CHAPTER 6
THE SCOPE OF STATE POWER OVER INDIAN AFFAIRS

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SECTION 1. INTRODUCTION

That state laws have no force within the territory of an Indian tribe in matters affecting Indians, is a general proposition. It has not been successively established, and at least in 1856 United States Supreme Court, since that Court decided, in Worcester v. Georgia, that the State of Georgia had no right to imprisonment a white man residing on an Indian reservation, with the consent of tribal and federal authorities, who refused to conform to state laws governing Indian affairs. In that case the court declared, per Marshall, C. J.:

The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokee themselves, or in conformity with treaties, and with the acts of Congress. (P. 500.)

The State of Georgia never did carry out the mandate of the Supreme Court in this case, and many other state courts and state legislatures since this decision in this case have likewise refused to acknowledge the implications of the decision. Nevertheless, when critical cases have been presented to the United States Supreme Court, the principles laid down in Worcester v. Georgia have been repeatedly reaffirmed.

The reasons judicially advanced for this incapacity of the states to legislate on Indian affairs have been variously formulated:

1. Specific bodies of state law are dealt with in other chapters of this work. Thus, state laws involving questions of discrimination against Indians, in the matter of franchise or in other respects, are dealt with in Chapter 8. State laws of inheritance are considered in Chapters 10 and 11. State laws on taxation are analyzed in Chapter 13. Those state laws which deal with Indian hunting and fishing rights are treated in Chapter 14. Section 7. Chapter 15 touches upon state laws relating to recognition or protection of tribal property. Chapters 18 and 19 deal respectively with criminal and civil jurisdiction of state courts as well as federal and tribal courts.


3. For an analysis of these cases, see F. S. Cohen, Indian Rights and the Federal Courts (1940). 24 Minn. L. Rev. 145.

4. The omission of this comma in the official United States Report has created some confusion as to the meaning of this sentence. Without the comma, the sentence seems to suggest that the weakness and helplessness of the Indians is due in part to treaties and that it is because of the weakness and helplessness of the Indians that the Federal Government may exercise the power of protection. With the comma, the sentence suggests rather that the factual situation of weakness and helplessness is only part of the basis of legal power, the other, and more important, basis being the obligations assumed by the United States towards Indian tribes by treaty. This comma is found in the Supreme Court Reporter edition of the opinion (6 Sup. Ct. 1109).
The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because it is necessary therein that the laws shall exercise their control within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes. (Pp. 383-385.)

Insofar as this argument relies upon treaties it is legally unassailable, for the treaties made between the Federal Government and the Indian tribes are part of the supreme law of the land and, as we have already noted, these treaties quite generally promised the tribes, either expressly or by implication, that they would not be subject to the sovereignty of the individual states, but would be subject only to the Federal Government.

On the other hand, insofar as the opinion in the Kagama case relies upon the factual helplessness of the Indians, the eminence of the state populations, and the impossibility of state control, serious questions may be raised both as to the validity of the argument and as to its scope and application, when the factual premises noted no longer correspond to the facts, it would, however, be a digression at this point to analyze the various doctrines advanced in support of the conclusion that within the Indian country in matters affecting Indians, federal law applies to the exclusion of state law. 9

It is enough for the present to note that 'the domain of power of the Federal Government over Indian affairs marked out by the federal decisions is so complete that, as a practical matter, the federal courts and federal administrative officials now generally proceed from the assumption that Indian affairs are matters of federal, rather than state, concern, unless the contrary is shown by act of Congress or special circumstances.

This, without questioning the constitutional doctrine that states possess original and complete sovereignty over their own territories save insofar as such sovereignty is limited by the Federal Constitution, a sense of realism must compel the conclusion that control of Indian affairs has been delegated; under the Constitution, to the Federal Government and that state jurisdiction in any matters affecting Indians can be upheld only if one of two conditions is met: either that Congress has expressly delegated to the state, or recognized in the state, some power of government respecting Indians; or that a question involving Indians involves non-Indians to a degree which calls into play the jurisdiction of a state government. Of these two situations, the former is undoubtedly more definite and therefore simpler to analyze. Such an analysis requires a listing of the acts of Congress which confer upon the states, or recognize in the states, specific powers of government with respect to Indians.

