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Note

*497 THE JURISDICTIONAL RELATIONSHIP BETWEEN THE IROQUOIS AND NEW YORK

STATE: AN ANALYSIS OF 25 U.S.C. SS 232, 233

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The federal government has plenary authority over Indian affairs under the "trust" doctrine, and, absent express congressional delegation, states are presumed generally to have no jurisdiction over Indians. The federal government's current policy vis-à-vis the American Indians is to encourage Indian self-government, based upon federally granted and inherent sovereign tribal rights. The State of New York, however, historically has exercised some jurisdiction over Iroquois territory, which is located within the State's boundaries. Although Congress has enacted legislation granting some criminal and civil jurisdiction over Iroquois territory to New York, the relationship continues to be controversial.
In this Note, Mr. Porter analyzes the relationship among New York, the Six Nations of the Iroquois Confederacy, and the federal government. The author describes the general history of this relationship. He then discusses the unique federal law principles which govern Indian-state relationships, and contrasts those general principles with New York's justifications for its historical exercise of jurisdictional authority over the Iroquois. Mr. Porter argues that the effect of New York's assumption of jurisdiction on the Iroquois people and their governments has been to undermine the federal policy encouraging Indian self-government. Finally, the author proposes and discusses various schemes for reform, which he argues would promote Indian self-determination.

INTRODUCTION

For over 200 years, the Six Nations of the Iroquois Confederacy [FN1] and the State of New York have struggled for *498 control over the land owned by the Six Nations. [FN2] During the early years of the American colonial period, when Iroquois power was at its peak, the political and military relationship between the colonies and the Confederacy was genuinely accomodating. But eventually, as the colonies sought to expand westward, large quantities of Iroquois land were transferred to New York in a series of early treaties with the colony, and later, with the State of New York. [FN3] Within twenty years after the Revolutionary War, almost all of what is now

New York State had been relinquished by the Iroquois. Later, as conflicts increased between Indians and non-Indians on the remaining Iroquois lands, the State [FN4] enacted legislation designed to "protect" the Iroquois from the non-Indian world. [FN5] This legislation precipitated the substantial involvement of the State in the internal affairs of the Six Nations during the remainder of the nineteenth *499 and early twentieth centuries. Within the last forty years, New York has obtained even greater authority over Iroquois affairs by securing federal legislation granting the State partial criminal and civil jurisdiction over Iroquois territory. [FN6]
The general relationship between Indian nations and the United States is founded on the treaty-based and judicially defined "trust," which requires that the federal government provide for and protect Indian people. In contrast, the relationship between Indian nations and the states, and certainly the relationship between the Iroquois and New York, usually has been one of significant and perpetual conflict with sporadic periods of harmony. Foremost among the reasons for this conflict is the fact that although Indian territory is always located within a particular state (or states), state governments are presumed initially to have absolutely no authority over either the conduct of individuals on the reservations or the territory itself.
In the last thirty years, the Supreme Court has created a body of doctrine governing the interrelationship between the federal, Indian, and state governments based upon principles of Indian sovereignty and self-government. Such an effort to establish concrete and workable guidelines has not been seen since the early 1800's. Not only has the sovereignty of Indian governments recently been recognized to exist in many different areas, [FN7] but the Court has often vigorously upheld the actual exercise of Indian governmental authority in the face of powerful state and private interests. Most importantly, the Court has held that the inherent sovereignty of Indian nations serves as the "backdrop" for deciding all state-Indian conflicts. [FN8] Even though the Court has since retreated from reliance on a pure notion of sovereignty to preclude state jurisdiction in Indian territory, [FN9] it deliberately has strengthened the protective relationship between the federal and Indian governments to the extent that federal laws are broadly construed to preempt state legislation where the state legislation threatens to infringe upon federally granted and inherent sovereign tribal rights. [FN10]
*500 The purpose of this Note is to explore the contours of the jurisdictional relationship that currently exists between New York and the Six Nations in light of the federal legislation granting partial criminal and civil jurisdiction over Iroquois territory to the State. [FN11] Part I sets forth some detailed background on the historical relationship between the federal, Iroquois, and New York governments. Part II discusses the basic federal law principles that have been developed in recent years to govern state-Indian conflicts. Part III delineates and critiques the various sources upon which New York relies, or has relied, to justify its exercise of jurisdictional authority over the Iroquois. Part IV argues that granting jurisdiction over the reservations to the State has undermined the development of Indian self-government in contravention of current federal Indian policy. And finally, Part V delineates proposals for reform of the current jurisdictional scheme that would accomodate the mutual interests of the federal and Indian governments in attaining Indian self-determination.

I. THE INFLUENCE OF NEW YORK STATE ON THE RESERVATION: 1777-1948

The relationship between the Iroquois and New York State is a unique one, predating the American Revolutionary War and the formation of the United States. From these early origins

until the granting of criminal jurisdiction to New York by the United States in 1948, [FN12] the State's self-defined role was as a guardian of the Indians, [FN13] in many ways analogous to the present role of the United States in national Indian affairs. However, throughout this period, New York was consistently at odds with the United States over which government had supreme control over the land and affairs of the Indian people originally neighboring, and later residing within, the State's borders. [FN14]

*501 The first indication that New York harbored guardianship intentions was a provision in its original constitution mandating that any land transactions with the Indians be invalid unless made with the consent of the State legislature. [FN15] However, even though the State early on sought to control relations between its citizens and the Indians, the time following the Revolution was a period of relative parity between the State and the Iroquois Confederacy. [FN16] Since the members of the Confederacy had sided predominately with the British during the Revolution and had remained a significant military force, the Iroquois were still viewed as a threat to the existence of the United States. Thus, a primary goal of both New York and the Continental Congress was to conclude peace treaties with the Confederacy. Under the authority of the Articles of Confederation, [FN17] the United States concluded the Treaty of 1784 at Fort Stanwix, which secured peace with the Six Nations. [FN18]

Following the ratification of the United States Constitution, which gives Congress the power "to regulate commerce ... with the Indian Tribes," [FN19] the United States became increasingly involved in regulating Indian affairs. In 1790, the first of several Indian Trade and Intercourse Acts was enacted, mandating that Indian land purchases by non-Indians be conducted pursuant to federal treaty or in the presence of federal officials. [FN20] Although *502 the legislation was fully applicable to New York, [FN21] the State continued to purchase Indian lands, both with and without federal consent, on the grounds that it retained the sovereign power to do so. [FN22] Federal officials, though aware that the State's conduct was in violation of both federal law and the Constitution, did not act to correct the situation. [FN23]

The general indifference of the federal government aside, one likely explanation for the initial deference concerning Iroquois affairs was New York's argument that it retained power over the Iroquois under the Articles of Confederation. [FN24] Although it now appears that New York may have had a legitimate role in Indian affairs under the Articles, [FN25] this role necessarily was diminished by the system of federal government established by the Constitution. However, the overall inactivity of Congress with regard to the Iroquois undoubtedly contributed to New York's continued belief that it had much greater authority over both their person and their territory. [FN26] Regardless of whether this authority was valid, New York gradually and unilaterally *503 began to assert control over reservation activity. In 1813, the State enacted legislation regulating reservation conduct, eventually expanding its influence to include the provision of health care, schools, and roads, in addition to benefits for non-Indians, such as railroad rights-of-way through the reservations. [FN27]

Notwithstanding the active State role during the early 1800's, New York clearly desired to be rid of the "Indian problem." [FN28] The Treaty of 1838, [FN29] arising out of the claim of the Ogden Land Company, [FN30] provided such an opportunity since the terms of the agreement provided for the relinquishment of all Iroquois lands and the removal of the Iroquois to the west. Nothwithstanding the State's preference, both this treaty and the compromise Treaty of 1842, [FN31] which returned the Allegany and Cattaraugus Reservations to the Seneca Nation, reestablished the United States as an active participant in the affairs of the Iroquois. [FN32]

Even though federal involvement in the 1838 and 1842 treaties strongly implied that New York did not have any unilateral authority to conduct land transactions, the State continued its attempts to exert jurisdictional authority over the reservations. Some of this authority was legitimated in New York ex rel. Cutler v. Dibble, [FN33] a Supreme Court decision upholding the right of the State to protect Indian lands from non-Indian intruders. However, the expansive interpretation of the State's power over the reservation in Dibble was short-lived. The New York Indians [FN34] involved an 1840 attempt by the State to tax lands the Senecas had agreed to relinquish pursuant to the Treaty of 1838, but had not vacated. The Court strongly repudiated the State's attempt to tax the reservation: "[T]he rights of Indians do not depend *504 on this or any other statutes of the State, but upon treaties, which are the supreme law of the land." [FN35]

State authority over the reservations continued to erode after an 1870 New York Supreme Court decision invalidated State-ratified leases made between Seneca landlords and non-Indian settlers in the City of Salamanca on the grounds that the leases had been granted absent federal authorization and were thus void. [FN36] The State legislature, conceding that "the Congress of the United States alone possess[ed] power to deal with and for the Indians ...," [FN37] successfully lobbied for a federal law ratifying the leases. [FN38]

The Salamanca lease controversy demonstrated that the State recognized its lack of authority over Iroquois land transactions. However, in 1888, a special committee of the New York legislature was commissioned for the purpose of formulating proposals to deal with the State's "Indian Problem." [FN39] The Whipple Report blamed the continued existence of "tribal relations" for the lack of Indian assimilation, believing that the best that could be done for the Indian would be to "[e]xterminate the tribe and preserve the individual; make citizens of them and divide their lands in severalty." [FN40] The Committee concluded that only by "the extension of the laws of the State over them, and their absorption into the citizenry" could the "Indian Problem" ultimately be resolved. [FN41]

Although the Whipple Report recommendations were not adopted, the State continued its efforts to change the State law and constitution. To the extent these attempts sought to weaken tribal existence, the ultimate impact, had the State been completely successful, would have been far less extreme than "dividing lands in severalty." [FN42] The State's lack of success was largely due to the fact that it was not united in these endeavors. *505 The New York Attorney General repeatedly maintained that the federal government's power over Indian affairs was exclusive. [FN43] In addition, the New York courts alternated between legitimating State power by upholding previous legislative enactments [FN44] and recognizing the supremacy of federal authority in Indian affairs. [FN45] Much of this confusion on the part of the New York courts was likely due to the ambiguous signals emanating from the United States Supreme Court. [FN46] Thus, during this period, the only clear conclusion that could be drawn was that: "[t]he general question of power of the state to legislate for the tribal Indians living on reservations [is] full of doubt and confusion." [FN47]

Much of the confusion was eliminated by the Second Circuit in the 1942 case of United States v. Forness, [FN48] which involved an attempt by the Seneca Nation to cancel a lease in the City of Salamanca for nonpayment of $44, representing eleven years of back rent. In a suit filed by the United States, the leaseholder argued that the action was barred by a State law requiring dismissal of an ejectment action if rent was tendered prior to *506 judgment, as had been done in this instance. However, the court rejected this reasoning and held that "state law cannot be invoked to limit the rights in lands granted by the United States to the Indians, because ... state

law does not apply to the Indians except so far as the United States has given its consent." [FN49]

The clarity of the Forness decision greatly distressed State officials, who believed that New York had some jurisdictional control over Iroquois territory. [FN50] In response to the fear that it had absolutely no authority, the State legislature created the Joint Legislative Committee on Indian Affairs to investigate the situation. [FN51] The Committee's agenda was clear. Two years later, in 1945, the Committee recommended bills for congressional enactment that would grant general criminal and civil jurisdiction over the reservations to New York. [FN52] Following extensive Senate hearings in 1948, almost complete criminal jurisdiction was granted to the State later that year in 25 U.S.C. § 232, and, in 1950, partial civil jurisdiction was granted in 25 U.S.C. § 233. [FN53]

II. FEDERAL LAW AND POLICY GOVERNING RELATIONS BETWEEN INDIAN NATIONS AND

STATES

In the last thirty years, the United States has dramatically altered its policy with regard to Indians and Indian nations. The current policy of self-determination [FN54] is both in purpose and effect diametrically opposed to the assimilation policy that directly preceded it. The objective of self-determination is to develop Indian self-government and promote economic self-sufficiency to the point that Indians are dependent only upon themselves for basic human needs. [FN55] Although Congressional initiative has been responsible for much of this shift in policy, *507 the Supreme Court, while emerging as the final expositor of Indian governmental rights and powers, has placed itself at the center of the campaign for self-determination.

Since its decision in Williams v. Lee, [FN56] the Court has attempted vigorously to formulate a coherent and consistent doctrine of federal Indian law that could, inter alia, serve to guide the lower courts in resolving Indian-state conflicts. [FN57] Several factors have made this task particularly difficult: the large number of different Indian nations throughout the United States, the wide variety of treaties that often serve as the determinant of tribal rights, the non-uniform body of federal statutory law applying to Indian territory existing as far back as the early years of American history, and the disparity of state treatment of Indians and Indian nations within state borders. Despite these formidable obstacles, the Court has managed to delineate some basic principles that define the authority of, and relationship between, the federal, state, and Indian governments.

Very few of these recent Supreme Court decisions have involved New York or the Six Nations. In the two decisions that have, the focus was primarily on land claims issues. [FN58] Although the cases shed some light on the current jurisdictional relationship existing between the New York and Iroquois governments, they are valuable primarily for their historical insight into the early relationship between the two governments.

From the perspective of Indian sovereignty, perhaps the greatest significance of the post-Williams cases has been the clarification of Indian governmental authority within Indian territory. The Court has recognized consistently that Indian governmental power is derived not from any grant of authority by Congress but from the retained sovereignty never relinquished to

the United States by treaty. [FN59] Although recognizing that Indian nations no longer retain full sovereign powers, the Court has observed that the Nations "are a good deal more than 'private, voluntary organizations"' and retain "attributes of sovereignty *508 over both their members and their territory." [FN60] As such, they remain the primary governing authority on the reservation, "dependent on, and subordinate to, only the Federal Government, not the States." [FN61] Accordingly, Indian governments retain, among many other vestiges of sovereignty, the power to determine a form of government, the power to define membership, the power to legislate, the power to administer justice, and the power to exclude persons from Indian territory. [FN62] Nonetheless, despite the fairly extensive scope of Indian governmental authority, limits on the exercise of this authority have been imposed by the federal government, the Indian governments themselves, and, in rare instances, the states. For example, through treaties entered into with the United States, Indian nations relinquished claims to vast areas of land and placed themselves under the protection of the United States. [FN63] In exchange, the federal government agreed to guarantee this protection, an agreement commonly referred to as the "trust doctrine." [FN64] Accordingly, the necessary result of this dependent relationship is that Indian governments remain subject to the overriding authority of the United States. By virtue of the Indian Commerce Clause [FN65] and the Supremacy Clause, [FN66] Congress, as against the states, retains plenary authority over Indian affairs [FN67] and has often acted explicitly to curb or to divest the jurisdiction of Indian governments. In addition to this restriction, the Supreme Court has determined that limitations exist on the inherent sovereign powers of Indian nations as the result of their dependence on the United States. Consequently, Indian governments have been restricted from freely alienating reservation land, [FN68] legally entering into direct commercial or governmental *509 relations with foreign nations, [FN69] and exercising criminal jurisdiction over non-Indians. [FN70]

Although encroachments by the federal government into the affairs of Indians generally have come to be expected, if not in some cases welcomed, the exercise of state power over reservation activity has long been a major source of contention. In recent years, as individual Indians and Indian governments have begun exerting their economic rights, state governments have been under great domestic political pressure to curb the influence of reservation activity on off-reservation businesses. [FN71] Congress under its plenary authority can provide expressly that state laws be applied to Indians on their reservations. [FN72] But even in the absence of explicit congressional consent, the Supreme Court has defined circumstances in which it will allow states to exercise some authority over Indian territory.

Originally, states had absolutely no authority over Indian affairs or Indian territory. In Worcester, the Supreme Court repudiated Georgia's attempt to ban the entry of non-Indians into Cherokee territory without the tribe's consent. In doing so, the Court established the conceptual underpinnings of modern-day tribal-state relations:

[T]he Cherokee nation ... is a distinct community, occupying its own territory ... 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 Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States. [FN73]

Although the Court has continued to recognize the inherent sovereignty of Indian nations in the years following Worcester, it has applied less rigidly the bright-line rule that relies on Indian sovereignty to preclude state jurisdiction. [FN74]

*510 Instead, the Court has established two separate barriers to the exercise of state jurisdiction over Indian territory. [FN75] The first barrier is that states may not act to influence reservation activity if such action "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them." [FN76] Thus, when on-reservation conduct involves only Indians, "state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." [FN77] Nonetheless, outside the unique area of state taxation of Indian governments and individual Indians, the Court has "not established an inflexible per se rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent." [FN78]

The second barrier to state jurisdiction is a "balancing" or "pre-emption" test that precludes a state from exercising jurisdiction over reservation activity where such an exercise is "pre-empted" by federal law. [FN79] "State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." [FN80] Nonetheless, although pre-emption analysis has replaced strict reliance on inherent Indian sovereignty *511 as a bar on the exercise of state jurisdiction, the "Indian sovereignty doctrine is relevant ... because it provides a backdrop against which the applicable treaties and federal statutes must be read." [FN81] Accordingly, the "balancing" test is a "particularized inquiry into the nature of the state, federal, and tribal interests at stake ... to determine whether, in the specific context, the exercise of state authority would violate federal law." [FN82]

The Court has defined a set of principles to guide the "particularized inquiry" associated with pre-emption analysis. Several considerations weigh heavily in favor of Indian governments. In addition to the "backdrop" of inherent sovereignty, the Court reads tribal interests and federal interests as inextricably linked. [FN83] The wide range of federal legislation designed to improve and strengthen Indian communities is direct evidence of the federal commitment to the protection and development of Indian self-government. [FN84] In addition, the Court reads these federal statutes broadly and has refused to require that a federal law explicitly pre-empt state law in order for pre-emption to be found. [FN85] In light of these considerations, the Court has developed several canons of construction to assist in fulfilling the intent of federal policies toward Indians: Treaties and other bilateral agreements with Indians are interpreted as the Indians would have understood them. Treaties and federal Indian statutes are interpreted in favor of retained tribal self-government and property rights as against competing claims under state law. Doubts or ambiguities in treaties or statutes are resolved in the Indian's favor. Federal Indian laws are to be interpreted liberally toward carrying out their protective purposes. [FN86]

With regard to state interests, the Court has found them to be "particularly substantial if the State can point to off-reservation effects that necessitate state intervention." [FN87] However, an exercise of state authority that imposes additional burdens on a tribal enterprise is justified only when there is some service or function performed by the state on behalf of non-Indians in *512 connection with the on-reservation activity. [FN88] The involvement of non-Indians in reservation activities is critical. When non-Indians engage in activity on reservations, the Court has indicated that a state's interest will increase in a challenge to the exercise of Indian governmental authority. [FN89] Notwithstanding the elevation of a state interest when non-Indians are involved, Indian governmental power over reservation activities is extensive and potentially limitless.

III. SOURCES OF NEW YORK STATE JURISDICTION OVER IROQUOIS TERRITORY

The foregoing general federal law principles defining the jurisdictional relationship between federal, state, and Indian authority serve as the foundation for understanding the current jurisdictional scheme that exists between the Six Nations and New York. The following sections discuss the three primary sources on which New York relies for its jurisdictional authority over Iroquois territory: the 1859 United States Supreme Court opinion, New York ex rel. Cutler v. Dibble, [FN90] and the statutes transferring partial criminal and civil jurisdiction to the State, 25 U.S.C. §§ 232 and 233.

A. Pre-existing Jurisdiction: New York ex rel. Cutler v. Dibble

The Dibble case was the earliest recognition by a federal court of an exercise of state jurisdiction over Indian territory. [FN91] The case arose out of an attempt by a Genesee County judge to remove three non-Indians who had claimed land held by the *513 Tonawanda Band of Senecas. [FN92] Prior to these events, on March 31, 1821, New York passed "[a]n act respecting the intrusion on Indian lands" which "made it unlawful for any persons other than Indians to settle and reside on lands belonging to or occupied by any tribe of Indians ...." [FN93] This law imposed a duty on the county judge, upon a complaint made to him [FN94] and with a finding that non-Indians were living on "such lands," to issue a warrant directing the sheriff to remove the intruders. [FN95] The issues before the Court were whether the statute violated the Constitution, treaties, or laws of the United States, and whether the non-Indians were denied their "property or rights" arising out of any treaty or federal law.

The Court upheld the statute, finding that there was nothing in the Constitution, laws, or Indian treaties of the United States that prevented the State from exercising its police power over the reservation to protect the "Indians from the intrusion of the white people, and to preserve the peace." [FN96] In so deciding, the Court expressed its opinion that

Notwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of a State to make such regulations to preserve the peace of *514 the community is absolute, and has never been surrendered. [FN97]

The Court went on to state that until the United States took affirmative action to remove the Indians from the reservation, the laws of New York would remain applicable to protect their possession of the land. [FN98]

The decision, including the broad dicta recognizing an absolute "sovereign" authority of New York over the reservations, has continued to serve to this day as a justification for State authority over the reservations. As recently as 1988, the Second Circuit cited the case to justify the application of municipal laws to Indians living within the city of Salamanca (a city located almost entirely on the Allegany Reservation of the Seneca Nation) as necessary "to preserve the peace of the commonwealth." [FN99] In addition, according to the leading treatise on federal Indian law, Dibble indicates that state laws enacted to benefit Indians are probably not pre-empted, and are otherwise valid unless "they infringe on the purposes of treaties and federal statutes." [FN100] Nevertheless, despite the conviction with which the Dibble Court articulated

the absoluteness of State power over the reservations, subsequent decisions holding to the contrary [FN101] have undermined the scope of the decision, making it questionable precedent. At the outset, the factual similarity and disparate treatment between Dibble and Worcester indicate that, in light of the latter's revitalization in Williams and subsequent cases, the reasoning supporting Dibble has been implicitly rejected. In Worcester, the Court rejected the power of Georgia to prohibit non-Indians from entering and residing on the reservation without permission from the governor, an allegedly "protective law," on the grounds that the Cherokees were a "distinct community ... in which the laws of Georgia can have no force ... but with the assent of the Cherokees themselves, or in conformity *515 with treaties, and with the acts of Congress." [FN102] However, this fundamental principle of Worcester is not discussed, or even mentioned, in the Dibble opinion. Although the Court could not have known that the Worcester reasoning would eventually serve as the theoretical basis for denying state authority in Indian territory, [FN103] it is surprising that the decision was not even mentioned, given the factual similarities between the two cases and the mere twenty-six years that separate them.

