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INDIAN RIGHTS AND THE CONSTITUTIONAL IMPLICATIONS OF THE MAJOR CRIMES ACT

I. Introduction

The Indian has been relegated a rather unique place in American jurisprudential thought. The Constitution, which empowers Congress to regulate Indian affairs,1 coupled with court decisions which have characterized the Indian as a congressional "ward,"2 have guaranteed the Indian special treatment under the laws of the United States.

The peculiar legal status of the Indian manifests itself in the modern context as a jurisdictional dilemma. The problem is especially egregious in the punishment of criminal offenses committed on an Indian reservation; whether federal, state, or tribal government will exercise jurisdiction over such offenses is determined by the identity of the parties involved in the crime and the type of crime committed.

In 1948 Congress passed 18 U.S.C. § 1152 granting federal courts exclusive jurisdiction over all criminal offenses committed within Indian country, and providing that the general laws of the United States shall extend to such offenses "unless otherwise expressly provided by law."3 However, a number of judicial and statutory exceptions to this general grant of jurisdiction to federal courts have developed. For example, in interpreting § 1152, the courts have agreed that when neither the perpetrator nor the victim of such offense is Indian there is no basis for federal jurisdiction.4 Thus, any crime committed within Indian country, when no Indian is involved, will be tried in a state court according to state law.

Section 1152 expressly provided an additional exception to the general grant of federal court jurisdiction. Federal law does not apply to a crime committed within Indian country when both perpetrator and victim are Indians, or when an Indian perpetrator has already been punished by a tribal court.5 Thus, as a practical matter, federal jurisdiction extends to crimes committed within Indian territory only if both an Indian and a non-Indian are involved.

The Major Crimes Act, 18 U.S.C. § 1153,6 is the most important statutory exception to the general mandate of § 1152. Section 1153 applies to the punishment of crimes committed by Indians within Indian country. It affords federal courts exclusive jurisdiction in situations involving any of thirteen enumerated

1 U.S. Const. art. I, § 8.
3 18 U.S.C. § 1152 (1970) reads in part: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."
4 It is well established that the state courts have exclusive jurisdiction over crimes committed on an Indian reservation where none of the participants are Indians. See, New York ex rel. v. Martin, 326 U.S. 496 (1946); United States v. Ramsey, 271 U.S. 467 (1926); United States v. McBratney, 104 U.S. 621 (1881).
5 Actually § 1152 lists another exception: "Where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." This does not seem applicable in the modern context.
offenses, even though both perpetrator and victim are Indian. However, section 1153 provides that although the federal court has exclusive jurisdiction over these offenses, "the offenses of burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, and incest shall be defined and punished in accordance with the laws of the State in which such offense was committed." Furthermore, among the offenses enumerated in § 1153, rape and assault with the intent to commit rape are to be substantively defined, but not punished, according to state law.

Although § 1152 grants federal courts exclusive jurisdiction over certain crimes committed by or against an Indian, this does not, of itself, guarantee that federal law will govern such offenses. 18 U.S.C. § 13 provides that when a crime committed within lands under the exclusive jurisdiction of the United States is not federally proscribed, the federal courts retain jurisdiction but must apply the law of the state in which the crime occurred. Thus, if a crime involving both an Indian and a non-Indian is committed within Indian country, but that crime is not federally proscribed, the defendant will be subject to prosecution in federal court. In this instance, however, the federal court will apply the law of the state in which the reservation is located.

Considered together, §§ 1152 and 1153 require federal law governance of a crime committed within Indian country in the following instances: (1) when a non-Indian commits a crime, proscribed under federal law, involving an Indian victim, and (2) when an Indian commits a § 1153 crime and no federal provision mandates the applications of state law, namely, murder, rape, manslaughter, assault with intent to kill, arson, robbery and larceny.

On the other hand, state law will define the offense: (1) when a non-Indian commits any act within Indian country against a non-Indian; (2) when either an Indian or a non-Indian commits any act within Indian country which is not a crime under federal law; and (3) when an Indian commits rape, assault with

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7 18 U.S.C. § 1153 (1970) reads in part: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to kill, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States."

8 18 U.S.C. § 1151 (1970) defines "Indian country" as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."


10 18 U.S.C. § 1153 (1970) reads: "Whoever within or upon any of the places now existing or hereinafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to like punishment."

11 See United States v. Big Crow, 523 F.2nd 955 (8th Cir. 1975), cert. denied, 96 S. Ct. 1126 (1976).
intent to commit rape, burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, or incest.

Thus, this statutory scheme clearly indicates that when one of the six crimes listed above is committed within Indian country, the applicability of federal or state law is dependent solely upon the race of the defendant.

Admittedly, § 1152, subject to previously noted exceptions, applies federal law to all persons committing a crime within Indian country. Section 1153, however, singles out six crimes which require the imposition of state law provided the defendant is Indian. Thus, a non-Indian charged with any of those same six crimes would be subject to federal law pursuant to § 1152, to the extent such crimes are federally proscribed.

Such a scheme raises obvious constitutional considerations; unless a rational justification exists for the different treatment accorded defendants due to their race, that portion of the Major Crimes Act which authorizes such a procedure may be unconstitutional as violative of due process.

Several courts have already considered the due process implications of this statutory scheme. However, no court has held the scheme unconstitutional absent a showing that a particular defendant was clearly prejudiced; some courts have refused to find a violation of due process even when such prejudice was clearly demonstrated. Despite its ultimate finding, all courts which have considered this issue have characterized the relationship between Congress and the Indians as that of a guardian and his ward. Those courts which have found the statutory scheme unconstitutional because it prejudiced a particular defendant have done so only because this prejudicial result was completely antithetical to the underlying ward-guardian characterization. No court has questioned whether this relationship can, in the proper circumstances, be adequate justification for the apparent discrimination underlying §§ 1152 and 1153, nor has any court suggested any alternate theory for justifying the differing treatment accorded defendants on the basis of race. Similarly, in its most recent attempt to eliminate the inequities created by §§ 1152 and 1153, Congress, too, has failed to reassess the validity of this relationship and has adopted only a stop-gap reform measure.

12 Burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, incest, rape, assault with intent to commit rape.
13 The reader should note that the distinction is not a matter of jurisdiction but of what law the federal court should apply. Thus, this disparity would not arise if the offense occurs in either Alaska, California, Minnesota, Nebraska, Oregon, or Wisconsin: under 18 U.S.C. § 1162 (1970) the federal government has ceded all of its jurisdiction to these states. Thus, state law applies to all crimes committed on a reservation, regardless of the nature of the offense or the race of the participants.
14 See text accompanying note 8 supra. With the exception of rape, § 1153 directs the federal courts to apply the State's substantive definition of and penalty for the crime committed; in the case of rape only the State's definition is to apply.
15 See text accompanying notes 4-6 supra.
18 See text accompanying note 140 infra.
II. Substantive Implications of §§ 1152 and 1153

As noted, § 1153 applies only to Indians and dictates that an Indian defendant accused of rape, burglary, assault with intent to rape, assault with a dangerous weapon, assault resulting in serious bodily injury, or incest be prosecuted under the law of the state where the alleged offense occurred. By contrast, a non-Indian who is similarly accused will be prosecuted according to federal law pursuant to § 1152 which applies the general laws of the United States to crimes committed within Indian country.

It is not apparent on the face of these statutes whether this double standard favors the Indian defendant or his non-Indian counterpart. Of course, a determination of which class of defendants is favored will ultimately depend, in each case, on where the offense occurred, while those of the non-Indian defendant are determined by federal law when such expressly exists. To the extent there is no applicable federal law, 18 U.S.C. § 13 provides that the perpetrator may be prosecuted in federal court for violation of state law.19 When the substantive requirements of state and federal law coincide, neither class of defendants would seem to be disadvantaged. Obviously, this will not always be the case. For example, one of the two laws may authorize a comparatively harsher penalty for the same offense,20 to the obvious disadvantage of whichever class of defendants is subject to prosecution under the law. Indeed, this disadvantage would occur if either law contemplated a greater maximum or a lower minimum sentence. In either case, the potential punishment of the two classes of defendants would be unequal. Similarly, prejudice may result when the substantive definition of one of these six crimes differs under federal and state law.21

As in the case of differing penalties, which class of defendants is prejudiced by varying substantive definitions of the crime is more a function of chance than a question of design. The advantage or disadvantage of being an Indian depends on whether state or federal law defines that particular offense so as to impose a greater burden of proof on the prosecution.22

While this disparate treatment of Indian and non-Indian defendants does not uniformly favor either class, §§ 1152 and 1153 clearly operate to classify those accused of committing certain crimes within Indian country according to race. Whether a particular defendant is subject to prosecution under state or federal law depends entirely on whether or not the accused is an Indian: an apparently invidious classification based on race.