For further discussion of these doctrines see Chapter 4, sec. 2, and Chapter 5.

SECTION 2. FEDERAL STATUTES ON STATE POWER

It will be convenient to group the federal statutes which grant or recognize state power over Indian affairs into two categories: (a) Those that apply throughout the United States; and (b) those that apply only to particular tribes or areas.

A. GENERAL STATUTES

The most important field in which State laws have been applied to Indians by congressional fiat is the field of inheritance. In the absence of federal legislation it is established that all questions relating to descent and distribution of the property of individual Indians are governed by the laws and customs of the tribe to which the Indians belong. 10 A given tribe may, of course, adopt such state laws as it considers suitable, and it may do this either by ordinance, 11 or, in conjunction with the Federal Government, by treaty. 12 Without such action of the tribal or the Federal Government, state laws of inheritance have no application to Indians residing on an Indian reservation.

This situation, however, has been greatly changed by congressional legislation affecting Indians to whom reservation lands have been allotted in severalty. The most important provision of this congressional legislation is contained in Section 5 of the General Allotment Act, 13 providing:

That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottee.

This section as originally enacted, also provided:

That the law of descent and partition in force in the state or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as otherwise provided and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act.


The Confederated Wea, Kaskaekia, Peoria, Piankeshaw, and Western Miamies were allotted under the Act of March 2, 1889, 25 Stat. 1013, but by that Act the provisions of the General Allotment Act were extended to these tribes. The same is true as to other tribes allotted under special acts of Congress, such for instance as the Chippewas of Minnesota, who were allotted under the Act of January 14, 1889, 25 Stat. 642. In accordance with the provisions of the General Allotment Act the Quapaw Indians were allotted under the Act of March 2, 1895, 28 Stat. 676, 507, without reference to the General Allotment Act and would seem to have been excluded from the provisions of that Act, so that the laws of Kansas did not apply to them.

The Sacs and Foxes were allotted under the Act of February 13, 1891, 26 Stat. 749, and under the provisions of that Act they became subject
tees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom allotment shall have been made, or, in case of his death, of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, disinherited of said trust and free of all charge or incumbrance whatever. [Italics supplied.]

As will be readily perceived, these provisions entirely withdraw from the operation of tribal laws and customs all matters of descent and partition concerning allotments made to Indians, under the General Allotment Act, and the laws of the State in which the land is situated must govern such matters, except as far as these matters are otherwise covered by federal statutes.

The scope of state power in the matter of inheritance of allotments has been considerably limited however, by legislation which confers upon the Secretary of the Interior full power to determine heirs and to partition allotments. Thus, for example, the Supreme Court has held that a will made by an Indian woman in accordance with departmental regulations, and approved by the Secretary of the Interior, devising her restricted land to others than her husband, was valid, notwithstanding a proviso in the Oklahoma law prohibiting a married woman from bequeathing more than two-thirds of her property away from her husband.

The Court said:

The Secretary of the Interior made regulations which were proper to the exercise of the power conferred upon him by the act of Congress, and it would seem that no comment is necessary to show that § 8341 [Oklahoma Code] is excluded from pertinence or operation. (P. 324.)

In a later case approving this decision, the Court sustained the validity of a lease made by an Indian on his family homestead, which violated an Oklahoma statute requiring execution by both spouses. The Court said:

Nor is the validity of the extension lease affected by the provision in the Oklahoma constitution that nothing in the laws of the United States shall deprive any Indian, or other allottee of the benefit of the homestead laws of the State. Whether or not this provision was intended to do more than to protect the allottees from the enforced seizure of their homesteads, it is sufficient to say that, whatever its purpose, it can have no more effect than the Oklahoma statute in giving validity to laws of the State repugnant to the reserved power of the United States in legislating in respect to the lands of Indians.

Neither the constitution of a State nor any act of its legislature, whatever rights it may confer on Indians or withhold from them, can withdraw them from the operation of an act which Congress passes concerning them in the exercise of its paramount authority. United States v. Holiday, 3 Wall. 407, 419. (P. 497.)

