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The Trend of Supreme Court Decisions in Indian Cases

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SPECIAL FEATURES

THE TREND OF SUPREME COURT DECISIONS IN INDIAN CASES*

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I

For the last several decades, Indian cases in the Supreme Court of the United States have enjoyed a very low profile. That may not be flattering to the tribes or to the advocates who argue Indian cases. But, on the whole, Indians have benefitted from the general disinterest in their cases. This is so for two related reasons.

(a) Within the Court itself, most Justices have shown very little interest. For many years, the assignment of the Court's opinion in Indian cases fell to Hugo Black or William Douglas, both sympathetic to the Indian cause. Putting aside monetary claims against the United States in respect to old wrongs (which have always divided the Court), it is significant how many unanimous landmark decisions were written by Justice Black. Most of them favored the Indians. I need only mention *Tulee*,[1] *Williams v. Lee*,[2] *Seymour*,[3] *Warren Trading Post*,[4] and *Arizona v. California*.[5] For Justice Douglas (whose bias in favor of Indians was tempered by his conservationist instincts), I can cite *Santa Fe*[6] and the first two *Puyallup*[7] decisions.

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1. Tulee v. Washington, 315 U.S. 681 (1942).
2. Williams v. Lee, 358 U.S. 217 (1959).
3. Seymour v. Superintendent, 368 U.S. 351 (1962).
4. Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965).
5. Arizona v. California, 373 U.S. 546 (1963).
6. United States *ex rel.* Hualpai Indians v. Santa Fe Pac. R.R., 314 U.S. 339 (1941).
7. Puyallup Tribe v. Department of Game, 391 U.S. 392 (1962); Department of Game v.

It is remarkable that those opinions, none of them inexorable in their result of their reasoning, and some of them quite startling in their implications, stirred no dissent. In almost any other area of the law, one or more Members of the Court would surely have dissented or concurred on more limited grounds. It seems obvious that the other Justices, in these cases, were not so acutely interested, and therefore, did not so critically examine the portent of the decisions. There are, of course, exceptions. I well remember having to twice argue *Menominee*[8] and *Choctaw Nation*,[9] both of which severely divided the Court, with Black and Douglas on opposite sides. But the general rule in the 1950s and 1960s was that decisions in Indian cases (except monetary claims) were unanimous.

To a lesser degree, the same pattern has continued in more recent times. Considering the force of the arguments on the other side (available, if not always forcibly made), and the increasing tendency of Justices to write separate opinions, it is quite extraordinary how many cases in the 1970s were unanimous. Let me suggest as examples of cases that, in another context, predictably would have stirred a dissent, *McClanahan*,[10] *Mattz v. Arnett*,[11] *Oneida*,[12] *Mancari*,[13] *Mazurie*,[14] *Fisher*,[15] *Bryan*,[16] *Wheeler*,[17] and *John*.[18] Who can doubt that the relatively low priority of Indian cases in the Supreme Court accounts, in some part at least, for the number of these decisions, issued unchallenged by any Member of the Court?

I recognize that the same lack of critical examination may be responsible for unanimous decisions in the opposite direction. One early example is *New York* ex rel. *Ray v. Martin*,[19] in which Justice Black, for a unanimous Court, reaffirmed the very troublesome *McBratney*[20] doctrine, holding that a crime by a white man against another white man on an Indian Reservation was the exclusive concern of State authorities, notwithstanding the apparently contrary rule announced by section 1152 of the Criminal Code. A more recent instance is *Moe*,[21] in which the entire Court joined Justice Rehnquist in condoning a requirement that Indian sellers of cigarettes pre-collect the State tax from their

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Puyallup Tribe, 414 U.S. 44 (1973).

