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Tribal Sovereignty and the Supreme Court's 1977-1978 Term

COMMENTS

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I. INTRODUCTION

Indian tribes occupy a unique status as governmental units within the federal system. Although most tribes exercise at least some governmental powers,[1] the source of these powers raises an interesting doctrinal question: Do Indian tribes exercise inherent powers of a sovereign or only congressionally delegated powers? Courts[2] and commentators[3] generally agree that tribes exercise powers of limited sovereignty.[4] Nevertheless, notions of inherent sovereignty have not bound the courts to decide cases in accordance with the theoretical underpinnings of this abstract doctrine. The judicial role in the developing doctrine of tribal sovereignty has been a dynamic one. And, although the concept of tribal sovereignty is generally recognized, certain judicial modifications of the doctrine arguably imply that Indian tribes do not possess

1. This Comment will deal only with those federally recognized Indian tribes that possess at least some powers of self-government.

2. *E.g.*, United States v. Wheeler, 435 U.S. 313 (1978); Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975). *But cf.* United States v. Kagama, 118 U.S. 375, 379 (1886): "Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two."

3. *E.g.*, F. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 122 (1971); Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 955-56 (1972). *Contra*, AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 573-82 (1977) (separate dissenting views of Congressman Lloyd Meeds) [hereinafter cited as POLICY REVIEW COMMISSION]; Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME LAW. 600 (1976).

4. Probably the foremost Indian law commentator, the late Felix Cohen, gave the following definition of the extent of tribal governing power:

> (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, *e.g.*, its powers to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i.e.*, its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

F. COHEN, *supra* note 3, at 123 (footnotes omitted).

the inherent rights of sovereignty, but are limited to the exercise of delegated powers.

A universally recognized tenet of Indian law is that the federal government has "plenary" power over the Indian tribes.[5] Thus follows a basic limitation upon inherent tribal sovereignty: tribal powers can be limited by congressional act.[6] Because of this broad limitation, one might reasonably question the meaningfulness of the distinction between inherent tribal power and congressionally delegated power. Surely an inherent power that can be severely limited is no great power.

Congress, however, apparently is not inclined to impose any major limiting legislation upon the Indian tribes. Indeed, the congressional disposition appears to be clearly to the contrary. Current federal policy encourages tribes to determine their own futures within the scope of limited federal supervision. Given this legislative policy, judicial delineations of tribal sovereignty play a major role in determining the scope of tribal governmental power.

Tribal sovereignty is evidenced by any affirmative exercise of tribal power. In addition, tribal sovereignty has defensive characteristics that come into play when another sovereign attempts to encroach upon a function of the tribal government.[7] The major source of tribal sovereignty doctrine, both historical and modern, comes from cases involving this "defensive" aspect. Recently, however, cases involving affirmative exercises of power have gained some prominence as tribes have attempted to exercise governmental powers in new areas.

Three cases from the Supreme Court's 1977-1978 Term illustrate the application of the tribal sovereignty doctrine in novel factual settings. The first case presents the question of whether a tribe can exercise criminal jurisdiction over a non-Indian.[8] The

5. Morton v. Mancari, 417 U.S. 535, 551-52 (1974). "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973).

6. Governmental powers of Indian tribes are also limited by treaty provisions. However, the United States has not entered a treaty with the Indians since 1871, when Congress passed a law prohibiting future pacts. Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. § 71 (1976)).

7. This principle is of early origin. "Jean Bodin perceived in his *Six livres de la république*, published in 1577, that sovereignty has a double aspect: it means that the state, or the prince, is the supreme power over subjects in a particular territory; second, it also signifies that the state enjoys freedom from interference by other states." I. DELUPIS, INTERNATIONAL LAW AND THE INDEPENDENT STATE 3 (1974).

8. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

second case examines whether a tribe is an arm of the federal government for purposes of the double jeopardy clause.[9] The third case interprets the Indian Civil Rights Act (ICRA) to determine if it implies both a waiver of tribal sovereign immunity and a federal cause of action against a tribal officer.[10]

This Comment will first examine the historical foundation and modern development of the doctrine of tribal sovereignty. A brief analysis of current federal Indian policy will then be undertaken to show the legislative context in which the sovereignty decisions must be understood. This will be followed by a close examination of the tribal sovereignty aspects of the 1977-1978 cases. Finally, conclusions will be drawn concerning the tribal sovereignty doctrine, its current vitality, and its applicability in varying factual contexts.

II. JUDICIAL DEVELOPMENT OF THE DOCTRINE

A. Laying the Groundwork

Like many federal law principles, the judicial doctrine of tribal sovereignty owes its birth to Chief Justice John Marshall. His opinions in *Cherokee Nation v. Georgia*[11] and *Worcester v. Georgia*[12] are important for more than historical perspective; many modern decisions continue to cite one or both of the opinions for basic Indian law propositions.[13]

In 1827, the Cherokee Nation asserted its powers of sovereignty through the adoption of a constitution.[14] In response, the State of Georgia attempted to make its laws generally applicable to the territory occupied by the Cherokees. The tribe brought an original bill in the Supreme Court seeking to enjoin Georgia from enforcing its laws on the Cherokee-occupied land. Although ultimately finding the Court lacked original jurisdiction because the Cherokees did not constitute a "foreign nation," Justice Marshall did take advantage of the opportunity to explain some basic characteristics of the nature of tribal existence within the federal scheme:[15]

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9. United States v. Wheeler, 435 U.S. 313 (1978).

10. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

11. 30 U.S. (5 Pet.) 1 (1831).

12. 31 U.S. (6 Pet.) 515 (1832).

13. *E.g.*, Morton v. Mancari, 417 U.S. 535, 555 (1974); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 168-69 (1973); Stevens v. Commissioner, 452 F.2d 741, 744 (9th Cir. 1971); Yanito v. Barber, 348 F. Supp. 587, 590 (D. Utah 1972).

14. *See* Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 503 (1969).

15. Compare Marshall's use of a dismissal for lack of jurisdiction as a stage to pro-

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[16]

The substantive controversy between Georgia and the Cherokee Nation had to wait but one more year to be heard. Samuel Worcester, a non-Indian missionary, was indicted for the crime under Georgia law of " 'residing within the limits of the Cherokee nation without a license.' "[17] Worcester was found guilty in the Georgia courts and he appealed his conviction to the United States Supreme Court. Justice Marshall, after a lengthy analysis of the applicable treaties, held that the United States through federal statutes and treaties had sought to exclusively regulate intercourse with the Indians. This, in effect, barred any state attempt to govern the Indian territory. "The act of the state of Georgia . . . [was] consequently void, and the judgment a nullity."[18]

Marshall made a number of statements in his majority opinion from which the doctrine of inherent tribal sovereignty would eventually be forged. In describing the Europeans' reaction to and treatment of the Indians as they came to the New World, for example, he said, "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power . . . ."[19] According to Marshall, the principles of international law mandated that this independent status should remain, at least in part: "[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating

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pound doctrinal principles in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Supreme Court has the power of judicial review of congressional legislation).

16. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) at 17.

17. Worcester v. Georgia, 31 U.S. (6 Pet.) at 537 (quoting the Georgia indictment).

18. *Id.* at 561.

19. *Id.* at 559.

with a stronger, and taking its protection."[20]

Thus, Marshall drew conclusions regarding the status of Indian nations from the tenets of international law. Although the rules of international law that influenced Marshall's findings are not deemed important in modern decisions, his conclusions are. Subsequent courts have struggled to apply these conclusions to the difficult problems involved in tribal attempts to exercise governmental powers and state and federal attempts to encroach upon those powers.

B. The Modern Development—State Encroachment

Modern interpretations of the scope of tribal governmental power have evolved in the context of state attempts to assert powers of government over tribes and individual Indians. The starting point is the case of *Williams v. Lee,*[21] decided by the Supreme Court in 1959. The case involved an attempt by a non-Indian (Lee) who operated a store on the Navajo reservation in Arizona to bring a collection suit against a Navajo couple in the Arizona courts. The Arizona Supreme Court affirmed a trial court judgment for Lee, holding that since Congress had not expressly proscribed such state court jurisdiction over Indians, the exercise of jurisdiction was proper.[22]

Upon certiorari to the United States Supreme Court, the Arizona judgment was reversed. Justice Black, speaking for a unanimous Court, relied on *Worcester* for the principle that state assertions of jurisdiction over persons on Indian reservations are generally invalid in the absence of congressional approval.[23] However, the Court recognized that some intrusions by states had been allowed.[24] Reconciling this with the general rule of no state jurisdiction, the Court concluded: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their

20. *Id.* at 560-61.

21. 358 U.S. 217 (1959). The fact that more than 100 years (1832-1959) are skipped in this analysis should not be taken to imply that no important decisions were handed down during this time. However, none of the cases decided in this period possess the broad, fundamental significance of the Cherokee cases of the early 1830's. Decisions from this period that may have particular relevance in any further discussion will be noted therein.

22. Williams v. Lee, 83 Ariz. 241, 244-46, 319 P.2d 998, 1001-02 (1958), *rev'd,* 358 U.S. 217 (1959).

23. 358 U.S. at 218-19.

24. State courts have been allowed to hear cases brought by an Indian against an outsider and to assert jurisdiction over crimes committed on the reservation by one non-Indian against another. *Id.* at 219-20.

own laws and be ruled by them."[25] This conclusion has since been referred to as the "infringement test." Because the Court determined the Arizona court's assertion of jurisdiction infringed upon the tribal right of self-government, the decision of the Arizona Supreme Court was reversed.[26]

Interestingly, the word "sovereignty" does not appear in the Court's opinion. Nevertheless, the concept of inherent governmental power underlies the basic rationale of the decision. It was the defensive aspect of sovereignty, *i.e.*, the right to be free from outside intrusion, that was involved in *Williams*. The rights of sovereignty recognized by the Court were not delegated to the tribe by Congress. Rather, they were the inherent governmental powers of the Navajo Tribe which had neither been extinguished nor relinquished.

The Court's reliance on tribal sovereignty is evidenced by its failure to rely on the treaty entered into between the Navajo Tribe and the United States. The Court noted that "[i]mplicit in [the] treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. Georgia,* was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed."[27] In *Worcester,* the Court had relied on a treaty guarantee of tribal self-government to invalidate an attempted state encroachment.[28] In *Williams,* however, the Court reasoned that the treaty recognized the power of tribal self-government and this preexisting power, not the treaty itself, thwarted the attempted state encroachment.

Three years after *Williams,* the Supreme Court issued an opinion interpreting the infringement test laid out in *Williams.* In *Organized Village of Kake v. Egan,*[29] the power of the State of Alaska to impose its fishing regulations on the Kakes and the Angoons, two Alaskan nonreservation Indian groups organized under the Indian Reorganization Act, was tested. The majority opinion, authored by Justice Frankfurter, liberally interpreted the infringement test so as to allow more state interference with tribal affairs than Justice Black probably had intended in his *Williams* opinion.[30] Given the nonreservation status of the Kakes and the Angoons, the Court's reliance on the infringement ratio-

25. *Id.* at 220.
26. *Id.* at 223.
27. *Id.* at 221-22.
28. *See* Martone, *supra* note 3, at 621.
29. 369 U.S. 60 (1962).
30. *See id.* at 72-76.

nale was probably misguided.[31]

Another important case of the 1960's was *Warren Trading Post Co. v. Arizona Tax Commission.*[32] *Warren Trading Post* involved an attempt by Arizona to impose its income tax on a trading post licensed by the federal government to do business on the Navajo Reservation.[33] The Arizona state courts upheld the tax and the Supreme Court reversed. The Court, however, did not rely upon an application of the infringement test to invalidate the tax. Rather, it was struck down because "the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders . . . except as authorized by Acts of Congress or by valid regulations promulgated under those Acts."[34] Thus, the Court apparently relied on preemption principles to protect the tribe from state encroachment, much as it did in *Worcester.*[35]

The infringement and the preemption rationales were synthesized in the 1973 decision of *McClanahan v. Arizona State Tax Commission.*[36] Arizona had attempted to impose its income tax on a Navajo woman living on the reservation and earning all of her income on the reservation. The Arizona courts upheld the tax. However, as in *Williams* and *Warren Trading Post,* the United States Supreme Court again reversed the Arizona courts.

In a unanimous decision, Justice Marshall explained the proper test:

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look in-

31. The Court in McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), distinguished *Kake* by limiting its application to nonreservation Indians. *Id.* at 176 n.15. *McClanahan*'s companion case, Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), demonstrates that even reservation Indians lose a good deal of their sovereignty-based protections when they venture outside of their boundaries. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-49. In *Mescalero,* the Court upheld a New Mexico gross receipts tax on the Mescalero Apache Tribe's ski resort operated on nonreservation land.

32. 380 U.S. 685 (1965).

33. The opinion does not clarify whether the trading post was operated by Indians or non-Indians.

34. 380 U.S. at 691.

35. The Court later asserted that the *Warren Trading Post* decision was not exclusively based on preemption principles. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170 n.6 (1973).

36. 411 U.S. 164 (1973).