The disparate treatment of the two cases might have been due to the arguments that were presented to the Court. In Dibble, New York made several arguments supporting its authority to remove the non-Indians from the reservation based upon New York's unique historical circumstances. Each of these arguments, however, has been rejected either explictly or implictly by subsequent Supreme Court decisions. New York claimed that the Non-intercourse Act of 1802 was not applicable to its actions. That is, since the pre-emptive right to purchase Indian lands was never ceded by New York to the United States pursuant to the ratification of the Constitution, the power of Congress established through the Commerce Clause was not applicable. This argument, resting on the notion that New York was somehow exempt from federal law as the result of its status as one of the thirteen original colonies, was supported by allegations that the Iroquois had been under the protection of New York's laws "from the time of the Revolution." [FN104] New York has continued to rely on this argument over the years, achieving some measure of success in extending its authority over the reservation. [FN105] However, in recent years, the federal courts have been particularly hostile to the argument and have thoroughly repudiated it. [FN106]

In the alternative, the State argued that the consent of the United States to the sale of Iroquois lands in New York indicated that the "small and detached bands or reservations ... were necessarily placed under the police regulations of the *516 State." [FN107] However, with regard to the divestment of tribal power pursuant to treaty, the Court has maintained consistently that Indian nations only relinquished those rights that were specifically enumerated in the language of the treaties, and then only to the United States. [FN108] The Court has also indicated that regardless of any inaction or lack of supervision by the federal government over a particular tribe, such inaction does not serve to diminish the federal interest in that tribe. [FN109] Finally, the State challenged the authority of Congress to deny the Tonawandas title to their land, also an argument that has been thoroughly repudiated by the Supreme Court. [FN110]

In addition to these inherent weaknesses in the Dibble reasoning, the decision in The New York Indians [FN111] eight years later severely restricted any authority that might have been given to the State in Dibble. The case involved an attempt by New York to construct highways on the Allegany and Cattaraugus Reservations and to impose taxes on the land to finance their construction. [FN112] In an opinion analyzing the treaties made between the Six Nations and the United States since 1784, the Court held that the statute is "illegal, and void as in conflict with

the tribal rights of the Seneca nation as guaranteed to it by treaties with the United States." [FN113] The Court declared that "these reservations a[re] wholly exempt from State taxation, and ... the exercise of this authority over them is an unwarrantable interference, *517 inconsistent with the original title of the Indians, and offensive to their tribal relations." [FN114]

To the extent that the Court's conclusion in The New York Indians differed significantly from that in Dibble, it is conceivable that the holding in The New York Indians should be interpreted narrowly as simply barring the State from taxing Indians or Indian property. However, the general principles formulated by the Court in defining the rights of Indian governments in general, and state-Indian relations in particular, [FN115] counsels against such a narrow interpretation. For example, even though the Court at the time believed that title to Seneca land had been divested from the Senecas, the Court recognized that it was a "mistake" to think that "the State, notwithstanding the possession of the Indians, might enter upon the reservations in the exercise of its internal police powers, and deal with them as with any other portion of its territory." [FN116] In rejecting the State's argument that the statute did "not disturb or affect the right of the Indians in their occupation of the reservations," the Court declared that "the rights of the Indians do not depend on this or any other statutes of the State, but upon treaties, which are the supreme law of the land." [FN117] Thus, by its use of such broad and conclusive language, the Court gave every indication that any attempt by New York to exercise its authority over the reservations, including its police power, would be unacceptable, and contrary to federal law.

Nonetheless, there exists a legitimate argument that Dibble is distinguishable from The New York Indians on the ground that the exercise of State authority in the former case was not nearly as invasive as the direct taxation of Indian lands that was rejected in the latter. However, it is highly unlikely that The New York Indians does not limit Dibble. The Court directly addressed the same question put to the Dibble Court; that is, whether N.Y. Indian Law § 8 is a legitimate exercise of State power. The Court concluded that section 8 is "a very free, if not extraordinary, exercise of power over these reservations and the rights of the Indians, so long possessed and so frequently guaranteed by treaties." [FN118]

*518 In addition, a more recent Court, while not formally deciding the issue, expressed its view that although Dibble was not overruled by The New York Indians, the latter case limited Dibble to its holding: "It is apparent that by the later decision in The New York Indians ... the Court did not consider the potential implication of the dictum expressed in Dibble applicable in situations where the State's power was exercised other than for the protection of the Indians on their tribal lands." [FN119]

The foregoing analysis demonstrates that the impact of Dibble on current State-Iroquois relations is significantly limited and that pronouncements suggesting that the State has "the power of a sovereign" over the Iroquois are irreconcilable with the fundamental principles of federal Indian law that have been promulgated since Worcester v. Georgia. Accordingly, there is no basis for relying on Dibble as indicative of a broad based State authority over the reservations. [FN120] New York ex rel. Cutler v. Dibble remains, at best, a severely restricted grant of jurisdiction to New York State in light of the questionable legal basis for its reasoning and the decisions in Worcester v. Georgia and The New York Indians.

B. 25 U.S.C. § 232

The enactment of 25 U.S.C. § 232 in 1948 was a monumental event in the history of the

relationship between the Iroquois and New York State. By granting almost total criminal jurisdiction over the reservations to New York State, the United States officially granted much of the authority over the Iroquois that New York had previously sought with vigor. But more significantly, the enactment of section 232 was indicative of the national sentiment at the time that the Iroquois, and Indians in general, were incapable of self-governance without assistance from outside sources.

*519 The general effect of the statute was to grant New York criminal jurisdiction over Iroquois territory to the same extent that State courts had jurisdiction over the rest of the State. [FN121] Although section 232 is a clear grant of jurisdiction to the State, the statute is relatively silent in defining the nature of the relationship between the State's criminal jurisdiction and the jurisdiction held by the federal and Indian governments. However, the official language and legislative history of the statute provide some evidence of how Congress intended section 232 to operate vis-à-vis the other governments. [FN122]

The legislative history indicates that there were two primary reasons for enacting section 232. [FN123] First, "in certain instances," the Indian governments did not "enforce the laws covering offenses committed by Indians." [FN124] Second, "the State ha[d] no jurisdiction to enforce laws designed to protect the Indians from crimes perpetrated by or against Indians." [FN125] Thus, Congress enacted the statute intending that "law and order should be established on the reservations when tribal laws for the discipline of its members have broken down." [FN126] This legislative history, albeit sparce, must necessarily inform any interpretation of the statute as it relates to the definition of jurisdictional authority existing between the federal, Iroquois, and State governments.

In analyzing how the grant of jurisdiction to New York affected the criminal jurisdiction previously held by the federal government, a comparision between an analogous statute, Public Law Number 83-280, [FN127] and section 232 is particularly instructive. *520 Section 232 was the fourth time that Congress had acted to allow a state to exercise criminal and/or civil jurisdiction within Indian territory. [FN128] Rather than continuing the trend of piecemeal grants of jurisdiction to particular states, Congress enacted Public Law 280. In addition to explicitly conferring total criminal and partial civil jurisdiction to six states, Public Law 280 provided a mechanism whereby any state that desired jurisdiction over the Indian territory within its borders could obtain it simply through unilateral legislative action. [FN129]

Given the similarity of the language and purpose of section 232 and Public Law 280, courts have often assumed that they should be read as granting the same measure of jurisdictional authority to the states affected. [FN130] However, the text of both statutes and their legislative histories clearly indicate that the grant of jurisdiction under the criminal section of Public Law 280, 18 U.S.C. § 1162, is more expansive than the grant of *521 jurisdiction under section 232. Based on this distinction, the conclusion can be drawn that Congress did not intend to grant New York exclusive criminal jurisdiction over Iroquois territory, but rather anticipated, or at least provided for, a role for the federal and tribal governments in reservation law enforcement.

The fundamental distinction between the two statutes lies in the fact that section 1162 of Public Law 280 explicitly rescinds the jurisdiction of the United States under the Indian Major Crimes Act [FN131] and the General Crimes Act. [FN132] Section 232 contains no such explicit divestment, and, accordingly, it must be presumed that federal jurisdiction is not divested under this statute. [FN133] This distinction is critical, because the retention of federal criminal jurisdiction demonstrates the existence of a federal role in reservation law enforcement, a

proposition that has been questioned to some degree. To the extent that this may lead to a legal obligation on the part of the federal government to assist in the development of Indian justice systems, or even to coordinate law enforcement efforts with the State, the Six Nations are in a significantly stronger jurisdictional position than those Indian nations subject to Public Law 280. Although the language of Public Law 280 indicates that Congress intended to supplant the federal obligation for criminal law enforcement in Indian territory with state obligation, the statutory language of section 232 clearly indicates that Congress did not intend the same result with regard to the State obligation to the Iroquois.

The legislative history of section 232 not only supports this conclusion but makes explicit that State criminal jurisdiction was only intended to "fill the gap." To wit, the grant of criminal jurisdiction to the State

contains no mandatory provisions whereby the State is bound to enforce the criminal laws in all instances of crime, but is permissory [sic] in nature and will establish a uniformity of jurisdiction in the State of New York which may be used to enforce the law when deemed proper and necessary by State officials and when law enforcement by Indian courts is deemed unsatisfactory. [FN134]

*522 By describing the jurisdictional grant under section 232 as "permissory" [sic], the language indicates that Congress intended to create a system of concurrent criminal jurisdiction among the New York, federal, and Iroquois governments over some matters. Although the absence of such an intent in Public Law 280 should not be construed to deny the ability of the Indian nations located in those states to exercise criminal jurisdiction, the legislative history of section 232 clearly supports the proposition that Congress did not intend to grant exclusive criminal jurisdiction over Iroquois territory to the State. [FN135]

This conclusion is supported by the only federal court decision to date that has dealt with the question. United States v. Burns [FN136] involved an attempt by several Mohawks, alleged to have conducted gambling operations in Mohawk territory in violation of State and federal laws, to bar federal subject matter jurisdiction. The defendants argued that section 232 constituted an exclusive grant of general criminal jurisdiction to the State. The court rejected this argument, finding that the statute did not explicitly mandate the extent of jurisdiction to be assumed by New York. In addition, the court found that the statutory language intended that "the laws of the state apply in Indian country just as they do in any other part of the state," which "certainly does not preclude federal jurisdiction." [FN137] Finally, since any repeal of federal jurisdiction would have to be implied, rather than clearly stated, [FN138] the court refused to find that federal jurisdiction was in any way diminished by the granting of jurisdiction to New York. [FN139]

Another issue pertaining to the scope of authority granted to New York is based on the distinction between section 1162 and section 232. Section 1162 granted jurisdiction over the reservations to the "States and Territories" in which they were located "to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory." [FN140] In contrast, section 232 granted jurisdiction to the "State of New York ... to the same exent as the courts of the State have jurisdiction over offenses committed elsewhere *523 within the State." [FN141] Although subtle, this distinction is significant in light of the difference between the full police power of the State and the power held by the State courts. To the extent that full police powers were not granted to New York under section 232, there is a substantive limitation on the grant of jurisdiction to the State. The language of the statute indicates that the State is not empowered to, inter alia, conduct on-going investigations, routine

patrols, or engage in other preventive criminal justice which does not require judicial involvement. And in light of the canon of construction that requires interpretation in favor of retained tribal rights, [FN142] section 232 mandates that the State limit its on-reservation conduct to responding to specific instances of crime. [FN143]

Questions may also be raised as to whether the enactment of section 232 was an unconstitutional abrogation of rights guaranteed by treaty. Even though Congress has plenary authority over Indian affairs, [FN144] the Supreme Court has determined that "plenary" does not mean "absolute" in the sense that Congress may act without constitutional restriction or judicial review. [FN145] Thus, in order to protect the inherent sovereignty of Indian nations which has not been relinquished to the United States by treaty, the Court has required that Congress demonstrate a "clear and plain" intent to abrogate Indian treaty rights. [FN146] The *524 rights at issue here pertain to the jurisdictional agreement made between the Six Nations and the United States in the Treaties of 1789 and 1794.

Prior to Burns, two lower New York courts passed upon the constitutionality of section 232. In People v. Cook, [FN147] the Onondaga Council of Chiefs, pursuant to its own duly promulgated tribal law, [FN148] attempted to remove non-Indians who had been living on Onondaga territory. [FN149] In upholding the constitutionality of the statute, the court relied upon the classic federal cases [FN150] legitimating the plenary power of Congress to, in this case, "lawfully delegate[] a portion of its control over the New York Indians to the State of New York" [FN151] by statute rather than through bilateral treaty. [FN152] The court concluded that section 232 was not intended to destroy self-government, but to "put to rest the conflict between the Federal and state government by a clear-cut delineation of state and Federal power with respect to a specific area of the law." [FN153]

However, to the extent that the court held that section 232 was a "delegation" of "a portion" of the federal government's jurisdiction over the Iroquois reservations to New York, it is incorrect, since nothing in the language of the statute suggests *525 that federal jurisdiction was to be divested. [FN154] In addition, by focusing on the authority of Congress to regulate Indian affairs, the court failed to recognize the jurisdictional relationship provided for in the treaties between the Six Nations and the United States. Failure to consider these treaties is fatal to a conclusive determination that section 232 is a constitutional enactment, since any jurisdictional relationship provided for in the treaties can only be abrogated if Congress acts with a "clear and plain" intent to do so. [FN155]

In People v. Boots, [FN156] the defendants moved to dismiss criminal charges on the grounds that section 232 was unconstitutional because Congress did not specifically abrogate their pre-existing treaty rights. However, the court summarily dispensed with the argument by citing a footnote in Washington v. Yakima Indian Nation, [FN157] to the effect that if Public Law 280 was a valid exercise of congressional power in the face of federal treaties with the Yakimas, then section 232 must also be valid since two major treaties with the Iroquois existed when it was enacted. In Burns, the defendants argued that the jurisdictional provisions of the 1789 Treaty served as the limit on the authority ceded to the United States, and also New York, with regard to criminal *526 offenses. The district court reached the same result as the Boots court. That is, the court dismissed defendants' constitutional argument, citing the same footnote of Yakima. [FN158]

The State court in Boots and the federal court in Burns, however, failed to consider that the Yakima Court was dealing with a "jurisdictional law of general applicability," [FN159] in which

Congress could not fully anticipate all of the possible treaty obstacles that could arise in a particular state's assumption of jurisdiction. In section 232, on the other hand, Congress was dealing with only one state, New York. In addition, the treaties made with the Six Nations were distinctive and arguably more favorable to the Six Nations, since the United States entered into them not as an act of conquest but more as an act necessary for the survival of the foundling nation. To this extent, the requirement that Congress be explicit in abrogating the jurisdictional relationship provided for in the Treaties of 1789 and 1794 is not unreasonable. [FN160] Given these previous decisions, it is probable that section 232 is constitutional. [FN161] Such a conclusion, however, is not invulnerable to attack, given the foregoing analysis and the fact that the Supreme Court has never ruled on the issue.

As has already been discussed, [FN162] the language and legislative history of section 232 do not indicate a congressional intent to relinquish federal criminal jurisdiction over Iroquois territory. The United States obtains criminal jurisdiction over Indian territory through the Indian Major Crimes Act (IMCA), [FN163] a statute which confers jurisdiction to the federal courts over fourteen specifically enumerated offenses, the General Crimes Act *527 (GCA), [FN164] a statute that applies "federal enclave" criminal laws to Indian territory, [FN165] and specific laws addressed to offenses in Indian Country. [FN166] The IMCA covers offenses committed by Indians in Indian country, as well as offenses committed by non-Indians against Indians. However, the Supreme Court has determined that offenses committed by non-Indians against other non-Indians in Indian territory are outside the jurisdiction of both the federal [FN167] and Indian governments. [FN168] In addition, since the IMCA relates exclusively to the authority of the federal government, it is likely that the IMCA does not pre-empt criminal jurisdiction exercised by Indian governments over their own citizens. [FN169]

Generally, absent a contrary indication from Congress, the existence of federal criminal legislation such as the IMCA entirely pre-empts state jurisdiction over similar offenses occurring on the reservation. [FN170] However, such is not the case when the object of the federal legislation is to grant jurisdictional authority to a state. Unlike Public Law 280, which explicitly withdrew federal jurisdiction, section 232 implicitly provides for the retention of federal jurisdiction. The question arises as to what degree, if any, federal criminal jurisdiction was affected by the grant of authority to the State.

*528 This issue was discussed in People v. Edwards, [FN171] where the court focused on whether section 232 completely divested the federal government of criminal jurisdiction over the New York reservations under the IMCA. The case involved the prosecution by the Onondaga District Attorney of an Indian who was charged with the murder of a non-Indian on the Onondaga Reservation. The defendant argued that New York did not have jurisdiction to prosecute Indians for a murder committed on the reservation because jurisdiction for that crime was exclusively retained by the United States under the IMCA.

In a careful analysis focusing on the legislative history of section 232, the court first concluded that the United States had not been divested of IMCA jurisdiction by the enactment of section 232. [FN172] Relying on basic canons of statutory construction, the court held that it was required to give effect to both statutes, since both dealt with the same subject matter and because of the presumption that subsequent legislation generally does not effectuate an implicit repeal of prior law. [FN173] The court relied on the legislative intent behind section 232 as the "primary and all-important factor in construing its true meaning." [FN174] However, the court concluded that Congress intended to give New York criminal jurisdiction only in areas "not expressly

claimed by the Federal Government." [FN175]
The court cited several reasons for its decision. One was that in its memorial to Congress requesting the legislation, the New York legislature specifically requested jurisdiction only over "those matters" which were not already under the jurisdiction of the federal government. [FN176] Another was that the Undersecretary of the Interior had made a recommendation on the proposed legislation to the same effect. [FN177] And finally, the court viewed as dispositive the fact that Congress had had two opportunities to repeal explicitly section 1153 jurisiction, but had declined to do so: the first, at the time of passage, and the *529 second, five years later, when Public Law 280 was enacted. [FN178] In addition, it found unpersuasive as dicta the argument that previous Supreme Court decisions mentioning section 232 had acknowledged an exclusive transfer of federal jurisdiction. [FN179] Although the court highlighted the fact that Congress viewed section 232 as similar to the legislation which granted jurisdiction to Kansas eight years earlier, it minimized the fact that the Kansas bill had explicitly reserved IMCA jurisdiction. [FN180] Based on this analysis, the court concluded that the IMCA pre-empted state jurisdiction over a murder on the reservation, and that the indictment should be dismissed. [FN181]
The decision of the court was reversed on appeal. [FN182] The appeals court held that it was "clear" that the lower court had erred in dismissing the indictment, since "the power to assert jurisdiction in such cases was granted to New York in 1948 by the enactment of section 232 of title 25 of the United States Code." [FN183] The court relied on several cases purporting to recognize an absolute grant of criminal jurisdiction to New York under section 232, although each of the cases was merely summarizing the effect of the statutes. [FN184] However, in narrowly ruling on the issue of whether New York was able to prosecute the case, the court expressed no opinion as to what extent, if any, the criminal jurisdiction of the federal government was affected.
*530 In light of the decision in United States v. Burns and the text and legislative history of section 232 and Public Law 280, there is little question that the United States retains full criminal jurisdiction over Iroquois lands pursuant to the IMCA, the GCA, and any other specific federal provision barring criminal activity in Indian country. [FN185]
Two additional considerations support the conclusion that the United States retains criminal jurisdiction over the Iroquois reservations. First, since these two statutes deal specifically with Indian affairs, any doubts concerning their interpretation must be liberally construed in favor of the Indians, [FN186] which in this case favors retention of federal jurisdiction. Second, in the absence of explicit language repealing the application of federal law over Iroquois territory, section 232 must be interpreted to give effect to federal jurisdiction, while still preserving the "sense and purpose" of both statutes. [FN187]
Such an interpretation is both possible and logically required, since the two statutes, read together, create a system of concurrent state-federal-tribal jurisdiction over Iroquois territory. [FN188] *531 Under such a scheme, the federal government retains jurisdiction concurrent with that of the State over all federally defined criminal offenses, such as those enumerated in the IMCA and the GCA, including all of the offenses that are defined by State law. [FN189] Accordingly, the nonenumerated crimes under the IMCA committed by an Indian against another Indian, which would normally be reserved exclusively to tribal authorities under the GCA, would be subject to concurrent jurisdiction with New York State where such offenses are governed by State law. An interpretation creating a system of concurrent state-federal-tribal jurisdiction is certainly consistent with the legislative purpose of section 232, since such a scheme allows the

State "to protect the Indians from crimes perpetrated by or against Indians" to the extent that the "tribes do not enforce the laws covering offenses committed by Indians." [FN190] A final question arising out of the enactment of section 232 is to what extent, if any, the grant of jurisdiction to New York divested the Iroquois governments of jurisdiction to enforce tribal laws and punish tribal members. The Conference Committee Report explicitly addressed this question by providing that it is not mandatory for the State to enforce the criminal law, but only to exercise jurisdiction "when deemed necessary by State officials and when law enforcement by Indian courts is deemed unsatisfactory." [FN191] Such language, combined with the presumption in favor of retained tribal rights absent explicit Congressional divestiture, suggests that the Six Nations retain complete inherent criminal jurisdiction over offenses committed on the reservation by Indians. [FN192] Although New York retains the power to determine when tribal process is "unsatisfactory," the Committee language does seem to limit the impact of this determination. Thus, it is unlikely that an affirmative State attempt to bar an exercise of criminal jurisdiction by an Iroquois government over its own *532 citizens would be upheld since lawful State action in such an instance depends upon sufficient evidence of ineffective tribal law enforcement. Although it can be concluded that concurrent criminal jurisdiction exists between both the State and Iroquois governments and between the State and federal governments, as a practical matter, New York exercises complete control over law enforcement in Iroquois territory. While New York recognizes the political ramifications associated with its exercise of jurisdiction, [FN193] it nonetheless dictates the terms by which its laws are enforced. [FN194] However, there does appear to be a major impediment to the exercise of section 232 jurisdiction by local law enforcement since the statutory language only grants jurisdiction to the "State of New York," and not to any of its political subdivisions. Although the statute provides that "New York shall have jurisdiction ... to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State," [FN195] it likely refers only to those State laws defining criminal activity and not to the general laws of the State that define delegations of police power to local officials. [FN196] Accordingly, under section 232, and in light of the canons of construction favoring retained tribal rights, the exercise of criminal jurisdiction in Iroquois territory by any official other than State law enforcement officials is an unauthorized *533 intrusion into the sovereign authority retained by the Iroquois governments. [FN197]

C. 25 U.S.C. § 233 [FN198]

Whereas section 232 was enacted primarily to combat lawlessness on the reservations, the primary motivation for allowing *534 civil suits involving Indians to be heard in New York courts was to "lead to the gradual assimilation of the Indian population into the American way of life" by "the gradual but final complete removal of governmental supervision and control." [FN199] On its face, section 233 purports to make a simple change in the jurisdictional structure by allowing reservation Indians both to sue and be sued in State court. However, save for the rather explicit provisos, the statute does not clearly delineate the scope of the grant of civil jurisdiction to New York State. This Part attempts to define the scope of the statute and the boundaries of federal, Iroquois, and State jurisdiction based upon the federal Indian law principles developed by the Supreme Court in recent years and in light of the current federal policy strongly disfavoring the assimilation of Indians. [FN200]

1. Access to the New York State Courts

Although section 233 was enacted to hasten the assimilation of the Iroquois, [FN201] the language of the statute and the legislative intent indicate that Congress merely intended to open up the New York State courts to the Iroquois and to create a system of concurrent civil jurisdiction between the New York and Indian courts over claims brought by and against Indians. To this extent, it cannot be overlooked that the State was also attempting *535 to recoup authority which it once exercised prior to the decision in United States v. Forness. [FN202] The terms of the statute indicate such a limited transfer of jurisdiction:

The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State .... [FN203]

Under the established canons of statutory construction, it is preferable, when possible, to read the language of a statute as effecting the legislature's intent in passing the law. [FN204] In comparison with section 232's transfer of criminal jurisdiction to the "State of New York," it is not insignificant that civil jurisdiction was granted only to the New York State "courts." Had Congress intended to do more than open up the State courts to Indians, it likely would have done so by broadening the scope of the language as it did in section 232. In addition, the legislative history is replete with indications that the only change that Congress intended by the enactment of section 233 was simply to allow Indians access to State courts.