19 See, note 6 supra.
20 See United States v. Big Crow, 523 F.2d 955 (8th Cir. 1975), cert. denied, 96 S. Ct. 1126 (1976); United States v. Cleveland, 503 F.2d 1067 (9th Cir. 1974); Gray v. United States, 394 F.2d 96 (9th Cir. 1967).
21 See, note 12 supra.
22 United States v. Boone, 347 F. Supp. 1031 (D.N.M. 1972). There is some suggestion by the Boone court that the amendment to § 1153 whereby assault with a dangerous weapon is to be defined according to state law was motivated, at least in part, by the fact that under federal law the substantive elements of that offense are rather stringent. "The legislative history of the challenged portion of the statute, quoted above, suggests that the offense of assault with a dangerous weapon was consigned to state law to make it easier to convict Indians." Id. at 1035.
III. Historical Origin of the Problem

A. Legal Status of Tribes before the Passage of the Major Crimes Act

The legal status of the tribes has been fraught with difficulties since the earliest history of the United States. In the colonial period, the King reserved the power to regulate Indian affairs. The Constitution, as adopted in 1789, gave Congress the authority "to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." Additionally, Chief Justice Marshall's opinions in *Cherokee Nation v. Georgia* and *Worcester v. Georgia* relegated the Indian tribes to the anomalous position of being a politically sovereign nation yet subject to congressional control.

Since the Indian tribes were deemed politically sovereign, they were outside the jurisdictional reach of local governments. Furthermore, because there was much ill-feeling between the tribes and their white neighbors, it was thought that a scheme which vested control in an organ of the federal government rather than with local authorities would foster an environment more conducive to the peaceful coexistence of the two groups. Thus, the relationship between the Indians and Congress was essentially paternalistic: the role of Congress was similar to that of an arbitrator whose duty was the protection of the tribes from their white neighbors. For these reasons, the Indian was not subject to local law.

Because of the political independence of the Indian, Congress initially limited its role to intervening only when there was a conflict between the Indians and non-Indians. Thus, in the criminal context, Congress in effect confined itself to enacting laws which applied only in the event that either the perpetrator or the victim of a crime was Indian. If, however, both were Indian, the tribal courts had exclusive jurisdiction over the offense.

B. The Passage of the Major Crimes Act

This jurisdictional scheme received a major blow as a result of congressional response to *Ex Parte Crow Dog*. That case concerned the fate of a Brule Sioux.

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27 "They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will. . . Meanwhile, they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian." 30 U.S. (5 Pet.) 1, 17 (1831).
28 "The Cherokee nation, then, is a distinct community, occupying its own territories, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and 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." 31 U.S. (6 Pet.) 515, 560 (1832).
29 "They [the Indian tribes] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they [the Indian tribes] are found are often their deadliest enemies." United States v. Kagama, 118 U.S. 375, 384 (1886); see also, *Indian Civil Rights Task Force*, supra note 23, at 353.
31 109 U.S. 556 (1883).
Indian who allegedly had murdered Spotted Tail, another Sioux. Since both Crow Dog and Spotted Tail were Indian, the then controlling jurisdictional scheme dictated that the Sioux Court had exclusive jurisdiction over Crow Dog. The Oglala Court found Crow Dog guilty and, in accordance with tribal custom, ordered him to make restitution to the bereaved family of Spotted Tail.\(^{32}\) Crow Dog was obliged to render service for, and convey property to, the victim's family. Although this sentence was entirely consonant with the Sioux notion of justice, the white populace was outraged by the idea that a man who had taken another's life should suffer only pecuniary loss. In response to public sentiment, Crow Dog was tried in the district court for the territory of Dakota; he was convicted and sentenced to death. On appeal, the Supreme Court concluded that the Dakota court did not have jurisdiction over an offense committed within Indian country when both the perpetrator and the victim were Indian. In vacating Crow Dog's federal sentence, the Court concluded that although Congress had the constitutional power to reach such conduct, it had not done so.\(^{33}\)

In response to the Supreme Court's decision in *Ex Parte Crow Dog*, Congress enacted the Major Crimes Act.\(^{34}\) By this Act Congress granted federal courts exclusive jurisdiction over murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny when such offenses are committed within Indian country by one Indian against another. The constitutionality of the Major Crimes Act was established in *United States v. Kagama*.\(^{35}\) Relying upon the semi-independent political status which had originally been accorded the Indian tribes, in Justice Marshall's analysis,\(^{36}\) the Court concluded that Congress had the authority to intervene in the internal affairs of the tribes, whether by legislation or by treaty.\(^{37}\) However, the more difficult question confronting the Court was whether Congress could define as a federal crime an offense committed solely within the territorial boundaries of a state. Reaching an affirmative conclusion, Mr. Justice Miller emphasized the special status of the tribes and noted that the impact of the Major Crimes Act on the jealously guarded autonomy of the states was minimal:

> It does not interfere with the process of the State courts within the reservation, nor with the operation of state laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.\(^{38}\)

### C. The Effect of the Major Crimes Act

It seems clear that as between the state and federal governments, their respective relationships with the tribes remained constant throughout this period. The local governments, whether state or territorial, were still deemed the enemy

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33 109 U.S. at 572.
34 Indian Appropriations Act of 1885, 23 Stat. 385 (1885).
35 118 U.S. 375, 385 (1886).
36 See text accompanying notes 25-27 supra.
37 118 U.S. 375, 382 (1886).
38 Id. at 383.
of the Indian, while the federal government was his protector. However, the passage of the Major Crimes Act as well as the Court's approach in *Kagama* clearly indicated that the relationship between the federal government and the tribes was changing. The Major Crimes Act thus resulted in decreased political sovereignty for the tribes and a corresponding increase in tribal dependence on the federal government.

The enactment of the Major Crimes Act was also significant because it was Congress' first intervention into internal tribal affairs. Perhaps even more crucial than the act of intrusion, however, was the form which it took. In depriving the tribal courts of exclusive jurisdiction over seven major crimes, Congress chose to vest jurisdiction in the federal courts rather than in their state or territorial counterparts.

Clearly, when public opinion dictated that an Indian accused of murder be subject to the same criminal sanctions as his non-Indian counterpart, Congress could have ceded some of its jurisdiction to the states. Perhaps vesting such jurisdiction in the states was not feasible in the context of the uneasy relationship between the Indians and the non-Indians. Such a determination is beyond the scope of this note. It is clear, however, that if the states had been given criminal jurisdiction comparable in scope to that accorded the federal courts by § 1152, the due process implications of that portion of § 1153 which directs the federal courts to apply state law would not have arisen.

Thus, the passage of the Major Crimes Act did nothing to alter the legal relationship between the tribes and the state or territorial governments. The Indians owed no allegiance to local authorities and were not bound by local laws. While the ambiguous status of the tribes in the national context was partially resolved by the passage of the Act, the decision to make the internal affairs of the tribes subject to federal rather than state law did little to eliminate the ambiguity at the local level. After the passage of this statute the tribes had lost all the attributes of a politically sovereign "nation." However, from the state's point of view, nothing had changed; the tribes still occupied the peculiar position of being physically located within the state's boundaries but completely immune from its laws. It is this ambiguous relationship which Congress failed to resolve in 1885 with the Major Crimes Act, and which it has subsequently failed to resolve. With the enactment of the Indian Crimes Act of 1976, Congress has again neglected to address this ambiguity by preserving intact that jurisdiction originally granted federal courts in the Major Crimes Act.

Congress has, however, resolved this ambiguity in six states; 18 U.S.C. § 1162 cedes to the state courts criminal jurisdiction over all offenses committed

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39 See, note 29 supra.
40 See, text accompanying note 29 supra.
41 See, text accompanying note 140 infra.
42 Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin.
43 18 U.S.C. § 1162 (1970) reads in part: "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 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."
on reservations located within the borders of these states.\textsuperscript{44} Since §§ 1152 and 1153 do not apply to crimes committed in these states, the local courts have exclusive jurisdiction over such crimes regardless of the nature of the crime committed or the race of the parties involved.\textsuperscript{45} This provision clearly has an assimilative effect because the Indian citizen\textsuperscript{46} is subject to the same laws as a non-Indian. However, while the legal status of the tribe has been clarified in those states where § 1162\textsuperscript{47} is applicable,\textsuperscript{48} ambiguity remains in those states where § 1162 does not apply.