> stead to the applicable treaties and statutes which define the limits of state power.
>
> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides *a backdrop against which the applicable treaties and federal statutes must be read.*[37]

The Court, after examining the applicable treaty and statutes, determined the federal position had consistently been that Arizona could not tax the Indians on the Navajo Reservation.

Although the *McClanahan* decision signals a retreat from exclusive reliance on principles of sovereignty in decisions involving state encroachments, it arguably strengthens the tribal position vis-à-vis the states. Since the infringement test was sometimes interpreted so as to allow significant state intrusions, the protection afforded the tribes by that test was tenuous, even though it was based on notions of inherent powers of self-government.[38]

Although tribal protection from state encroachment under the *McClanahan* test depends basically on the existence of an applicable statute or treaty, this does not necessarily mean the courts will require specific statutory or treaty language in order to insulate tribes from state action. Indeed, the *McClanahan* Court relied heavily upon implications from the relevant statutes and treaty.[39] A broad reading of the relevant law is justified in light of the *McClanahan* rule that requires statutes and treaties to be read against the backdrop of tribal sovereignty. Hence, as the pertinent law is analyzed, there exists a presumption against state encroachment.[40]

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37. *Id.* at 172 (emphasis added) (footnotes and citations omitted).

38. A 1971 case, in addition to foreshadowing *McClanahan*'s emphasis on the applicable treaties and legislation in state encroachment cases, highlighted the difference between sole reliance on the infringement test and reliance instead on federal law. In Kennerly v. District Court, 400 U.S. 423 (1971) (per curiam), the Court was confronted with a fact situation similar to *Williams*. *Kennerly* involved a state court action against reservation Indians to collect a debt incurred on the reservation. However, the Blackfeet Tribe involved in *Kennerly* had passed a law consenting to concurrent civil jurisdiction over tribal members with the State of Montana. Even though tribal consent vitiated any claim of state infringement, the Court relied on the "governing Act of Congress" language of the *Williams* infringement test to invalidate state court jurisdiction. The governing act was Public Law 280, ch. 505, 67 Stat. 588 (1953) (current version at 18 U.S.C. § 1162 (1976), 25 U.S.C. §§ 1321-1326 (1976), and 28 U.S.C. § 1360 (1976)) (for a brief discussion of Public Law 280, see note 45, *infra*), and since Montana had not assumed civil jurisdiction by affirmative legislation (Montana had assumed criminal jurisdiction), the Court held that state court jurisdiction under the facts presented was improper.

39. *See* 411 U.S. at 173-79.

40. The Court noted that there was little chance that a state encroachment case would come up where no federal treaty or legislation applied since "in almost all cases

III. CURRENT FEDERAL INDIAN POLICY

Federal Indian policy has been characterized by a marked lack of consistency. From the late eighteenth century until only recently, the policy pattern can generally be described as one of vacillation between two extremes: (1) the policy of separation—the tribes should be separated from the general non-Indian population; and (2) the policy of assimilation—the Indians should be acculturated into the general American society.[41] The treatymaking and reservation days of the first half of the nineteenth century,[42] the assimilative General Allotment Act of 1887,[43] the Indian Reorganization Act of 1934,[44] and the termination legislation of the 1950's[45] all represent divergent attempts by the federal government to finally solve the "Indian problem."

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federal treaties and statutes define the boundaries of federal and state jurisdiction." *Id.* at 172 n.8.

41. Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 139-40 (1977).

42. For a general discussion of early federal Indian policy, see S. TYLER, A HISTORY OF INDIAN POLICY 32-94 (1973). For a good discussion of judicial review of treaties, see Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CALIF. L. REV. 601 (1975).

43. Ch. 119, 24 Stat. 388 (current version in scattered sections of 25 U.S.C.). The major facet of the General Allotment Act was a provision for land allotments to be given to individual Indians. Ch. 119, § 1, 24 Stat. 388 (current version at 25 U.S.C. § 331 (1976)). Congress hoped that this would encourage the Indians to imitate the white man and to follow his ways. *See* S. TYLER, *supra* note 42, at 95-124; Washburn, *The Historical Context of American Indian Legal Problems*, 40 LAW & CONTEMP. PROB. 12, 18-19 (1976).

44. Ch. 576, 48 Stat. 984 (current version at 25 U.S.C. §§ 461-479 (1976)). The Reorganization Act played a major role in the revitalization of the tribes. For one thing, it ended the practice of individual allotments which had seriously eroded the reservation land bases. Additionally, the Act acknowledged the tribes' right to organize governments and authorized the adoption of tribal constitutions and bylaws. Ch. 576, § 16, 48 Stat. 984 (codified at 25 U.S.C. § 476 (1976)). For a general discussion of the Indian Reorganization Act, see Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972).

45. The policy of termination was generally spelled out in a House Concurrent Resolution:

> Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship . . . .

H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953). Termination legislation took both particular and general forms. Some tribes were expressly terminated. *E.g.*, Act of June 17, 1954, ch. 303, 68 Stat. 250 (repealed by Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973) (codified at 25 U.S.C. §§ 903-903f (1976))). The foregoing legislation dealt with the termination and later restoration of the Menominee Tribe. Restoration is an atypical result for a terminated tribe. For a chronicle of the Menominee

Current federal policy recognizes the failure of the termination legislation and does not purport to constitute a quick and final disposition of the "Indian problem." It is succinctly described by the appellation, "Indian self-determination."[46] The Supreme Court has declared that the Indian Civil Rights Act of 1968[47] was passed partially in furtherance of the goals of self-determination.[48] Likewise, two years after the passage of the Indian Civil Rights Act, the policy of self-determination was clearly articulated in a speech to Congress by then-President Nixon.[49]

President Nixon recognized that federal policy had varied between two extremes: (1) excessive federal paternalism, and (2) termination of the federal-tribal relationship.[50] In order to combat this discordant pattern, President Nixon made the following recommendation:

> This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become indepen-

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experience, see Preloznik & Felsenthal, *The Menominee Struggle to Maintain Their Tribal Assets and Protect Their Treaty Rights Following Termination*, 51 N.D.L. REV. 53 (1974).

Another major piece of termination legislation, general in its application, is commonly referred to as Public Law 280. It granted certain states jurisdiction over all civil and criminal matters occurring on Indian reservations. It also allowed any other of the unnamed states to assert similar jurisdiction by affirmative legislative act. Public Law 280, ch. 505, 67 Stat. 588 (1953) (current version at 18 U.S.C. § 1162 (1976), 25 U.S.C. §§ 1321-1326 (1976), and 28 U.S.C. § 1360 (1976)). For a background discussion of the termination policy, see Wilkinson & Biggs, *supra* note 41.

46. *See, e.g.*, Wilkinson & Biggs, *supra* note 41, at 162-65; Comment, *The Indian Battle for Self-Determination*, 58 CALIF. L. REV. 445, 463 (1970). It is still too early to tell whether this policy will endure or whether it is simply another in a long procession of short-lived federal formulas.