As might be concluded by focusing exclusively on the text of the statute, the enumeration of certain rights to be afforded protection does not imply that Congress authorized State jurisdiction in areas not explicitly mentioned in the statute. [FN205] A close reading of the statute indicates that Congress did not directly intend to impede Indian self-government by allowing Indians access to State courts-a conceivable objective given the statute's professed purpose of facilitating assimilation. For example, *536 the first proviso, authorizing the retention of "tribal laws and customs," was originally drafted to limit the time period in which those laws could be preserved to one year after enactment. [FN206] The Conference Committee that approved the final bill not only agreed to extend this period to two years, [FN207] it also provided that tribal laws and customs were to be recognized and given effect even after this period, so long as they were proven to the satisfaction of the court. [FN208] The third and fourth provisos, barring the taxation and alienation of tribal lands by the State, [FN209] also demonstrate congressional intent to maintain the integrity of Iroquois self-government by placing an explicit limit on State authority. Thus, despite its assimilationist underpinning, the statute indicates little intention by Congress to undermine directly the internal operation of Iroquois governance or threaten tribal existence. However, since there is no federal court decision to support this textual reading of the statute, the intepretation of an analogous statute, Public Law 280, provides a valuable guide for measuring the grant of civil authority to the State. As was mentioned earlier, [FN210] 25 U.S.C. §§ 232 and 233 were among the legislation precedent to Public Law 280. [FN211] Although the laws dealing with criminal jurisdiction were more concerned with establishing law and order on the reservations, they, and the civil jurisdiction statutes in particular, all served to effectuate the assimilation of Indian people into American society by granting jurisdiction over the reservations and reservation Indians to the states. [FN212] Even though the authority granted to the states

under Public Law 280 was more pervasive, given that the statutes were enacted for the same purpose and to fulfill the same policies, they should be construed in pari materia. [FN213] Thus, the *537 decision of the Supreme Court in Bryan v. Itasca County, [FN214] which defined the scope of Public Law 280's grant of civil jurisdiction, is dispositive of at least the upper limit on the State's authority under section 233. [FN215]

At issue in Bryan was an attempt by a county official to assess a personal property tax on the motor home of a Chippewa Indian living on the Leech Lake Reservation. The Court concluded that the language in Public Law 280 granting to the state "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in ... Indian country ... to the same extent that such State ... has jurisdiction over other civil causes of action," [FN216] was "intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes." [FN217] Although the language and legislative history of section 233 indicate that Congress intended to assimilate the Iroquois, [FN218] the language also reveals that there was a perception of inadequate tribal process, due to the weakness of the Anglo-American style courts and the ineffectiveness of traditional methods of dispute resolution. [FN219] Accordingly, the congressional *538 response, not unlike congressional action in Public Law 280, was to open up the New York courts to Indians in order to provide an "adequate" legal forum for the resolution of civil matters.

There has been no decision by a federal court on whether section 233 establishes a system of concurrent subject matter jurisdiction between the State and tribal courts. However, there is no indication in the statute that such a scheme is precluded, and given the presumption in favor of retained tribal rights, it must be concluded that Congress intended Iroquois judicial systems to continue exercising jurisdiction over matters involving Iroquois citizens. Subsequent actions of the State also support the conclusion that section 233 established a system of concurrent jurisdiction. Shortly after section 233 was enacted, New York amended its law explicitly to assume the grant of jurisdiction from the United States:

Any action or special proceeding between Indians or between one or more Indians and any other person or persons may be prosecuted and enforced in any court of the state to the same extent as provided by law for other actions and special proceedings. [FN220]

In addition, New York rescinded the exclusive jurisdiction of the Seneca Nation Peacemaker's Court, which purportedly had been granted by the State's own Indian law. [FN221]

The State courts have consistently interpreted sections 5 and 233 as establishing a system of jurisdiction concurrent with tribal forums. The scope of section 5 was discussed in Application of Jimerson, [FN222] a case involving a boundary dispute between two Senecas on the Cattaraugus Reservation. The Seneca Nation Council had previously issued a ruling on the matter presented to the court, but the judgment was rescinded in order to allow *539 the parties to take the case to State court. The New York Supreme Court recognized that section 233, read in conjunction with section 5, established a system of concurrent jurisdiction over the reservations which allowed it authority to decide the case in dispute. [FN223]

The appellate court was even more definitive, and elaborated that

"[t]he statute is permissive and nothing in its legislative history indicates that it was intended to do more than open the State courts to Indians, if they should choose to use them ... [T]he amendment to section 5 of the Indian law conferred upon the State courts no more than concurrent jurisdiction." [FN224]

The court concluded by adding that "there exists no provision of law providing for review of decisions of the Indian courts by any State court." [FN225]

The New York State courts have consistently followed this construction of section 233. As section 233 has been applied to section 5, the State courts have exercised civil jurisdiction over a wide variety of matters, including distribution of judgment funds, [FN226] probate proceedings, [FN227] worker's compensation claims, [FN228] torts, [FN229] and suits initiated by Indian *540 governments. [FN230] However, the State courts have declined to exercise jurisdiction in cases involving judicial review of Peacemaker's Courts, [FN231] determination of tribal membership, [FN232] determination of title to reservation lands, [FN233] challenges to the validity of Indian leadership, [FN234] suits against Indian governments, [FN235] suits against Indian leadership acting within authorized official capacity, [FN236] and actions initiated by the State Attorney General to enforce tribal law. [FN237]

A remaining issue concerns the choice of law to be applied by a State court in a case involving Indians. There is strong indication that Congress intended New York courts to apply tribal law where it exists and can be discerned. The language of section 233 suggests that the Indian nations "preserve" those laws which they wanted to "govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue." [FN238] However, the statute also provides that State courts should recognize "tribal law or custom which may be proven to the satisfaction of such *541 courts." [FN239] The fact that none of the Six Nations recorded their laws for the benefit of State courts should not detract from the obvious intent of Congress to have tribal law apply where it is applicable.

By contrast, although Public Law 280 requires that "any tribal ordinance or custom ... be given full force and effect in the determination of civil causes of action" in state courts, the statute ultimately limits self- government because the requirement applies only "if [the tribal law is] not inconsistent with any applicable civil law of the State." [FN240] Such a limitation severely restricts the ability of Indian governments to exercise traditional governing methods by setting a state's public policy as a limit on tribal lawmaking. The policy rationale for enacting Public Law 280 was assimilation, and undermining the impact of traditional, non-Anglo-American methods of adjudicating Indian disputes accomplishes this objective. However, similar language limiting Indian governmental action is noticeably absent from section 233. Rather, the language of the first proviso in section 233 recognizes, if not actually encourages, the continued existence and use of law uniquely promulgated by the Iroquois governments in order to regulate the conduct of Iroquois people. [FN241]

This difference in scope is especially important in areas outside the judicial realm, in instances where an Indian government chooses to exercise authority regulating reservation conduct in a manner that is well within its inherent sovereign powers of governance but is counter to the established public policy of the State. [FN242] Section 233 indicates that in such cases tribal law should govern and be enforced by the State court. [FN243] In contrast, *542 section 1360(a) of Public Law 280 expressly requires that state law apply over Indian territory, a provision conspicuously absent from section 233. [FN244] Accordingly, not only is a New York State court deciding a case involving Indians obligated to consider and apply tribal law, but it must also enforce tribal laws to the extent that they directly regulate the conduct of individual Indians. State law is applicable only in those areas where tribal law clearly does not exist.

Even though it may be concluded that the enactment of section 233 established a jurisdictional system that would allow suits involving Indians to be brought in either state or tribal courts, the

question remains whether section 233 was intended to confer general regulatory authority over the Iroquois territory to the State.

2. General Regulatory Authority

In John v. City of Salamanca, [FN245] a Seneca residing on the Allegany Reservation challenged the applicability of a municipal building code that required him to obtain a building permit to make renovations on his leasehold property, which was located *543 on the reservation, but within the City of Salamanca. [FN246] This unique issue arose due to the fact that the State-chartered City of Salamanca is located almost entirely on property leased from the Seneca Nation. The plaintiff claimed that the Salamanca municipal laws and zoning rules were generally inapplicable on lands of the Seneca Nation and to members of the Seneca Nation residing within the City. In response, the City argued that it had obtained explicit congressional authority to impose its building code within city boundaries and on Seneca land from both the 1875 Act of Congress and 25 U.S.C. § 233. [FN247]

In granting the City's motion for summary judgment, the district court cited section 8 of the 1875 Act, which provides that "all municipal laws and regulations of said State may extend over and be in force in said villages," [FN248] but did not find the 1875 Act dispositive of the issue. The court recognized that the Forness court had interpreted the section 8 reference to "municipal laws" as meaning local municipal law and not the general State law applicable to municipalities. [FN249] However, the court reasoned that the congressional response to this decision by the enactment of sections 232 and 233 effectively overruled Forness and "g[a]ve the State of New York general jurisdiction over Indian reservations." [FN250] Thus, the court held that the City was properly acting to enforce its building code on the reservation by requiring the compliance of a Seneca residing within city limits.

On appeal, the Second Circuit affirmed the district court decision, but decided the case on more narrow grounds, focusing *544 exclusively on the 1875 statute as the basis for the City's authority to apply its building code. [FN251] In so doing, the court did not affirm the district court's intepretation of section 233 or decide whether the statute provided for general state regulatory authority over Iroquois territory. [FN252]

Despite the fact that the Second Circuit decided the case on more limited grounds, the district court decision stands as the first instance in which a federal court attempted to define the general regulatory scope of section 233. As it has already been established that section 233 was at least intended to open up the State courts to suits involving Indians, [FN253] the question remains whether the statute was designed to grant New York State general regulatory authority over Iroquois territory.

Bryan v. Itasca County [FN254] addresses this precise question. The case involved an analogous statute [FN255] and established general principles for construing statutes that grant jurisdiction to a state over Indian territory. Thus, Bryan should control the issue of whether section 233 authorizes general regulatory jurisdiction to New York State. [FN256] The Supreme Court concluded that the enactment of Public Law 280 did not grant general civil regulatory authority over Indian territory to the affected states, but instead only granted the power to adjudicate civil disputes involving Indians. [FN257] The Minnesota Supreme Court held that the enumerated exceptions to state jurisdiction in Public Law 280 negatively implied a general power of state taxation over the reservation. [FN258] Relying on the legislative history and the applicable

canons of construction, the Court reversed that decision.
Examining the legislative history, the Court found that the enactment of Public Law 280 was primarily motivated by concern *545 over the lack of law enforcement on the reservations. [FN259] It concluded that there was a "total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations" [FN260] and "the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations." [FN261]
Similarly, the legislative history of section 233 demonstrates a lack of congressional intent to grant general regulatory jurisdiction to New York. The statute originated from the same 1948 Senate hearings that led to the enactment of section 232; the primary focus of Congress in those hearings was on reservation lawlessness. [FN262] Although there is some indication that Indians should be allowed access to the state courts, [FN263] there is absolutely no indication that Congress intended to confer general civil regulatory authority to the State. Thus, the bill that Congress enacted in 1950 was only "to confer jurisdiction on the courts of the state of New York with respect to civil actions between Indians or to which Indians are parties." [FN264] Based on the similarity of the language and legislative history between the two statutes, Bryan instructs that section 233, like Public Law 280, merely authorized the State courts to adjudicate civil cases involving Indians.
Although cognizant of the assimilationist motivation behind the enactment of Public Law 280, the Bryan Court suggested that Congress's intent in limiting state jurisdiction to the resolution of cases involving Indians was indicative of the fact that *546 Congress had no intention of fully assimilating Indians into "American society." [FN265] The Court concluded that establishing general state civil regulatory authority over the reservations would have had the unintended effect of destroying tribal self-government. [FN266] Not only does the legislative history of section 233 favor a similar conclusion, but the language of the statute implies that Congress anticipated the continued operation of Iroquois government. [FN267]
Finally, to eliminate any doubt as to its conclusion, the Bryan Court relied on the basic canon of statutory interpretation that "'statutes passed for the benefit of dependent Indian tribes ... are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'" [FN268] Thus, in light of the strong policy and legal similarities between Public Law 280 and section 233 that favor their being interpreted in the same manner, the Bryan decision should control the interpretation of section 233, at least to the extent that Bryan denies the State general regulatory *547 authority over the reservations. [FN269] The explicit language and legislative history of section 233, read in the context of Bryan, clearly indicate that New York was not granted general regulatory jurisdiction and that, consequently, the district court opinion in John was incorrect.
Although section 233 did not grant general regulatory jurisdiction to New York, the State has nonetheless unilaterally attempted to apply its regulatory law in Iroquois territory. In People v. Redeye, [FN270] Seneca defendants had been convicted by a town justice for violation of the hunting provisions of the State Environmental Conservation Law. The appellate court reversed the decision of the town justice and dismissed the suit on the grounds, inter alia, [FN271] that the hunting and fishing proviso of section 232 was intended to protect the hunting and fishing rights of the Seneca Nation that had been secured by the Treaty of 1794. [FN272] The court concluded that New York lacked the authority to apply the State conservation law to Seneca citizens engaged in on-reservation conduct. [FN273]
A similar result was reached in Seneca Nation of Indians v. State, [FN274] where the State

attempted to invoke the New York Highway Law in order to condemn a portion of the Allegany Reservation to clear title for an expressway. The State explicitly argued that section 233 made its highway law applicable to the reservation. [FN275] However, the court rejected the State's argument by citing the proviso that bars "alienation" of any Indian lands [FN276] *548 and did not address the issue of whether section 233 conferred general regulatory authority on the State. In People by Abrams v. Anderson, [FN277] the court reached the same result, with regard to an attempt by the New York Attorney General to enforce a tribal law outlawing gambling on the reservation. The court dismissed the Attorney General's motion on two grounds. First, the court rejected the Attorney General's contention that "his standing to enforce Federal law [was] no different from his standing to enforce tribal law." [FN278] The court explained that "[t]he State's power, indeed its obligation, to enforce Federal law under the Supremacy Clause is quite distinct from its assertion of power to enforce the laws of a separate sovereign or quasi-sovereign." [FN279] Second, the court rejected the motion on the grounds that the State was pre-empted from interfering in the dispute since Indian bingo was "a subject which the Supreme Court has determined is not a legitimate focus of State power." [FN280]

The aforementioned cases demonstrate the manner in which the State has attempted to exercise regulatory authority over Indians on Indian territory absent any express authority to do so. The reaffirmance of the Bryan principles in California v. Cabazon Band of Mission Indians [FN281] indicates that the Supreme Court is not receptive to any state attempts to regulate reservation conduct. [FN282] However, there is as yet no case that explicitly rejects the incorrect notion of the John court, that State or local officials are free to regulate the activities of Iroquois on Iroquois territory.

Even though New York has been unsuccessful in its unilateral attempts to apply its regulatory law in Iroquois territory, it nonetheless has succeeded where an Iroquois government has requested or allowed the State to so act. [FN283] The areas in which the State currently exercises authority over Iroquois territory are delineated in the New York Indian Law, [FN284] and in other provisions of the State law generally applicable to state citizens.

*549 The State Indian Law is for the most part a remnant of the era prior to the Forness decision when it was thought that the State not only had significant jurisdictional authority to regulate reservation affairs, but also authority to control the internal operations of the Six Nations. [FN285] Most of the provisions originated in the 1800's, as early as 1813, and little has been done substantively to revise them. Although the commitment of the United States to the Iroquois was reaffirmed by Forness and by the subsequent enactment of sections 232 and 233, the major provisions of the old State Indian law not only remain intact, but also continue to be relied upon by both State and Iroquois officials.

There is a significant problem in such reliance, primarily because most of the law's provisions purport to regulate the internal operation of the Iroquois governments. Based on the general principle set forth in Williams v. Lee, [FN286] state action of this sort is barred since it "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them." [FN287] Thus, most provisions of the State Indian Law are on their face invalid since they provide for State interference with Iroquois self-government. [FN288] Even to the extent that these State laws are subject to a balancing or pre-emption analysis, a substantial number cannot be legitimated.

There exist, however, two factors that arguably justify the exercise of this authority. One legitimating factor is the Dibble *550 decision, which has been cited for the proposition that

"beneficial" state legislation favoring Indians is not pre-empted by the principles of federal Indian law. [FN289] But, as has been discussed, [FN290] Dibble is a restricted decision, at most authorizing the State to remove "intruders," that is, non-Indians, from the reservation. [FN291] Even to the extent Dibble is applicable, it certainly does not grant authority to the State generally to regulate activities on the Reservation.

The second argument favoring application of the State Indian Law is that Indian governments in their sovereign capacity to self-govern may freely choose to rely on the State and its law where such reliance is perceived to further their governmental objectives. Certainly there are numerous instances in which Indian officials have not only relied upon, but aggressively sought to execute provisions of the State Indian Law. [FN292] Notwithstanding *551 the consistency of this latter argument with the federal policy of self-determination, there is support for the proposition that Indian nations cannot relinquish tribal rights under the guise of self-determination by subjecting themselves to state law when such an action would violate federal law. [FN293] Such a limitation on the ability of the State to influence on-reservation activity comports with the trust responsibility of the federal government to the Iroquois. For example, reliance on the State law providing for the election of Mohawk chiefs would be a violation of federal law to the extent that the exercise of such a law would interfere with the manner in which the Mohawks may otherwise self-govern. [FN294]

The foregoing analysis indicates that Indian governments are not subject to the general regulatory authority of the State unless they willingly, and not in contravention of federal law, subject themselves to it. Certainly much of the reliance on the State is due to the overwhelming need for some mechanism to alleviate the distressful lack of developed institutions that can address modern problems. [FN295] However, repeated efforts to invoke State law raise the question whether Iroquois governments that rely on State assistance realize that they do so at the expense of sovereignty and governmental rights.

C. Special Jurisdictional Situations

The analysis thus far has focused on the general jurisdictional interrelationship between the federal, State, and Indian governments over the territory of the Six Nations. There remain, however, *552 two circumstances in which the broad grants of jurisdiction under sections 232 and 233 require individual attention in their application. The first situation involves the City of Salamanca, which is located almost entirely upon the Allegany Reservation. The second concerns the Tonawanda Reservation, where title to the land is held in trust by New York State.

As has already been briefly discussed, [FN296] the City of Salamanca ("the City") is located almost entirely upon the Allegany Reservation of the Seneca Nation of Indians. As the result of expansion westward and the rise of the railroad in southwestern New York beginning in the mid-1800's, the Seneca Nation entered into several thousand leases with non-Indians for reservation land, which eventually led to the establishment of several villages on the reservation. [FN297] However, the New York State Court of Appeals invalidated these leases on the grounds that they had been made in violation of the federal Trade and Intercourse Act. [FN298] The State then successfully petitioned Congress for ratification of the leases, [FN299] which allowed for the creation of the City of Salamanca. The jurisdictional maze that currently exists in the City is directly attributable to the provisions of the 1875 Act and the grant of criminal and civil jurisdiction to the State by sections 232 and 233.

The interrelationship of these statutes led to the dispute presented in John v. City of Salamanca, [FN300] which addressed the question of whether a Seneca living within the City was subject to City regulatory laws. [FN301] The district court held that under the 1875 Act and section 233, City laws applied to all individuals living within the City whether they were Indian or not. [FN302] On appeal, the Court of Appeals for the Second Circuit affirmed *553 the decision of the district court, but declined to adopt the district court's interpretation of section 233. [FN303] Instead, the court of appeals restricted its reasoning to an analysis of the 1875 statute. In so doing, it implicitly rejected the lower court's holding that section 233 provided the State with general regulatory authority over the reservations. [FN304]

The John court found that although the City of Salamanca had elected to adopt the state building code, it was nonetheless enforcing its own law and not State law. [FN305] Accordingly, the ordinance was held applicable to all individuals living within the City, whether Senecas or not. The court rejected the argument that the City ordinance could not apply to a Seneca living within the City on the grounds that Congress had anticipated Seneca residence within the City by barring the taxation of Seneca property, but had nonetheless not made any special provision or exemption of Senecas from City laws in general. [FN306]

The court briefly considered what authority the Seneca Nation retained over the leased land within the city boundaries. It found that in passing the 1875 Act, "Congress limited the sovereignty of the Seneca Nation over the reservation land within the City of Salamanca." [FN307] The basis for the court's conclusion was that within the language of the statute, Congress had also provided for the application of State highway law over the reservation, but only upon the consent of the Seneca Nation Council. In contrast, with regard to the applicability of "municipal law" within the villages, no consent of the Council was required. Since "[t]he 1875 Act distinguishes between the villages and the *554 remainder of the reservation," the court concluded that the Seneca Nation "retained authority over the latter, but not the former." [FN308] However, such a conclusion is non-binding since the court's discussion of the Seneca Nation's authority in the City is dicta. Such a qualification of the court's discussion is critical to the rights of the Senecas because the court did not completely explore the property interests of the Seneca Nation within the City.

Even though John suggests that the Seneca Nation is totally divested of authority within the City, the court's language was overbroad, since the non-Indians living within the City only lease the land and do not hold it in fee. [FN309] Although the degree to which the Seneca Nation is divested of authority over the leased land is an open question, at the very least, John indicates that the Seneca Nation is only divested of authority over leased land, and not land retained by it in fee. The court elaborated on the effect of the 1875 Act on the ownership interest of the Senecas:

The 1875 Act did not disturb the Seneca Nation's rights to free use and enjoyment of the leased land. Congress merely ratified leases executed by members of the tribe. These leases were voluntary conveyances of rights to present use and possession. Therefore, by their own actions the Indians diminished their enjoyment of the leased land. Under the leases, future rights of occupancy, granted in the 1794 Treaty, remain secure, subject only to the expiration of the lease terms. However, in the interim, the Indians cannot treat the leaseholds as they would other portions of the reservation. Their "free use" necessarily is limited by the rights of those in possession. [FN310]

Put simply, when the land is leased, City laws govern; when the land is not leased, Seneca Nation

laws govern. [FN311]

*555 However, having clarified the rights of the City over the leaseholds, the court did not adequately address the fact that the plaintiff, as a Seneca, differed from a non-Indian leaseholder. The court mistakenly believed that the City as an entire entity, rather than individual tracts of land, was being leased from the Senecas. [FN312] Thus, when the 1875 Act "diminished" the Seneca Nation's 1794 Treaty rights, the court held that it diminished the plaintiff's Treaty rights as well. [FN313] The problem arises because when the plaintiff purchased his "lease" from the previous non-Indian owner, he did not assume the same lessee obligations as a non-Indian. Plaintiff was not obligated to pay rent or taxes to the City and was treated by both the City and the Seneca Nation as obtaining the equivalent of an "assignment" of possessory and occupancy interests in accordance with Seneca Nation tribal law and custom. [FN314] Thus, if it was truly the "leased" nature of the land that divested the rights of the Seneca Nation, the decision was wrongly decided, since the plaintiff obtained his rights in the land not as a non-Indian would obtain a lease from the Seneca landlords, but as a Seneca citizen would through the traditional law of occupancy of the Seneca Nation.

*556 Not suprisingly, in combination with the 1875 Act, the application of sections 232 and 233 results in a different jurisdictional scheme in the City than in other Iroquois territory. The John decision reaffirmed the fact that the general laws of the State do not apply within the City of Salamanca. [FN315] Accordingly, only City municipal laws apply over leasehold property, regardless of whether the lessee is an Indian or a non-Indian. It follows that City laws do not apply over property held by the Seneca Nation, since that property is not leased and is controlled by the Seneca Nation like any other part of Seneca territory.

Reading the 1875 Act and section 232 in a way that would give meaning to both, [FN316] the State courts have criminal jurisdiction over all lands within the City of Salamanca, whether or not the land is leased by the Seneca Nation. Although section 232 does not explicitly address this specific situation, the statute certainly allows the State to enforce its criminal law over the entire reservation since Congress expressly granted it such authority. [FN317]

On the other hand, since section 233 only provided for Indian access to the state courts, the inapplicability of State civil law to leased land within the City remains undisturbed. In his petition for certiorari, the plaintiff in John argued that the enactment of section 233 superseded any regulatory authority that might have been granted to the City under the 1875 Act. [FN318] However, *557 to the extent that section 233 was not a grant of general regulatory jurisdiction to the State, it could not logically be said to alter the previously existing regulatory scheme. The explicit acknowledgment by the Second Circuit that section 233 was not germane to the question presented in John supports this conclusion.