The Indian reservation remains in the politically peculiar position of being a "state" within a state. As noted above, because of the natural animosity between whites and Indians in the early days of this country, the Crown, and later the federal government, was better equipped to regulate Indian affairs than were the states.\textsuperscript{49} However, despite recent discord between Indians and non-Indians, this theory is not viable today. It is important to recognize that the present ambiguity stems from Congress' initial role as a buffer between two antagonistic factions. Although congressional intervention into tribal affairs has increased, the tribes have always been encouraged to retain some semblance of self-government; the unresolved ambiguity is thus a product of the underlying but competing goals of separation and assimilation.\textsuperscript{50} For this reason, state control, with notable exceptions,\textsuperscript{51} has remained minimal. It is, of course, because state-tribal relations have never been uniformly resolved that federal rather than state courts exercise criminal jurisdiction over the Indian in most instances. Whether state or federal courts have jurisdiction over crimes committed on an Indian reservation is, of course, different from the problem of which sanctions the court of competent jurisdiction is to apply. It is apparent, however, that if the jurisdictional question were resolved in favor of the states the due process problems raised by that portion of § 1153 which directs the federal courts to apply state law would not exist.

\textsuperscript{44} In California, Nebraska, and Wisconsin the state has jurisdiction over all Indian country within the physical confines of the state. However, the table in § 1162 excepts certain areas in the remaining three states where federal jurisdiction is retained.
\textsuperscript{45} 18 U.S.C. § 1162(c) (1970). Section 1162(c) provides that §§ 1152 and 1153 will not apply in those areas listed in the above-mentioned table. Since § 1152 is not in force, these states have jurisdiction over crimes committed by a non-Indian on an Indian reservation. See note 3 supra for the text of § 1152.
\textsuperscript{46} By a 1940 act all Indians are United States citizens.
\textsuperscript{47} 28 U.S.C. § 1360(a) (1970). § 1360 is the civil counterpart of 18 U.S.C. § 1162 and provides that the same six states shall have jurisdiction over civil actions between Indians or where one of the parties is Indian.
\textsuperscript{48} Section 1162 is silent on whether the tribe retains any control over crimes committed by or against its members. Section 1360(c) provides that any tribal ordinance not inconsistent with State law will be given "[f]ull force and effect in the determination of civil causes of action...." As a practical matter, however, there are very few situations in which a tribal court's decision has any legal effect.
\textsuperscript{49} See, note 29 supra.
\textsuperscript{50} The competing goals of fostering the assimilation of the Indian and at the same time encouraging the tribe to maintain a separate legal identity is a much discussed topic. See, Burke, The Cherokee Cases: A Study in Law, Politics, and Morality, 21 STAN. L. REV. 500 (1969); Burnett, note 32 supra; Davis, Criminal Jurisdiction Over Indian Country in Arizona, 1 ARIZ. L. REV. 62 (1969); Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 U.C.L.A. L. REV. 535 (1975); Kane, Jurisdiction Over Indians and Indian Reservations, 6 ARIZ. L. REV. 237 (1965); Kelly, Indian Adjustment and the History of Indian Affairs, 10 ARIZ. L. REV. 559 (1968); Note, Red, White and Gray: Equal Protection and the American Indian, 21 STAN. L. REV. 1256, 1237-40 (1969).
\textsuperscript{51} See, notes 42 and 47 supra.
IV. Constitutional Implications of § 1153
Basis of Constitutional Attack

As previously explained § 1152 provides that federal law will govern all crimes committed by or against an Indian within Indian country unless federal law expressly dictates otherwise.\(^2\) Section 1153, which applies only to Indians, is an express exception to § 1152 because it requires that the federal court apply the law of the state in which the crime is committed if that offense is rape, assault with intent to commit rape, burglary, assault with a dangerous weapon, assault resulting in serious bodily injury, or incest.\(^3\)

Thus, the effect of §§ 1152 and 1153 when taken together is that an Indian who commits certain crimes within Indian country will be prosecuted according to state law whereas a non-Indian who commits the same offense shall be subject to prosecution under federal law. While such a statutory scheme provides for disparate treatment under the law, based on race, it is not susceptible to attack under the equal protection clause of the 14th amendment.\(^5\) That amendment provides that “no state shall .... deny to any person within its jurisdiction the equal protection of the laws.”\(^5\)

Clearly, the 14th amendment does not apply here because, if there is a denial of equal protection, it stems not from state action but rather from the operation of two federal statutes.

Although the 14th amendment is the only express reference to equal protection in the Constitution, the Supreme Court has held that if the federal government discriminates unfairly among its citizens it violates the due process clause of the fifth amendment. In Bolling v. Sharpe,\(^6\) the Court held that racial segregation in the Washington, D.C. schools violated the fifth amendment.

Under the Bolling analysis if the challenged classification is inherently discriminatory it violates the due process clause of the fifth amendment.\(^7\) However, although the Bolling Court read a limited equal protection guarantee into the due process clause, the Court made it clear that it did not consider the two guarantees identical:

The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which only applies to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases.\(^8\)

\(^{52}\) See, text accompanying note 3 supra.
\(^{53}\) See, text accompanying note 10 supra.
\(^{54}\) U.S. Const. amend. XIV, § 1.
\(^{55}\) Id. (emphasis added).
\(^{56}\) 347 U.S. 497 (1954). Bolling was the companion case to Brown v. Board of Education, 347 U.S. 483 (1954) where the Supreme Court held that segregation in the public schools violated equal protection.
\(^{57}\) 347 U.S. at 499.
\(^{58}\) Id.
Thus, due process and equal protection are discrete but related guarantees.\textsuperscript{59}

V. Judicial Development

The Supreme Court has never ruled on the constitutionality of § 1153, that is, whether subjecting an Indian defendant to prosecution under state law and a non-Indian to prosecution under federal law deprives either class of defendants of due process under the fifth amendment.\textsuperscript{60} However, several United States Courts of Appeals have considered the issue.

A. Gray v. United States: Initial Controversy

In \textit{Gray v. United States},\textsuperscript{61} a 1967 case decided by the Ninth Circuit, several Indian defendants were convicted of the rape of a non-Indian woman. Under § 1153, in the case of an alleged rape by an Indian, the offense itself is to “be defined in accordance with the laws of the state in which the offense was committed. . . .”\textsuperscript{62} The statute further provides that when the victim is also Indian, sentencing the defendant is to be “at the discretion of the court.”\textsuperscript{63} However, as required under a joint reading of §§ 1152 and 1153, when the perpetrator is an Indian and the victim is non-Indian, the state definition of the offense continues to control, but punishment is metered out in accordance with general federal law. Thus, in the situation posed in \textit{Gray}, such federal law requires a penalty of “death, or imprisonment for any term of years or for life.”\textsuperscript{64} This same penalty applies to all non-Indian defendants convicted of rape on lands of federal jurisdiction.\textsuperscript{65}

\textsuperscript{59} It is outside the scope of this note to trace the history of equal protection under the due process clause of the fifth amendment since \textit{Bolling}. Rather, the difference is noted as necessary background to understanding the approach which the federal courts have taken to the equal protection claims which Indian defendants have lodged against §§ 1152 and 1153. It should be noted that although \textit{Bolling} was the first case to articulate the relationship between equal protection under the fifth and fourteenth amendments, earlier cases had suggested that the fifth amendment guarantees equal protection under the law. \textit{See Hurd v. Hodges}, 334 U.S. 24 (1948); \textit{Petrillo v. United States}, 332 U.S. 1 (1947); \textit{Korematsu v. United States}, 323 U.S. 214 (1944); \textit{Stewart Machine Co. v. Davis}, 301 U.S. 548 (1937); \textit{Truax v. Corrigan}, 257 U.S. 312 (1921); \textit{Antico, Equal Protection Outside the Clause}, 40 CAL. L. REV. 362 (1952); \textit{Wilson, Merging Concepts of Liberty and Equality}, 12 WASH. & LEE L. REV. 362 (1955).

\textsuperscript{60} The Supreme Court has granted certiorari in \textit{United States v. Antelope}, 523 F.2d 400 (9th Cir. 1975), \textit{cert. granted}, 96 S. Ct. 1100 (1976). There an Indian was found guilty of murder, pursuant to the Major Crimes Act. His victim was a non-Indian woman, and the murder was committed within Indian country and in the perpetration of a robbery. Since the victim was non-Indian, Antelope would have been prosecuted under Idaho law had he not been Indian. The Ninth Circuit held that § 1153, as applied to this defendant, is unconstitutional because Idaho law contains no provision for felony-murder whereas federal law does. Thus, Antelope is subject to harsher sanction than a non-Indian guilty of the same offense. Although the equal protection arguments raised by this defendant are similar to those raised by the defendants in the cases discussed below, it deals with a somewhat different issue, namely, whether retention of jurisdiction by the states over crimes committed within Indian country where neither of the participants are Indian violates the due process rights of an Indian defendant, charged, pursuant to § 1153, with committing a crime against a non-Indian.

\textsuperscript{61} 394 F.2d 96 (9th Cir. 1967), \textit{cert. denied}, 393 U.S. 985 (1968).

\textsuperscript{62} § 1153 was amended in 1966, Pub. L. No. 89-707, § 1, 80 Stat. 1100, and again in 1968, Pub. L. No. 90-284, § 501, 82 Stat. 80. However, the portion challenged in \textit{Gray} has not been amended, except to include in addition, “falsification with intent to commit rape.”