47. Pub. L. No. 90-284, tits. II-VII, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301-1341 (1976)). The ICRA made most, but not all, of the Bill of Rights proscriptions applicable to Indian tribes (the ICRA contains no establishment clause, for example). The Bill of Rights was previously considered inapplicable to the tribes because the Supreme Court had held in 1896 that the fifth amendment grand jury clause was unenforceable against the Cherokee Tribe. Talton v. Mayes, 163 U.S. 376 (1896). The *Talton* Court adopted the following rationale: "It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which . . . had for its sole object to control the powers conferred by the Constitution on the National Government." *Id.* at 384. *Talton* was generally interpreted as making the Bill of Rights as a whole inoperable against Indian tribes. *See, e.g.*, Native Am. Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959).

48. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62-66 (1978).

49. Special Message to the Congress on Indian Affairs, 1970 PUB. PAPERS 564.

50. *Id.* at 566-69.

> dent of Federal control without being cut off from Federal concern and Federal support.[51]

The President's primary intent was to allow the Indians to control appropriate federal programs, especially local education.[52]

Congress' response is exemplified by the Indian Self-Determination and Education Assistance Act of 1975.[53] A portion of the declaration of the Act's policy reads:

> The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.[54]

The Act directs the Secretary of the Interior and the Secretary of Health, Education, and Welfare (HEW) to contract out various programs to the tribes upon request.[55] Furthermore, it directs the Department of the Interior to grant funds upon tribal request for the improvement of tribal governments, and HEW to do the same for the development or improvement of health facilities.[56] Likewise, it contains broad provisions for Indian involvement in the education of Indian children.[57]

A few days prior to the passage of the Indian Self-Determination and Education Assistance Act, Congress, in a joint resolution, created the American Indian Policy Review Commission to make a "comprehensive review of Indian affairs."[58] The Commission submitted its final report to Congress on May 17, 1977. The Commission endorsed the policy of self-determination and identified two basic principles of Indian law to guide future policy determinations: (1) tribal sovereignty, and (2) a federal-tribal trust relationship.[59]

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51. *Id.* at 566-67.

52. *Id.* at 567-71.

53. Pub. L. No. 93-638, 88 Stat. 2203 (codified in scattered sections of 5, 25, 42, 50 U.S.C.).

54. 25 U.S.C. § 450a(b) (1976).

55. *Id.* §§ 450f-450g.

56. *Id.* § 450h.

57. *Id.* §§ 455-458e.

58. *Id.* § 174 note.

59. Specifically, the Commission stated:

> The fundamental concepts which must guide future policy determinations are:
>
> 1. That Indian tribes are sovereign political bodies, having the power to

True to the legislative mandate, the Commission's report is indeed comprehensive,[60] and no attempt is made here to summarize it. Concerning legislation affecting tribal sovereignty, the report states: "This Commission has not proposed any legislative action with regard to the jurisdiction or authority of tribal governments. We have rejected any such effort as being premature and not warranted by any factual evidence."[61] So long as Congress endorses this view and refrains from passing legislation affecting inherent tribal authority, the doctrine of tribal sovereignty as interpreted by the judiciary will play a major role in the tribes' pursuit of self-determination. With this in mind, the Supreme Court's sovereignty analysis in three recent decisions will now be studied.

IV. The Cases of the 1977-1978 Term

None of the 1977-1978 Supreme Court sovereignty decisions involved attempted state encroachments upon tribal sovereignty. Since modern development of the sovereignty doctrine primarily concerned such state encroachments, the 1977-1978 decisions offer profitable comparisons of the application of the doctrine in different factual contexts.

A. Oliphant v. Suquamish Indian Tribe

1. *Facts and posture before the Court*

Mark David Oliphant was arrested by authorities of the Suquamish Indian Tribe during the annual Chief Seattle Days cele-

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determine their own membership and power to enact laws and enforce them within the boundaries of their reservations, and

2. That the relationship which exists between the tribes and the United States is premised on a special trust that must govern the conduct of the stronger toward the weaker.

Policy Review Commission, *supra* note 3, at 3-5.

The Policy Review Commission was not without its dissenters. Vice Chairman Lloyd Meeds vigorously disagreed with the majority report. He claimed that the report was "the product of one-sided advocacy in favor of American Indian tribes." *Id.* at 571 (separate dissenting views of Congressman Lloyd Meeds). His main point of contention was the majority report's view of tribal sovereignty:

> The fundamental error of this report is that it perceives the American Indian tribe as a body politic in the nature of a sovereign as that word is used to describe the United States and the States, rather than as a body politic which the United States, through its sovereign power, permits to govern itself and order its *internal* affairs, but not the affairs of others. The report seeks to convert a political notion into a legal doctrine.

Id. at 573 (emphasis in original).

60. The Commission made 206 specific recommendations.

61. Policy Review Commission, *supra* note 3, at 5.

bration sponsored by the tribe. He was charged with assaulting a tribal officer and resisting arrest. Daniel B. Belgarde was arrested by authorities of the same tribe after a high-speed chase ending in a collision between Belgarde's car and a tribal police car. He was charged with "recklessly endangering another person" and with injuring tribal property. Both Oliphant and Belgarde were non-Indians who resided on the Suquamish Reservation.

Both men petitioned the United States District Court for the Western District of Washington for writs of habeas corpus. Tribal proceedings were stayed pending the outcome of the habeas petitions. Both petitioners argued the Suquamish Indian Provisional Court lacked criminal jurisdiction over non-Indians. The district court denied the habeas petitions. The Ninth Circuit Court of Appeals affirmed the denial of Oliphant's petition, reasoning that "the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is a sine qua non of the sovereignty that the Suquamish originally possessed."[62] Judge Kennedy dissented, explaining that "[p]rinciples of 'tribal sovereignty' developed in the preemption context simply have no application [to the problem presented] here."[63] Focusing on relevant legislation rather than the doctrine of tribal sovereignty, Judge Kennedy concluded, "Unlike the majority, I would not require an express congressional withdrawal of jurisdiction" to divest the tribe of criminal jurisdiction over non-Indians.[64] While Belgarde's appeal was pending before the Ninth Circuit, the Supreme Court granted both Oliphant's and Belgarde's certiorari petitions to "decide whether Indian tribal courts have criminal jurisdiction over non-Indians."[65]

2. *Sovereignty analysis*

Oliphant v. Suquamish Indian Tribe[66] presented the Court with a problem never before presented: the propriety of tribal criminal jurisdiction over non-Indians in the absence of congressional authorization. The Suquamish Tribe based its claim of

62. Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976), *rev'd sub nom.* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The circuit court stated the issue as follows: "The question is not whether Congress has conferred jurisdiction upon the tribe. The tribe, before it was conquered, had jurisdiction, as any independent nation does. The question therefore is, did Congress (or a treaty) take that jurisdiction away?" *Id.* at 1009 n.1.