A second field in which state law has been extended to Indian reservations by congressional fiat is the realm of laws covering "inspection of health and educational conditions" and the enforcement of "sanitation and quarantine regulations" as well as "compulsory school attendance." By the Act of February 10, 1929, Congress authorized the enforcement of such laws upon Indian reservations by state officials "under such rules, regulations, and conditions as the Secretary of the Interior may prescribe."

A third body of state laws is extended over Indian reservations by section 289 of the Criminal Code, which makes offenses by non-Indians against Indians and by Indians against non-Indians punishable in the federal courts in accordance with state laws existing at the time of the federal enactment in question.

It will be noted that the foregoing statute is expressly made inapplicable to any offense committed by and against an Indian, by the terms of section 218 of title 25 of the U. S. Code.

Apart from these three fields there has been no general congressional legislation authorizing the extension of state laws to Indians on Indian reservations.

Within those three fields it is probable that any devolution of authority from Congress to the states may be revoked at such time as Congress sees fit."

B. SPECIAL STATUTES

Apart from the general statutes noted in the preceding section, a number of acts of Congress dealing with particular tribes or areas confer various powers upon state courts, state legislatures, and state administrative officials. These statutes deal most commonly with such subjects as crimes, taxation, and

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In Oklahoma there has been a particularly broad devolution of powers to the state government. The "organs" of the state constitute the "sovereignty" of the state. There are, however, federal restrictions, and the courts have upheld the prohibition of sales of liquor to all "ward" Indians, even non-Indian citizens or alien who would be subject to the laws of the state or territory in which he finds himself, to the same extent that a non-Indian citizen or alien would be subject to those laws. 

SECTION 3: RESERVED STATE POWERS OVER INDIAN AFFAIRES

While, the general rule, as we have noted, is that plenary authority over Indian affairs rests in the Federal Government to the exclusion of state governments, we have likewise noted two major exceptions to this general rule. First, where Congress has expressly declared that certain powers over Indian affairs shall be exercised by the states, and second, where the matter involves non-Indian questions sufficient to ground state jurisdiction.

In proceeding to analyze this latter exception to the general rule, we may note that in point of constitutional doctrine, the sovereignty of a state over its own territory is plenary, and therefore the fact that Indians are involved in a situation, directly or indirectly, does not ipso facto terminate state power. This territorial principle is terminated only if the matter is one that falls within the constitutional scope of exclusive federal authority. 

A case in which the factors of situs, person and subject matter all point to exclusive federal jurisdiction, as, for example, in a transaction involving a transfer of restricted property between Indians on an Indian reservation, the basis of exclusive federal power is clear. On the other hand, where all three factors point away from federal jurisdiction, the power of the state is clear. There exists, however, a broad twilight zone in which one or two of the three elements noted—situs, person and subject matter—point to federal power and the remainder to state power. These are the situations which require analysis and the various combinations of these factors present six situations for consideration.

(A) Indian outside Indian country engaged in non-federal transaction.
(B) Indian outside Indian country engaged in federal transaction.
(C) Indian, within Indian country engaged in non-federal transaction.
(D) Non-Indian outside Indian country engaged in federal transaction.
(E) Native Indian in Indian country engaged in federal transaction.
(F) Non-Indian in Indian country engaged in non-federal transaction.

A brief discussion of these six type-situations is in order.

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RESERVED STATE POWERS OVER INDIAN AFFAIRS

A. INDIAN OUTSIDE INDIAN COUNTRY ENGAGED IN NON-FEDERAL TRANSACTION

It is undoubtedly true, as a general rule, that an Indian who is "off the reservation" is subject to the laws of the state or territory in which he finds himself, to the same extent that a non-Indian citizen or alien would be subject to those laws.

B. INDIAN OUTSIDE INDIAN COUNTRY ENGAGED IN FEDERAL TRANSACTION

To the general rule set forth in the preceding paragraph, an exception must be noted: If the subject matter of the transaction is a subject matter over which Congress has asserted its constitutional-power, the state must yield to the superior power of the nation. For example, Congress has taken the position that its constitutional concern with Indian tribes requires a prohibition of sales of liquor to all "ward" Indians, even outside of Indian reservations, and the courts have upheld this exercise of power. Under the circumstances, any state interference with this prohibition would undoubtedly be held invalid.