\textsuperscript{63} Id. (emphasis added).


Thus, defendants contended that because of the potential for distinction between punishment of Indian and non-Indian defendants, § 1153 was unconstitutional. Specifically, their argument was premised on the fact that § 1153 can operate to afford the Indian male "some type of advantage over other parties committing rapes within the jurisdiction of the United States."\(^6\)

In *Gray* the defendants did not claim that the provision which directs the federal court to apply the state's rape law renders § 1153 unconstitutional. Rather, defendants claimed that § 1153 violates due process because, in effect, it prescribes a different penalty based on the race of the victim. The court's analysis is, however, pertinent to the issue raised in this note since it has been followed by all courts which have considered whether that part of § 1153 which dictates that Indian defendants be tried under state law violates their due process right to equal protection under the law.

In *Gray* the Ninth Circuit rejected this constitutional challenge, emphasizing that § 1153 was specifically designed to benefit the Indian, and that it is within Congress' constitutional power to enact laws which so benefit the Indian. The Court did not quarrel with defendants' somewhat tenuous contention that because § 1153 gives the court discretion to impose a lesser penalty when the rape victim is an Indian, it may afford Indians a benefit. Rather, the court held that according such an advantage to Indians is consonant with accepted policy because "it has long been acknowledged that Congress, in the exercise of its constitutional power, has recognized and established for the Indian people a peculiar and protected status as wards of the Federal government."\(^7\) Furthermore, the court in *Gray* expressly rejected the argument that the wardship theory is no longer a viable rationale for upholding a statute favoring one class of defendants over another.\(^8\)

It should be noted, however, that *Gray*, in at least one sense, was an easy case for the court to decide. Even assuming that the wardship doctrine is viable, the case tends to resolve itself because the statute does not contradict the underlying rationale of the doctrine. It is clear that the defendants in *Gray* were not injured as a result of the statute: they were Indian, and, had they raped an Indian woman, they might have benefitted in the form of a lesser penalty. Since § 1153 applies only to Indians, the racial distinction complained of in *Gray* could never work to the disadvantage of an Indian defendant accused of rape. Thus, the statute is not inconsistent with the theory that the Indian is the ward of Congress because the guardianship status was designed to protect the Indian. Thus, assuming the theory is a viable justification for upholding such a statute, the court's

\(^{66}\) 394 F.2d at 98.  
\(^{67}\) *Id.*  
\(^{68}\) *Id.* In support of its view the court cited with approval *In re Carmen's Petition*, 165 F. Supp. 942 (N.D. Cal. 1958), aff'd 270 F.2d 809 (9th Cir. 1959), *cert. denied*, 361 U.S. 934 *(1960).*
reliance in *Gray* on this relationship preserves that theory intact.  

B. Subsequent Developments

In *Henry v. United States*, an Indian defendant had been convicted in federal court for the rape of two non-Indians. The defendant alleged that he had been denied his due process right to equal protection because he had been prosecuted under state law whereas a non-Indian would have been charged under federal law. Relying on *Gray*, the Ninth Circuit again rejected a challenge to the constitutionality of § 1153. The court emphasized, however, that because the victim was not Indian the state court, rather than the federal court would have had jurisdiction over the crime had the perpetrator also not been Indian. Thus, the defendant, whether Indian or not, would have been prosecuted under state law. The defendant did not raise and the court did not consider, however, whether the defendant's right to equal protection of law, as guaranteed by the equal protection clause, was violated due to the fact that the Indian defendant was tried in federal court, whereas, had he not been Indian, he would have been tried in state court.

It is essential to distinguish the two distinct elements of the constitutional attack made by the defendant in *Henry*. On the one hand, the defendant claimed that his rights had actually been prejudiced by the operation of § 1153 because he had been prosecuted under state law and a non-Indian would have been prosecuted under federal law. On the other hand, he contended that §§ 1152 and 1153 are unconstitutional because the underlying classification is so discriminatory that it violates the fifth amendment. In *Gray* only the latter was asserted. As noted above, the *Henry* court found that since state law would apply regardless of the defendant's race the claim of prejudice was erroneously asserted. The Ninth Circuit also rejected the claim that the implicit racial classification of § 1153 renders the statute unconstitutional.

As noted above, in rejecting the claim made by the defendant in *Gray*, the Ninth Circuit emphasized that the historical status of Indians as “wards” of the federal government is adequate justification for the racial classification underlying §§ 1152 and 1153. Since the racial classification of § 1153 was deemed immaterial in *Henry*, the court was not forced to resolve the more difficult situation in which a statute embodying a classification purportedly designed to benefit the
Indians unduly prejudices the rights of a particular Indian defendant. However, the *Henry* court's favorable citing of *Gray* would seem to endorse that court's reliance on the ward theory to validate § 1153 despite its underlying racial classification.

C. Cases Where the Rights of the Indian Are Prejudiced

In 1972 the Eighth Circuit was presented with a case in which, unlike the situation in *Gray*, the racial distinction underlying § 1153 clearly prejudiced a particular Indian defendant. In *Kills Crow v. United States* an Indian defendant was convicted in district court, pursuant to § 1153, of having assaulted his wife on an Indian reservation with intent to do her great bodily harm. Because there was evidence that Kills Crow was drunk when he assaulted his wife, and thus arguably did not have the requisite intent to be charged with aggravated assault, the defendant requested that the trial judge instruct the jury on the lesser included offense of simple assault. On appeal, the Eighth Circuit held that the district court could not have given the requested instruction because that court did not have jurisdiction over the offense of simple assault when committed on an Indian reservation. In so holding, the court emphasized that under the Major Crimes Act federal jurisdiction is limited to those crimes specifically enumerated therein. In construing § 1153, the court emphasized that Congress had expressed an intent to grant federal jurisdiction over only a select number of crimes because it had recognized that the maintenance of some semblance of legal autonomy was important to the tribes. The court felt that this underlying objective ought to be respected.

The procedural effect of this construction is that an Indian who commits any of the crimes enumerated in § 1153 on an Indian reservation is, as a matter of law, not entitled to have the jury instructed on a lesser included offense. If a defendant charged with committing against an Indian one of the offenses enumerated in § 1153 is not an Indian, a federal court has jurisdiction to give the instruction (1) under federal law if the lesser included offense is a federal crime or (2) under state law if the lesser offense is not federally proscribed. In this particular case, had Kills Crow not been Indian, the jury could have been instructed that if they found that the defendant did not intend to assault he could still be convicted of simple assault pursuant to 18 U.S.C. § 113.

Thus, a construction of § 1153 which automatically denies an Indian defendant the right to have the jury instructed on a lesser offense clearly has due process implications. In *Kills Crow*, the court agreed with defendant's contention that

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73 See text following note 64 supra.
74 432 F.2d at 118.
75 451 F.2d 323 (8th Cir. 1971).
76 Id. at 324.
77 Id. at 325. Other cases which similarly limit the jurisdictional grant of § 1153 are cited in note 3 of the court's opinion.
78 Id. at 327.
79 By operation of 18 U.S.C. § 13 the federal court would have jurisdiction to give the requested instruction under state law.
80 Subject to a fine of not more than $300 or imprisonment for not more than three months or both. 18 U.S.C. § 113 (1970).
§ 1153 is based on a racial classification and noted that this initially made the statute constitutionally suspect. The court emphasized, however, that this classification would render the statute unconstitutional only if the classification were found to be capricious or invidious. In holding that neither the racial classification underlying the Major Crimes Act nor its resultant effect of denying the defendant an instruction on the lesser offense were unconstitutional, the court examined the historical context in which this classification arose. From this examination, the court concluded that the non-Indian/Indian distinction in § 1153 is neither capricious nor invidious because it is consonant with the guardian-ward relationship between the federal government and the Indians. In so concluding, the court cited a passage from *United States v. Thomas* which designated as incident to this relationship the power to pass laws such as the Major Crimes Act for the protection and general welfare of the Indian.

Thus, the *Kills Crow* court clearly adopted the approach initially employed by the Ninth Circuit in *Gray*: the historical relationship between the federal government and the Indians is adequate constitutional justification for a criminal statute with an underlying racial classification. It is crucial to note, however, that because the defendant in *Kills Crow* was actually prejudiced by § 1153, the Eighth Circuit’s analysis extends rather than merely affirms the validity of the ward-guardian relationship. Thus, the *Kills Crow* court apparently did not consider that the procedural effect of narrowly construing the language of § 1153 to deny an Indian defendant an instruction on lesser included offenses mandated a different approach than that taken by the court in *Gray*. There is, moreover, somewhat of a conceptual contradiction in the court’s analysis. The ward-guardian notion presumes that the relationship is for the benefit of the Indian “ward,” yet in the factual situation presented in *Kills Crow*, the rights of the Indian defendant were arguably prejudiced precisely because of the racial distinction made in §§ 1152 and 1153. The court resolved this conflict by subordinating the rights of this defendant to the advantage to Indians in general to be derived from construing § 1153 strictly so as to limit the situations in which the federal courts exercise criminal jurisdiction over the Indian. Given the fact that the court’s construction automatically deprives an Indian defendant charged under § 1153 of an instruction on a lesser included offense, the court’s resolution is somewhat less than satisfactory.