The Reservation of the Tonawanda Band of Senecas presents another jurisdictional anomaly with regard to the application of sections 232 and 233, because title to the reservation is held "in trust" by New York State. [FN319] The situation arose as the result of the Treaty of 1842, in which the Seneca Chiefs agreed to relinquish claim to the Buffalo Creek and Tonawanda Reservations in exchange for return of the Allegany and Cattaraugus Reservations, which they had previously sold. [FN320] In 1857, the Tonawanda Reservation Senecas, who had refused to relocate to the west as was provided for in an 1838 Treaty, agreed to relinquish their claim to the lands in Kansas that had been set aside for them in exchange for $256,000, which was to be used to purchase their old reservation in New York. [FN321] They did so, acquiring 7549 acres for $165,000. [FN322]

However, the 1857 Treaty made provision for the State to hold title to the Tonawanda Reservation in trust. [FN323] In United States v. National Gypsum Co., [FN324] the Second Circuit Court of Appeals addressed the issue of whether the State, as titleholder, had the authority to allow the leasing of Tonawanda lands to *558 non-Indians for mining purposes. The court determined that by agreeing to allow the State to hold title to their lands, the Tonawandas "preferred to arrange for protection by the State of New York on their old reservation rather than to remain under the immediate control of the United States[,] with which they had had some friction." [FN325] The court was convinced that the United States could have assumed exclusive authority if it had "thought best." [FN326] But in allowing the State to assume title, "it deliberately left a large measure of control in respect to the reservation to the State of New York." [FN327]

Although National Gypsum apparently confers great authority on the State with regard to the Tonawandas, there are several considerations that favor a narrow reading of the decision. [FN328] First, it is clear from the court's opinion that it is the reservation, and not the Tonawanda people, that is within the authority of the State. [FN329] Thus, it is likely that the State's power over the *559 reservation, if any, is limited to regulating land use and does not encompass interference with other on-reservation activity.

However, to suggest that the State is authorized to regulate reservation land use is remarkably inconsistent with the general policy on Indian lands that was expressed in the provisos to section 233. Although the provisos do not explictly bar "leasing" of the reservations by the State, they do bar taxation and alienation of Indian lands. [FN330] In addition, even though the Court of Appeals rejected the argument, current federal law still bars the leasing of Indian lands absent congressional authorization. [FN331] Thus, in the future event that New York seeks unilaterally to lease or otherwise regulate the Tonawanda Reservation, there would be sufficient justification to challenge the holding of National Gypsum.

Apart from the effect of section 233 already mentioned, the enactment of sections 232 and 233 probably had no impact on the Tonawanda jurisdictional scheme, even if National Gypsum allowed the State to lease reservation lands. If anything, the enactment of the statutes with such strong language prohibiting State alienation, taxation, or attachment of Iroquois territory only serves to undermine any rights that the State might have. In any event, even if Congress did intend to leave a "large measure of control" over the Tonawanda Reservation to New York, it is virtually impossible to determine the scope of such a right absent further judicial interpretation in light of the principles of self-governance articulated by the Supreme Court in recent years. [FN332]

IV. The Effect of 25 U.S.C. §§ 232 and 233 on Indian Self-Government

The foregoing account of how sections 232 and 233 have operated during the last forty years details some of the legal issues that have arisen as the result of granting partial criminal and civil jurisdiction over Iroquois territory to New York State. However, notwithstanding the importance of analyzing the legal significance of these laws, the political, economic, and social *560 effect of the statutes on the Indian communities that they were designed to assist must not remain unexamined. Although the statutes have aided in clarifying the scope of state power on the reservations, they have nonetheless failed to satisfactorily accommodate the changes in federal Indian policy that have occurred since they were enacted.

It is currently the policy of the United States to promote the self-determination of Indian people through the strengthening of Indian political institutions and reservation economies. [FN333] The policy is not only different from the policy of assimilation that was the background of sections 232 and 233, [FN334] it is diametrically opposed to it. The Supreme Court has recognized this shift in policy, not only in its approach to deciding cases dealing with the powers of Indian governments, but also in the way it treats Indian tribal courts. [FN335] However, these legal and political changes at the federal level have not significantly affected the relationship that exists between the Six Nations and New York. The State cases that apply sections 232 and 233 demonstrate that these statutes have successfully contributed to the assimilation of Indian people by virtue of their undermining effect on the development of Indian communities, and, notwithstanding the current federal policy, they will continue to do so for as long as they remain applicable law.

There are three significant effects on reservation life that have resulted from the system of jurisdiction established by sections 232 and 233. [FN336] The first effect is the crippling and stagnation of tribal judicial process due to the establishment of a system of concurrent jurisdiction between Indian judicial systems and state courts. A second and related effect of such a jurisdictional system is that State courts routinely review Indian governmental *561 action, which invades the political functioning of Indian governments. And finally, when Iroquois communities perpetually rely on the State to provide essential governmental functions of law enforcement and judicial redress, a psychological dependence is created.

As described earlier, [FN337] section 233 established a limited system of concurrent jurisdiction on the reservations. [FN338] The necessary result of such a system of jurisdiction is that access to the state courts has stagnated the development of tribal judicial process. [FN339] In any system where an individual has the opportunity to avail herself of a judicial system that not only maintains the appearance of greater integrity, but also is better able to enforce its judgments, the rational individual will opt for the stronger system. Naturally, over time, the stronger system continues to develop and grow even stronger by virtue of the greater deference to it, while the weaker system declines, eventually ceasing to exist.

The Supreme Court is not unaware that allowing Indians access to state courts has this effect on tribal judiciaries. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering [FN340] involved an attempt by North Dakota to disclaim pre-existing civil jurisdiction that would have allowed an Indian government to sue a non-Indian business in state court. [FN341] The primary concern of the Court was whether any exercise of state jurisdiction over a cause of action arising on the reservation would undermine the tribe's rights of self-governance. [FN342] In *562 explaining the effect of the Vermillion decision, which allowed individual Indians to bring suit in state court, the Court explained:

[T]he full breadth of state-court jurisdiction recognized in Vermillion cannot be squared with principles of tribal autonomy; to the extent that Vermillion permitted North Dakota state courts to exercise jurisdiction over claims by non-Indians against Indians or over claims between Indians, it intruded impermissibly on tribal self-governance .... As a general matter, tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country. [FN343]

By approving a framework that allows suits by Indians in state court but not vice versa, the Court recognized the importance of maintaining a jurisdictional environment that fulfills the general

mandate of federal law to protect and foster the development of Indian governments and judicial process. [FN344]

The enactment of section 233 and the opening of the New York State courts to any suit involving Indians necessarily accomplished the intrusion into Iroquois self-government that the Wold Court so strenuously guarded against. In fact, the intrusion resulting from section 233 was far worse than the scheme presented to the Court in Wold. The Wold Court believed that there was no effect on Indian self-governance when Indians were allowed to sue non-Indians in state court, based on the fact that the Fort Berthold tribal court did not have subject-matter jurisdiction over the claim that the plaintiffs sought to bring. [FN345] However, where an Indian court has subject-matter jurisdiction to hear a case brought by an Indian against a non-Indian for a cause of action arising on the reservation, deciding the case in *563 state court necessarily contributes to the erosion of tribal self-governance, since bypassing the Indian court interferes with "the right of reservation Indians to make their own laws and be ruled by them." [FN346]

The negative effect on tribal judicial process can be seen in the cases brought before the New York State courts. One example is Application of Jimerson, [FN347] a case involving a boundary dispute between two Senecas on the Cattaraugus Reservation. The plaintiff originally brought her claim before the Seneca Nation Peacemaker's Courts, which "have exclusive jurisdiction in all civil cases arising between individual Indians residing on [the Allegany and Cattaraugus] Reservations, except those over which the Surrogate's Courts have jurisdiction." [FN348] The Seneca Nation Council, on appeal, affirmed the decision of the Peacemaker's Court, giving a partial interest in the land to both parties. [FN349] However, seventeen months later, the Council vacated this decision in order to allow the parties to present their claim in State court. [FN350]

It is not entirely clear why the Council chose to vacate its earlier decision. Perhaps it felt pressure by the litigants to "do justice" and implicitly affirm their "right" to have their case decided in the State courts. Or perhaps the Council feared reversal *564 by the State courts because it was not aware that the State courts generally decline to interfere in cases pending, and decided by, the Peacemaker's Courts. [FN351]

Moreover, the Seneca Council was aware that the Seneca people quite rationally did not trust the tribal judiciary, which has often been politicized and unreliable. [FN352] Even in cases where the judicial process has been legitimate, judgments have been difficult to enforce. [FN353] Indeed, it may have been a conscious effort to allow the parties to obtain a State judgment that might conceivably be recognized and enforced rather than having a Peacemaker's Court judgment that would be ignored. Although these circumstances have improved in recent years, [FN354] these variables help to explain why an Iroquois citizen would opt to bring their claims in the State courts. [FN355] In any event, by vacating its decision, the Council not only violated the Seneca Nation Constitution by not upholding the exclusive jurisdiction of the Peacemaker's Courts, but it also unintentionally undermined its own integrity and ability to adjudicate decisively the disputes brought before it by its citizens.

The system of concurrent jurisdiction established by section 233 does nothing to alleviate this problem. Rather than providing the opportunity for tribal judiciaries to gain expertise and integrity, the statute perpetuates the erosion of tribal courts by continuing *565 to allow State courts to decide disputes involving citizens of the Six Nations. The fact that State courts have an obligation to apply tribal law is of only minimal significance in the context of the integrity of tribal judiciaries, since this obligation does nothing affirmatively to develop tribal processes. Notwithstanding the authority conferred by sections 232 and 233, only if tribal courts can obtain

from the State courts the deference that the United States Supreme Court currently gives them will Indian judiciaries be able to achieve the credibility and stability necessary to fully actuate internal and autonomous methods of dispute resolution.
Another drastic consequence of allowing Indians into State courts is that in deciding cases involving individual Indians, the State courts often exercise judicial review over Iroquois governmental actions and thereby deny the opportunity for that government to resolve domestic matters among its citizens. Generally, there are several bases for denying the authority of State courts to exercise any judicial review. Primarily, State court review violates the Williams principle, by "infring[ing] on the right of reservation Indians to make their own laws and be ruled by them." [FN356] In addition, as a matter of federal law, only federal courts have the right to review tribal court actions, and then only when exercising federal question or diversity jurisdiction. [FN357] And finally, state court review is potentially damaging because of the possibility of invoking the New York State Indian Law in contradiction of federal or tribal law.
The negative consequences of State court review can be seen in Hennessy v. Dimmler, [FN358] a case involving an attempt by the Onondaga Council of Chiefs, pursuant to tribal law, to remove non-Indians living on the Onondaga Reservation. The Chiefs, pursuant to the jurisdictional provisions of the Treaty of 1794, [FN359] requested the assistance of federal officials, who delegated the task to the Onondaga County District Attorney, authorizing him-with the Chiefs' approval [FN360]-to invoke *566 N.Y. Indian Law § 8, the procedure for State removal of intruders. [FN361]
After determining that the section 8 petition was properly before it, the court proceeded to evaluate the legitimacy of the Chief's decision to remove the non-Indians with regard to the Indian Civil Rights Act (ICRA). [FN362] The court found that the Chief's action constituted, "in effect, a taking of private property without compensation; a denial of due process and the application of an ex post facto law," as well as "a denial of equal protection under the law." [FN363] The court concluded that "[s]uch serious deprivations of constitutional rights far outweigh any claims of tribal custom or principle which could be made under this particular set of facts." [FN364] The court's decision was extraordinary not only because a State court was reviewing the conduct of an Iroquois government, but also because it was incorrect in its assumptions concerning the status of Indian governments generally. With regard to the ICRA claim, the court relied on the United States court of appeals decision in Martinez v. Santa Clara Pueblo, [FN365] a decision later reversed by the Supreme Court. [FN366] In reversing the decision, the Supreme Court recognized the congressional respect for non-Anglo-American-but nonetheless legitimate-traditional objectives and methods of justice found in Indian communities. [FN367] The State court's language in Hennessey indicates that it was imparting notions of fairness and procedure perfectly applicable to Anglo-American courts. [FN368] However, in doing so, it disregarded the fact that Indian governments may govern both differently and legitimately, as a matter of federal law. [FN369] And, in doing so, it *567 completely frustrated the operating political process of the Onondaga Nation.
Another instance of State court review of Indian governmental action is People by Abrams v. Anderson. [FN370] Individual Indian operators of a bingo hall on the Tuscarora Reservation sought a preliminary injunction to prevent Indian protesters from interfering with the bingo hall operation. A central issue in the case was whether the anti-bingo protesters has been "deputized" by the Tuscarora Council of Chiefs in order to execute an anti-gambling ordinance and were thus operating under the shield of sovereign immunity. However, both the trial court and the appellate

court characterized the dispute as a "private civil claim" between the bingo operators and individual protesters and not as an action "against the tribe or its duly authorized law enforcement officials." [FN371]
Contrary to the court's presentation of the issue, [FN372] ordering the preliminary injunction subjected the actions of the Tuscarora Nation to the review of the State courts and consequently undermined its ability to self-govern. Under the volatile circumstances *568 that surrounded the bingo demonstrations, [FN373] the court undoubtedly felt great pressure to alleviate the tension as expediently as possible. Unfortunately, in its attempt to stabilize the situation, the court failed to recognize the legitimacy of the Tuscarora Chiefs' attempt to enforce Tuscarora law against Tuscarora people by characterizing the dispute as a "private civil action." [FN374] If the State court had found that the action was cloaked in the sovereignty of the Tuscarora Nation, it would have been powerless to intervene. Certainly the court acted appropriately if this dispute had involved non-Indians and had been off the reservation. But to the extent that the real dispute was between the Tuscarora government and Tuscarora citizens, the State court was acting far beyond its authority and improperly interfered with the otherwise properly functioning political process of the Tuscarora Nation.
Another more subtle example of State court review of Indian governmental action is demonstrated by john v. Hoag. [FN375] At issue in the case was a resolution passed by the Seneca Nation Council purportedly granting the plaintiff, an individual Seneca, an exclusive distributorship for the sale of cigarettes on the reservation. The plaintiff alleged that the Seneca Nation had breached a "contract" by not prohibiting the sales activity of the defendant Hoag, who had also obtained the right to sell cigarettes by resolution of the Seneca Council. [FN376] The State court, however, after reviewing the procedures of the Seneca Nation Peacemaker's Court, concluded that the plaintiff "never opted to commence an action" in that court and invoked its concurrent jurisdiction to sustain an interference of contract claim against the defendants. [FN377]
Although the court recognized that the Seneca Nation itself could not be sued, it nonetheless benignly decided to review the effect of Seneca Nation legislation by sustaining jurisdiction over the "contract" claim against the defendants. The court did understand the interests of the Seneca Nation: "To whom and on what conditions the right of sale of cigarettes on the lands of the Seneca is without question an internal legislative determination *569 reserved to the Seneca Nation." [FN378] However, the court failed to perceive that determining whether the plaintiff did indeed have an exclusive right to sell cigarettes and whether the defendant did in fact interfere with that right turned on the language and legislative intent of a Seneca Nation law. [FN379]
Under these circumstances, exercising State jurisdiction over the dispute between these two Senecas impermissibly interfered with the right of the Seneca people, through their elected representatives, "to make their own laws and be ruled by them." [FN380] The only legitimate forum for adjudicating a dispute between two Senecas over the scope of Seneca Nation legislation was the Peacemaker's Court of the Seneca Nation, and not a New York State court.
The conclusion to be drawn from these cases is that it is virtually impossible under the system of jurisdiction established by sections 232 and 233 for the Iroquois governments to exercise their rightful sovereign authority over political matters in a system that provides for oversight by the State courts, even though, as demonstrated by the Anderson and Hoag cases, State courts have become more concerned about infringing upon the sovereignty of Indian nations. But the same cases demonstrate the ways, both consciously and unconsciously, that state courts can effectively

undermine the political and legal processes of Indian governments. This threat to tribal self-government will continue to exist as long as individual Indians are capable of taking disputes among themselves into the state courts.

The final significant effect of sections 232 and 233 on Iroquois self-government is that the statutes perpetuate an attitude of dependence on New York State and inhibit the community initiative necessary for improving tribal political and legal institutions. Although this effect is somewhat related to the previous discussion concerning the effect of concurrent jurisdiction on the development of tribal courts, the emphasis here is more on the continuing psychological impact of having the State, rather than the Iroquois governments themselves, fulfilling traditional governmental functions.

*570 The problem can best be demonstrated by analyzing the law enforcement situation of the Seneca Nation. [FN381] Currently, the Seneca Nation operates its own police force, the only government of the Six Nations to do so. [FN382] In addition, the State police and the sheriffs' departments of Cattaraugus and Erie Counties maintain a working relationship with Seneca Nation law enforcement officers to provide relatively uniform criminal law enforcement on the Allegany and Cattaraugus Reservations. The problem is that the existence of such an arrangement created by section 232 undermines the community incentive necessary to establish exclusive tribal law enforcement. By augmenting the police services provided by the Seneca Nation, State participation apparently satisfies the remaining community need for law enforcement, as evidenced by the lack of initiative to alter the status quo.

One could argue that because the Seneca community is satisfied with the current level of law enforcement provided by the mix of State and Indian police, the Senecas must be truly "self-governing." Otherwise, they would alter the mix of Indian and non-Indian law enforcement to obtain a combination of police services that better reflects the community preference. However, the complacency associated with the provision of State police services is evidence of the gradual assimilation of the Seneca people into the fabric of the New York State political community. If a desire for complete autonomy over the provision of law enforcement indicates a pure commitment to self-government, then to the extent that any level of non-Indian police services completely satisfies the law enforcement needs of the Seneca people, the self-governing motivation of the Seneca people must be partially destroyed. Since section 232 permits the State to enforce its laws on the reservation, the statute has over time gradually eroded the self-governing motivation of the Seneca people to provide, by their own efforts, this integral function of government.

*571 The real problem for self-governance will arise if the government of the Senecas ever attempts to exercise criminal jurisdiction in areas where the State is currently enforcing the law and is unwilling to relinquish its exclusive power. [FN383] Ideally, there should be a continuum of jurisdiction, with the State withdrawing primary support contingent upon the ability of the Iroquois government to assume the added responsibility. Arguably, Congress intended to create such a situation by enacting section 232. But suppose the State does not withdraw its exercise of jurisdiction: would the State defer to an Indian legal system empowered to prosecute charges of theft, assault, or even murder? Would it welcome the assistance? Or resent the loss of control? It certainly seems that cooperative agreements, such as the one that exists between the Cattaragus Reservation law enforcement and the county sheriff's department, are the key to any smooth transition. Ultimately, if New York State is not a willing partner to the assumption of law enforcement responsibility by the Iroquois nations, then these governments will never be totally

succesful in their efforts to change the current system. Such a situation would only lead to further dependence as Iroquois people would be forever subject to the assimilative effect of section 233. Certainly the exercise of criminal jurisdiction by the State is not bad in all cases. The effect is negative only where an Iroquois government is structurally and financially able to provide police services, but does not do so due to a lack of community initiative. In fact, the exercise of State jurisdiction is not only positive, but imperative, when dealing with Iroquois governments that are ill-equipped to exercise a traditional governmental function, such as law enforcement. In these situations, the provision of police services by the State is beneficial only until the Iroquois government itself is developed enough to sustain its own police force. Unfortunately, this event may never occur because the community initiative to govern exclusively in this area could, if not already, be totally depleted due to the years of dependence on the State.

These three different effects of sections 232 and 233 on Iroquois tribal courts and self-determination demonstrate that the *572 presence of these laws undermines the ability to self-govern every time an Iroquois government or individual relies on the State for protective or adjudicative services. [FN384] Such consequences were predictable effects of the statutes. Although the Congress that enacted the statutes must have had a genuine desire to improve the quality of life for Iroquois people on the reservations, the assimilationist policy reflected in the statutes has perpetuated a dependency on the majority society. If self-determination is truly the objective of the Iroquois people and the United States, it will not be achieved while sections 232 and 233 remain applicable law.

V. RECOMMENDATIONS FOR REFORM AND CONCLUSION

The grant of criminal and civil jurisdiction over Iroquois territory to New York State under sections 232 and 233 has, for the most part, fulfilled the objectives of the Congress that enacted those statutes. Although lawlessness has not disappeared from the reservations, section 232 has provided a mechanism that at least allows for a mimimum level of law enforcement. However, the exercise of State law enforcement on the reservations appears linked to the working relationship that exists between Iroquois officials and State and local law enforcement officials responsible for implementation. [FN385] Naturally, the possibility exists that police services could arbitrarily be denied since the exercise of criminal jurisdiction is not mandatory, but occurs only "when deemed proper and necessary by State officials and when law enforcement by Indian courts is deemed *573 unsatisfactory." [FN386] Although civil rights violations remain possible, [FN387] the discretion available within section 232 ultimately holds the key to any future assumption of law enforcement duties by the Iroquois governments themselves while section 232 remains current law.

Even though section 233 does not grant as much authority to the State as section 232, its effects on self-government are no less significant. By allowing individual Indians and Indian nations to file suit in State court, the enacting Congress may have done more to undermine self-governance than by simply allowing the State to assume responsibility for law enforcement. As has been discussed, opening up the State courts to reservation Indians has had the effect of opening up the internal affairs of the Iroquois governments to the scrutiny and authority of a much more powerful sovereign, as well as subordinating tribal judicial process to a seemingly more equitable judicial system. The potential result is that the negative long-term effects of section 233 on self-determination far outweigh the threat posed to the Six Nations from allowing the State to

exercise criminal jurisdiction over the reservations.
In light of these effects and the fact that the United States no longer pursues a policy of assimilating American Indians, the current jurisdictional scheme must be altered. One solution, although fairly drastic, would be to repeal sections 232 and 233 immediately. The effect of repealing section 233 would be simply to deny reservation Indians access to the State courts and would leave them with no alternative but to turn to tribal forums for resolution of their disputes. It is certain that such a change would be difficult in the short run, since only the Seneca Nation has a now-familiar style judicial system. But the change would reestablish a normally functioning political process in which the citizenry would demand that some form of equitable judicial process be implemented. By reestablishing the incentive to improve internal judicial systems, any discomfort due to the elimination of State courts as a viable option for resolving disputes would be offset by the real, long-term possibility that credible and equitable judicial processes could be reconstructed within tribal government. Arguably, the past forty years of access to *574 State courts could serve as a standard of fairness that Iroquois people could demand from their own judicial systems.
Despite the feasibility of immediately repealing section 233, the immediate repeal of section 232 would likely do more harm than good to Iroquois communities. This is so for two reasons. First, the Iroquois governments of today are not sufficiently developed to supplant completely State law enforcement. Second, because of this inadequacy, the immediate repeal of State criminal jurisidiction would have a much more severe and damaging effect on Indian communities than simply denying reservation Indians access to State courts. Thus, only a gradual and managed repeal of section 232 will allow Iroquois governments to assume control over the governmental function of law enforcement currently being administered by New York State.
The most natural and effective legislative revision would establish a mechanism that would allow for the piecemeal retrocession of jurisdiction by New York State, as determined by the affirmative action of the individual Iroquois nations. Such a scheme would allow the Indian communities themselves, each having a range of abilities to assume governmental responsibilities, to determine the scope of State authority over their territory. For example, a referendum, a vote of the tribal council, or a decision of the Chiefs could serve as a sufficient indicator of whether a particular community desired assistance from New York in fulfilling the basic governmental function of law enforcement. Perhaps more importantly, reform of this type would create the right to choose the relationship that exists between an Iroquois nation and the State. To allow for an Indian nation to determine the degree of state involvement in its territory is not without legislative precedent. The 1968 amendments to Public Law 280, which were codified in various sections of the U.S. Code, have worked a substantial change in the way states exercise both criminal and civil jurisdiction in Indian country. First, 25 U.S.C. §§ 1321 and 1322 allow for any state to assume criminal and civil jurisdiction over particular Indian territory located within its boundaries, but only with the consent of the particular Indian nation involved. [FN388] In addition, 25 U.S.C. § 1323 allows for the retrocession of "all or any measure of criminal or civil jurisdiction, or both," acquired by a state pursuant to Public Law 280, dependent upon the *575 unilateral action of that state. [FN389] By altering the mechanism by which states obtain, or retain, jurisdiction over Indian territory, Congress explicitly recognized that the previous grants of jurisdiction to states were improper absent the consent of the people to be subject to state control. A scheme to allow the Six Nations themselves to determine the amount of State involvement would accomodate this view. Although the jurisdictional relationship with the State

would be different with regard to each Iroquois community or nation, such a change would not place undue administrative burdens on the State, given the decentralization of the State police. Ultimately, this proposal for change in New York would provide greater responsiveness and legitimacy, since the Six Nations themselves would determine whether there would be a retrocession of State jurisdiction and to what extent such retrocession would take place. [FN390]

Another possible mechanism for protecting and strengthening Iroquois self-government would be to provide for formal federal oversight of the State's exercise of jurisdiction over Iroquois territory and people. Because the existence of State jurisdiction does not allow for the unimpeded development of Iroquois political and legal systems, monitoring by the federal government might provide the only alternative under the current scheme that could eventually lead to self-governance, completely free from State involvement. Accordingly, a pledge of federal financial assistance and training to develop Indian law enforcement and judicial capabilities not only would result in short-time local improvements but also would serve to put the State on notice that it is merely fulfilling a caretaker role until the Iroquois nations themselves can provide law enforcement and judicial services.