63. *Id.* at 1015 (Kennedy, J., dissenting).

64. *Id.* at 1019.

65. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

66. 435 U.S. 191 (1978).

right to prosecute non-Indians on its powers of inherent sovereignty. Because Congress had not expressly taken away its power to prosecute non-Indians, the tribe argued it retained such power as part of its inherent sovereignty. Oliphant and Belgarde argued that the doctrine of tribal sovereignty is at odds with principles of international law, decisions of the Supreme Court, and federal law.[67] Thus, the issue was framed so as to turn on the basic distinction of whether, in the absence of a governing treaty or congressional act, Indian tribes exercise inherent or delegated power.

Justice Rehnquist, in his majority opinion, went great lengths to demonstrate that at one time all three branches of the federal government shared the view that Indian tribes lack criminal jurisdiction over non-Indians.[68] With regard to this "commonly shared presumption," Justice Rehnquist stated: "[W]hile not conclusive on the issue before us, [the presumption] carries considerable weight."[69]

The opinion then examined the applicable treaty, the Treaty of Point Elliott. Relying upon language of the treaty wherein the Suquamish Tribe acknowledged its dependence on the United States and promised to deliver up federal offenders to the United States, Rehnquist concluded that, when viewed in historical context, these passages cast "substantial doubt" on the right of the tribe to prosecute non-Indians.[70] The Court admitted, however, that the treaty provisions alone would be insufficient to deprive the Suquamish Tribe of criminal jurisdiction over non-Indians.[71]

Without treaty or statutory provisions upon which to base a decision, the Court was faced squarely with the task of defining the general governing powers of an American Indian tribe. The Court responded by fashioning the following characterization of Indian tribal powers:

> [T]he tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enact-

67. Brief for Petitioners at 19-20, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

68. 435 U.S. at 196-206. Justice Rehnquist considered this view to be "shared" by the "lower federal courts" on the basis of one federal district court case decided in 1878, *Ex parte* Kenyon, 14 F. Cas. 353 (C.C.W.D. Ark. 1878) (No. 7,720). 435 U.S. at 199-201, 206.

69. 435 U.S. at 206.

70. *Id.* at 206-08. The Court attempted to reconcile this conclusion with a general rule of Indian treaty construction that "ambiguous expressions must be resolved in favor of the Indian parties concerned," Wilkinson & Volkman, *supra* note 42, at 617, by implying that the meaning of the treaty provisions is " 'clear from the surrounding circumstances.' " 435 U.S. at 208 n.17 (quoting DeCoteau v. District County Court, 420 U.S. 425, 444 (1975)).

71. 435 U.S. at 208.

> ments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers "*inconsistent with their status.*"[72]

Oliphant's "inconsistent with their status" exception, later referred to by the Court as the "implicit divestiture" exception,[73] deserves close attention.[74] The Court noted that two other powers had previously been found to be inconsistent with the Indians' status: the power to convey reservation land[75] and the power to form political alliances with foreign nations.[76] The Court, however, emphasized that the implicit divestiture exception is not "restricted to limitations on the tribes' power to transfer lands or exercise external political sovereignty."[77]

The Court also quoted a passage from a separate opinion of Justice Johnson in the 1810 case of *Fletcher v. Peck* for the proposition that Indian tribes lack power over anyone but themselves. "[T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves.*"[78] At best this sentence is misleading; at worst it is wrong. In the context of Johnson's opinion, it came as an answer to his own question: "What, then, practically, is the interest of the states in the soil of the Indians within their boundaries?"[79] At first glance, the portion of the answer following the semicolon seems to suggest that the Indians have the right to govern everyone within their borders "except themselves," a patently absurd conclusion. One reasonable interpretation of this

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72. *Id.* (emphasis in original) (quoting 544 F.2d at 1009).

73. The Court used "implicit divestiture" in United States v. Wheeler, 435 U.S. 313, 326 (1978), to refer to the exception to tribal sovereignty promulgated in *Oliphant*. "Implicit divestiture" will be used instead of "inconsistent with their status" to refer to the exception both because of its preferred length and its preferred descriptiveness.

74. This formulation is similar to the second prong of Cohen's definition of tribal governing powers, set out in full at note 4 *supra*. Cohen distinguishes between internal powers, like local self-government, and external powers, such as forming treaties with foreign nations. Cohen states the external powers are terminated upon conquest, apparently because such powers are inconsistent with the tribes' status relative to the United States.

75. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

76. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-17 (1831).

77. 435 U.S. at 209.

78. *Id.* (emphasis and brackets in original) (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1810) (separate opinion of Johnson, J.)).

79. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1810) (separate opinion of Johnson, J.). Since the question inquires into the interests of the states, Rehnquist's bracketed insertion of "to the United States" results in a misquotation.

confusing sentence is that the limitations on Indian sovereignty allow the states the right of governing every person within tribal limits except the Indians. This would at least be a logical, if not accurate, answer to the question posed.[80] The statement, if interpreted in this manner, says nothing directly about the Indians' power to govern non-Indians.

The Court in *Oliphant* ultimately concluded that the exercise of criminal jurisdiction over non-Indians is inconsistent with the status of Indian tribes.[81] The rationale employed in arriving at this result deserves full illumination:

> Protection of territory within its external political boundaries is, of course, as central to the sovereign interests of the United States as it is to any other sovereign nation. But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." . . . It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.[82]

It is difficult to extract a workable rule from this case for use in future cases involving the assertion of tribal power over non-Indians. The Court apparently concluded that any exercise of tribal government that intrudes without warrant on the personal liberty of non-Indians is inconsistent with tribal status. Beyond this, the Court offers no guidance in future applications of the implicit divestiture exception to tribal sovereignty.

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80. Justice Marshall's opinion for the Court in *Fletcher* allowed the states to hold title to lands reserved to Indian tribes. This position was later rejected by the Marshall Court. Martone, *supra* note 3, at 619. Perhaps this explains the confusion surrounding the use by the *Oliphant* Court of the material quoted from Johnson's opinion.

81. In a surprisingly short dissent, given the case's importance, Justice Marshall, joined by Chief Justice Burger, "agree[d] with the court below that the 'power to preserve order on the reservation . . . is a sine qua non of the sovereignty that the Suquamish originally possessed.' " 435 U.S. at 212 (Marshall, J., dissenting) (quoting 544 F.2d at 1009). Justice Brennan did not participate in the consideration or decision of the case.

