(n69)Footnote 69. *Langford v. Monteith, 102 U.S. 145, 147 (1880)* .

(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").

(n72)Footnote 72. *Langford v. Monteith, 102 U.S. 145, 147 (1880)* .

(n73)Footnote 73. *Utah & N. Ry. Co. v. Fisher, 116 U.S. 28 (1885)* .

(n74)Footnote 74. *Utah & N. Ry. Co. v. Fisher, 116 U.S. 28, 31-32 (1885)* ; *see also Maricopa & Phoenix R.R. Co. v. Arizona, 156 U.S. 347, 352 (1895)* (validating judicial process to enforce Arizona territorial tax on railroad company's

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

(n75)Footnote 75. *Thomas v. Gay, 169 U.S. 264 (1898)* .

(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].

(n79)Footnote 79. *Donnelly v. United States, 228 U.S. 243 (1913)* .

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

(n81)Footnote 81. *Warren Trading Post Co. v. Ariz. State Tax Comm'n, 380 U.S. 685 (1965)* (state sales tax). *But see Dep't of Taxation & Fin. v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994)* (Indian trader statutes do not facially preempt state regulations imposing tax-collection and recordkeeping requirements on federally licensed Indian traders with respect to on-reservation sales of cigarettes to nonmembers, where state tax is levied on purchasers); *see also* § 6.03[2][a].

(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].

(n83)Footnote 83. *See United States v. Mazurie, 419 U.S. 544, 558 (1975)* ; *Williams v. Lee, 358 U.S. 217 (1959)* .

(n84)Footnote 84. *See Worcester v. Georgia, 31 U.S. 515 (1832)* .

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

(n86)Footnote 86. Most of the rights in tribal lands in what is now Oklahoma and Kansas were established in this way. *See, e.g., Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)* ; *The Kansas Indians, 72 U.S. 737 (1867)* . In the post-treaty period, after 1871, many reservations were set aside in congressionally ratified agreements between the United States and the tribes. *See, e.g., Idaho v. United States, 533 U.S. 262 (2001)* ; *Winters v. United States, 207 U.S. 564 (1908)* .

(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.).

(n90)Footnote 90. *See, e.g.*, Act of Aug. 14, 1848, § 1, *9 Stat. 323* (Or.); Act of June 12, 1838, § 1, *5 Stat. 235* (Iowa).

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

(n92)Footnote 92. Pub. L. No. 85-508, § 4, *72 Stat. 339 (1958)* (Alaska); Act of June 20, 1910, §§ 2, 20, *36 Stat. 557* (N.M. and Ariz.); Act of June 16, 1906, § 1, *43 Stat. 267* (Okla.); Act of July 16, 1894, § 3, *28 Stat. 107* (Utah); Act of Feb. 22, 1889, § 4, *25 Stat. 676* (N.D., S.D., Mont., Wash.). The practice between 1889 and 1959 was to require that a new state disclaim jurisdiction over Indian lands in its constitution and acknowledge the authority of the United States over those lands. Idaho and Wyoming were admitted during this period without enabling acts, because their territorial governments initiated statehood and proposed constitutions in compliance with federal policies. Both of their proposed constitutions contained Indian disclaimers, and these constitutions were then ratified by Congress in statehood acts. Act of July 10, 1890, *26 Stat. 222* (Wyo.); Act of July 3, 1890, *26 Stat. 215* (Idaho); *see also Idaho v. United States, 533 U.S. 262, 271 (2001)* (recounting passage of Idaho Statehood Act). Presumably the legal effect is the same as in other states.

(n93)Footnote 93. Georgia preceded the *Union, Worcester v. Georgia, 31 U.S. 515 (1832)* , as did *New York, The New York Indians, 72 U.S. 761 (1867)* ; *see* § 6.01[2]; *see also United States v. John, 437 U.S. 634 (1978)* (Miss.); *Bryan v. Itasca County, 426 U.S. 373 (1976)* (Minn.); *United States v. McGowan, 302 U.S. 535 (1938)* (Nev.); *Donnelly v. United States, 228 U.S. 243 (1913)* (Cal.); *United States v. Kagama, 118 U.S. 375 (1886)* (Cal.).

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).

(n96)Footnote 96. *See, e.g.,* Public Law-280, Pub. L. No. 83-280, *67 Stat. 588* (codified as amended at *18 U.S.C. § 1162*; *25 U.S.C. §§ 1321-1326*; *28 U.S.C. § 1360*); Indian Gaming Regulatory Act of 1988, *25 U.S.C. §§ 2701-2721.*

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

(n98)Footnote 98. *25 U.S.C. § 349.*

(n99)Footnote 99. *Moe v. Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 477-479 (1976)* .

(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

the United States"); Memorandum of the President, *59 Fed. Reg. 22,951 (1994)* (Government-to-Government Relations with Native American Tribal Governments) (Pres. William J. Clinton).

(n102)Footnote 102. *Williams v. Lee, 358 U.S. 217 (1959)* .

(n103)Footnote 103. *Williams v. Lee, 358 U.S. 217, 219 (1959)* ; *see also Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123-124 (1993)* ; *Montana v. Blackfeet Tribe, 471 U.S. 759, 764-765 (1985)* ; *New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-332 (1983)* . *See* § 6.01[4].

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

(n105)Footnote 105. *McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973)* .

(n106)Footnote 106. Several lower courts after *Williams v. Lee, 358 U.S. 217 (1959)* , had focused on the word "infringed" in that opinion, and construed it narrowly to mean direct interference with the tribal government itself. The lower court in *McClanahan* was among these. *See McClanahan v. Ariz. State Tax Comm'n, 484 P.2d 221 (Ariz. App. 1971)* , *rev'd, McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973)* . The Supreme Court rejected this argument and construed the term "infringement" in *Williams v. Lee* to deal "principally with situations involving non- Indians." *McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 179 (1973)* . The *Williams* decision itself was a private case, so direct interference with tribal government is not required to exclude state law. *See also* § 6.03.

(n107)Footnote 107. *McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 179-180 (1973)* .

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

(n109)Footnote 109. *Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)* ; *Organized Village of Kake v. Egan, 369 U.S. 60 (1962)* ; *cf. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995)* ; *Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 124-126 (1993)* . Both *Mescalero Apache Tribe* and *Organized Village of Kake* relied in part on *Ward v. Race Horse, 163 U.S. 504 (1896)* , for the proposition that state laws ordinarily apply to Indians outside the reservation context. *See Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-149 (1973)* ; *Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962)* . The Supreme Court's partial overruling of *Race Horse* in *Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204-205 n.7 (1999)* , has undermined this proposition as applied to situations in which federal law confers off-reservation rights.

(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. Sohappy, 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.*