Aside from any immediate alteration in the current jurisdictional scheme, several changes must be made by New York State in order for it to be in full compliance with federal law. With regard to the exercise of criminal jurisdiction, the State must establish a formal and coherent policy governing the circumstances in which it will enforce its laws or otherwise take action in Iroquois territory. To the extent that the State should *576 exercise criminal authority only where tribal law enforcement is inadequate, the continued lack of a policy can only lead to continued confusion and instability between Indian officals and the State officials charged with implementing reservation law enforcement.

In addition, the State must substantially revise its own Indian Law to eliminate those provisions that conflict with federal and tribal law. In the absence of any change, the State will continue illegally to usurp authority that properly belongs either to the Iroquois nations or to the United States. Until this body of outdated law is revised, there will continue to exist a mechanism to justify ultra vires State action. Revision will directly serve to enhance the authority of Indian governments to control their internal matters by eliminating the possibility of an outside influence, such as the State or State law, from misdirecting local energies away from internal problems.

Finally, with regard to the exercise of section 233 civil jurisdiction, State judges must be acutely aware that allowing Indians to bring their claims in State court does not mean that federal law and policy are inapplicable. Although section 233 undermines the ability of tribal courts to exercise their exclusive jurisdiction in Peacemaker's Courts, [FN391] State courts cannot contribute to this erosion of self-government. Ultimately, the rights of individual Indians to bring their claims in State court must be balanced against the sovereign rights of Indian communities to self-govern. State courts must apply tribal law where it exists and can be discerned. And given the federal policy and law currently favoring the right of Indian nations to decide for themselves what judicial process will exist in their territory, the only type of case involving an Indian that should be heard in State court, while section 233 remains the current law, is one where the cause of action arises off the reservation. In all other circumstances, notwithstanding the language of the statute, the exercise of jurisdiction will "infringe[] on the right of reservation Indians to make their own laws and be ruled by them," [FN392] and such concerns should be considered when determining subject matter jurisdiction to decide a case involving Indians.

Although much of the current quandry in pursuing self-government is derived from what the

federal and State governments *577 have done, there remains a significant remedy that can minimize the effects of sections 232 and 233. It takes the form of unilaterally prohibiting the conduct that sections 232 and 233 explicitly allow. That is, an Iroquois government could create negative incentives to prevent its citizens from affirmatively involving State law enforcement or taking a dispute to a State court. Certainly the nuances of such disincentives and their consequences could be left to the particular government, but the overall effect would be to virtually eliminate the effect of section 232 or section 233. Of course, much of the problem in this remedy is whether section 232 and section 233 will even allow such political initiative to exist. Ultimately, the Six Nations can never genuinely achieve autonomous self-government unless they themselves desire it, since any hope of legislative revision is necessarily contingent upon their involvement. A major impediment to such real reform is no doubt linked to the damaging conception of sovereignty that is held by many Iroquois people and leaders. The current age, much like the age that existed two hundred years ago, is not one that respects hollow protestations that sovereignty is being infringed. True sovereignty is much more than a declaration; it is an affirmative and substantive exercise of political power that is based on the will of the people. Real self-determination for the Iroquois Nations will only be realized when the governments can substantively fulfill all of the political, economic, social, and in some cases, spiritual, needs of their people. In light of the threat that sections 232 and 233 pose to the psychology of self-governance, Iroquois leaders have a moral obligation to carry the burden of revitalizing a community spirit that is intolerant of any jurisdictional scheme that allows the State of New York to interfere with the right of self-determination.

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[FN1] The Confederacy, or the "Haudenosaunee" (People of the Longhouse), as they call themselves, refers to the historical alliance between the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora Nations. The Mohawk, Oneida, Onondaga, Tonawanda Band of Senecas, and the Tuscaroras all retain governance by Chiefs in Council, and are active participants in the Confederacy. The Seneca Nation of Indians is a representative democracy that was formed in 1848 by a constitution adopted by the Seneca people and is a politically separate nation from the Confederacy. The Mohawks also retain some governance by elected officials. See F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 416-24 (1942 ed.) [hereinafter F. COHEN (1942 ED.)]; SEE ALSO NEW YORK STATE EXECUTIVE CHAMBER, PRELIMINARY REPORT TO THE GOVERNOR ON STATE-INDIAN RELATIONS 3-6 (MAY 1988) (UNPUBLISHED REPORT ON FILE WITH THE AUTHOR) [HEREINAFTER PRELIMINARY REPORT]. TO THE EXTENT THERE IS NO SINGLE TERM THAT CAN DESCRIBE ALL OF THE IROQUOIS NATIONS, THEY WILL BE REFERRED TO IN THIS NOTE BY THEIR HISTORICAL DESIGNATION OF "IROQUOIS" OR "SIX NATIONS."S."
The current relationship between the Six Nations and the State, as accurately described by the State, is:
The more traditional Indian nations do not officially recognize the legitimacy of a direct State role in Indian issues, but they do look to the State as a service provider pursuant to treaty

obligations. They believe that a sovereign relationship exists only with the United States and that the State of New York has only an incidental, ministerial relationship with the nations as an agent of the United States. Accordingly, they do not acknowledge formal relations with the State, whether on issues of criminal jurisdiction, taxation or the regulation of other activities such as hunting and fishing. In actual practice, however, all Indian nations accept, albeit do not formally acknowledge, an official State role.
Preliminary Report at 2-3.
Although the Shinnecock Tribe and the Poospatuck Tribe are also located within the interior boundaries of New York State, jurisdictional issues involving their territory will not be discussed in this Note, since these Indians are recognized as an Indian nation only by New York State, and not the federal government. Accordingly, federal law does not apply to their affairs. Id. at 5.

[FN2] Within the confines of federal law, fee title to the lands of the Six Nations is held by the United States as sovereign. "Indian title," which is a right of occupancy good against all but the sovereign, is held by the Six Nations. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 668 (1974); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).
The Mohawks (Akwesasne) own 14,640 acres within the borders of the United States; the Oneidas, 35 acres; the Onondagas, 7300; the Cayugas, 0 acres; the Tonawanda Band of Senecas, 7549 acres; the Seneca Nation of Indians, 44,960 acres constituting three reservations (Allegany-21,680, Cattaraugus-22,640, Oil Springs-640); the Tuscaroras, 5700 acres. See L. HAUPTMAN, FORMULATING AMERICAN INDIAN POLICY IN NEW YORK STATE, 1970-1986 at App. III (1988). Currently, the Mohawks, Oneidas, Cayugas, and Senecas have outstanding land claims against New York State. See generally C. VECSEY & W. STARNA, IROQUOIS LAND CLAIMS (1988).

[FN3] See L. HAUPTMAN, supra note 2, at 7-9.

[FN4] Throughout this Note, the word "State," when capitalized, refers exclusively to New York.

[FN5] See L. HAUPTMAN, supra note 2, at 9-10.

[FN6] Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232 (1988)) (criminal jurisdiction); Act of Sept. 13, 1950, ch. 947, § 1, 64 Stat. 845 (codified at 25 U.S.C. § 233 (1988)) (civil jurisdiction).

[FN7] See infra note 62 and accompanying text.

[FN8] See infra note 81 and accompanying text.

[FN9] See infra note 74 and accompanying text.

[FN10] See infra notes 79-80 and accompanying text.

[FN11] Since the analysis in this Note is limited to a discussion of 25 U.S.C. §§ 232 and 233, important regulatory jurisdictional issues such as environmental regulation and state taxation of

Indian economic activity will not be addressed.

[FN12] See supra note 6.

[FN13] See, e.g., infra note 27 and accompanying text.

[FN14] See generally Gunther, Governmental Power and New York Indian Lands-A Reassessment of a Persistent Problem of Federal-State Relations, 8 BUFFALO L. REV. 1, 3-13 (1958); see also L. HAUPTMAN, supra note 2, at 3-17.

[FN15] N.Y. CONST. art. XXXVII (1777). A similar provision was contained in Art. I § 13 of the 1938 New York Constitution but was repealed Nov. 6, 1962, effective Jan. 1, 1963. Article XXXVII also is analogous to the federal Trade and Intercourse Acts. See infra note 20.

[FN16] F. COHEN (1942 ed.), supra note 1, at 416-19.

[FN17] See Oneida Indian Nation v. New York, 860 F.2d 1145, 1153-61 (2d Cir. 1988), cert. denied 110 S. Ct. 200 (1989), which held that although Article IX(4) of the Articles of Confederation was a grant of authority to the national government to make treaties with the Indians, it did not deprive the states of the right to extinguish title to Indian land within their borders. Article IX(4) provides, in part:
The United States in Congress assembled shall also have the sole and exclusive right and power of ... regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated ....

[FN18] Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15, reprinted in 2 C. KAPPLER, INDIAN AFFAIRS-LAWS AND TREATIES 5 (1904). The Treaty also guaranteed the land holdings of the Iroquois in exchange for their relinquishing claim to the western territory. This promise, and the Trade and Intercourse Acts, see infra note 20 and accompanying text, continues to serve as the basis for current land claims to areas in central New York State. See Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985). See generally C. VECSEY & W. STARNA, supra note 2.

[FN19] U.S. CONST. art. I, § 8, cl. 3.

[FN20] Act of July 22, 1790, ch. 33, 1 Stat. 137. Without major change, the policy was continued in six other Acts, including the Act of June 30, 1834, ch. 161, 4 Stat. 729 (repealed in part) (codified forward and amended at 18 U.S.C. §§ 1152, 1160, 1165 (1982); 25 U.S.C. §§ 177, 179, 180, 193, 194, 201, 229, 230, 251, 263, 264 (1988)); see also F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 110 n.388 (1982 ed.) [[[hereinafter, F. COHEN (1982 ed.)].

[FN21] See Oneida Indian Nation, 414 U.S. at 670-71. "The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13." Id. at 670. See also Oneida Indian Nation, 470 U.S. at 245-

48; Tuscarora Nation of Indians v. Power Authority of New York, 257 F.2d 885, 888-89 (2d Cir. 1958).

[FN22] See Gunther, supra note 14, at 6. For a reprinting of many of these treaties, see SPECIAL COMMITTEE APPOINTED BY THE N.Y. ASSEMBLY OF 1888 TO INVESTIGATE THE INDIAN PROBLEM OF THE STATE OF NEW YORK, REPORT Doc. No. 51, 190-382 (1889) [hereinafter, WHIPPLE REPORT].

[FN23] See Gunther, supra note 14, at 6.

[FN24] See supra note 17.

[FN25] See Oneida Indian Nation v. New York, 860 F.2d 1145 (2d Cir. 1988), cert. denied 110 S. Ct. 200 (1989).

[FN26] The Supreme Court has recognized the nature of the relationship between New York and the Iroquois: "There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians." Oneida Indian Nation v. County of Oneida, 414 U.S. 664, 678 (1974). See also Comment, The New York Indians' Right to Self-Determination, 22 BUFFALO L. REV. 985, 989-93 (1973).
Perhaps the genesis for the State's position was a December 16, 1786 agreement between New York and Massachusetts, which ceded to New York the "government, sovereignty and jurisdiction" over lands in western New York in exchange for "the right of preemption of the soil of the native Indians." Massachusetts eventually sold this "right of preemption" to a private individual, Robert Morris, on May 11, 1791, who used it to purchase most of what is now western New York State from the Senecas in 1797. The agreement was implicitly ratified by the United States, since the sale was supervised by a federal commissioner. See S. DOC. NO. 154, 54th Cong., 2d Sess. 4 (1897) (letter from J.R. Jewell, United States Indian Agent).

[FN27] See WHIPPLE REPORT, supra note 22, at 80-85 App. A, for a list of legislation affecting the Iroquois passed between 1813 and 1888.

[FN28] See F. COHEN (1942 ed.), supra note 1.

[FN29] Treaty with the New York Indians, Jan. 15, 1838, 7 Stat. 550, reprinted in 2 C. KAPPLER, INDIAN AFFAIRS-LAWS AND TREATIES 502 (1904).

[FN30] See WHIPPLE REPORT, supra note 22, at 34-37. The Ogden Land Company claim to the remaining Iroquois territory originated from the transfer of the preemption right from Massachusetts to Robert Morris. See supra note 25.

[FN31] Treaty with the Seneca, May 20, 1842, 7 Stat. 586, reprinted in 2 C. KAPPLER, INDIAN AFFAIRS-LAWS AND TREATIES 537 (1904).

[FN32] See Gunther, supra note 14, at 8. See also Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1856), which involved an attempt by the Ogden Land Company to eject Tonawanda Senecas from lands which had been ceded to it in the Treaty of 1842. However, the Court denied the action, stating that "the removal of Indians from their ancient possessions" must be under the authority of the federal government and "under its care and superintendance." Id. at 370-71.

[FN33] 62 U.S. (21 How.) 366 (1858).

[FN34] 72 U.S. (5 Wall.) 761 (1866).

[FN35] Id. at 768; see also The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866), a companion case in which the Court also rejected the authority of a state to tax Indian lands.

[FN36] See United States v. Forness, 125 F.2d 928, 930-31 (2d Cir. 1942), cert. denied sub nom. City of Salamanca v. United States, 316 U.S. 694 (1942).

[FN37] 1875 N.Y. LAWS 819; see Gunther, supra note 14, at 10.

[FN38] Act of Feb. 19, 1875, 18 Stat. 330, ch. 90, pt. 3, amended by Act of Sept. 30, 1890, 26 Stat. 558, ch. 1132 (extending the renewal term from 12 years to 99 years).

[FN39] See WHIPPLE REPORT, supra note 22, at 3.

[FN40] Id. at 68.

[FN41] Id. at 78. The aggressiveness of the Whipple Report was undoubtedly due to a similar policy preference of the United States expressed in the General Allotment Act of 1887. See F. COHEN (1982 ed.), supra note 20, at 127-36.

[FN42] Gunther, supra note 14, at 12.

[FN43] Id. at 13-14; 1915 Op. N.Y. Att'y Gen. (II 1915 Report N.Y. Att'y Gen) 492.

[FN44] See Mulkins v. Snow, 232 N.Y. 47, 133 N.E. 123, 124 (1921) (With regard to "tribal reservation Indians," New York law operates to "define the powers and rights of such Indians in order to promote peace and good order and provide for the rule of law where Congress is inert and the Indians are incompetent or indifferent."); Johnson v. Long Island R.R., 162 N.Y. 462, 467-68, 56 N.E. 992, 993 (1900) ("[Indians] are regarded as wards of the state, and, generally speaking, possessed of only such rights to appear and litigate in courts of justice as are conferred upon them by statute."); Seneca Nation of Indians v. Christy, 126 N.Y. 122, 27 N.E. 275 (1891), appeal dismissed 162 U.S. 283 (1896).

[FN45] See Patterson v. Council of Seneca Nation, 245 N.Y. 433, 157 N.E. 734, 738 (1927) ("[I]n its capacity of a sovereign nation the Seneca Nation is not subservient to the orders and directions of the courts of New York State ...."); Mulkins, 133 N.E. at 124 ("The contention has

been made with some force that where Congress does not act, no law runs on an Indian reservation save the Indian tribal law and custom."); People ex rel. Cusick v. Daly, 212 N.Y. 183, 105 N.E. 1048, 1049 (1914) (rejecting the argument that the state had more control over the New York Indians than the federal government had over the Indians in the west: "[T]ribes [are] wards of the nation and not of the states.").

[FN46] See New York ex rel. Kennedy v. Becker, 241 U.S. 556 (1916), a case involving the state regulation of off-reservation hunting and fishing. Relying on The New York Indians, 72 U.S. (5 Wall.) 761 (1866), the Court held that although the Indians are wards of the United States, "this fact does not derogate from the authority of the state, in a case like the present, to enforce its laws at the locus in quo." 241 U.S. at 564. In dicta, the Court expressed its view that concurrent jurisdiction on the reservations, "instead of maintaining in each the essential powers of preservation, would in fact deny it to both." Id. at 563; cf. United States ex rel. Kennedy v. Tyler, 269 U.S. 13 (1925) (state court jurisdiction legitimate over lands and members of the Seneca Nation); cf. Seneca Nation v. Christy, 162 U.S. 283 (1896) (Senecas barred by New York statute of limitations from suing to invalidate conveyances of land to private individuals).

[FN47] Mulkins, 133 N.E. at 124.

[FN48] 125 F.2d 928 (2d Cir. 1942).

[FN49] Id. at 932. The Court allowed the Seneca Nation to cancel the lease but made cancellation contingent upon a new lease being held open for 60 days. Id. at 942.

[FN50] Gunther, supra note 14, at 14.

[FN51] Id. at 14-15.

[FN52] Id. at 15.

[FN53] See supra note 6. For a detailed account of this history, see L. HAUPTMAN, THE IROQUOIS STRUGGLE FOR SURVIVAL: WORLD WAR II TO RED POWER 15-43 (1986).

[FN54] See infra notes 55-62 and accompanying text.

[FN55] See, e.g., Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 25 U.S.C. §§ 2701-2721 (1988); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n (1988); Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543 (1988); Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341 (1988); Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-492 (1988).

[FN56] 358 U.S. 217 (1959) (denying jurisdiction of the state court over a civil action brought by a non-Indian against an Indian, where the cause of action arose on the reservation and Congress had not explictly given jurisdiction over the reservation to the state court).

[FN57] C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 1 (1987).

[FN58] See County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985); Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).

[FN59] See California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987); Williams, 358 U.S. at 269, 271; United States v. Kagama, 118 U.S. 375, 381-382 (1886); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556 (1832).

[FN60] United States v. Mazurie, 419 U.S. 544, 557 (1975).

[FN61] Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980).

[FN62] F. COHEN (1982 ed.), supra note 20, at 232-52.

[FN63] Oneida Indian Nation, 414 U.S. at 672.

[FN64] See United States v. Kagama, 118 U.S. 375 (1886); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). See also F. COHEN (1982 ed.), supra note 20, at 220-21.

[FN65] U.S. CONST. art. I, § 8, cl. 3.

[FN66] U.S. CONST. art. VI, cl. 2.

[FN67] See Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-84 (1977); F. COHEN (1982 ed.), supra note 20, at 207-216; but see Comment, Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations, 22 HARV. C.R.-C.L. L. REV. 507, 509-56 (1987).

[FN68] Oneida Indian Nation, 414 U.S. at 667-68.

[FN69] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831).

[FN70] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) ("By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.").

[FN71] See Cotton Petroleum v. New Mexico, 109 S. Ct. 1698 (1989).

[FN72] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987). See, e.g., Indian Gaming Regulatory Act of 1988, supra note 55.

[FN73] Worcester, 31 U.S. (6 Pet.) at 561.

[FN74] See, e.g., Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

[FN75] See Three Affiliated Tribes Of the Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 147 (1984); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

[FN76] Williams v. Lee, 358 U.S. 217, 220 (1959).

[FN77] Bracker, 448 U.S. at 144.

[FN78] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214- 15 (1987) (citing Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1976), and Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980). In both Moe and Colville, the Court found that the state could require tribal smokeshops on Indian reservations to collect sales tax from non-Indian customers enjoying the off-reservation services of the state.) See also Puyallup Tribe, Inc. v. Department of Game of Wash., 433 U.S. 165 (1977), where a treaty provision requiring that Indian fishing rights be exercised "in common with all citizens" and the fact that all but 22 of the 18,000 acres of reservation land were held by individuals in fee simple combined to authorize state regulation of on-reservation fishing by tribal members.

[FN79] McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973) ("[T] he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption."); see also Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965); see generally F. COHEN (1982 ed.), supra note 20, at 270-79. Pre-emption analysis in the Indian law context is unlike other kinds of pre-emption. "Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other." Bracker, 448 U.S. at 143.

[FN80] Cabazon, 480 U.S. at 216 (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983)).

[FN81] McClanahan, 411 U.S. at 172.

[FN82] Bracker, 448 U.S. at 144-45; see also Cotton Petroleum Corp. v. New Mexico, 109 S. Ct. 1698, 1707 (1989).

[FN83] See F. COHEN (1982 ed.), supra note 20, at 207-16.

[FN84] See supra note 55.

[FN85] Bracker, 448 U.S. at 143-44.

[FN86] F. COHEN (1982 ed.), supra note 20, at 274.

[FN87] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 336 (1983); see also Puyallup Tribe, Inc. v. Department of Game of Wash., 433 U.S. 165 (1977).

[FN88] Mescalero Apache Tribe, 462 U.S. at 336 (1983) ("[A] state seeking to impose a tax on a transaction between Indians and nonmembers [of the tribe] must point to more than its general interest in raising revenues."); but see Cotton Petroleum Corp. v. New Mexico, 109 S. Ct. 1698 (1989).

[FN89] Cabazon, 480 U.S. at 215-16; Mescalero Apache Tribe, 462 U.S. at 333.

[FN90] 62 U.S. (21 How.) 366 (1859).

[FN91] See John v. City of Salamanca, 845 F.2d 37 (2d Cir. 1988), cert. denied, 109 S. Ct. 133 (1988), in which the Court noted that the exercise of State authority upheld in Dibble "presaged" the state jurisdiction recognized in United States v. McBratney, 104 U.S. 621 (1882) (state jurisdiction exists over non-Indians who committed crimes against other non-Indians on the reservation).