8. Menominee Tribe v. United States, 391 U.S. 404 (1968).
9. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).
10. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).
11. Mattz v. Arnett, 412 U.S. 481 (1973).
12. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).
13. Morton v. Mancari, 417 U.S. 535 (1974).
14. United States v. Mazurie, 419 U.S. 544 (1975).
15. Fisher v. District Court, 424 U.S. 382 (1976).
16. Bryan v. Itasca County, 426 U.S. 373 (1976).
17. United States v. Wheeler, 435 U.S. 313 (1978).
18. United States v. John, 437 U.S. 634 (1978).
19. New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).
20. United States v. McBratney, 108 U.S. 621 (1881).
21. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976).

non-Indian purchasers on a Reservation. But, all things considered, the Tribes have benefitted from the Court's somewhat careless approach to Indian cases.

(b) Equally important is the attitude of the general public and the national press toward Indian cases. To whatever extent the Court might be influenced by prevailing currents of opinion in its other cases, that is not a factor in most Indian cases. Nor is there here any real risk that the Court's decision will be overturned by Congress. The reason is that, except in the affected State and among a select band of lawyers, the non-Indian world simply does not notice decisions affecting Indian rights. The only recent show of interest by the general public and the press was when the Indian Tribes of Maine laid claim to a substantial part of that State. But, fortunately, that case did not reach the Supreme Court and is not likely to do so. To my knowledge, no Indian decision of the Court in several decades has received national attention.

This is all to the good. No doubt, most Americans are aware that the National Government, and some State Governments as well, have, over two centuries, killed and starved and robbed and cheated the Indian. They know, moreover, that, for long periods, it was governmental policy to destroy the Tribe's identify and culture. When, on rare occasions, they are led to think about it, white Americans feel guilty about the past, and they sympathize. Most of them probably would not begrudge the money awards made by the Court of Claims and the Indian Claims Commission. But, that, I suspect, is as far as it goes. Indeed, for one untutored in Indian law, the major decisions of the Supreme Court would seem very questionable, if not downright "un-American."

- Why should Indians enjoy special preferences in jobs and government contracts?

- Why should Indian property and Indian Reservation income be uniquely exempted from State and local taxes, even when the Indians receive some services paid for by those taxes? (Justice Stevens, not hostile to the Indian cause, asked that question in Court a few months ago).

- Why should Indians who pay no State and local taxes be entitled to vote in State and local elections?

- Why should tribal governments have power to regulate and tax non-Indians on a Reservation who are ineligible to sit on the tribal council or to participate in the election of council members?

- Why should Indians alone be free to hunt and fish free of most restrictions, except those of their own choosing?

- Why should relatively few Indians in the State of Washington be assured the right to catch half the salmon, while other fishermen are compelled to share the other half?

- Why should Indians have the unique right to preempt scarce water which, for the most part, they do not even use today?

These, and like questions, challenge very fundamental principles, embodied in mottos that every schoolboy learns: "No taxation without representation," "government is color blind," "equality under the law," "one man, one vote." Of

course, there are special reasons for these exceptional rules. But I should not like the Court (or the Congress) to be bound by the answers a Gallup poll would give to these questions.

(c) I do not want to suggest that the Supreme Court would buckle before popular outrage, if it were vocalized. The Court has proved its courage in this respect often enough. But, on the other hand, the Court cannot always ignore the mood of the country. And I am not sure that on the very debatable questions of Indian law the Court would be wholly insensitive to a very general reaction to the effect that "enough is enough." Besides, some of the Justices probably have nagging doubts concerning even the established rules favoring Indians. A national debate might bring those doubts to the fore. And finally, whatever the Court does, the Congress — whose power in this matter is almost without limit — must head the public clamor.

I say only that the low visibility of Indian cases is a blessing not lightly to be thrown away. In my view, it is very dangerous to press on the Court propositions that are bound to stir hostile instincts in the general public and may produce a like reaction from a majority of the Justices.