A second example may be found in the realm of restricted-personal property of Indians. Where, for example, a herd of cattle is held by an Indian or an Indian tribe subject to federal restrictions upon alienation, it seems clear that the removal of the property from the reservation would not free it from such federal restrictions, and any state laws or proceedings inconsistent with federal control would be clearly unconstitutional.

The line between federal transactions which are of such concern to the Federal Government that the state cannot legislate in the matter and other transactions on which the state is permitted to legislate, is not always easy to draw. Where, for example, an Indian or an Indian tribe is restricted in the exercise of certain rights, the state is without power to exempt the individual from state regulations or to alter the provisions of federal law in a manner inconsistent with federal purpose.

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example, hunting or fishing rights off the reservation have been promised to Indians, the question has arisen whether such rights may be controlled by state conservation statutes. In the present state of the law, no simple answer can be given to the question.\(^{39}\) Likewise, the question of whether taxable land purchased for Indians, outside of a reservation, and held subject to federal restrictions upon alienation, is immune from the tax laws of the state, has given rise to considerable litigation.\(^{40}\) In this situation it seems that, despite the federal concern in the subject matter, the state may levy property taxes if Congress is silent, but may not do so if Congress prohibits such legislation.\(^{41}\)

C. INDIAN WITHIN INDIAN COUNTRY ENGAGED IN NON-FEDERAL TRANSACTION

It is well settled that the state has no power over the conduct of Indians within the Indian country, whether or not the conduct is of special concern to the Federal Government.\(^{42}\) Thus Indian marriage and divorce, offenses between Indians, and sales of personal property between Indians are matters over which the state cannot exercise control, so long as the Indians concerned remain within the reservation.\(^{43}\) This disability has generally been explained in terms of tribal sovereignty and a federal policy of protecting such tribal sovereignty against state invasion. Thus, in denying state jurisdiction over adultery among Indians on an Indian reservation, the Supreme Court declared in United States v. Quiver,\(^{44}\) per Van Devanter, J.:

At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws.\(^{45}\) (Pp. 603-604.)

Whether the local state laws may be applied to the Indians of a tribe with their consent, expressed through agreement or otherwise, is a question which the Supreme Court does not seem to have passed upon squarely. There is no doubt that many tribes in the past have accepted state laws.\(^{46}\) Indeed, in the early years of the Republic, it appears that various treaties were made between Indian tribes and, the various states.\(^{47}\) The validity, however, of such formal or informal arrangements, has not been definitely established. It would seem that if state laws are adopted by Indian tribes, they have effect as tribal laws and not simply as exercises of state sovereignty.\(^{48}\)

D. NON-INDIAN OUTSIDE INDIAN COUNTRY ENGAGED IN FEDERAL TRANSACTION

Although ordinarily a non-Indian outside of Indian country is in no way subject to federal law governing Indian affairs, and is wholly subject to state law, there are certain subject matters in which the federal interest is so strong that even with respect to non-Indians outside the Indian country, federal law will supersede state law. Such a matter, for instance, is the transfer from one non-Indian to another of restricted property unlawfully taken from an Indian reservation.\(^{49}\) Another example may be found in the realm of transactions between an employee of the Indian Bureau and a third party, consummated outside of the Indian country, which involve a personal interest in Indian trade.\(^{50}\) This class of transactions in which non-Indians outside of the Indian country must take account of federal Indian law, is extremely limited in scope, applying primarily to matters involving "property in which the Federal Government has an interest," and to the personnel of the Indian Service itself.\(^{51}\)