[FN92] Dibble, 62 U.S. (21 How.) at 369. It appears that the claims of the non-Indians were obtained from Ogden and Fellows, who had secured title to the Tonawanda reservation in the Treaty with the Seneca, May 20, 1842, 7 Stat. 586, reprinted in 2 C. KAPPLER, INDIAN AFFAIRS-LAWS AND TREATIES 537 (1904). The Treaty of 1842 rescinded the Treaty with the New York Indians, Jan. 15, 1838, 7 Stat. 550, reprinted in 2 C. KAPPLER, INDIAN AFFAIRS-LAWS AND TREATIES 502 (1904), which had divested the Seneca Nation of all lands in western New York, and gave the Cattaraugus and Allegany Reservations back to the Senecas in exchange for their relinquishing possession of the Tonawanda and Buffalo Creek Reservations. The Senecas residing on the Tonawanda Reservation refused to vacate the reservation. See United States v. National Gypsum Co., 141 F.2d 859 (2d Cir. 1944). However, their possession was secured by the Treaty with the Seneca, Tonawanda Band, Nov. 5, 1857, 11 Stat. 735, reprinted in 2 C. KAPPLER, INDIAN AFFAIRS-LAWS AND TREATIES 767 (1904).

[FN93] Dibble, 62 U.S. (21 How.) at 368.

[FN94] The complaint in Dibble was filed by the Tonawandas themselves. Id. at 371.

[FN95] Id. This law was the precursor to the current removal statute, N.Y. INDIAN LAW § 8 (McKinney Supp. 1989).

[FN96] Dibble, 62 U.S. (21 How.) at 370. The Court highlighted the fact that, although the Treaty of 1942 divested the Tonawanda Senecas of ownership, the failure of the United States to remove them meant that the New York statute was applicable, since all it required was that the Indians "occupy" the land. Thus, the rights of the relators were not violated because the Treaty did not provide for a right of entry. Id. at 371.

[FN97] Id. at 370.

[FN98] Id. at 371.

[FN99] John v. City of Salamanca, 845 F.2d 37, 41 (2d Cir. 1988), cert. denied 109 S. Ct. 133 (1988).

[FN100] F. COHEN (1982 ed.), supra note 20, at 278-79, 528, 658-59; see also Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1857) (rejecting an attempt by non-Indians to take forcible possession of Tonawanda land by utilizing the State removal procedure and upholding the superior authority of the United States to deal with the Indians).

[FN101] See supra notes 75-79 and accompanying text.

[FN102] Worcester v. Georgia 31 U.S. (6 Pet.) 515, 561 (1832).

[FN103] Williams v. Lee, 358 U.S. 217, 223 (1959).

[FN104] Dibble, 62 U.S. (21 How.) at 367, 368.

[FN105] See People v. Martin, 326 U.S. 496 (1946); Seneca Nation of Indians v. Christie, 126 N.Y. 122, 27 N.E. 275 (1891), appeal dismissed 162 U.S. 283 (1896).

[FN106] See Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 672- 74 (1974); Tuscarora Nation of Indians v. Power Authority of New York, 257 F.2d, 885, 888 (2d Cir. 1958); Seneca Nation of Indians v. New York, 397 F. Supp. 685, 687 (W.D.N.Y. 1975); see also People ex rel. Cusick v. Daly, 212 N.Y. 183, 196-197, 105 N.E. 1048, 1052 (1914).

[FN107] Dibble, 62 U.S. (21 How.) at 368.

[FN108] See supra note 59.

[FN109] United States v. John, 437 U.S. 634, 652-53 (1978) ("[T]here have been times when Mississippi's jurisdiction over the Choctaws and their lands went unchallenged ... [but] neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them.").

[FN110] See Oneida Indian Nation, 414 U.S. at 667; Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587-88 (1823).

[FN111] 72 U.S. (5 Wall.) 761 (1866).

[FN112] Section 8 of the Act of May 4, 1841 provided that the taxes
may be imposed, assessed, levied, and collected as directed by this act, notwithstanding the occupation of the said lands, or parts or portions thereof, by the Indians, or by any other person or

persons; and the failure to extinguish the right of the Indians, or to remove them from the possession thereof, shall not impair the validity of said taxes, or prevent the collection thereof.
Id. at 764 (emphasis by Court).
The legislature, in passing the statute, relied on the Treaty of 1838, which divested the Seneca Nation of its lands in western New York and granted title to Ogden and Fellows. See supra note 92.

[FN113] The New York Indians, 72 U.S. (5 Wall.) at 771-72.

[FN114] Id. at 771.

[FN115] See supra note 86 and accompanying text.

[FN116] The New York Indians, 72 U.S. (5 Wall.) at 767.

[FN117] Id. at 768.

[FN118] Id. at 766.

[FN119] Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 672 n.7 (1974).

[FN120] But see John v. City of Salamanca, 845 F.2d 37, 41, cert. denied, 109 S. Ct. 133 (1988), where the Second Circuit suggested such broad authority does exist. For a discussion of John, see infra note 245 and accompanying text.

[FN121] The statute, 25 U.S.C. § 232 (1988), provides:
The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State:
Provided, That nothing contained in this section shall be construed to deprive any Indian tribe, band, or community, or members thereof, [of] hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights.
Act of July 2, 1948, ch. 809, 62 Stat. 1224.

[FN122] H.R. REP. NO. 2355, 80th Cong., 2d Sess., reprinted in 1948 U.S. Code Cong. Serv. 2284.

[FN123] See supra notes 50-53 and accompanying text for the suggestion that the State was also seeking to recoup authority that it had previously exercised.

[FN124] H.R. REP. NO. 2355, supra note 122.

[FN125] Id.

[FN126] Id.

[FN127] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, 588-90 (codified as amended in various sections of 18, 28 U.S.C.; main provisions at 18 U.S.C. § 1162 (1988) (criminal) and 28 U.S.C. § 1360 (1982 & Supp. V 1987) (civil)).

[FN128] See Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified at 18 U.S.C. § 3243 (1988)) (transfer of partial criminal jurisdiction over all reservations in Kansas); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (transfer of criminal jurisdiction over the Sac and Fox reservations in Iowa); Act of May 31, 1946, ch. 279, 60 Stat. 229 (transfer of criminal jurisdiction over Devils Lake Reservation in North Dakota).

[FN129] Section 1162 of Public Law 280 provides:
(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:
[Alaska (with exceptions), California, Minnesota (with exception), Nebraska, Oregon (with exception), and Wisconsin]
(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.
(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.
This scheme was amended by the Act of April 11, 1968, Pub. L. No. 90-284, tit. IV, §§ 401-403, 82 Stat. 78 (codifed as amended at 25 U.S.C. §§ 1321-1326 (1988)), which, inter alia, imposed the requirement of Indian consent prior to any future assertions of jurisdiction. 25 U.S.C. § 1321(a) (1988).

[FN130] See, e.g., infra note 152.

[FN131] 18 U.S.C. §§ 1153, 3242 (1988).

[FN132] 18 U.S.C. § 1152 (1988); 18 U.S.C. § 1162(c); see supra note 129.

[FN133] For a detailed examination of this question, see infra notes 170-190 and accompanying text.

[FN134] H.R. REP. No. 2355, supra note 122.

[FN135] Id.

[FN136] 725 F. Supp. 116 (N.D.N.Y. 1989).

[FN137] Id. at 121.

[FN138] Id. at 122.

[FN139] Id. at 121-22.

[FN140] 18 U.S.C. § 1162(a) (1988).

[FN141] 25 U.S.C. § 232 (1988) (emphasis added).

[FN142] See supra note 86.

[FN143] The legislative history indicates that the Undersecretary of the Interior recommended that "the words 'the courts of' ... be omitted [from the draft bill] so as to confer jurisdiction on the State of New York instead of limiting it to the courts." H.R. REP. No. 2355, supra note 122, at 2287. There is some evidence that the committee deliberately failed to accommodate the suggestion since the bill was eventually changed to include other recommendations of the Undersecretary that followed in the same sentence of his letter.

[FN144] See, e.g., Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Kagama, 118 U.S. 375 (1886); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[FN145] F. COHEN (1982 ed.), supra note 20, at 217-20 (citing Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-85 (1977), and Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899)).

[FN146] Id. at 222-24 (citing as recent examples, Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979); Menominee Tribe v. United States, 391 U.S. 404 (1968)); but see Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 478 n.22 (1979), where the Court rejected respondent's argument that a treaty right to self-government could not be abrogated by the enactment of Pub. L. No. 83-280 absent the specific intent of Congress to do so:

To accept the Tribe's position would be to hold that Congress could not pass a jurisdictional law of general applicability to Indian country unless in so doing it itemized all potentially conflicting treaty rights that it wished to affect .... The intent to abrogate inconsistent treaty rights is clear enough from the express terms of Pub. L. 280.

[FN147] 81 Misc. 2d 235, 365 N.Y.S.2d 611 (Onon. Co. Ct. 1975).

[FN148] Use of the term "tribal law" will refer to the domestic law of Indian nations. In contrast,

use of the term "Indian law" will refer to the federal or State law applicable to Indians.

[FN149] In March 1974, the Council of Chiefs enacted a law barring all non-Indians from living on the reservation, regardless of their tenure or family affiliations. The Chiefs had initially petitioned the United States Justice Department to remove the non-Indians, which deferred the matter to the Onondaga County District Attorney's Office for proceedings pursuant to N.Y. INDIAN LAW § 8 (McKinney 1950 & Supp. 1990). Refusing to petition the District Attorney directly, the Chiefs and their supporters attempted to remove the non-Indians themselves, which ultimately led to the indictment at issue. Cook, 365 N.Y.S.2d at 615.

[FN150] See, e.g., Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973); United States v. Kagama, 118 U.S. 375 (1886).

[FN151] Cook, 365 N.Y.S.2d at 618-19.

[FN152] The court also relied on a case upholding the application of a county gambling ordinance over a reservation in a Public Law 280 state. Id. at 619 (quoting Rincon Band of Mission Indians v. County of San Diego, 324 F. Supp. 371 (S.D. Cal. 1971), aff'd, 495 F.2d 1 (9th Cir. 1974), cert. denied, 419 U.S. 1008 (1974)).
The Cook court was relying upon a slightly misguided understanding of the tribal-state relationship expressed in Rincon: "There is no doubt that a residual sovereignty remains in Indian tribes even in those states where Public Law 280 operates. There is nothing in policy or law, however, which indicates that this limited self government inherent in the Indian tribes may rise to challenge State law ...." Id. (citing Rincon, 324 F. Supp. at 378). However, it is now settled law that Public Law 280 did not authorize general regulatory authority to states and localities. See infra Part III(C)(2).

[FN153] Cook, 365 N.Y.S.2d at 619.

[FN154] Accord United States v. Burns, 725 F. Supp. 116 (1989); see supra notes 133-135 and accompanying text.

[FN155] See, e.g., United States v. Dion, 476 U.S. 734, 738 (1986); Menominee Tribe v. United States, 391 U.S. 404, 412 (1968); United States v. Santa Fe Pacific RR. Co., 314 U.S. 339, 353 (1941).
To demonstrate the point, the Treaty of 1789, Treaty with the Six Nations, Jan. 9, 1789, 7 Stat. 33, reprinted in 2 C. KAPPLER, INDIAN AFFAIRS-LAWS AND TREATIES 23 (1904), provides that state courts will have jurisdiction over robbery and murder cases involving both Indians and non-Indians, where the offense occurs within a particular state. Id. at 25. In addition, the Six Nations agreed to extradite any of its citizens who committed a robbery or murder in a state and later returned to Indian territory. Id. Since the Treaty provides that jurisdiction is based on geography, id. at 23-24, the implication is that the Iroquois nations retain exclusive jurisdiction over all offenses committed within their territory, regardless of whether the crime was committed by an Indian or a non-Indian.

A more comprehensive jurisdictional relationship was outlined in the Treaty of 1794, Treaty with the Six Nations, Nov. 11, 1794, 7 Stat. 44, reprinted in 2 C. KAPPLER, INDIAN AFFAIRS-LAWS AND TREATIES 34 (1904), which provides a mechanism whereby the party injured by a citizen of one government can petition the government of the perpetrator for redress. Id. at 36 (Article VII). However, a significant clause in Article VII specifies that such an arrangement would be maintained "until the legislature (or great council) of the United States shall make other equitable provision for the purpose." Id. Notwithstanding the provision in Article VII of the 1794 Treaty reserving the right of Congress to alter the jurisdictional arrangement, it remains an open question whether granting jurisdiction over the Six Nations to New York State was equitable.

[FN156] 106 Misc. 2d 522, 434 N.Y.S.2d 850, 852 (Frank. Co. Ct. 1980).

[FN157] Boots, 434 N.Y.S.2d 850, 852 (citing Yakima, 439 U.S. 463, 478 n.22 (1979)); supra note 146.

[FN158] Burns, 725 F. Supp. at 120 (citing Yakima, 439 U.S. at 478 n.22).

[FN159] Yakima, 439 U.S. at 478 n.22 (emphasis added).

[FN160] Congress did, however, explicitly provide for the protection of hunting and fishing rights. See H.R. REP. No. 2355, supra note 122.

[FN161] But see New York ex rel. Ray v. Martin, 326 U.S. 496, 501 (1946) ("Neither the 1794 Treaty nor any other requires a holding that offenses by non-Indians against non-Indians disturbing the peace and order of Salamanca are beyond New York's power to punish.").

[FN162] See supra note 133 and accompanying text.

[FN163] 18 U.S.C. §§ 1153, 3242 (1988) (covering murder, manslaughter, kidnapping, maiming, rape, adultery with a female under 16, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larcency).
There is no indication that the IMCA was intended to serve as the exclusive basis for federal criminal jurisdiction. See generally F. COHEN (1982 ed.), supra note 20, at 302-04. For a listing of a number of federal laws conferring criminal jurisdiction over Indians, see id. at 286 n.46.

[FN164] 18 U.S.C. § 1152 (1988). The statute contains a significant exemption for crimes committed "by one Indian against the person or property of another Indian" and for crimes committed by an Indian which have been punished in accordance with tribal law. See generally F.COHEN (1982 ed.), supra note 20, at 287-300.

[FN165] See United States v. Blue, 722 F.2d 383 (8th Cir. 1983) which stated that 18 U.S.C. § 1152 is not a predicate for general federal jurisdiction in Indian country. Rather the scope of section 1152 is limited to the applicability or nonapplicability of federal enclave laws, those laws passed by the federal government in exercise of its police powers over federal

property and now defined in the United States Code in terms of "special maritime and territorial jurisdiction of the United States," 18 U.S.C. § 7.
Id. at 385 (quoting United States v. White, 508 F.2d 453, 454-55 (8th Cir. 1974)).

[FN166] See, e.g., 18 U.S.C. § 1166 (1988) (prohibiting advancing or profiting from gambling activity); 18 U.S.C. § 1955 (1988) (conducting an illegal gambling business); see liquor laws, such as 18 U.S.C. §§ 1154, 1156, 1161, 3055, 3113, 3488, 3618-3619) (1988).

[FN167] New York ex rel. Ray v. Martin, 326 U.S. 496 (1946); Donnelly v. United States, 228 U.S. 243 (1913), reh'g denied, 228 U.S. 708 (1913) (limiting United States v. McBratney, 104 U.S. 621 (1882) (exception to the GCA for crimes by non-Indians against other non-Indians)); see also F. COHEN (1982 ed.), supra note 20, at 298.

[FN168] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[FN169] The Supreme Court has not decided this issue. See United States v. John, 437 U.S. 634, 651 n.21 (1978). For the argument that the IMCA probably does not affect tribal criminal jurisdiction, see F.COHEN (1982 ed.), supra note 20, at 337-41.

[FN170] John, 437 U.S. at 651 (IMCA pre-empts state jurisdiction). The Supreme Court has intimated, but not decided, that state jurisdiction is pre-empted by the IMCA. See F.COHEN (1982 ed.), supra note 20, at 353 n.42 (citing Williams v. Lee, 358 U.S. 217, 220 n.5 (1959)).

[FN171] 104 Misc. 2d 305, 428 N.Y.S.2d 406 (Onon. Co. Ct.), rev'd, 78 A.D.2d 582, 432 N.Y.S.2d 567 (4th Dep't 1980).

[FN172] Edwards, 428 N.Y.S.2d at 410.

[FN173] Id. at 409-10.

[FN174] Id. at 410; see also United States v. N.E. Rosenblum Truck Lines, Inc., 315 U.S. 50, 55 (1942) ("Where the plain meaning of words used in a statute produces an unreasonable result, 'plainly at variance with the policy of the legislation as a whole,' we may follow the purpose of the statute rather than the literal words.") (citation omitted).

[FN175] Edwards, 428 N.Y.S.2d at 410 (emphasis in original).

[FN176] Id.; H.R. REP. NO. 2355, supra note 122, at 2285.

[FN177] Edwards, 428 N.Y.S.2d at 411; H.R. REP. NO. 2355, supra note 122, at 2287.

[FN178] Edwards, 428 N.Y.S.2d at 411; Public Law 280 originally contained an explicit waiver of federal criminal jurisdiction under the GCA and IMCA. See 18 U.S.C. § 1162(c) (1988).

[FN179] Edwards, 428 N.Y.S.2d at 411 (citing Oneida Indian Nation v. County of Oneida, 414

U.S. 661, 679 (1974)); Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 471 n.8 (1979).

[FN180] Edwards, 428 N.Y.S.2d at 411; H.R. REP. NO. 2355, supra note 122.

[FN181] Edwards, 428 N.Y.S.2d at 411-12.

[FN182] People v. Edwards, 78 A.D.2d 582, 432 N.Y.S.2d 567 (4th Dep't 1980).

[FN183] Id. at 568.

[FN184] Id. (citing Yakima Indian Nation, 439 U.S. at 471; Oneida Indian Nation, 414 U.S. at 679; Organized Village of Kake v. Egan, 369 U.S. 60, 73-74 (1962) (highlighting §§ 232 and 233 as instances where "States were permitted to assert criminal jurisdiction, and sometimes civil jurisdiction as well"); Williams v. Lee, 358 U.S. 217, 221 (1959) (§§ 232 and 233 as "granting broad civil and criminal jurisdiction to New York"); United States v. Devonian Gas & Oil Co., 424 F.2d. 464, 468 (2d Cir. 1970) (where enactment of §§ 232 and 233 "relinquished the criminal and civil jurisdiction of the United States over New York Indians"); Anderson v. Gladden, 188 F. Supp. 666, 677 (D. Oregon 1960) ("Congress surrendered to the state of New York complete jurisdiction over all crimes committed on Indian Reservations"), aff'd 293 F.2d 463 (9th Cir. 1961); and People v. Cook, 81 Misc. 2d 235, 240-41, 365 N.Y.S.2d 611, 617-18 (Onon. Co. Ct. 1975) ("Congress ... granted to the State of New York criminal jurisdiction over New York Indian Reservations.").

[FN185] However, there is some evidence that Congress may have intended to alter federal criminal jurisdiction over Iroquois territory to the extent it failed explicitly to retain jurisdiction as it previously had done in granting jurisdiction to Kansas, Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified as amended at 18 U.S.C. § 3243 (1988)), North Dakota, Act of May 31, 1946, ch. 279, 60 Stat. 229 (criminal jurisdiction over the Devils Lake Reservation only), and Iowa, Act of June 30, 1948, ch. 759, 62 Stat. 1161 (criminal jurisdiction over the Sac and Fox Indian Reservation only, "Provided, however, That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations."). Congress considered amending section 232 to include a provision that would have explicitly preserved such jurisdiction. In a memorial apparently ignored by Congress, New York sought to limit its assumption of criminal jurisdiction to those areas not already subject to federal jurisdiction. H.R. REP. NO. 2355, supra note 122, at 2285. Similarly, in enacting the bill, Congress also considered, but did not follow, the advice of the Undersecretary of the Interior to include a proviso to that effect in the bill. Id. at 2286-87 (report of Mar. 1, 1948 from Oscar Chapman, Undersecretary of the Interior). The Undersecretary recommended several amendments, none of which were enacted except for two technical changes. Finally, it is not irrelevant that the Iowa jurisdiction bill, which contained a proviso explicitly retaining federal jurisdiction, was enacted only two days prior to section 232. Although not dispositive, these facts tend to support the conclusion that Congress may have sought to relinquish some measure of federal jurisdiction over Iroquois territory.

[FN186] Bryan v. Itasca County, 426 U.S. 373, 392 (1976); Antoine v. Washington, 420 U.S. 194, 199-200 (1975); see supra note 86 and accompanying text.

[FN187] Watt v. Alaska, 451 U.S. 259, 267 (1981) (where two statutes are not in irreconcilable conflict, "'repeals by implication are not favored,' Morton v. Mancari, 417 U.S. 535, 549 (1974) .... The intention of the legislature to repeal must be 'clear and manifest.' [citation omitted] We must read the statutes to give effect to each if we can do so while preserving their sense and purpose.").

[FN188] But see United States v. John, 437 U.S. 634, 651 (1978) ("Section 1153 ordinarily is pre-emptive of state jurisdiction when it applies."). John can be distinguished on the grounds that, unlike John, sections 1153 and 232 are n pari materia in New York and should be construed together. The issue does not exist in Public Law 280 jurisdictions, since section 1153 jurisdiction was explicitly withdrawn.

[FN189] See, e.g., Assimilative Crimes Act, 18 U.S.C. § 13 (1988), and the crimes of burglary and incest under the IMCA.

[FN190] H.R. REP. NO. 2355, supra note 122.

[FN191] Id.

[FN192] Limits on the criminal jurisdiction of an Indian government over its own citizens were imposed by Congress in the 1968 Indian Civil Rights Act. Act of April 11, 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 73, 77 (codified at 25 U.S.C. §§ 1301-1303 (1988)).
However, all remedies except for habeas corpus review are available only from tribal forums. See also F. COHEN (1982 ed.), supra note 20, at 666-70.

[FN193] See supra note 1, at 25 ("The traditional governments claim that this Act [§ 232] is a violation of the 1794 Treaty of Canandaigua and, therefore, of no force and effect. In recent years, the elective governments have generally supported State law enforcement efforts on their reservations.").

[FN194] Id. at 25-26. As described by the State, its "system" of law enforcement on the reservations consists of:
Ad hoc arrangements [that] have been made with traditional tribal governments with respect to keeping the peace and arresting persons accused of crimes who reside on the reservations. Generally, police notify a designated chief before entering a reservation. In some cases, the chiefs have made an accused criminal available to authorities for arrest.
The State Police seek to cooperate with tribal officials in conducting activities on reservations. However, there have been instances of State Police, county sheriffs or local police entering reservations without prior consultation. This occurs, for example, when circumstances require immediate action. This situation has arisen several times on the Tuscarora Reservation located in Niagara County ....

[FN195] 25 U.S.C. § 232 (1988).

[FN196] 25 N.Y. JUR. 2D Counties, Towns, and Municipal Corporations § 218 (1982) ("The residual 'police power' reposes in the state, not in its political subdivisions, and in presuming to exercise such power, a municipality must first show a delegation of such power from the state."); see also 20 N.Y. JUR 2D Constitutional Law § 200 (1982 & Supp. 1989).

[FN197] However, contrary to the statutory language, the New York Attorney General has concluded that "[a] sheriff may provide routine road patrol service within Indian reservations for the purpose of enforcing the State's criminal law as authorized by the United States." 82 Op. Att'y Gen. 91 (1982). The rationale for this decision was that
[s]ince the United States has granted jurisdiction over offenses committed on an Indian reservation, it follows that the agency charged with enforcing the criminal law of the State in a geographical area which includes the Indian reservation has the power to police the area in the same manner that the agency polices the rest of the geographical area.
Id. at 92.
Such an interpretation is incorrect in light of the foregoing analysis. In addition, history indicates that such a situation is not always deniable, since exercises of authority by local governments over Indian territory have often been quite damaging to Indian communities. This is so not only because Indian self-governance is undermined by creating a situation of dependency, but also because the potential for discriminatory treatment increases significantly. Moreover, the fact that section 232 only granted jurisdiction to the State "to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State" (emphasis added) necessarily implies that the State may not delegate its general police power to local officals even if such a delegation is contemplated under the jurisdictional grant to the State. Rather, it would appear that the power of the courts, i.e., the power to prosecute specific instances of misconduct, is delegable.