We have one example in *Oliphant*.[22] The United States supported the Suquamish Tribe in that case. But to no avail. The Court could not condone a tribal claim to impose criminal penalties on Reservation residents who had no voice in writing the laws under which they would be tried and whose race was excluded from the jury that would determine their guilt. When, in the Government's brief, I suggested that there was nothing unusual in a foreigner being subjected to the laws of Rome when living in Rome (or words to like effect), the Attorney General of the State of Washington reacted much like Governor Lumpkin of Georgia 150 years ago, who was outraged at the "impudence" of summoning his State before the Supreme Court at the suit of the *Cherokee Nation*,[23] which he described as "a few savages residing within the territory of Georgia." Had the Court ruled with the Tribe, there might well have resulted a more general "hue and cry" that would have found audience in the Halls of Congress. At all events, the Court itself drew the line, viewing the claim as beyond the pale.

So, also, I would expect the Court, if put to the test, to reject other extreme claims. To give only one example, I cannot suppose the Court will condone a tribal regulation that purports to reserve to members alone, to the exclusion of other permanent residents of the Reservation, the right to hunt and fish there. And the same applies to any other blatantly discriminatory tribal regulation or tax measure. As it happens, the *Crow*[24] case, just taken by the Court, will probably resolve that question soon enough.

(d) I have suggested that stirring a public backlash may encourage the

22. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
23. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
24. Crow Tribe v. EPA, 454 U.S. 1081 (1981).

Supreme Court to call a sharp halt to the recognition of Indian rights, and may even persuade it to retreat somewhat. It might be, though, that it is too late to worry about that. It is certainly true that, increasingly, more Members of the Court are individually looking at Indian cases, witness the greater number of divided decisions. I need only cite *DeCoteau*,[25] *Rosebud*,[26] *Oliphant*, the *Yakima P.L. 280 Case*,[27] and the *Washington Fishery Case*.[28] The Court is no longer docilely following the strong lead of a Hugo Black or a Bill Douglas. But, in my view, that makes it all the more important not to ask too much of the Court. Justices, still willing to follow faithfully, without re-examination, older decisions favoring the Tribes, may be pushed into reconsidering those precedents if they are pressed too far. We prevailed in the *Washington Fishery Case*, but not by much. I suspect all it would have taken to lose that case was to ridicule the 50 percent formula and insist that the Tribes enjoyed an unlimited and open-ended right to catch all the fish they could, leaving only what was left to other fishermen. Wisely, the Tribes did not press that argument and the United States stopped at a 50 percent maximum.

II

I have said more than enough about not "rocking the boat" and stirring a backlash. The Court is not as fragile as all that. There are, I believe, some directions now fixed that nothing will change. And there are issues that inevitably will reach the Court, regardless how strongly we, or the Justices themselves, might wish to leave well enough alone. Moreover, the status quo is unsatisfactory, and risk or not, we must press for something more.

I begin with what seems secure. These are trends which I believe the Court will not reverse, short of clear action by Congress.

(a) Except as Congress has expressly provided otherwise, the Court will continue, I am confident, to allow full sway to tribal authority over members, whether that involves the exercise of criminal or civil or taxing jurisdiction, or family matters, or questions or membership. This is sufficiently indicated by such cases as *Fisher*, *Wheeler*, and *Martinez*.[29] Although strong cases under the Indian Civil Rights Act will no doubt be presented to challenge the *Martinez* ruling — to the effect that, except for habeas corpus, that statute is not enforceable in federal court — my betting is that the Court will stand firm. I suggest that, when only Indians are involved, the Court will rebuff State interference and will also tend to read much more restrictively federal laws that

25. DeCoteau v. District County Court, 420 U.S. 425 (1975).

26. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

27. Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979).

28. Washington v. Washington State Comm. Pass. Fishing Vessel Ass'n, 443 U.S. 658 (1979).

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

have been assumed to require federal dictation or approval of tribal actions.