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81 451 F.2d at 325 (8th Cir. 1971). The argument has been made in non-criminal contexts that the distinction between Indians and non-Indians is not racial because “Indian” in various federal statutes only refers to those who are members of certain federally recognized tribes. Therefore, the classification is statutory and not racial because a full-blooded Indian who is not a member of one of these tribes and a non-Indian are treated equally. See, Morton v. Mancari, 417 U.S. 535 (1974). This argument is inapposite here, however, because under § 1153 tribal membership is not determinative of one’s status as an Indian. See, United States v. Ives, 504 F.2d 935 (9th Cir. 1974); *In re Carmen’s Petition*, 165 F. Supp. (N.D. Cal. 1958), aff’d, 270 F.2d 809 (9th Cir. 1959), cert. denied, 361 U.S. 934 (1960); Davis v. United States, 32 F.2d 860 (9th Cir. 1929).

82 451 F.2d 323, 325 (8th Cir. 1971).

83 “We recognize also, however, that racial classifications initially are only suspect, and are unconstitutional only if invidious and capricious. Whether a given classification is consistent with due process depends upon the context in which the classification is made, and history is relevant to this inquiry.” *Id.* at 325-26.


85 451 F.2d at 326.

86 *See also*, United States v. Analla, 490 F.2d 1204 (10th Cir. 1974).
1. A Departure from the *Gray* Rationale?

Three courts, when faced with a factual situation similar to that presented in *Kills Crow*, have concluded that when the rights of an individual defendant are actually prejudiced because § 1153 directs a federal court to apply state law, the operation of the statute is unconstitutional. The approach taken by these courts is perhaps more significant than the result actually reached.

In *United States v. Boone*\(^8^7\) the United States District Court for the District of New Mexico dismissed an indictment for assault with a dangerous weapon. Under § 1153 assault with a dangerous weapon is to be defined and punished according to state law. Because New Mexico law does not require proof of intent and federal law does,\(^8^8\) the substantive rights of the Indian defendant were considered prejudiced. Here the federal prosecutor would have had a greater burden of proof had the defendant not been Indian.\(^8^9\)

In holding that § 1153 violated the defendant's fifth amendment due process guarantee the court applied a rational basis test, and rejected the government's contention that the racial classification was reasonably related to a proper governmental motive. The government had sought to rely on *Kills Crow*. However, the court distinguished *Kills Crow* because, in that case, the general benefit to all Indians of preserving tribal autonomy was held to outweigh the prejudice to the defendant flowing from the racial classification underlying §§ 1152 and 1153. The *Boone* court also distinguished *Gray*, where § 1153 arguably operated to the benefit rather than prejudice of the defendants, and concluded that prejudice, not benefit, accrued to Indians in general from that portion of the statute which provides that assault with a dangerous weapon be defined and punished according to state law.

The holding of the *Boone* court is clear: when the classification underlying § 1153 actually prejudices the rights of a particular defendant the ward-guardian relationship is insufficient rationale to sustain a prejudicial result. However, that the court distinguished *Kills Crow* rather than repudiating its analysis would seem to indicate that it adheres to the basic premise underlying *Gray*: the ward-guardian relationship is still viable justification for the Indian/non-Indian distinction underlying § 1153. This court added the vitally important provision that when this distinction actually prejudices the rights of a particular defendant the historic relationship between Congress and the Indians is insufficient rationale to sustain that prejudicial result. The significance of this development is somewhat muted, however, by the court's apparent refusal to discard altogether the ward theory as a proper constitutional basis for upholding the implicit racial distinction underlying § 1153.

In *United States v. Cleveland*\(^9^0\) the Ninth Circuit was faced with a dilemma similar to that presented in *Boone*. Although the *Cleveland* court agreed that when the Major Crimes Act operates to the disadvantage of an Indian defendant

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\(^8^7\) 347 F. Supp. 1031 (D.N.M. 1972).
\(^8^8\) 18 U.S.C. § 113(c) (1970).
\(^8^9\) A non-Indian who committed a crime on an Indian reservation would be prosecuted in federal court by virtue of § 1152 which extends federal jurisdiction to Indian country.
\(^9^0\) 503 F.2d 1067 (9th Cir. 1974).
that result is unconstitutional, the court's analysis differs somewhat from that of the Boone court. Cleveland involved the claims of four Indians who were charged under Arizona law, pursuant to § 1153, with assaulting both Indians and non-Indians with a deadly weapon during a fracas on the reservation. They appealed their indictments to the district court, alleging that § 1153 operated to deny them due process because had they not been Indian, they would have been tried, pursuant to § 1152, under federal law which in this particular instance prescribed a lighter penalty and imposed a heavier burden of proof on the prosecutor than did Arizona state law. The district court accepted the defendants' claims and dismissed the indictments.

The government appealed this dismissal and the Ninth Circuit reversed the dismissal of those counts charging defendants with having assaulted non-Indians. The court concluded that those counts involved no denial of the defendants' due process right to equal protection. Since there is no basis for federal jurisdiction when neither the perpetrator nor the victim of a crime committed within Indian country is Indian, the non-Indian defendant would have been tried in a state court under state law. Thus, contrary to defendants' claim, even had they not been Indian, they still would have been subject to prosecution under state law. Thus, the 1966 and 1968 amendments to § 1153, which subject the Indian to prosecution under and punishment according to state law, treat Indians and non-Indians who commit these particular offenses against an Indian within Indian country virtually equally. The only difference is that Indians are tried in federal court and non-Indians are tried in state courts.

The court did affirm, however, the dismissal of those counts which charged the Indian defendants with the assault of other Indians because had defendants not been Indian they would have been prosecuted under federal law. The judge accepted the argument of these defendants because, as a result of the 1966 and 1968 amendments and substantive differences between federal and Arizona assault statutes, these defendants were subject to harsher penalties and, at the same time, the prosecution did not bear as heavy a burden of proof as it would have had they not been Indian. In the court's analysis, this was a distinction based solely on the defendants' race, and since no state interest sufficient to justify this distinction was asserted, it violated the equal protection requirements of the fifth amendment.

It is perhaps significant that the Ninth Circuit in Cleveland did not make reference to the historical ward-guardian relationship it had relied upon in Gray.

91 Id. at 1070.
92 The district court opinion is unreported.
93 503 F.2d at 1071.
94 See, note 4 supra.
95 Defendants did not allege that this difference also raised equal protection considerations. However, the tone of the court's treatment of this issue intimates that such a contention would not be well received.
96 "The sole distinction between the defendants who are subjected to state law and those to whom federal law applies is the race of the defendant. No federal or state interest justifying the distinction has been suggested, and we can supply none. The 1966 and 1968 amendments to § 1153 as applied to adopt Arizona law in defining and punishing assault with a dangerous weapon and assault resulting in serious bodily injury alleged to have been committed by an Indian against an Indian are violative of the equal protection requirement of the Fifth Amendment." 503 F.2d at 1071.
This omission alone is insufficient ground to conclude that Cleveland marks an affirmative departure from this aspect of Gray.

However, the absence of any reference to the ward theory indicates that Cleveland is a more striking departure from the analytical framework of Gray than Boone. Nevertheless, it is clear that Cleveland and Boone are entirely consistent. In both cases, the court was confronted with a situation where the racial classification underlying §§ 1152 and 1153 worked to the clear disadvantage of the Indian defendant, and this result was found to violate that defendant's fifth amendment rights.

The most recent case in which an Indian defendant challenged the constitutionality of § 1153 is United States v. Big Crow.\(^97\) In Big Crow, an Indian defendant convicted of assault resulting in serious bodily injury challenged his conviction on fifth amendment grounds. Because the alleged assault occurred on an Indian reservation located in South Dakota,\(^98\) and the offense charged was one of those enumerated in § 1153, the Indian defendant was subject to federal prosecution. But, because the offense charged, assault resulting in serious bodily injury, was one of those which, after the 1966 and 1968 amendments, is to be defined and punished according to state law, Big Crow was charged and convicted under a South Dakota statute. This statute provides for the imprisonment in the state penitentiary for not less than one and not more than five years.\(^99\) The defendant claimed that his conviction violated the due process clause of the fifth amendment because had he not been Indian, he would have been tried, pursuant to § 1152, under 18 U.S.C. § 113(d) which prescribes a maximum sentence of six months imprisonment and a $500 fine.\(^100\) Big Crow claimed that because § 1153 subjected him to a penalty much harsher than that to which a non-Indian would have been subjected his conviction was unconstitutional.