82. 435 U.S. at 209-10 (quoting H.R. REP. No. 474, 23d Cong., 1st Sess. 18 (1834)).

Arguably, any exercise of governmental power by an Indian tribe over a non-Indian intrudes upon his personal liberty. Hence, the implicit divestiture exception promulgated in *Oliphant* could be used to strike down every tribal attempt to exercise jurisdiction over non-Indians.[83] This would result in restricting the Indian tribes to the exclusive exercise of delegated powers in governing non-Indians since a power inconsistent with tribal status can only be exercised "in a manner acceptable to Congress."[84]

B. United States v. Wheeler

1. Facts and posture before the Court

Anthony Robert Wheeler, a Navajo, pleaded guilty to charges brought against him by the Navajo Tribe of disorderly conduct and contributing to the delinquency of a minor. Over a year later, Wheeler was indicted by a federal grand jury in the United States District Court for the District of Arizona on a charge of statutory rape arising out of the same incident that led to the tribal charges. Wheeler moved to dismiss the federal charge on the basis of double jeopardy, since contributing to the delinquency of a minor is a lesser included offense of statutory rape. The district court dismissed the indictment and, upon appeal,

83. At least one lower court has interpreted *Oliphant* in this manner. *See* Trans-Canada Enterprises v. Muckleshoot Indian Tribes, [1978] 5 INDIAN L. REP. (AILTP) § F-153 (W.D. Wash. July 27, 1978) (relying on *Oliphant*, district court set aside its original order allowing tribe to regulate land use on non-Indian owned land and to impose business fees on non-Indians within the reservation). *But see* Salt River Project Agricultural Improvement & Power Dist. v. Navajo Tribe of Indians, No. 78-352 (D. Ariz. July 11, 1978) (memorandum and order) (Indian tribe found to possess inherent power to tax non-Indian interest in leased land on the reservation, *Oliphant* notwithstanding).

Three years before *Oliphant*, the Court announced that Congress had the authority to delegate to a tribe the power to regulate liquor on a reservation. United States v. Mazurie, 419 U.S. 544 (1975). The case involved a federal prosecution of a non-Indian who operated a tavern on privately owned land within the Wind River Reservation for doing business without a *tribal* liquor license. Justice Rehnquist, speaking for a unanimous Court, reasoned that the propriety of the delegation was enhanced by the tribe's "independent authority over matters that affect the internal and social relations of tribal life." *Id.* at 557. One wonders whether the Court, and especially Justice Rehnquist, has retreated from this position since *Mazurie*, or whether *Oliphant* will be limited to its specific holding of divesting tribes of criminal jurisdiction over non-Indians, thus leaving the question of other types of jurisdiction over non-Indians, such as business regulation and taxation, subject to further analysis.

The Indian Policy Review Commission stated the following with regard to tribal jurisdiction over non-Indians: "We . . . reject the notion that the jurisdictional reach of Indian tribes within Indian country should be limited to their own membership alone." POLICY REVIEW COMMISSION, *supra* note 3, at 5.

84. Oliphant v. Suquamish Indian Tribe, 435 U.S. at 210.

the Ninth Circuit upheld the dismissal.[85] The Ninth Circuit felt the case presented the question of "whether Indian tribal courts and federal district courts are 'arms of different sovereigns.' "[86] This was the crucial determination since, under the "dual sovereignty" principle, successive prosecutions by separate sovereigns do not amount to double jeopardy. The Supreme Court granted certiorari to resolve a conflict among the circuit courts over whether successive prosecutions by federal and tribal authorities constitute double jeopardy.[87]

2. Sovereignty analysis

The sovereignty issue in *United States v. Wheeler*[88] arises in a unique factual situation. No Indian tribe's affirmative exercise of governmental power was being questioned, nor was a tribe claiming interference from another government. Rather, the decision revolved solely around the vitality of the basic theory of tribal sovereignty. Indeed, the *Wheeler* decision turned on the distinction between delegated and inherent powers.

The Court had previously held that successive prosecutions by state and federal governments were valid,[89] but that prosecution by a territorial court could not be followed by federal prosecution.[90] The distinction lies in the concept of dual sovereignty. While prosecution by two different arms of the same sovereign is prohibited, successive prosecutions by separate sovereigns do not constitute double jeopardy.[91] Hence, the Court was faced with the question of whether Indian tribes are more like states or federal territories.

According to Justice Stewart, "the controlling question in this case is the source of this power to punish tribal offenders: Is it a part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress?"[92] A unanimous Court[93] rejected the argu-

85. United States v. Wheeler, 545 F.2d 1255 (9th Cir. 1976), *rev'd*, 435 U.S. 313 (1978).

86. 545 F.2d at 1256.

87. United States v. Wheeler, 435 U.S. 313, 316 (1978).

88. 435 U.S. 313 (1978).

89. Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959).

90. Puerto Rico v. Shell Co., 302 U.S. 253 (1937); *see* Grafton v. United States, 206 U.S. 333 (1907).

91. For a recent discussion of the dual sovereignty doctrine, see State v. Rogers, 90 N.M. 604, 566 P.2d 1142 (1977).

92. 435 U.S. at 322.

93. Justice Brennan did not participate in the consideration or decision of the case.

ment that Congress' plenary authority over the tribes necessarily implies that a tribe is dependent upon Congress for its source of power.[94] Instead, "[t]he powers of Indian tribes are, in general, '*inherent powers of a limited sovereignty which has never been extinguished.*' "[95] Summing up these powers and limitations, the Court attempted to delineate the scope of tribal governmental powers:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.[96]

After examining the relevant treaties and statutes, the Court found that the Navajo Tribe did indeed possess criminal jurisdiction over its members as a result of the tribe's retained, inherent sovereignty. Consequently, the federal and tribal prosecutions were not conducted by the same sovereign. Under the dual sovereignty principle, therefore, the successive prosecutions did not violate the double jeopardy clause.[97]

The result in *Wheeler* is not nearly as important as the rationale employed in arriving at that result. The Court unmistakably and explicitly concluded that the general governmental powers exercised by an Indian tribe are inherent, not delegated. The Court also expanded the *Oliphant* implicit divestiture exception.

The Court explained that the Indian tribes' criminal jurisdiction over their own members was not lost as a necessary result of their dependent status. Instead, "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."[98] The Court listed three areas of im-

94. 435 U.S. at 319-20.

95. *Id.* at 322 (emphasis in original) (quoting F. COHEN, *supra* note 3, at 122).

96. *Id.* at 323.