To this extent, I believe the court is committed to the idea of tribal self-government and to encouraging the development of independent tribal institutions. My fear is that a majority of the Court will view this as full satisfaction of the residual sovereignty of Indian tribes and their right of self-government. *Wheeler* can be so read.

(b) I think it also clear that the Court will fully preserve the State tax immunity of Reservation Indians and Indian property, real and personal, within Reservations, as well as existing exemptions for restricted Indian land outside Reservations. *McClanahan*, *Mescalero*[30], *Moe*, and *Bryan*, firmly settle those matters, however questionable the articulated rationale of those cases.

(c) Nor do I believe the Court will go back on its decisions recognizing treaty secured tribal hunting and fishing rights, both on and off Reservation. The *Puyallup* cases, *Antoine*[31] and the *Washington Fishery Case*, will survive. But we must appreciate the limited scope of those decisions. None of them remotely suggests that a Tribe "owns" the game or fish involved, or says anything about tribal regulation of non-Indian hunting or fishing within a Reservation, much less condones discrimination against non-Indian permanent residents. Additionally, with respect to migrating fish or game which are not confined within the Reservation, it is clear that tribal members cannot help themselves without limit. Indeed, the *Washington Fishery Case* reaffirms the holding of *Payallup III*[32] that necessary State conservation regulations apply to migrating fish *within* a Reservation. It may be that the actual exercise of State jurisdiction can be avoided by adequate tribal regulation. But that is not clear. Off-reservation rights are, of course, subject to stricter limitations and, at least potentially, to necessary State conservation jurisdiction.

One other comment about off-reservation rights is called for. Some believe the *Menominee* decision — a precarious precedent at best — can be extended so as to preserve hunting and fishing rights in *ceded* lands, even though the treaty or agreement or statute says nothing about it. Some lower courts may accept that proposition. But, in my view, the Supreme Court will not — at least as to areas not held by Indians. The tendency is to confine special Indian immunities and prerogatives to "Indian country," and perhaps to the Reservation, except where explicit provisions of treaty or statute require going further. Indeed, this is, in my view, a promising development: the more geographically restricted they are, and the more clearly defined the boundaries, the easier it is to concede special rights and governmental powers to the Tribes.

(d) Although the Court has had no recent occasion to speak to the question, I do not doubt that it will fully respect tribal control of its land and natural resources. Here I mean only Indian-owned, and primarily tribally owned, land

30. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

31. Antoine v. Washington, 420 U.S. 194 (1975).

32. Payallup Tribe v. Department of Game, 433 U.S. 165 (1977).

and resources within a Reservation. I believe the Court will rebuff any State attempt to interfere with tribal decisions about land use, or water use, or development or non-development of mineral deposits or timber, except only as it is demonstrably necessary to protect non-Indian neighbors from harm or serious nuisance. Of course, the State can enjoin activities within an Indian Reservation that threaten others of its citizens in the same way that it could prevent such activities in a neighboring State. That includes polluting the air or water, excessive diversions from a stream, and, as the Court's recent action in *Idaho v. Oregon & Washington*[33] indicates, taking too many migrating fish. How much further, if at all, the Court will condone State intervention, is not clear. But I would expect the Court to hold that at least tribally held Reservation land is immune from general State zoning regulation and that the exploitation of tribally owned resources requires no permission from State authorities.

(e) Another noticeable trend in the Court's recent decisions is to prefer the claims of the Tribe over those of individual members. *Jim*[34] gave some indication in that direction and *Hollowbreast*[35] confirmed it. *Martinez* points the same way, and so does the *Washington Fishery Case* by stressing the tribal nature of the fishing rights there involved.

(f) Finally, the Court has indicated some concern about the heavy, and often clumsy, hand of federal officials in tribal affairs. A sufficient example is *Tooahnippah*,[36] in which the Court found wholly unwarranted the Interior Department's substitution of its views for the will of the testator as to who should inherit an Indian allotment. I perceive a disposition on the Court's part to open to judicial challenge what were once deemed unreviewable decisions of federal officials in respect of Indian property. Arbitrary, or even grossly negligent, federal actions will no longer be immunized.