[FN198] 25 U.S.C. § 233 (1988) Section 233 provides:
The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State:
Provided, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts:
Provided further, That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom:
Provided further, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to

execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land:
And provided further, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands, within any Indian reservation in the State of New York:
Provided further, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.

[FN199] H.R. REP. NO. 2720, 81st Cong., 2d Sess., reprinted in 1950 U.S. Code Cong. Serv. 3731, 3732. The statute certainly has the protective effect of providing an adequate forum for the redress of wrongs, particularly those commited by non-Indians who later flee the reservation.

[FN200] See supra note 54. Since the statute does not interfere with the ability of Indians or Indian governments to bring suit in federal court, issues pertaining to federal jurisdiction need not be discussed.

[FN201] H.R. REP. NO. 2720, supra note 199.

[FN202] 125 F.2d 928 (2d Cir. 1942). See supra notes 50-53 and accompanying text.

[FN203] 25 U.S.C. § 233 (1988) (emphasis added).

[FN204] American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) ("As in all cases involving statutory construction, 'our starting point must be the language employed by Congress,' [citation omitted] and we must assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.' [[[citation omitted] Thus, 'absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); see also Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary common meaning.").

[FN205] In Bryan v. Itasca County, 426 U.S. 373, 378-79 (1976), where the Court interpreted the analogous Public Law 280, the Court rejected the argument that the exceptions to state jurisdiction listed in the statute would have no meaning unless the statute conferred through silence a general right to tax. See infra note 217. Such a reading would also be inconsistent with the canon of construction favoring retained tribal rights. See supra note 86.

[FN206] H.R. REP. NO. 2720, supra note 199, at 3733.

[FN207] Id.

[FN208] Id. at 3732.

[FN209] Id.

[FN210] See supra note 129 and accompanying text.

[FN211] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, 588-90 (codified as amended in various sections of 18, 28 U.S.C.; main provisions at 18 U.S.C. § 1162 (1988) (criminal) and 28 U.S.C. § 1360 (1982 & Supp. V 1987) (civil)).

[FN212] See S. REP. NO. 699, 83d Cong., 1st Sess., reprinted in 1953 U.S. Code Cong. & Admin. News 2409, 2409-14; H.R. Rep. No. 2720, supra note 199, at 3731-32.

[FN213] See Brief Amicus Curiae of the Seneca Nation of Indians at 13- 15, John v. City of Salamanca, 845 F.2d 37 (2d Cir. 1988), cert. denied 109 S. Ct. 133 (1988) (citing Menominee Tribe of Indians v. United States, 391 U.S. 404, 411-12 (1968) (Public Law 280 to be construed in pari materia with the Menominee Indian Termination Act of 1954, 68 Stat. 250, 25 U.S.C. §§ 891-902 (1988) (later repealed by Menominee Restoration Act, 87 Stat. 770, 25 U.S.C. §§ 903-903f) (1988))).

[FN214] 426 U.S. 373 (1976).

[FN215] The New York State Attorney General agrees that Bryan is vital to an understanding of section 233, concluding that section 233 does "not [[[appear] to provide the State with the authority to regulate substance abuse programs on Indian reservations," 87 Op. Att'y Gen. 35 (1987), and also that section 233 does not confer general power to tax a reservation Indian earning income on the reservation. 77 Op. Att'y Gen. 76 (1977).

[FN216] 28 U.S.C. § 1360(a) (1982 & Supp. V 1987). Note the nearly identical language in the first section of section 233, quoted supra note 198.

[FN217] Bryan, 426 U.S. at 383. The Court also excerpted the "sparse" legislative history of section 1360(a) for support for this conclusion. Id. at 381-83.

[FN218] H.R. REP. NO. 2720, supra note 199, at 3732:
The Indians of New York have been classified by the Indian Bureau as among the most advanced in the Nation, and the Bureau has stated that they are in no further need of governmental supervision or control. The committee therefore believes that, in view of the fact that the Indians have the right to preserve the customs and laws they want to prevail in civil cases, and that the State of New York has expressed its willingness and desire that its courts assume jurisdiction over the civil actions and proceedings as provided for in this bill, this is fair and equitable legislation for the Indians and the State of New York.
The enactment of this legislation into law would be in line with the established policy of the Public Lands Committee in its dealings with Indians; i.e., this committee is especially interested in passing legislation which will lead to the gradual assimilation of the Indian population into the American way of life, and the gradual but final complete removal of governmental supervision and control. This bill seems to be a real step in this direction.

[FN219] See Hearings before a Subcomm. of the Comm. on Interior and Insular Affairs on S.683, S.1686, S.1687 80th Cong., 2d Sess. 3-4, 7-8, 114-15, 138 (1948) [hereinafter 1948 Hearings]; but see id. at 58-59, 161 (questioning the need for and propriety of New York State's jurisdiction over Indian affairs).
The Peacemaker's and Surrogate's Courts of the Seneca Nation are the only Anglo-American style courts currently in operation among the Six Nations. The traditional governments rely on Chiefs to fulfill the judicial function. However, there is no reason to believe that such a system should be afforded any less deference than the Seneca Nation courts simply because it is not analogous to the United States legal system.

[FN220] N.Y. INDIAN LAW § 5 (McKinney 1950 & Supp. 1990). The amendment was apparently to comply with the language of section 233, which limits State court jurisdiction in "civil actions and proceedings, as now or hereinafter defined by the laws of such State."

[FN221] Id. § 46.

[FN222] 44 Misc. 2d 1028, 255 N.Y.S.2d 627 (Albany Co. Ct. 1963), aff'd sub nom. In re Jimerson, 22 A.D.2d 417, 255 N.Y.S.2d 959 (3d Dep't 1965).

[FN223] Application of Jimerson, 255 N.Y.S.2d at 630 ("Prior to 1953 the Peacemaker's Court had exclusive jurisdiction of questions involving title to real property claimed by the Indians living on a Seneca Reservation. By the enactment of [§ 5], exclusive jurisdiction was rescinded and concurrent jurisdiction of such actions was placed in the state courts.").

[FN224] In re Jimerson, 255 N.Y.S.2d at 961.

[FN225] Id.

[FN226] Application of Jimerson, 255 N.Y.S.2d at 631 (in action under sections 22 and 23 of Court of Claims Act, and where the Seneca Nation Council transferred boundary dispute to State courts for final disposition, the court would not disturb final judgment of Council).

[FN227] In re Jimerson's Will, 68 Misc. 2d 945, 328 N.Y.S.2d 466, 468 (Erie Co. Ct. 1972) (in action under Indian Law § 5, State court had concurrent jurisdiction with Seneca Nation Surrogate's Court for probate of a will under section 233).

[FN228] Anichinapeo v. L.W. Bennett & Sons, 65 A.D.2d 105, 411 N.Y.S.2d 414 (3d Dep't 1978) (in action under Worker's Compensation Law, Indian Law § 5 allowed jurisdiction where Congress did not pre-empt all matters involving Indians, as demonstrated by enactment of section 233).

[FN229] People by Abrams v. Anderson, 187 A.D.2d 259, 529 N.Y.S.2d 917, 923-24 (4th Dep't 1988) (in motion for preliminary injunction, where legitimate law enforcement effort of the Tuscarora Nation was not yet established, §§ 233 and 5 conferred subject matter jurisdiction to State court over alleged claim of tortious interference of business since dispute was merely a

private civil claim by Indians against other Indians); John v. Hoag, 131 Misc. 2d 458, 500 N.Y.S.2d 950, 956-57 (Catt. Co. Ct. 1986) (tortious interference of contract claim brought by one Seneca against another Seneca was properly before State court where plaintiff did not properly exercise the jurisdiction of the Peacemaker's Court and properly filed in State court first).

[FN230] Oneida Indian Nation v. Burr, 132 A.D.2d 402, 522 N.Y.S.2d 742 (3d Dep't 1987) (Section 233 interpreted to allow Indian governments to bring suit in State courts under Indian Law § 5).

[FN231] Application of Jimerson, 255 N.Y.S.2d at 630.

[FN232] Bennett v. Fink Construction Co., 47 Misc. 2d 283, 262 N.Y.S.2d 331, 333-34 (Erie Co. Ct. 1965) (in action by plaintiff pursuant to N.Y. C.P.L.R. § 6301 to enjoin defendant from erecting building on reservation, section 233 clause providing for recognition of tribal law bars exercise of jurisdiction where Surrogate's court determined that the daughter of a Seneca father and a Cayuga mother was not a Seneca and thus could not inherit tribal lands).

[FN233] Velez v. Huff, 48 Misc. 2d 10, 263 N.Y.S.2d 967, 968 (Chaut. Co. Ct. 1965) (in action by plaintiff pursuant to Article 15 of the Real Property Actions and Proceedings Law to clear title to certain reservation lands, court declined jurisdiction where Peacemaker's Court interpreted to have exclusive jurisdiction); but see Mohawk v. Longfinger, 1 Misc. 2d 509, 149 N.Y.S.2d 36, (Catt. Co. Ct. 1955) (where the court relied on sections 233 and 5, but also on Public Law 280 as superseding section 233 and lifting the proviso barring State court jurisdiction over actions involving Indian lands).

[FN234] Holcombe v. Dimmler, 55 A.D.2d 808, 390 N.Y.S.2d 274 (Onon. Co. Ct. 1976) (where the trial court declined to intervene in the internal political affairs of the Onondaga Nation).

[FN235] John v. Hoag, 131 Misc. 2d 458, 500 N.Y.S.2d 950, 952-54 (Catt. Co. Ct. 1986) (where sovereign immunity not waived by the Seneca Nation or the federal government contract claim against an Indian government barred).

[FN236] Id. at 954-56 (failure to show that Indian officials acted outside official capacity or in manner forbidden by the sovereign bars suit).

[FN237] People by Abrams v. Anderson, 137 A.D.2d 259, 529 N.Y.S.2d 917, 921-22 (4th Dep't 1988) (Executive Law § 63(12) did not provide Attorney General standing to enforce tribal law prohibiting bingo, since the state's obligation to enforce federal law is "quite distinct" from an assertion of power "to enforce the laws of a separate sovereign or quasi-sovereign.").

[FN238] 25 U.S.C. § 233 (1988).

[FN239] Id.

[FN240] 28 U.S.C. § 1360(c) (1982).

[FN241] 25 U.S.C. § 233 (1988). In addition, section 233 confers jurisdiction on the courts of the State of New York, rather than to the "States or Territories," as provided in Public Law 280. Although this distinction certainly is not conclusive of a greater transfer of jurisdiction to the states under Public Law 280, it does support it. See H.R. REP. NO 2355, supra note 122, at 2286-87 (letter from the Undersecretary of the Interior to the Senate Committee on Public Lands).

[FN242] For example, affirmative governmental action pertaining to family law, taxation, and gaming differs from that of the State. However, there are many more instances where an Indian government has not acted or regulated, leading to significant, but nonetheless legitimate, differences from State policy that necessarily increase pressure for affirmative "remedial" action by the State.

[FN243] The statutory language implicitly requires that state courts apply "tribal laws and customs ... which may be proven to the satisfaction of the courts." 25 U.S.C. § 233. This clause was added by the Conference Committee. H.R. CONF. REP. NO. 3040, 81st Cong., 2d Sess., reprinted in 1950 U.S. Code Cong. Serv. 3731, 3733-34. The original bill only allowed one year in which to record all tribal laws and customs to be preserved for state court proceedings. Id. That limit would have been unduly burdensome and inequitable. However, the amended version more adequately fulfills the sponsor's intent that written law guide State court determinations involving Indians.
Note that Public Law 280 requires tribal law to be applied only when not contrary to state public policy. With regard to section 233, there is some indication that the sponsors intended full faith and credit for tribal court decisions. A full faith and credit amendment, ultimately rejected, was believed to "do the same thing" as the language eventually enacted:
Mr. Miller: [If] there are some conflicts [between the treaty now in existence and the state laws], do the customs and unwritten laws and those things under the treaty have first priority over the laws of the State of New York, or are they superseded by the State of New York?
Mr. Morris: The treaty rights will have first priority and will supersede the laws of the State of New York ....
96 CONG. REC. H12459 (daily ed. Aug. 14, 1950).

[FN244] 28 U.S.C. § 1360(a) requires that "those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State."

[FN245] CIV-86-621C (W.D.N.Y. Order of Apr. 16, 1987), aff'd, 845 F.2d 37 (2d Cir. 1988), cert. denied, 109 S. Ct. 133 (1988), reprinted in Petition for a Writ of Certiorari at 13a, John v. City of Salamanca (No. 88- 84) [hereinafter Petition for Certiorari].

[FN246] The Act of February 19, 1875, ch. 90, 18 Stat. 330 [hereinafter 1875 Act], ratified leases made to non-Indians by the Seneca Nation, establishing six villages on the Allegany Reservation.
In United States v. Forness, 125 F.2d 928, 930-31 (2d Cir. 1942), the Second Circuit held that the words "municipal laws" as used in the 1875 Act referred to the local laws of the City of

Salamanca, and not to the laws of the State that applied to municipalities, barring the application of a State procedural rule that would have denied the ability of the Seneca Nation to cancel leases for non-payment of rent.

[FN247] Defendants say that the City of Salamanca is charged by general law of the State of New York with the enforcement of a general law of the State of New York ... [and that] plaintiff does not qualify for the exempting provisos of 25 U.S.C. § 233. They say no tribal law or custom stands in the way of a state law requirement to obtain a building permit.
Petition for Certiorari, supra note 245, at 17a-18a.

[FN248] The 1875 Act, supra note 246, at ch. 90, § 8. See also 1 C. KAPPLER, INDIAN AFFAIRS-LAWS AND TREATIES 155, 156 (1904).

[FN249] Petition for Certiorari, supra note 245, at 18a.

[FN250] Petition for Certiorari, supra note 245, at 19a. In arriving at this conclusion, the court relied on two dubious premises: (1) that the 1875 Act, which is very specific, was superseded by sections 232 and 233, and (2) that section 233 conferred general regulatory authority on the State.

[FN251] John v. City of Salamanca, 845 F.2d 37 (2d Cir. 1988), cert. denied, 109 S. Ct. 133 (1988).

[FN252] Id. at 43. "[W]e need not reach the issue whether section 233 expanded the state's regulatory jurisdiction over the Seneca Nation. Thus, we do not adopt Judge Curtin's reasoning, but nevertheless agree with the result he reached." Id.

[FN253] See supra note 202 and accompanying text.

[FN254] 426 U.S. 373 (1976).

[FN255] See supra note 205 and accompanying text.

[FN256] See Brief Amicus Curiae for the Seneca Nation, supra note 213, at 15-24.

[FN257] Bryan, 426 U.S. at 391-92. See also California v. Cabazon Band of Mission Indians, 480 U.S. 202, 208 (1987) ("We recognized [in Bryan] that a grant to states of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values.").

[FN258] See infra note 205 and accompanying text.

[FN259] Bryan, 426 U.S. at 379 ("The primary concern of Congress in enacting Pub. L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement.").

[FN260] Id. at 381.

[FN261] Id. at 384.

[FN262] See supra note 122 and accompanying text.

[FN263] See 1948 Hearings, supra note 219, at 2, 7, 8, 213.

[FN264] H.R. REP. NO. 2720, 81st Cong., 2d Sess. (1950), reprinted in 1950 U.S. Code Cong. & Admin. News 3731. One of the sponsors of the legislation, Rep. Daniel Reed (R-N.Y.), the representative of the district containing part of the Seneca Nation, stated:
The educated Indians, who are the majority in the tribe, of course, are anxious to have this privilege of going into the State courts. Under S. 192 they can go into the supreme court, which would be comparable to the circuit court of appeals in most states, and they could take an appeal to the appellate court at Rochester, N.Y., and from the appellate court to the court of appeals, if dissatisfied. The Indians want this right and the state of New York now wishes to give it to them. 96 CONG. REC. H12,456 (1950).

[FN265] Bryan, 426 U.S. at 387 ("Today's congressional policy toward reservation Indians may less clearly than in 1953 favor their assimilation, but Pub.L. 280 was plainly not meant to effect total assimilation.").

[FN266] Id. at 388-89:
And nothing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than "'private, voluntary organizations,'" United States v. Mazurie, 419 U.S. 544, 557, 95 S. Ct. 710, 718, 42 L. Ed. 2d 706 (1975)-a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments. The Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves, and § 4(c), 28 U.S.C. § 1360(c), providing for "full force and effect" of any tribal ordinances or customs "heretofore or hereafter adopted by an Indian tribe ... if not inconsistent with any applicable civil law of the State," contemplates the continuing vitality of tribal government.

[FN267] The provisos contained in section 233 are nearly identical to those in section 1360(c), except for language in the latter statute that "[n] othing in this section ... shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made thereto." As the Court in Bryan decided, the presence of this language should not negatively imply that New York can regulate tribal lands, etc. Bryan well establishes the fact that the provisos excepting state conduct
may be read simply as a reaffirmation of the existing reservation Indian-Federal Government relationship in all respects save the conferral of state-court jurisdiction to adjudicate private civil causes of action involving Indians. [The court agreed] with the Court of Appeals for the Ninth Circuit that § 4(b) "is entirely consistent with, and in effect is a reaffirmation of, the law as it

stood prior to its enactment."
426 U.S. at 391 (citation omitted).

[FN268] Bryan, 426 U.S. at 392 (quoting Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918)). See also supra note 86 and accompanying text.

[FN269] See also United States v. Burns, 725 F. Supp. at 125. (In light of Bryan, the similarities between section 233 and Public Law 280 necessitate that New York does not have general regulatory authority over Iroquois territory.).

[FN270] 78 Misc. 2d 834, 358 N.Y.S.2d 632 (Catt. Co. Ct. 1974).

[FN271] The court also relied on the Act of August 31, 1964, Pub. L. No. 88-533, § 9, 78 Stat. 738, 741 (reaffirming the right of Seneca citizens to hunt and fish on the Allegany reservation and to regulate hunting and fishing by non-members) to find that the Act of January 5, 1927, Pub. L. No. 69-537, ch. 22, 44 Stat. 932 (State hunting and fishing laws applicable on the Seneca reservations, but not if discriminatory against Indians) was applicable only to non-Indians. Redeye, 358 N.Y.S.2d at 635.

[FN272] Redeye, 358 N.Y.S.2d at 634-35.

[FN273] Id. at 635.

[FN274] 397 F. Supp. 685 (W.D.N.Y. 1975).

[FN275] The State filed this claim in spite of the fact that a previous attempt to take Tuscarora lands relying on the same statute was flatly rejected by the Second Circuit Court of Appeals. Tuscarora Nation of Indians v. Power Authority, 257 F.2d 885 (1958). The court also rejected the State's argument that the Non-intercourse Acts did not apply to New York because it was one of the original thirteen colonies. Seneca Nation, 397 F. Supp. at 687.

[FN276] 25 U.S.C. § 233 (1982) ("[N]othing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands, within any Indian reservation in the State of New York.").

[FN277] 137 A.D.2d 259, 529 N.Y.S.2d 917 (4th Dept. 1988).

[FN278] Anderson, 529 N.Y.S.2d at 922.

[FN279] Id. (citation omitted).

[FN280] Id. (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)).

[FN281] 480 U.S. 202 (1987).

[FN282] New York has acknowledged the Supreme Court's unwillingness to uphold State attempts to regulate reservation activities. 87 Op. Att'y Gen. F11 (1987).

[FN283] See, e.g., Barnes v. White, infra note 294; note 327.

[FN284] N.Y. INDIAN LAW (McKinney 1950 & Supp. 1989). See infra note 288 and accompanying text.

[FN285] See supra Part I.

[FN286] 358 U.S. 217 (1959).

[FN287] Id. at 220.

[FN288] See, e.g., N.Y. INDIAN LAW §§ 5-a ("Surrender of tribal records"), 9 ("Residence of other Indians on tribal lands"), 17 ("Disqualification of women from voting"), 23 ("Consent of agent to certain contracts"), 24 ("Leases"), 27 ("Custody of wampums"), 41 ("Enumeration of [[[Seneca Nation" SNI"] officers"], 42 ("Time and place of [SNI] annual election"), 43 ("Qualifications of [SNI] voters and eligibility for [SNI] office"), 44 ("The [duties of SNI] treasurer"), 45 ("The [duties of SNI] clerk"), 46 ("[operation and jurisdiction of] peacemakers' courts"), 47 ("Record of peacemakers"), 48 ("Costs and fees"), 49 ("Incompetency of peacemakers"), 50 ("Appeals to council of Seneca Nation"), 51 ("Appeals from peacemakers' court of Tonawanda nation"), 52 ("Enforcement of judgments"), 53 ("[duties of] The marshal"), 55, 95, 102 ("Allotment of lands"), 57 ("Offering or giving bribes prohibited"), 58 ("Acceptance of bribes prohibited"), 59 ("Conveying bribes prohibited"), 70 ("Confirmation of nationality"), 72 ("The [[[duties of SNI] president"), 73, 80 ("General powers and duties of the council"), 75, 82 ("Vacancies in elective offices"), 88 ("Encroachment by Indians on occupied lands"), 89 ("Court of impeachment"), 96 ("Consent of [[[Tuscarora] chiefs to sales of timber"), 101 ("[duties of St. Regis Mohawk (SRM)] clerk"), 103 ("Consent of [SRM] Chiefs to sale of timber"), 106 ("Jurisdiction of [SRM] council to determine disputes"), 107 ("General powers of [SRM] council"), 108 ("Qualifications of [SRM] voters"), 109 ("Officers of [[[SRM] tribes"), 110 ("Election of [SRM] officers"), 111 ("Conduct of [SRM] elections"), 112 ("Canvass of votes"), 113 ("Vacancies") (McKinney 1950 & Supp. 1989).

[FN289] See supra note 33 and accompanying text.

[FN290] Id.

[FN291] See N.Y. INDIAN LAW § 8 (McKinney 1950 & Supp. 1989).
In Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering Co., 467 U.S. 138 (1984), the Court defined the circumstances under which jurisdiction preexisting Public Law 280 jurisdiction would be valid: "Nothing in the language or legislative history of Pub. L. 280 indicates that it was meant to divest States of preexisting jurisdiction and otherwise lawfully assumed jurisdiction." Id. at 150. The Court stated that "lawfully assumed jurisdiction" is that jurisdiction which does not violate the Williams test and is not "pre-empted by incompatible

law." Id. at 147. Thus, the standard applied in this Article to reject most of the N.Y. Indian Law as a possible source of "pre-existing jurisdiction" is the same standard that the Court applied in Wold Engineering.

[FN292] See, e.g., Oneida Indian Nation of New York v. Burr, 132 A.D.2d 402, 522 N.Y.S.2d 742 (3d Dept. 1987) (recognizing right of an Indian government to bring an action in State court under Indian Law § 5); Tuscarora Nation of Indians v. Swanson, 108 Misc. 2d 429, 437 N.Y.S.2d 603 (S. Ct. Niag. Co. 1981) (Tuscarora Nation brought suit under N.Y. Indian Law § 5 to enjoin non-Tuscarora defendants from continuing with construction of a permanent home upon the reservation and also to have them ejected as intruders under N.Y. Indian Law § 8).
In addition, although the New York Attorney General concluded that the State had no authority to regulate a State substance abuse program on the reservations based on his reading of California v. Cabazon Band of Mission Indians and sections 232 and 233, he nonetheless authorized the Director of Substance Abuse Services to proceed:
Here the State is not seeking to impose unilaterally its regulatory authority with respect to an Indian substance abuse program. Rather the St. Regis Mohawk Tribe has, through its tribal government, voluntarily applied for approval and funding of its substance abuse program. Clearly this request for discretionary funding is consistent with notions of tribal sovereignty and congressional goals of encouraging tribal self-sufficiency and economic development (California v. Cabazon Band, 107 S. Ct. at 1092).
...
We believe that the voluntary application of a native American substance abuse program to the Division of funding and the regulation of the funded program by the Division is consistent with Federal law governing tribal sovereignty .... This limited assertion of jurisdiction by the Division, founded as it is upon the consent of the contracting parties, would in my opinion neither interfere with nor be incompatible with federal and tribal interests reflected in federal law (id. at 1092).
87 Op. Att'y Gen. 35, 36 (1987).