97. *Id.* at 326-32. The Court also expressed concern that since tribal punishment is limited by the Indian Civil Rights Act to a maximum sentence of six months in jail and a $500 fine, an earlier tribal prosecution for a serious offense could preclude a federal prosecution where a much more serious punishment could result, thereby frustrating important federal interests in the prosecution of major offenses. *Id.* at 330-31.

The *Wheeler* decision demonstrates the sometimes conflicting positions of Indian tribes and individual Indians. Although *Wheeler* constitutes a victory for the tribes, it cannot be so described for the individual Indian.

98. *Id.* at 326. The Court's use of "nonmembers" instead of "non-Indians" is most likely inadvertent. It is not clear, for instance, whether the nonmember daughter (who,

plicit divestiture: (1) power to freely alienate land to non-Indians, (2) power to "enter into direct commercial or governmental relations" with foreign nations, and (3) power to prosecute nonmembers.[99] The Court explained that these are areas of implicit divestiture because the tribes' dependent status is inconsistent with the "freedom independently to determine their external relations."[100]

The Court's explanation that implicit divestiture of sovereignty has occurred in areas involving relations between tribes and nonmembers can mean one of two things. It could mean that any attempt by an Indian tribe to exercise governmental power over nonmembers will be struck down under the implicit divestiture exception, or it could simply mean that application of the exception is limited to relations between tribes and non-Indians. In the context of the decision, the language was probably used to show that the implicit divestiture exception did not apply in the *Wheeler* case because it involved a tribal exercise of power over a tribal member. Since the exception is limited to tribal-nonmember relations, it could not apply to the *Wheeler* facts. The *Wheeler* case, then, should not be read as invalidating every tribal exercise of governmental power over nonmembers. Rather, it merely explained that when the "implicit divestiture" exception is invoked, it will be in a tribal-nonmember context.

C. Santa Clara Pueblo v. Martinez

1. *Facts and posture before the Court*

Julia Martinez, a member of the Santa Clara Pueblo, and her daughter, Audrey Martinez, brought a class action suit against the pueblo in the United States District Court for the District of New Mexico.[101] They sought declaratory and injunctive relief against the pueblo and its governor, in an attempt to enjoin the enforcement of a membership ordinance. The pueblo had passed an ordinance declaring that a child born of a Santa Claran father and a non-Santa Claran mother was a member of the pueblo, but

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although the child of a Santa Claran mother and a Navajo father and raised on the reservation, was refused Santa Claran membership) in Martinez v. Santa Clara Pueblo, 436 U.S. 49 (1978), discussed in notes 101-22 and accompanying text *infra*, would be in the same position vis-à-vis the Santa Claran Tribe as would a non-Indian residing on the reservation.

99. 435 U.S. at 326.

100. *Id.*

101. Julia Martinez represented the class of Santa Claran women married to nonmembers. Audrey Martinez represented the class of children of a Santa Claran mother and a non-Santa Claran father.

a child whose father was a non-Santa Claran and whose mother was a Santa Claran could not be a member of the pueblo. Audrey Martinez had lived on the Santa Clara Reservation her entire life, but because her father was a Navajo she was ineligible for Santa Claran membership. The Martinezes alleged a denial of equal protection under the Indian Civil Rights Act. The pueblo and its governor moved to dismiss the complaint, arguing that the district court lacked jurisdiction to decide intratribal matters involving tribal self-government. The district court denied this motion, relying heavily on the great preponderance of case law supporting federal court jurisdiction in such a situation.[102]

Following a full trial on the merits, the district court issued a judgment in favor of the tribe. The opinion discussed the development of the Santa Clara Pueblo and the historical background of its membership policies. The court felt that the "equal protection" clause of the Indian Civil Rights Act should be construed differently from the similar federal constitutional guarantee,[103] and concluded that the clause should not be interpreted "in a manner that would invalidate a tribal membership ordinance when the classification attacked is one based on criteria that have been traditionally employed by the tribe in considering membership questions."[104]

On appeal, the Tenth Circuit Court of Appeals affirmed the district court's holding as to jurisdiction, but reversed its decision on the merits.[105] The circuit court reasoned that "to the extent that the Indian Civil Rights Act applies, tribal immunity is thereby limited."[106] With the immunity barrier passed, the court determined that 28 U.S.C. § 1343(4), which establishes federal jurisdiction for actions seeking to protect civil rights under an act of Congress,[107] was properly a basis for jurisdiction. The circuit court agreed with the district court's conclusion that the equal protection clause of the ICRA should not be interpreted on the basis of fourteenth amendment precedent alone. Nevertheless, using fourteenth amendment standards as a "persuasive guide,"

102. Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 7-8 (D.N.M. 1975), *rev'd*, 540 F.2d 1039 (10th Cir. 1976), *rev'd*, 436 U.S. 49 (1978).

103. *Id.* at 17.

104. *Id.* at 18.

105. Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976), *rev'd*, 436 U.S. 49 (1978).

106. *Id.* at 1042.

107. 28 U.S.C. § 1343 (1976) states in part: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ."

the court determined that the ICRA provision had been violated.[108] The Supreme Court granted certiorari.[109]

2. Sovereignty analysis

Santa Clara Pueblo v. Martinez[110] presented the Court with a task of statutory interpretation. The lower courts, in upholding jurisdiction, had relied on an implied congressional waiver of tribal sovereign immunity extracted from the terms of the Indian Civil Rights Act. Lending support to the lower courts' decisions were Justice Blackmun's recently voiced doubts "about the continuing vitality in this day of the doctrine of tribal immunity."[111] In spite of these arguments, the Supreme Court dealt with the immunity issue almost summarily in an opinion by Justice Marshall.

The Court stated that the Indian tribes enjoy the common law immunity from suit enjoyed by sovereigns. Although the Court recognized that this aspect of tribal sovereignty could be limited by Congress,[112] the Court held "that a waiver of sovereign immunity ' "cannot be implied but must be unequivocally expressed." ' "[113] Since the ICRA contained no express waiver of sovereign immunity, the Court held that the doctrine of sovereign immunity barred suit against the Santa Clara Pueblo.[114]

The Court was still confronted, however, with the issue of whether the ICRA implied a cause of action against the governor of the pueblo since, as an officer of the pueblo, he was not protected by sovereign immunity. Resolution of this issue involved the doctrine of tribal sovereignty since "providing a federal forum for issues arising under § 1302 [ICRA's "bill of rights"] constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself."[115] The Court reviewed the factors relevant "in determining whether a cause of action is implicit in a statute not expressly providing one,"[116] and decided that not all of the requirements were met.

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108. 540 F.2d at 1046-48.

109. Santa Clara Pueblo v. Martinez, 431 U.S. 913 (1977).

110. 436 U.S. 49 (1978).

111. Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 178 (1977) (Blackmun, J., concurring).

112. "This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress." 436 U.S. at 58.