As I have already said, I believe the Court will be receptive to the suggestion that existing federal statutes do not, in fact, vest in the Interior Department the degree of supervisory control over tribal affairs that has been assumed. Indeed, that Department, in many instances, has been asked to approve tribal actions which it claims no power to control. But it must be noted that the Court is much more likely to correct present errors and unauthorized interference than it is to investigate past wrongs and permit monetary recoveries outside the Indian Claims Commission Act. *Mason*[37] and *Mitchell*,[38] and the result I expect in the *Sioux Nation*[39] case, make that clear.

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33. Idaho v. Oregon & Washington, 444 U.S. 390 (1980).
34. United States v. Jim, 409 U.S. 80 (1972).
35. Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976).
36. Tooahnippah v. Hickel, 397 U.S. 598 (1970).
37. United States v. Mason, 412 U.S. 391 (1973).
38. United States v. Mitchell, 445 U.S. 535 (1980).
39. United States v. Sioux Nation, 448 U.S. 371 (1980).

Although the Court has thus far avoided doing so, I think it fair to say that it has thrown out a warning that even Congress' power to manage tribal property and tribal affairs is not as "plenary" as was once believed. I do not read as much into the *Weeks*[40] decision as some do. But it does reject the old notion (never fully endorsed by the Court anyway) that congressional decisions affecting Indians are beyond scrutiny by the courts. I do not expect the Court to re-open the question whether Congress can abrogate an Indian treaty or whether Congress can authorize the taking of recognized Indian land upon payment of just compensation. Nor — although the arguments are much stronger — do I suppose the Court will entertain any challenge to the constitutionality of Public Law 280 before tribal consent was required, or to the Termination Acts of the 1950s, much less the earlier Allotment Acts. Yet, there is reason to expect the Court to look more closely at any future federal legislation that is blatantly discriminatory — as between Indians themselves or as between Indians and non-Indians — or that adversely affects Indian property or rights without a rational basis in "the unique obligation [of the United States] toward the Indians." Whatever the actual result of the case, we may soon learn more about the Court's thinking on this score when it decides *Sioux Nation.*

IV

There remains the critical question of jurisdiction over non-Indians within a Reservation, both those who own land and live there as permanent residents and those who come into the Reservation to engage in business activities or commercial transactions with the Tribe or its members. In these matters, the present Court has not recently spoken, although it cannot be too much longer before the decisions in *Colville*,[41] *White Mountain Apache*[42], and *Central Machinery*,[43] will reveal its thinking. The imminence of those decisions makes it very rash to predict anything, but we can at least explore the possible approaches.

(a) I begin with the situation common to all reservations: non-Indian business invitees on the Reservation. I mean to include those who *sell* to Tribes or members, those who *buy* from them, those who perform *services* on the Reservation for the Tribe (whether it be construction work, or logging, or mineral extraction, or anything else), and also those who come to fish or hunt or ski or drink or enjoy other recreational activities offered by the Indians for a price.

The first question is whether the *Tribe* can regulate and tax such activities

40. Delware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977).
41. Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980).
42. White Mountain Apache v. Bracker, 448 U.S. 136 (1980).
43. Central Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980).

by non-Indians within the Reservation. Venerable precedents suggest an affirmative answer and I would expect the Court to adhere to them. The old rationale was simply that, since the tribe could exclude non-members altogether, it must be free to impose conditions on their admission. I think that still holds good for areas remaining in Indian ownership within a Reservation. The decision in *Williams* v. *Lee* points in that direction. The result may be very different, of course, in respect of fee owners whose ancestors were invited by Congress a century ago, without any express condition of submitting to tribal authority.