The government contended that Big Crow's analysis of the law was erroneous and that a non-Indian who committed the same offense against an Indian on a reservation would also be subject to prosecution in federal court under South Dakota law. The government argued that “assault resulting in serious bodily injury” is not a federal crime because § 113(d) only punishes assault and the offense with which Big Crow was charged included battery as well. Therefore, if Big Crow were not Indian he nevertheless would have been charged under South Dakota law, not pursuant to § 1153 but by operation of the Assimilative Crimes Act.\(^101\) That Act gives the government authority to resort to state law if anyone commits an act within Indian country which, although not a crime under federal law, is a crime under the law of the state in which it was committed. The Eighth Circuit found that since § 113(d) prohibits the conduct involved in assault resulting in serious bodily injury, resort to state law was not authorized by the Assimilative Crimes Act and a non-Indian accused of committing aggra-

\(^{97}\) 523 F.2d 955 (8th Cir. 1975), cert. denied, 96 S. Ct. 1126 (1976).

\(^{98}\) Id. at 956.

\(^{99}\) S.D. Comp. Laws Ann. § 12 (1967). The statute is quoted in the court's opinion at 957.

\(^{100}\) 18 U.S.C. § 113(d) (1970) provides: “Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows: (d) Assault by striking, beating, or wounding, by fine of not more than $500 or imprisonment for not more than six months, or both.”

vated assault within Indian country would, therefore, be charged under federal law. Thus, a non-Indian defendant accused of the same crime as Big Crow would be subject to a lesser penalty.

After concluding that Big Crow was subject to a higher penalty than he would have been had he not been Indian, the court concluded that this application of § 1153 was unconstitutional. In reaching this conclusion the court distinguished Morton v. Mancari where the Supreme Court upheld disparate treatment of Indians that uniformly benefited all Indians. The Eighth Circuit said that because the racial classification underlying § 1153 only worked to prejudice Big Crow's rights, it could not meet the test laid down by the Supreme Court in Mancari — that any special treatment of the Indians be rationally tied to Congress' role of protecting the Indian: "[I]t is difficult for us to understand how the subjection of Indians to a sentence ten times greater than that of non-Indians is reasonably related to their protection".

The court further suggested that since § 1153 embodies a racial classification, a strict scrutiny approach ought to be employed, whereby the government would be required to show a compelling state interest for the distinction. The court held that the government had shown no reason, compelling or otherwise, for the distinction. Therefore, an application of § 1153 which subjects an Indian defendant to a harsher penalty than a non-Indian violates the fifth amendment.

Because the government confined its argument to the absence of any disparity in treatment between Indian and non-Indians accused of assault resulting in serious bodily injury, it did not rely on the "ward" status of Indians as justification for the racial classification underlying §§ 1152 and 1153. Thus, the court was not faced with this argument, and consequently the finding of unconstitutionality in Big Crow cannot be considered an express repudiation of the theory that the ward-guardian relationship is adequate justification for the racial distinction embodied in §§ 1152 and 1153, where the defendant is not thereby prejudiced.

Moreover, the court expressly disapproved of the Tenth Circuit's approach in United States v. Analla. There, the defendant had claimed that although § 1153 did not operate to his disadvantage, the racial distinction underlying the Major Crimes Act was contrary to its stated aims. The Tenth Circuit upheld defendant's conviction, relying on the special status of Indians as justification for

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102 523 F.2d at 958.
103 417 U.S. 535 (1974). In Mancari a non-Indian challenged the constitutionality of the Bureau of Indian Affairs' hiring practice of preferring Indians over non-Indians. Mancari is distinguishable, however, from the issue at hand because that preference (1) arises in a non-criminal context; (2) uniformly benefits all Indians with no possibility that it will prejudice the rights of any Indian; and (3) is not based on racial criteria but rather tribal membership.
104 "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government we cannot say that Congress' classification violates due process." Id. at 555.
105 523 F.2d at 959.
106 Id. at 960.
107 Id.
108 United States v. Analla, 490 F.2d 1204 (10th Cir.), vacated and remanded on other grounds, 419 U.S. 813 (1974). An Indian defendant was charged under New Mexico law and tried in federal court, pursuant to § 1153, with assault resulting in serious bodily injury.
the distinction. It is clear, from the court's treatment of Analla, that it would have set aside Big Crow's assault conviction even if the government had made the assertion that although this classification is racial, and this defendant's rights are thereby prejudiced, the classification is, nevertheless, not unconstitutional because it is reasonable in the context of the unique guardian-ward relationship between Congress and the Indians. This intimation is strengthened when one considers that the nexus between any prejudice to the defendant's rights and the racial classification in Analla was somewhat tenuous, whereas, that nexus was very clear in Big Crow.

It must be noted that Judge Lay, in his opinion for the majority, juxtaposed Analla and Mancari. In so doing he was careful to distinguish the latter on the grounds that the Bureau of Indian Affairs' hiring practice clearly favors all Indians, whereas here § 1153 operated to subject an Indian to a harsher penalty. Because the Supreme Court relied in Mancari on the special guardian-ward relationship between Congress and the Indians in upholding the Bureau's discriminatory hiring practices, the comparison between Analla and Mancari suggests that the court is affirming rather than questioning the viability of this relationship as justification for the racial classification of § 1153. The implication is that while the Eighth Circuit would not uphold a conviction when an Indian defendant suffered substantial prejudice as a result of that classification, it would not disturb that classification if it operated to the benefit of the Indian. Thus, the key to the court's analysis is a finding of actual prejudice to a particular defendant. This is a significant but somewhat limited inroad into the wardship doctrine, and, indeed, is entirely consonant with the underlying premise of this doctrine—that the Indian benefit.

2. Parameters of the Departure

In Boone, Cleveland, and Big Crow, the courts found that because § 1153 defines and punishes certain crimes according to state law, Indian defendants were subjected to harsher penalties based upon a lesser showing of proof by the prosecution than non-Indians. All three cases held that this result was unconstitutional because the distinction between non-Indian and Indian defendants was purely racial ad no proper governmental motive for this classification had been demonstrated. A closer examination of these opinions reveals, however, that they differ from Gray only in result and that the approach taken in these three cases is entirely consistent with the court's analysis in Gray. In Gray, the court found that Gray had benefited from the operation of § 1153, and that although the Major Crimes Act embodies a racial classification, the special status of Indians as "wards" of the federal government was sufficient to legitimize this classi-

109 "To be sure, § 1153 is based upon a racial classification. The constitutionality of such a classification, however, is apparent from the history of the relationship between Indians and the federal government. That relationship from the beginning has been characterized as resembling that of a guardian and a ward. . . . Given such a perspective, we are unable to ascribe to § 1153 an invidious classification. . . ." 490 F.2d at 1208.
110 523 F.2d at 959.
111 See note 103 supra.
112 See text following note 61 supra.
As noted above, Indians were originally accorded this status because Congress, and not local governments, was deemed better able to protect the Indians. It is this rather unique relationship upon which the court in Gray relied in holding § 1153 constitutional despite its underlying racial classification. It must be noted that this status is premised upon the protection aspect of the guardian-ward relationship. Thus, anything enacted pursuant to this relationship must ultimately be beneficial to the Indian “wards.” In Gray, the court was not faced with a situation where a statute passed pursuant to this relationship actually worked to seriously disadvantage an Indian. Therefore, the Gray approach reflects no inconsistency in the theory: the judgment, while not mandated by the policy underlying this relationship, does not thwart its realization.

However, the Boone, Cleveland and Big Crow courts each confronted a situation in which an Indian was disadvantaged by the application of a statute enacted pursuant to the guardian-ward relationship. All three courts resolved the conflict in favor of the defendant. Given the fact that the unique status of the Indians is premised upon protecting the Indian and that in these decisions the statute involved worked to the disadvantage of the Indian defendant, the result reached in these cases cannot be considered inconsistent with the spirit of Gray.