E. NON-INDIAN IN INDIAN COUNTRY ENGAGED IN FEDERAL TRANSACTION

If, where the subject matter is of federal concern, a non-Indian is subject to federal, rather than state jurisdiction, even for acts occurring outside of an Indian reservation. a fortiori he is subject to federal jurisdiction for acts of federal concern committed within an Indian reservation. Indeed, there is a very broad realm of conduct in which non-Indians on an Indian reservation are subject to federal rather than state power. With respect to all offenses committed by whites against Indians on an Indian reservation, state jurisdiction yields to federal jurisdiction,\(^{52}\) although in fact the Federal Government has adopted state laws in providing for the punishment of such offenses by the federal courts.\(^{53}\) Likewise, there are various reservation, offenses for which Congress has prescribed penalties enforceable in federal courts, which are applicable to non-Indians, and in some instances to Indians as well.\(^{54}\) It has been administratively held that even a state officer cannot claim the protection of state law if he enters an Indian reservation without congressional authorization for the purpose of searching an Indian's home for property thought to be in the unlawful possession of the Indian.\(^{55}\)

Although the federal, constitutional jurisdiction over matters affecting Indian affairs on an Indian reservation has generally been viewed as an exclusive jurisdiction, excluding all state legislation, an exception to the general rule has been recognized where the state legislation supplements the protection of Indians provided by federal law. Such state legislation, which may be termed "ancillary" to federal law, is upheld in State of

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\(^{39}\) See Chapter 14, sec. 7; and Chapter 15, sec. 21.

\(^{40}\) See Chapter 13.

\(^{41}\) Ibid.

\(^{42}\) See Chapter 7.

\(^{43}\) Ibid., and see Chapter 13, sec. 5. And see Memo. Sol. 1. D., April 26, 1939. holding that the State of California is without jurisdiction to compel Indians residing on rancherias within the state to take out licenses for dogs owned by them.

\(^{44}\) 241 U. S. 602 (1916).


\(^{46}\) See, for example, the discussion of New York Indians in Chapter 22. and the comments on the Eastern Cherokee of North Carolina in Chapter 14, sec. 2.


\(^{48}\) Rice, The Position of the American Indian in the Law of the United States (1934), 16 J. Comp. Leg. 78, 85. While the Constitution forbids a state's entering into any treaty, alliance, or confederation (Art. 1, sec. 10, discussed in Worcester v. Georgia, 6 Pet. 515, 579 (1832)), the position has been taken by at least one state court that this did not prevent treaties or compacts for the extinguishment of Indian title between states and Indian tribes. Seneca Nation v. Christie, supra.

\(^{49}\) "An Indian tribe may, if it so chooses, adopt as its own the laws of the State in which it is situated and may make such modifications in these laws as it deems suitable to its peculiar conditions." 55 L. D. 14, 42 (1934).

\(^{50}\) See fn. 38, supra.

\(^{51}\) See Chapter 2, sec. 38.


\(^{53}\) See Chapter 2, sec. 38, and Chapter 18.

\(^{54}\) See Chapter 18, sec. 5. There may be situations, however, in which a concurrent jurisdiction may be exercised by the state to protect Indians against non-Indians. State of New York v. Dibble, 62 U. S. 366 (1858), discussed in Chapter 15, sec. 10C.

\(^{55}\) See sec. 2A, supra.

\(^{56}\) See Chapter 18, sec. 3.

\(^{57}\) 68 L. D. 38 (1936).
"Indian country," and "transaction of federal concern." But these questions, elsewhere treated, are not the views above expressed on the various combinations of factors necessary to support state jurisdiction on Indian matters; and these views are therefore to be found in the materials discussed in various other chapters, particularly Chapters 5, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19.

46 See fna. 62, 63, and 64 supra.

F. NON-INDIAN IN INDIAN COUNTRY ENGAGED IN NON-FEDERAL TRANSACTION.

The mere fact that the location of an event subject to Indian reservation does not prevent the exercise of state jurisdiction where the parties involved are not Indians and the subject matter of the transaction is not of federal concern. Thus, it has been held that murder of a non-Indian by a non-Indian on an Indian reservation in the absence of express federal legislation to the contrary, is a matter of exclusive state jurisdiction.

Likewise the validity of state taxation of personally non-Indian within Indian country has been sustained.

G. SUMMARY.

The rules applicable to each of the foregoing types of situations are not established beyond the possibility of doubt, and they leave much room for debate in defining the three factors in terms of which these rules have been formulated: "Indian country," and "transaction of federal concern."