The other question as to what I have labelled "business invitees" is whether the *State* can also regulate and tax their on-Reservation activities. That is the question directly involved in the three cases now awaiting decision. The answer is very much in doubt. But I will rashly predict that the Court will invoke *Warren Trading Post* to hold that State regulation and taxation is preempted, at least when the Reservation situs of the activity or transaction is not wholly artificial or fortuitous. Thus, I am optimistic about *White Mountain Apache*, less so about *Central Machinery* and *Colville*, especially in light of *Moe*. But I do not despair that the Court will recognize an immunity from State taxes even in the last two cases in deference to the congressional policy of furthering tribal self-sufficiency, which in many cases depends upon insulating non-Indians from State taxes in respect of their dealings with a Tribe.

(b) The same two questions — can the Tribe regulate and tax? Can the State do so? — arise in connection with non-Indian permanent residents who own land within a Reservation. But the problems are very different. I am now speaking of the activities of non-Indians within a Reservation which do not directly involve Indians, but which, in one degree or another, affect the Indian community. I put to one side crimes and torts in which no Indian is involved. The *McBratney* line of cases — recently re-affirmed in *Antelope*[44] — tells us that the State will enjoy criminal jurisdiction when offender and victim are both non-Indian. I assume State courts will likewise deal with purely non-Indian civil disputes. The Supreme Court, I think, is almost certain to leave these arrangements alone. But there remains the whole area of "regulatory law."

The tribal claim to regulate the activities of non-Indian owners within a Reservation, especially in a "checkerboard" situation, is fairly strong, because those activities immediately affect the Indian community. Thus, reasonable and non-discriminatory zoning regulation, hunting and fishing restrictions, pollution controls, and water use rules, can be justified. The Supreme Court has not directly spoken and the first case to present some aspect of the question may be the *Crow* case. *Oliphant* is not a good omen, and it inhibits enforcement by

44. United States v. Antelope, 430 U.S. 641 (1977).

criminal penalties. But I do not despair. At all events, I would have no reluctance in pressing reasonable and non-discriminatory claims of this sort, especially if it can be shown that tribal regulation is essential to protect the Indian community. If such claims prevail, it does not immediately follow that State regulation is preempted. But, assuming it takes the first big step, I believe the Court probably will be persuaded that the need for a single uniform system justifies the second step as well.

The issue of *taxation*, as to non-Indian permanent residents, is quite separate. Here, the State claim is well-established in Supreme Court decisions and there is no real prospect of reversing the rules. Nor do I hold much hope for any tribal claim (and I know of none) to tax non-Indian land or the Reservation income of non-Indian permanent residents — unless, perhaps, if the tax is directly related to services provided to them by the Tribe. There is, under present conditions, no point in pursuing this idea.

V

The answer to these questions about tribal and State authority over activities by non-Indians within a Reservation depends, in part, on where one begins. For some years, most Indian cases involving assertions of State jurisdiction within a Reservation have been resolved by asking two questions: (1) Is the exercise of State authority preempted by relevant provisions of federal treaties or statutes? and (2) In any event, does the State's action infringe upon the Indians' right of self-government? This approach has worked well enough so far. But it cannot serve much further. Unless a firmer basis for the special Indian immunities and prerogatives is substituted, I fear the edifice will crack, if it does not altogether crumble.

(a) The Court has stretched provisions of treaties and statutes to the breaking point to find federal pre-emption of State intervention. Even with respect to State taxation of Reservation Indians, it is very difficult to point to any provision of federal law that does more than exempt tribal land. And, certainly, we can find nothing expressly foreclosing State regulation or taxation of non-Indians on a Reservation, even when their activities immediately affect the Indian community. I suspect that this statutory pre-emption approach will yield nothing more. To press it any further would expose the pretense too starkly.