Congress, consistent with its role as protector of the Indians, can pass a criminal law which penalizes certain conduct even though that law confers no benefits on Indians. However, a law which places the defendant at a disadvantage merely because he is Indian is completely antithetical to the guardian-ward notion. When § 1153 dictates the adoption of state law, it is clear that the Indian is in the same position as he would have been if there were no special relationship between Congress and the Indians, except that he is tried in federal court. Because § 1152 subjects a non-Indian who commits any crime within Indian country to prosecution under federal law, the Indian defendant is obviously not in the same position as a non-Indian accused of the same crime. It is this disparity which is completely inconsistent with the rationale used in Gray. In this context it is clear that these cases do not recognize or reject the fatal inconsistencies in the underlying rationale of Gray. Moreover, given the strong conceptual bond between Gray and the result reached in Boone, Cleveland, and Big Crow, even when there is no express reliance on the ward-guardian relationship, these cases cannot be read as a repudiation of the constitutional viability of this relationship. That none of the courts have repudiated the ward-guardian relationship between the Indians and Congress as a viable justification for the racial discrimination underlying § 1153 seems more critical than the courts’ willingness to declare actual prejudice resulting therefrom unconstitutional. Thus, the courts

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113 394 F.2d at 99.
114 See, text accompanying note 29 supra.
115 394 F.2d at 98.
116 The obligation to protect the tribes logically encompasses the power to protect the Indians from themselves.
117 In Boone the court rejected the government’s reliance on Kills Crow’s favorable treatment of the ward-guardian relationship because there some benefit accrued to Indians as a whole. Thus, the Boone opinion should not be read as a repudiation of the ward-guardian relation as viable rationale for the underlying racial distinction in § 1153. In Cleveland, no reference was made to this relationship. In Big Crow, the court expressly rejected it as justification where the rights of an Indian defendant are thereby seriously prejudiced.
have failed to consider whether this historic relationship is proper justification for treating Indian defendants differently from other defendants in a criminal case. It seems critical to clarifying the rights of the Indian that courts consider this issue.

As noted above, Kills Crow presented a similarly conflicting factual situation because an Indian defendant was prejudiced by a statute purportedly passed incident to Congress' role as guardian of Indian affairs. There, the court weighed two competing values—that federal courts have jurisdiction over only a select number of crimes and leave the rest within the jurisdiction of the tribal courts, and the prejudice actually suffered by this particular defendant—and concluded that the benefit of this statutory scheme to Indians generally outweighed the prejudice to this particular defendant. Thus, the Kills Crow court reached a clearly different result from that reached in Boone, Cleveland, or Big Crow. Moreover, in reaching this result the court expressly relied on the ward-guardian relationship to justify the racial classification underlying § 1153. However, the difference in approach between Kills Crow and these three cases is clearly more a difference of interpretation than a difference in kind. The courts differ as to when the prejudice to one individual outweighs the benefit to the whole, but apparently agree that Congress' role as guardian can legitimize a racially discriminatory statute. This is evident from the fact that the courts which decided Boone, Cleveland, and Big Crow did not question the constitutional viability of the guardian-ward concept as justification for the racial distinctions drawn by Congress in enacting §§ 1152 and 1153. Instead, the courts' holdings there were strictly contingent on a finding of prejudice to the particular defendant. More importantly, the tone of the courts' analyses indicates that, despite the finding of unconstitutionality, these cases do not represent a basic departure from Gray. Instead, they comprise a limited exception to Gray, which is entirely within its contemplation and strictly confined to its facts.

From the above examination of the relevant case law, it is clear that no court has expressly or even impliedly repudiated the ward-guardian relation as adequate justification for the racial distinction implicit in §§ 1152 and 1153. Every finding of unconstitutionality was contingent on a finding that defendant had been placed in a less advantageous position than he would have been had he not been Indian. More importantly, the courts which found no violation of the due process clause relied exclusively on the special status of Congress as "guardian" of the Indians to justify the racial distinction Congress made in enacting §§ 1152 and 1153. Because the distinction involved here is clearly racial, such reliance on an ancient relationship without questioning either whether it is viable in the modern context or whether such a relationship can legitimize racial discrimination is clearly misplaced.

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118 The viability of the relationship between Congress and the Indians as justification for the racial disparity underlying § 1153 has been affirmed in the non-criminal context. See, Morton v. Mancari, 417 U.S. 535 (1974).
119 See, text following note 75 supra.
120 451 F.2d at 326.
3. Test Used by the Courts

The courts which refused to find a constitutional violation accepted this distinction as reasonably related to proper governmental motive. Although there is little dispute that this distinction is a racial one, all courts which have found the distinction constitutional have been satisfied either that there was a rational basis for the classification or that Congress in creating it did not do so out of an invidious motive. Indeed, only the most recent case, Big Crow, suggests that since the distinction underlying §§ 1152 and 1153 is clearly racial, a strict scrutiny test, requiring a showing of a compelling state interest for the classification, ought to be applied.

But whatever the test to be employed, there must, at the very least, be some reasonable relation between the classification and some proper governmental motive, for no classification, no matter its nature or source, is constitutional if it is arbitrary. The only justification asserted for the racial distinction underlying §§ 1152 and 1153 is the guardian-ward relationship between Congress and the Indians. For this reason the legal parameters of this relationship must be carefully scrutinized to determine its constitutional vitality. This inquiry is especially pertinent in light of the suggestion in Big Crow that a compelling state interest must be shown. In the event that other courts adopt this requirement, it is germane to consider whether the guardian-ward relationship is sufficiently viable to survive the transition.

VI. How Rational Is the Rationale?

A. Historical Viability of the Guardian-Ward Concept

As noted above, the notion that Indians are "wards" of Congress is rooted in history. While the role of Congress as protector of the Indian has somewhat blurred in recent years, there remains the concern that the tribes maintain some semblance of political autonomy from the states. Thus, the tribes are encouraged to retain their own courts and systems of government. Yet, this is somewhat undermined by the increasing federal control detailed above. In the context of modern developments, retention of control by Congress seems at best a stopgap measure between two competing goals—that the Indians be assimilated by subjecting them to similar legal sanctions as other citizens and that the Indians be

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121 See United States v. Big Crow, 523 F.2d at 959.
122 See note 81 supra.
123 Where a suspect criteria such as race is involved a showing of compelling state interest is required to uphold the classification. There has been no suggestion by the courts that an equal protection claim brought under the fifth amendment demands different treatment.
124 The court in Kills Crow appears to use a strict scrutiny test, but holds that the classification is constitutional upon the apparent absence of invidious motivation on the part of Congress in enacting the Major Crimes Act and does not require a showing of compelling state interest. 451 F.2d at 325-26.
125 523 F.2d at 959-60.
126 See, text following note 23 supra.
127 See, note 50 supra.
128 All Indians are United States citizens.
encouraged to retain a separate identity through self-government in the hope that this will ease the desired transition.\textsuperscript{129}

The result of these competing goals is that even today the legal status of the tribes is problematical. The tribe is no longer a "nation" or even a "state" in any sense, but, at the same time, its members have not been legally assimilated at the state level. This, of course, is not the case in those states where the state courts have complete jurisdiction over criminal\textsuperscript{130} and civil\textsuperscript{131} actions in which an Indian is a party.\textsuperscript{132} Because the Indians have not been legally assimilated, they are, pursuant to § 1153, subject to criminal prosecution in a federal court under state law whereas a non-Indian similarly charged is subject, pursuant to § 1152, to prosecution in federal court under federal law unless the victim of his crime is also not Indian.

The original reason for appointing Congress as "guardian" of the Indians seems anachronistic today: the Indians and the states are no longer antagonistic factions. Indeed, the Supreme Court has recognized that Congress' role as "guardian" of the Indians is not destined to be perpetual, and that Congress may terminate the relationship whenever it chooses.\textsuperscript{133} However, there may be cultural inequities which make total assimilation impossible. Although the relationship between Congress and the Indians may still be viable today its viability is less established than previously. Thus, one might speculate that if Big Crow's suggestion that a compelling state interest is required to justify the racial classification underlying § 1153 is adopted by other courts, this viability will not be sufficient to sustain the transition.

B. Constitutional Viability of the Ward-Guardian Relationship

However, to admit that total assimilation may be impossible and that the unique relationship between Congress and the tribes may still be historically viable today does not resolve the constitutional considerations raised by §§ 1152 and 1153. The unique relationship between Congress and the tribes at most only sanctions the jurisdictional allocation between state and federal governments, but the Indian defendants in these cases are not alleging that their being subject to federal rather than state jurisdiction raises constitutional implications since both Indians and non-Indians charged with the commission of crimes within Indian country are subject to federal prosecution. Rather, they are alleging that because they were prosecuted under state law, whereas a non-Indian would have been prosecuted under federal law, they were denied their due process right to equal protection under the law. The jurisdictional set-up is tied to the constitutional problem, but only to the extent that if the Indian were subject to state rather than federal jurisdiction the problem of which law applies would not arise. This

\textsuperscript{132} There is a provision which enables other states to assume jurisdiction, but a provision in the Indian Civil Rights Bill makes such assumption contingent on tribal assent. See Goldberg, supra note 50.
\textsuperscript{133} Matter of Heff, 197 U.S. 488, 499 (1905).
does not mean, however, that the jurisdictional web must be untangled before the constitutional problem can be redressed or that the jurisdictional problem which manifests itself in the ward-guardian relationship between Congress and the Indians necessarily justifies the racial classification.