[FN293] See, e.g., Kennerly v. District Court, 400 U.S. 423, 428-30 (1971) (per curiam) (rejecting affirmative legislative action of an Indian government to subject itself to Public Law 280 jurisdiction where such action violated federal law, since the statute required a majority vote of all enrolled members in order to assume state jurisdiction).

[FN294] See Williams v. Lee, 358 U.S. 217 (1959). For another instance in which a state court automatically deferred to an invasive state law, see Barnes v. White, 494 F. Supp. 194 (N.D.N.Y. 1980), where suit was filed against Mohawk chiefs who refused to step down after a recall vote. The parties did not challenge the fact that "each [chief] was elected to office by the Tribal membership pursuant to the New York State Indian Law § 110." Id. at 195.

[FN295] See, e.g., Hannagan, A tangle of laws, rights and tempers: Mohawks and troopers face each other at St. Regis Reservation, Syracuse Herald Am., July 23, 1989, at A11, col. 2 (discussing the hostilities between private Mohawk entrepreneurs and the State police over State attempts to close illegal gambling operations).

[FN296] See supra Part II.

[FN297] See L. HAUPTMAN, THE IROQUOIS STRUGGLE FOR SURVIVAL: WORLD WAR II TO RED POWER, supra note 53, at 17.

[FN298] See supra note 36.

[FN299] See supra note 38.

[FN300] 845 F.2d 37 (2d Cir. 1988), cert. denied, 109 S. Ct. 133 (1988).

[FN301] The case involved an Indian living within the City who refused to comply with the city building code. The plaintiff challenged the ordinance on the grounds that Congress had not conferred general regulatory power to the states and localities. Id. at 39. He also claimed that he was exempt from the ordinance because he was an Indian living within the confines of the reservation and Congress in the 1875 Act had not explicitly provided that local law should apply to Indians on the reservation. See Petition for Certiorari, supra note 245, at 16a-17a. Plaintiff also claimed that the ordinance violated the Treaty with the Six Nations, Nov. 11, 1794, 7 Stat. 44, which set aside lands for the Seneca Nation and guaranteed their "free use and enjoyment." John, 845 F.2d at 39.

[FN302] See supra Part II(C)(2).

[FN303] John, 845 F.2d at 43.

[FN304] The narrower decision was basically a reaffirmance of United States v. Forness, 125 F.2d 928 (2d Cir. 1942). See supra note 202. Section 8 of the 1875 Act provides:
That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and bridges shall be in force within said villages, and may, with the consent of said Seneca Nation in council, extend to and be in force beyond, said villages in said reservations, or in either of them; and all municipal laws and regulations of said State may extend over and be in force within said villages:
Provided, nevertheless, That nothing in this section shall be construed to authorize the taxation of any Indian, or property of any Indian not a citizen of the United States. (emphasis added).

[FN305] John, 845 F.2d at 40-41.

[FN306] Id. at 42. The reasoning of the court on this point is apparently contrary to the established principle of federal Indian law that states (and localities) obtain jurisdiction over the reservation and reservation Indians only where Congress has expressly so provided. See supra Part II. Admittedly this is an ambiguous circumstance, but the canon of construction that all ambiguities in federal law must be resolved in favor of the Indians should be dispositive.

[FN307] John, 845 F.2d at 42.

[FN308] Id.

[FN309] See Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 109 S. Ct. 2994, 3012-15 (1989) (Indian tribe had authority to zone property owned in fee in those areas of its reservation that were closed to the general public).

[FN310] John, 845 F.2d at 42 (emphasis added).

[FN311] There is nothing in the opinion to suggest that the Seneca Nation is divested of any authority over Seneca citizens who choose to reside within the City. Accordingly, such authority must be presumed to exist as over Senecas living on the reservation, but not within the City limits.
In addition, it remains an open question to what extent the Seneca Nation may exercise civil regulatory jurisdiction over non-Indians living in the City, in order to further public policy initiatives designed to protect Seneca citizens or its residuary interests in the leased land. See Montana v. United States, 450 U.S. 544, 565-66 (1980), where the court set forth two circumstances that justified civil authority of an Indian nation over non-Indians:
Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. [citations omitted] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic serenity, or the health or welfare of the tribe.

[FN312] Id. at 43 ("John, a member of the tribe, now possesses rights in the leased land as an individual.").
Section 1 of the Act of August 14, 1950, 64 Stat. 442, clarified the fact that the Seneca Nation was the ultimate lessor and that the individual residents of the City, and not the City itself, were the ultimate lessees:
[T]he city of Salamanca may ... pay to the treasurer of the Seneca Nation all moneys payable on leases within the city of Salamanca on behalf of the owners of such leases: Provided further, That nothing herein contained shall be construed to authorize the city of Salamanca to grant new leases, or to modify, change, or alter existing leases, except with the consent of the Seneca Nation and upon terms agreeable to the Seneca Nation ....

[FN313] Id. at 42.

[FN314] See Petition for Certiorari, supra note 245, at 2 n.1. See also F. COHEN (1942 ed.), supra note 1, at 189. Plaintiff's assignment was similar to that obtained by other Senecas over other parts of the reservation.

[FN315] John, 845 F.2d at 41. The court stated:
Referring to our determination in Forness that the laws of New York State did not extend to the leased land, john suggests that, under our interpretation of the 1875 Act, Congress provided for

the enforcement of village laws, but not state laws, on the leased land. In fact, in Forness, we held that Congress had created just such a jurisdictional scheme; the Forness court concluded that only the laws of New York's municipalities extended to the leaseholds, to the exclusion of state laws governing the relations of lessors and lessees. Forness, 125 F.2d at 932 (footnote omitted). See also N.Y. INDIAN LAW § 71, as amended by L.1969, ch. 893; L.1892, ch. 679; L.1881, §§ 1, 3 (McKinney 1950 & Supp. 1989) ("Exclusion of villages from reservations; lease of lands therein; certification of copies of leases by the Seneca Nation of Indians and recording thereof"). Section 71 provides that, with regard to the six villages established by the 1875 Act, "all the general laws of the state are extended over and apply to the same." However, to the extent that section 71 is a State law, John reaffirms the congressional intent behind the 1875 Leasing Act that State law is inapplicable within the City and that accordingly section 71 cannot be used to apply general State laws within the City.

[FN316] See Watt v. Alaska, 451 U.S. 259, 267 (1981), as discussed supra note 187.

[FN317] It is conceivable that the City of Salamanca could exercise criminal jurisdiction over this land if it were delegated this authority by the State. See supra note 196.

[FN318] See Petition for Certiorari, supra note 245, at 18-20. Relying on Montana v. Blackfeet, 471 U.S. 759 (1985) (Congressional failure to reaffirm previous authorization for state taxation of royalty interests in minerals on Indian lands in a later act served to withdraw consent where a clear statement of congressional consent was necessary to uphold state taxation of Indians), the plaintiff argued that congressional failure to reaffirm in section 233 the grant of regulatory authority provided in the 1875 Act served implicitly to withdraw congressional consent to exercise local regulatory authority over Indians.

[FN319] United States v. National Gypsum Co., 141 F.2d 859, 860 (2d Cir. 1944).

[FN320] See supra note 29 and accompanying text.

[FN321] Treaty of Nov. 5, 1857, ratified June 4, 1858, 11 Stat. 735, reprinted in 2 C. KAPPLER, INDIAN AFFAIRS-LAWS AND TREATIES 767, 768 (1904).

[FN322] National Gypsum, 141 F.2d at 860.

[FN323] Acticle III of the Treaty provided that title to the lands was
to be held by [the Secretary of the Interior] in trust for the said Tonawanda Band of Indians and their exclusive use, occupation and enjoyment, until the legislature of the State of New York shall pass an act designating some persons, or public officer of that State, to take and hold said land upon a similar trust for said Indians; whereupon they shall be granted by the said Secretary to such persons or public officer.
The Secretary conveyed the lands to the New York State Comptroller on February 14, 1862, "in trust, for the said Tonawanda Band of Indians and for their exclusive use, occupation and enjoyment, in the manner particularly defined in said Treaty." National Gypsum Co., 141 F.2d at 860.

[FN324] 141 F.2d 859 (2d Cir. 1944), rev'ing 49 F. Supp. 206 (W.D.N.Y. 1942).

[FN325] Id. at 862.

[FN326] Id.

[FN327] Id. at 862. The court was clear in its decision that New York had great authority over the Tonawanda Reservation:
There can be no other explanation of the arrangement for transferring the Tonawanda Reservation from the Secretary of the Interior to the Comptroller of the State of New York, or of the continued recognition by the Federal authorities of the exercise of State supervision over that reservation. Ever since 1862 there have been statutory enactments by the State regarding the administration of the Reservation of the Indians and for some seventy years there have been provisions relating to sales of gypsum from that Reservation.
Id.
However, the district court viewed the transfer of reservation title to New York differently:
The purpose was to put the title in trust in New York State in order that the experience it had had, as hereinbefore set forth, could not be repeated. Under this trust there was no right to convey any real estate. The gypsum in the mines is a part of the real estate, and the State as trustee had no authority to deplete the real estate by permitting the removal of the gypsum. The making of these leases purports to create an interest in land.
National Gypsum, 49 F. Supp. at 211.

[FN328] The district court opinion presents several arguments to invalidate the State's attempt to lease Tonawanda lands. The basis for the court's decision is that federal law had pre-empted the leasing of Indian lands under state law. See id. at 210. The court also held that Congress had not explicitly provided for State control over the reservation, but only for holding the land in trust, and thus the State had no authority to control leasing. Id. at 212-14.

[FN329] See National Gypsum, 141 F.2d at 862:
While there can be no question but that the United States could have controlled the Tonawandas if it had thought best, we are inclined to think that it deliberately left a large measure of control in respect to the reservation to the State of New York. There can be no other explanation ... of the continued recognition by the Federal authorities of the exercise of State supervision over that reservation.

[FN330] 25 U.S.C. § 233 (1988).

[FN331] 25 U.S.C. § 177 (1988). Such is not the case with the Seneca Nation, which may lease lands at its discretion. See Act of Aug. 14, 1950, 64 Stat. 442.

[FN332] See supra Part II.

[FN333] See supra Part II.

[FN334] See supra note 199 and accompanying text.

[FN335] See Iowa Mutual Ins. Co. v. LaPlante 107 S. Ct. 971, 977 (1987) ("The federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts."); National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985) ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge .... Exhaustion of tribal remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.").

[FN336] The assessments throughout this section are the author's, who is a citizen of the Seneca Nation and was raised on the Allegany Reservation.

[FN337] See supra Part III(C).

[FN338] Unless otherwise indicated, the emphasis in this section will be on section 233 rather than on section 232 since there are many more cases that focus on section 233. The theoretical effect of doing so is neglible since both statutes constitute significant intrusions into the self-governing processes of the Six Nations.

[FN339] Terms referencing "judicial process," "judiciaries," and so forth are defined broadly to include the formal judicial systems of the Seneca Nation Peacemaker's Courts and the Chieftain-based methods of adjudication of the Iroquois Confederacy. However, the analysis in this section is most directly applicable to the courts of the Seneca Nation, which are the only Iroquois judicial systems interacting with the State courts.

[FN340] 467 U.S. 138 (1984).

[FN341] Id. at 144. In Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957), which was an expansive decision allowing state court jurisdiction over all matters involving Indians arising in Indian country, except for cases involving Indian lands. The main issue in Wold Engineering was whether the Indian government could sue a non-Indian in state court under the Vermillion grant of jurisdiction. The state, however, argued that assumption by a state of Public Law 280 jurisdiction worked to disclaim any such preexisting jurisdiction. However, the Court concluded that the State's ultimate motivation was to induce the tribe to waive its sovereign immunity from suit by consenting to the state law that would have implemented Public Law 280 jurisdiction in North Dakota.

[FN342] Wold, 467 U.S. at 148. See also Williams v. Lee, 358 U.S. 217, 220 (1959).

[FN343] Wold, 467 U.S. at 148-49. The Court added:
The exercise of state jurisdiction is particularly compatible with tribal autonomy when, as here,

the suit is brought by the tribe itself and the tribal court lacked jurisdiction over the claim at the time the suit was instituted.
Id. at 149.

[FN344] See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 106 S. Ct. 2305, 2314 (1986), where the Court stated that
The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances, much in the same way that the perceived inequity of permitting the United States or North Dakota to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted.

[FN345] Id. at 2308.

[FN346] The effect, though subtle, is undoubtedly significant. The ability to sue non-Indians for civil law violations in tribal court for misconduct on the reservation is vital to achieving the legitimacy necessary for maximum effectiveness both within the Indian community and in the non-Indian community. See Iowa Mut. Ins. Co. v. LaPlante, 107 S. Ct. 971, 978 (1987) ("The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in National Farmers Union [[citation omitted], and would be contrary to the congressional policy promoting the development of tribal courts."); see also National Farmers Union Ins. Co. v. Crow Tribe of Indians, 105 S. Ct. 2447, 2452-54 (1985) (upholding the power of tribal courts to exercise civil subject-matter jurisdiction over non-Indians).

[FN347] 4 Misc. 2d 1028, 255 N.Y.S.2d 627 (Albany Co. Ct. 1963).

[FN348] Seneca Nation of Indians Const., 1898, § IV, cl. 2, as amended Sept. 12, 1978.

[FN349] See Application of Jimerson, 255 N.Y.S.2d at 629. See also Seneca Nation of Indians Const., 1898, § IV, cl. 5 ("All determinations and decisions of the [Peacemaker's] Court shall be subject to the Council, ... and the decision of the Council shall be final between the parties.").

[FN350] The October 20, 1956 Resolution of the Seneca Nation Council read in part: Whereas, since said date of May 21, 1955 both parties, of necessity, have their claims before the New York State Court of Claims, and additional party or parties claimants have likewise filed claims to said lands before the New York State Court of Claims, giving to that Court jurisdiction over said 3rd party claims;
Be It Resolved, That the decision of this Council entered on May 21, 1955 be set aside and held for naught, and all parties claimants make proof of their claims before the New York State Court of Claims.
255 N.Y.S.2d at 629.

[FN351] Application of Jimerson, 255 N.Y.S.2d at 630; see Patterson v. Council of Seneca Nation, 245 N.Y. 433, 157 N.E. 734 (1927); Mulkins v. Snow, 232 N.Y. 47, 133 N.E. 123

(1921).
However, the State courts have not always responded with such deference to tribal law. In In re Jimerson's Will, a probate case, the court acknowledged the exclusive jurisdiction of the Seneca Nation Surrogate's Court over such matters, but nonetheless held that N.Y. INDIAN LAW § 5 and § 233 conferred concurrent jurisdiction on the State courts. See also Mohawk v. Longfinger, 149 N.Y.S. 36 (Catt. Co. Ct. 1955) where the court failed to dismiss an action for partition of lands between two Senecas on the Cattaraugus Reservation on the grounds that section 233 and Public Law 280 conferred jurisdiction to the State to hear cases involving Indian lands; but see Velez v. Huff, 263 N.Y.S.2d 967 (S. Ct. Chau. Co.1965) (denying plaintiff's motion to stay proceedings before the Peacemaker's Court on claim to land title), where the court distinguished Longfinger on the grounds that there was no action pending in the Peacemaker's Court when the case was filed in State court.

[FN352] 1948 Hearings, supra note 219, at 7-8, 107-08.

[FN353] Id.

[FN354] The Seneca Nation has recently codified a number of laws in an attempt to improve the role of the Peacemaker's Court. See, e.g., SENECA NATION PEACEMAKER'S AND SURROGATE'S COURT RULES OF CIVIL PROCEDURE (1985).

[FN355] See, e.g., John v. Hoag, 131 Misc. 2d 458, 500 N.Y.S.2d 950 (S. Ct. Catt.Co. 1986) (where plaintiff bypassed the formal procedure of the Seneca Nation Peacemaker's Court in favor of filing in state court); Velez v. Huff, 48 Misc. 2d 10, 263 N.Y.S.2d 967 (Chau. Co. Ct. 1965) (where the State court declined plaintiff's motion to enjoin similar proceedings before the Peacemaker's Court).

[FN356] Williams v. Lee, 358 U.S. 217, 220 (1959).

[FN357] Iowa Mut. Ins. Co. v. LaPlante, 107 S. Ct. 971, 976 (1987).

[FN358] 90 Misc. 2d 523, 394 N.Y.S.2d 786 (Onon. Co. Ct. 1977).

[FN359] Treaty with the Six Nations, Nov. 11, 1794, art. VII, 7 Stat. 44, reprinted in 2 C. KAPPLER, INDIAN AFFAIRS-LAWS AND TREATIES 34, 36 (1904).

[FN360] The court understood "that the Indians were jealously guarding their rights under various treaties with the United States of America, and in particular the Treaty of Canandaigua (Nov. 11, 1794) and they were not about to take any action on their own in the Courts of New York which could possibly jeopardize any of their treaty relations." Hennessey, 394 N.Y.S.2d at 788.

[FN361] See id. at 787-88.

[FN362] See id. at 789-90; 25 U.S.C. 1302 (1988).

[FN363] Hennessy, 394 N.Y.S.2d at 791.

[FN364] Id.

[FN365] Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976).

[FN366] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The Supreme Court decision clarified the fact that Indian governments are not subject to judicial review of their official conduct under the ICRA, except through habeas corpus petitions, which are reviewable by the federal courts.

[FN367] Id. at 62-63.

[FN368] See Hennessey, 394 N.Y.S.2d at 791.

[FN369] Santa Clara Pueblo, 436 U.S. at 56-57, 72. People v. Cook, 81 Misc. 2d 235, 365 N.Y.S.2d 611 (Onon. Co. Ct. 1975) was an earlier attempt by the Onondaga Chiefs to remove non-Indians from their reservation. As in Boots, they petitioned federal offficals for assistance, who referred the matter to the Onondoga County district attorney. Cook, 365 N.Y.S.2d at 615. Not understanding why the Onondagas refused to invoke § 8 directly, the court only saw that "the warriors, chiefs, clanmothers and supporters moved from one home to another physically removing families of non-Indians, resulting in the alleged threats and forceful entries that produced the indictment." Id. at 615.
In its decision, the court recognized the Onondaga's right to self-government, but held that the defendant Chief's conduct went "beyond the concept of self-government and into the area that both Congress and the Legislature of the State of New York ha[d] pre-empted in order to avoid injury to both property and person." Id. at 627. To the court, N.Y. INDIAN LAW § 8 provided the only legal procedure for removal, and not to follow that procedure was unacceptable for any Indian government:
The concept of self-government as in any concept of a free society has its restrictions, and where the Congress or the local state legislatures have enacted legislation in an area upon the basis that injury to person or property may be avoided, the rights of any individual or group must yield to the welfare of the public as a whole.
Id. (emphasis added).

[FN370] 137 A.D.2d 239, 529 N.Y.S.2d 917 (4th Dept. 1988).

[FN371] Anderson, 529 N.Y.S.2d at 923. The court relied exclusively on the plaintiff's pleading of the case and found that the "[d]efendants have not yet established that the tribe has a validly enacted anti-gambling law, that the Council of Chiefs is the proper legislative body of the tribe, that defendants are duly designated law enforcement officials, or that defendants were acting in that capacity in interfering with the bingo operation." Id.
In so finding, the court ignored evidence that the Tuscarora Chiefs were recognized by the United States and the State of New York as the legitimate governing authority on the reservation, that it

had reaffirmed an 1885 anti-gambling ordinance on April 1 and June 10, 1987, and that it had legitimately empowered the defendants to enforce that law. Id. at 918.

[FN372] "'(T)he issuance of an injunction in this case should not be construed to diminish or impair the rights of self-government of the Tuscarora tribe, nor ... (to circumscribe) the conduct of Tuscarora government officials.' Since the preliminary injunction issued to plaintiffs was not obtained against the sovereign [citations omitted], the relief is not barred by the doctrine of sovereign immunity." Id. at 923-24.

[FN373] Preliminary Report, supra note 1, at 8.

[FN374] Anderson, 529 N.Y.S.2d at 923.

[FN375] 131 Misc. 2d 458, 500 N.Y.S.2d 950 (S. Ct. Catt. Co. 1986).

[FN376] Id. at 951.

[FN377] Id. at 956-57. The court dismissed the case against the Seneca Nation and its officers on the basis of its sovereign immunity from suit. Id. at 951-56.

[FN378] Id. at 955.

[FN379] Although the court acknowledged it was legislation, it analyzed the case in terms of a contract dispute. See, e.g., id. at 951, 955, 957-58.

[FN380] Williams v. Lee, 358 U.S. 217, 220 (1959).

[FN381] The grant of jurisdiction to the State, and thus the effect of dependency, is far more extensive under section 232 than under section 233.

[FN382] Preliminary Report, supra note 1, at 26. The Mohawks temporarily operated a police force during the late 1970's, but it was disbanded due to internal conflicts over its administration. The existence of some Seneca law enforcement indicates that a desire for governmental autonomy exists in this area. However, the existence of the Seneca Nation police is conceivably due to the fact that law enforcement was previously inadequate or non-existent when left solely in the hands of the State. Thus, the Seneca Nation police force may have arisen simply to fill a gap in law enforcement, an admittedly easier task than assuming jurisdiction in an area in which the State is active.

[FN383] Given a lack of grass roots initiative to alter the status quo, it is likely that any change in the provision of police services will arise solely due to the leadership of Iroquois governmental officials.

[FN384] This statement is not true for governments that are not yet capable of exercising self-government, as that term is defined by the fulfillment of traditional governmental functions. More concretely, these external standards of self-government entail: protection and strengthening

of sovereignty and culture; provision of police protection; stabilization and regulation of economic activity; provision for health, education, and welfare; maintainance of borders, lands, and highways; and establishment of relations with other governments. To the extent that assistance from the State or federal governments is limited to facilitating development of these functions, such reliance does not threaten self-government if no other means to eventual independence is feasibly attainable.
By relying on these definitions, the author is imparting standards of governmental performance that may or may not reflect how the citizens of those governments define "successful government." But since the level of functional sovereignty is dependent upon the extent to which a government can independently fulfill the survival needs of itself and its people, the degree to which these standards are satisfied is an accurate measure of both sovereignty and self-determination.

[FN385] See supra note 194.

[FN386] H.R. Rep. No. 2355, supra note 122.

[FN387] See Thompson v. State of New York, 487 F. Supp. 212 (N.D.N.Y. 1979) (where a civil rights action was sustained against local officials who withdrew police and fire protection from the reservation).

[FN388] 25 U.S.C. § 1326 (1988).

[FN389] 25 U.S.C. § 1323 (1988).

[FN390] Such a proposal assumes that the tribal government would not retrocede jurisdiction for its own sake and would only do so when the capability of the tribal government was commensurate with the challenge of assuming those duties previously exercised by the State.

[FN391] Seneca Nation of Indians Const., 1898, § IV, cl. 2, as amended Sept. 12, 1978.

[FN392] Williams v. Lee, 358 U.S. 217, 220 (1959).
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