113. *Id.* (quoting United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. King, 395 U.S. 1, 4 (1969))).

114. *Id.* at 59.

115. *Id.*

116. *Id.* at 60. The relevant factors to be considered in determining whether a statute

The Court felt that it was unnecessary to provide a "judicially sanctioned intrusion into tribal sovereignty" in order to fulfill the purposes of the ICRA.[117] In reaching this conclusion, the Court relied on the directive of *McClanahan*: the ICRA must be read against the backdrop of tribal sovereignty.[118] The Court identified two competing congressional purposes behind the ICRA: (1) to strengthen the "position of individual tribal members vis-à-vis the tribe," and (2) "to promote the well-established federal 'policy of furthering Indian self-government.' "[119] Analyzing these purposes against the backdrop of tribal sovereignty, the Court concluded that in this case, the scales tipped in favor of the latter purpose. Therefore, no cause of action was implied under the ICRA against the governor.

Justice White dissented, arguing that the ICRA did imply a cause of action against the governor. Justice White agreed with the majority that the suit against the pueblo was barred by tribal immunity. He felt, however, that the underlying purposes of the ICRA could be furthered only by permitting the additional intrusion into tribal self-government that would result from recognizing a federal cause of action against the governor.[120]

Martinez demonstrates the reluctance of the Supreme Court to permit interference with the sovereignty of the Indian tribes. Equally significant, however, are its practical implications. The ICRA had provided a fruitful source of federal jurisdiction over cases alleging tribal abuses, but *Martinez* indicates that similar actions will now be limited to tribal courts. Moreover, since the Court found no congressional waiver of sovereign immunity, that defense will be available to a tribe in its own courts unless the tribe itself has expressly waived it.

The *Martinez* opinion contains dictum that is curious in light of the recent decisions in *Oliphant* and *Wheeler*. Responding to a contention of the court of appeals that the constitutional norms of the ICRA could not be realized without federal jurisdiction, the

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implies a cause of action are: (1) Is the plaintiff a member of the class for whose benefit the statute was passed? (2) Is there any implicit or express legislative intent to create or deny such a cause of action? (3) Is the remedy sought consistent with the general policy of the legislative scheme? And (4) is the cause of action one normally left to the tribal law? *Id.* at 60 n.10.

117. *Id.* at 61.

118. *Id.* at 60.

119. *Id.* at 62 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).

120. *Id.* at 79-83 (White, J., dissenting). Justice Rehnquist joined in all parts of the majority opinion except the section wherein the tribe was "recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* at 58. Justice Blackmun did not participate in the consideration or decision of the case.

Court emphasized that tribal forums would still be available. "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians *and non-Indians.*"[121] The Court cited *Williams*[122] for this proposition, a case in which the non-Indian party was the plaintiff. Therefore, perhaps the dictum was intended only to mean that non-Indians may bring suit in tribal courts. Surely, when a non-Indian is involved in an ICRA suit he will usually be the moving party since the ICRA prohibits abuses of civil rights by tribal governments. The tribe or a tribal official will normally be the defendant in such cases. Nevertheless, the dictum does lend credence to the argument that *Oliphant* is not the final word on the issue of whether tribal attempts to assert noncriminal jurisdiction over non-Indians are valid.

V. CONCLUSION

A cursory review of recent Indian law decisions could lead to the following conclusions concerning the Supreme Court's view of tribal governing powers: (1) Indian tribes have broad governmental control over their own members, (2) encroachments upon Indian tribes by other governments will generally be disallowed, and (3) Indian tribes lack governmental power over non-Indians. Unfortunately, the Court decisions used as support for these conclusions have not always been based on consistent reasoning. Because the area of Indian affairs involves major matters of policy (like similarly political fields), doctrinal purity in judicial decisions has sometimes been sacrificed to the pressures of public opinion. However, there are dangers in such a judicial course. Absent judicial consistency, decisional capriciousness may prevail, leaving those who might be affected by court decisions confused and uncertain, unable to reasonably predict the direction of the wandering judicial travail.

Regardless of the theoretical inconsistencies inherent in recognizing Indian tribes as sovereigns in the American system of federalism, the Court consistently adheres to the general position that tribes possess the powers of limited sovereignty. Necessarily, then, the actual limits imposed upon tribal sovereignty are of primary importance in determining the scope of tribal governing powers. Since treaties are no longer entered into between the

121. *Id.* at 65 (emphasis added).
122. 358 U.S. 217 (1959).

Indians and the United States, Congress' plenary authority over the tribes defines the modern limits upon tribal sovereignty.

In *Oliphant,* however, the Supreme Court chose to impose a substantial *judicial* limit upon tribal governing power. The Court announced the implicit divestiture exception to tribal sovereignty, which takes away from the tribes powers that are "inconsistent" with tribal status. Specifically, the Court held that criminal jurisdiction over non-Indians had been implicitly divested. The Court failed, however, to describe the parameters of the exception, allowing uncertainty to attend the exception and its proper application. As a result, broad judicial limits could be imposed upon tribal governing powers (especially powers over non-Indians) without sufficient reasoning or justification.

The *Wheeler* and *Martinez* cases demonstrate the current application of the predominant tribal sovereignty analysis—examining applicable statutes and treaties against the backdrop of tribal sovereignty. They also indicate the Court's willingness to adapt the approach developed in state encroachment cases to different factual contexts. In *Wheeler,* since no treaty or statute controlled the outcome, tribal sovereignty was converted from a backdrop to an actor at center stage. Recognizing the inherent nature of tribal sovereignty, the Court held that Wheeler had not been subjected to double jeopardy by successive tribal and federal prosecutions. In *Martinez,* the tribal sovereignty backdrop was held to immunize the Santa Clara Pueblo from suit absent an express congressional waiver. Additionally, the sovereignty backdrop affected the Court's analysis of the ICRA to determine if the Act implied a cause of action against a tribal officer. Because one of two competing legislative purposes of the ICRA was consistent with the concept of tribal sovereignty, that purpose prevailed. Accordingly, no cause of action was implied.

By examining applicable treaties and statutes against the backdrop of tribal sovereignty, a court can fairly reconcile the somewhat conflicting legal principles of tribal sovereignty and tribal subjection to congressional authority. Such an approach realistically acknowledges the fundamental limiting power of Congress, yet it also pays proper respect to the principle of tribal sovereignty. However, a broad application of the implicit divestiture exception to tribal sovereignty, made possible by the failure of the Court to supply adequate standards, would defeat this approach and place the locus of limiting power in the courts. Therefore, the Court should announce rules to govern application of the implicit divestiture exception. Due deference for Congress'

plenary authority suggests that narrow rules should govern such application.

William D. Holyoak