In assessing the constitutional vitality of the guardian-ward relationship, it ought to be noted that the source of this relation is entirely historical. There is no clause in the constitution which appoints Congress as "guardian" of the Indians. The only mention of Indians in the constitution is in the commerce clause. Thus, the ward-guardian concept is completely a creation of Congress and of judges. That it is an extra-constitutional concept does not mean that anything passed pursuant to such a relation is unconstitutional, but such a relationship does not give Congress the authority to enact legislation which is immune from subsequent attack. This was the holding of the Supreme Court in United States v. Klamath Indians. There the Court held that even though Congress could constitutionally enact legislation to benefit the Indians, its authority is not immune from constitutional limitations and thus the Indians were entitled to just compensation for land taken.

Thus, the status of Indians as "wards" of the federal government cannot alone sanction the passage of the Major Crimes Act if that Act denies to Indians their due process guarantee of equal protection under the law. This conclusion is even more compelling when one considers that the rights jeopardized here are related to criminal process. In recognition of the importance of these rights, the courts have, when faced with a situation where the application of state law mandated by § 1153 works to the clear disadvantage of the Indian defendant, held this result unconstitutional. As noted above, this approach is entirely consonant with the underlying premise of the ward-guardian relationship, namely that the Indian benefit.

This approach is basically inadequate because the courts have failed to distinguish jurisdictional and constitutional considerations. When considered together §§ 1152 and 1153 do erect a classification which is primarily based on race. Although the authority to subject Indians who commit crimes on the reservation to federal rather than state jurisdiction does stem from the unique relationship between Congress and the Indians, this authority does not include the power to enact a statutory scheme which embodies racially discriminatory criteria.

Furthermore, this scheme contradicts the underlying objectives of this relationship, whether or not defendant is actually prejudiced. Since the sanctions come from a foreign source, applying one set of sanctions to the Indian and another to non-Indians neither enhances the assimilation of Indians nor eases this transition by enabling them to retain a cultural identity. The argument is made that § 1153 does further these goals because federal courts have jurisdiction over

134 U.S. Const. art I, § 8, reads: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (emphasis added). This mention indicates a clear intention on the part of the drafters of the Constitution to assume jurisdiction over the tribes rather than give jurisdiction over Indian affairs to the states. However, the Supreme Court in Kagama v. United States, 118 U.S. 375 (1886), concluded that this reference in the commerce clause did not by itself give Congress the power to prescribe a criminal code for the Indians at 378-79.

135 304 U.S. 119 (1938).

136 Id. at 123.
only a select number of crimes, whereas the tribal courts retain jurisdiction over the rest.\textsuperscript{137} However, this argument merely illustrates the confusion between jurisdiction and constitutionality. The existence of § 1153 may further the competing goals of assimilation and separation, but treating Indians and non-Indians accused of committing the same crimes on the reservation differently does absolutely nothing to further these goals. Thus, although the guardian-ward relation may even today provide adequate constitutional justification for subjecting the Indians on the reservation to federal jurisdiction its vitality does not extend to the erection of a racial distinction among those who commit crimes on the reservation.

VII. Conclusion

This note, in dealing with the constitutional implications of §§ 1152 and 1153 has discussed jurisdiction only as necessary background for an understanding of historical origin and the approach taken by the courts. Thus, it is outside the scope of this note to determine whether state or federal law should apply to crimes committed within the confines of an Indian reservation.

It is clear, however, that whichever law is applied should be applied equally to all defendants regardless of their race. To effect such equality does not require that the Indian be jurisdictionally assimilated into the state. Although this has been done in some states,\textsuperscript{138} it may be contrary to the wishes of the Indians themselves.\textsuperscript{139} If § 1153 were amended so as to apply to anyone accused of one of the crimes enumerated therein, regardless of his race or the race of his victim, this would remedy its present constitutional deficiencies. Such an amendment would destroy the constitutional inequality complained of without disturbing to any great extent the jurisdictional status quo. Under the present set-up, the federal courts have jurisdiction over non-Indians who commit crimes on the reservation unless the victim is not Indian. Thus, amending § 1153 would deprive the state courts of jurisdiction only when none of the parties involved in a crime committed on an Indian reservation is Indian, and would grant the states jurisdiction where a crime not enumerated in § 1153 is committed on the reservation by a non-Indian against an Indian.

VIII. Legislative Postscript

On May 29, 1976 Congress enacted the Indian Crimes Act of 1976.\textsuperscript{140}

\begin{itemize}
\item \textsuperscript{137} See, above discussion of United States v. Kills Crow, 451 F.2d 323 (8th Cir. 1971), in text following note 75 supra.
\item \textsuperscript{138} See, notes 43-45, supra.
\item \textsuperscript{139} See, note 132, supra.
\item \textsuperscript{140} Act of May 29, 1976, Pub. L. No. 94-297, 90 Stat. 585. The amended § 1153 reads:
\begin{quote}
Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, 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 larceny within Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the
\end{quote}
\end{itemize}
This statute purports to eliminate the constitutional problems raised by the Major Crimes Act as discussed in this note. It amends that portion of § 1153 which formerly provided that certain offenses be defined or punished according to state law: in the future only incest and burglary, when committed by an Indian within Indian country, will be defined and punished according to state law. As the legislative history indicates, defining burglary and incest according to state law raises no due process problems, because, although the amended § 1153 applies only to Indians, incest and burglary are not crimes under federal law. Thus, both non-Indians and Indians who commit these crimes on a reservation will be prosecuted under federal law. The statute further provides that an Indian who commits any one of the offenses enumerated in § 1153 within Indian country will be tried in the same court as any other person similarly situated.

The nature of the changes effected by the Indian Crimes Act indicate quite clearly that Congress has sought to amend a possibly unconstitutional statute rather than undertake a serious appraisal of the problems underlying the present policies on Indian affairs. Admittedly, the statute lays to rest some of the difficult equal protection questions raised by Indians who have been tried under § 1153 and thus redresses a serious grievance which the Indians have had to endure. The statute, however, does nothing to untangle the state-federal conflicts which underpin this area of the law: even after the passage of this statute states have exclusive jurisdiction over offenses committed on an Indian reservation where no Indian

laws of the State in which such offense as are in force at the time of such offense.

In addition to the offenses of burglary and incest, any other of the above offenses which are not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the law of the State in which such offense was committed as are in force at the time of such offense.

Sec. 3. Section 113 of title 18, United States Code, is amended by adding at the end thereof the following new subsection: (f) Assault resulting in serious bodily injury, by fine of not more than $10,000 or imprisonment for not more than ten years, or both.

Sec. 4. Section 3242, title 18, United States Code, is amended to read as follows: All Indians committing any offense listed in the first paragraph of and punishable under § 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts as are all persons committing such offense within the exclusive jurisdiction of the United States.

141 See text accompanying note 10 supra.
143 See, note 6 supra.
144 Murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, and larceny. Note that the offense of kidnapping has been added.
146 The Indian Crimes Act of 1976 was obviously designed to remedy various constitutional problems raised in cases brought by Indian defendants who were charged under the old § 1153. The statute has been amended to eliminate the disparate treatment of Indian defendants accused of rape, depending on the race of the victim, the constitutionality of which was raised in Gray; 18 U.S.C. § 113 (1970) has been amended to include assault resulting in serious bodily injury, thus making it a federal crime and thereby eliminating one of the issues raised in Big Crow; and finally § 3242 seems to have been amended in response to the suggestion by the Cleveland court that where a defendant accused of committing a crime on the reservation is tried might be significant.
is involved.\textsuperscript{147} That the Indian remains, after the passage of this act, the ward of Congress, is clear from the language of the amended § 1153: the statute still applies only to crimes committed by Indians.\textsuperscript{148} Because this act does not terminate the historic relationship between Congress and the Indians, whether this special relationship can sustain the constitutionality of a statute or series of statutes undoubtedly based on race remains a crucial issue.

The Indian Crimes Act of 1976 is clearly important because it redresses a serious denial of constitutional rights. It fails, however, to resolve, and inevitably postpones resolution of, a vitally important issue—whether the historic relationship between Congress and the Indians can, in the modern context, sustain a legislative classification based on race.

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\textsuperscript{147} 1976 U.S. Code Cong. & Ad. News at 1643. The amended § 1153 does not deprive the states of exclusive jurisdiction over crimes committed within Indian country where none of the participants are Indian. The legislative history of this amendment suggests that this change was not effected because the Supreme Court has recently granted certiorari in United States v. Antelope, 523 F.2d 400 (9th Cir. 1975), \textit{cert. granted}, 96 S. Ct. 1100 (1976). That case raises the issue of whether the fact a non-Indian who commits one of the crimes enumerated in the Major Crimes Act within Indian country against a non-Indian is subject to prosecution under state law is unconstitutional. This issue remains even after the passage of this new law, since an Indian would be subject to prosecution under federal law.