The so-called "infringement" test is equally vulnerable. The very term "self-government" suggests tribal authority only over members. Indeed, there is language in *Wheeler* suggesting as much. So understood, it is very difficult to argue that regulating or taxing non-Indians who are merely buying from or selling to Indians is an aspect of self-government, or that State regulation and taxation of such non-Indian activities infringes "the right of the Indians to make their own laws and be ruled by them." It is even more difficult to rely on the right of *self*-government to explain tribal regulation of land use by non-Indian residents of a Reservation who have no dealings with the Indians.

(b) The limitations and weaknesses of the traditional "pre-emption" and "infringement" tests, have led me back to the old idea of residual tribal sovereignty. The obvious advantages of this approach are: (1) that, as *Wheeler* stressed, to determine what powers remain, one does not look to see what Congress *granted,* but simply what has been *taken,* all else surviving; (2) that "sovereignty," as opposed to self-government, necessarily implies some authority over a *territory*; and (3), that the same principle usually – although not always – decides both whether tribal authority exists and whether State authority is precluded.

Until very recently, there were serious obstacles to headlining the term "Indian sovereignty." First, to speak of "sovereign Tribes" within States was undiplomatic, to put it mildly. Second, "sovereign" seemed an ill-fitting word to describe wholly dependent collections of Indians, sometimes of unrelated Tribes, merely subsisting on government "hand-outs" on arbitrarily assigned reservations, often with no governmental structure of their own. Third, to claim tribal sovereignty appeared to be inconsistent with the State jurisdiction within Reservations that had to be conceded (e.g., the *McBratney* rule and the taxability of non-Indian land), not to mention the "plenary" power of Congress. And, finally, in *McClanahan,* if not earlier, the Court had relegated the Indian sovereignty doctrine to the role of a mere "backdrop." I may add that talk of "sovereignty" tends to create unreal expectations in the Indian community.

All these problems still exist. But the significant rebirth of tribal institutions makes the claim of sovereignty more persuasive. And, equally important, the Supreme Court's eloquent exposition of the doctrine in *Wheeler,* together with the re-affirmation of tribal sovereign immunity from suit in *Puyallup III* and *Martinez,* authorizes us to speak of sovereignty once more without committing *lèse-majesté.* Accordingly, in the Government's brief in *Colville,* I outlined a claim to presumptive tribal territorial jurisdiction over all activities occurring within a Reservation. But I also made the more traditional modern arguments. We must wait to see the Court's reaction.

(c) Assuming the Court does not, once again, bury the Indian sovereignty doctrine beyond revival, it becomes important to define the scope of tribal sovereignty. There is nothing to be gained by harking back to colonial days when the Six Nations Confederacy, for instance, was a fully independent foreign power. And, on the other hand, we must define sovereignty in a way that justifies invoking that term, rather than a lesser word more appropriate to describe a private club. This is not the time or place to attempt a full definition. A few generalities must suffice.

Indian Tribes are, of course, "domestic" sovereignties. In this respect, they are deemed to have surrendered (willingly or not) to the United States much the same powers the States surrendered by forming the "more perfect Union." But there are, of course, important differences. Tribes, unlike States, are not directly constrained by the Bill of Rights or the Reconstruction Amendments. On the other hand, they are not protected by the Tenth Amendment and

congressional power over them is almost unlimited. What is more, even without legislation, Tribes, because of their "dependent status" vis-à-vis the United States, are deemed to have relinquished the right to alienate their land except to the United States or with its approval, and also the right to punish non-members. In sum, tribal sovereignty is a precarious thing subject to diminution, even perhaps destruction, at the will of Congress.

Anything so vulnerable may not sound like a "sovereign," or even a "semi-sovereign," entity. Indeed, if the Court in *Wheeler* had not repeatedly used the word, I would be tempted to substitute the concept of "separateness." But in fact, history and political theory tell us that there is nothing incongruous in the notion of a quasi-sovereign sub-nation, retaining its limited independence only so long as, and to the extent that, the suzerain wills it. At all events, Indian Tribes today are sovereign primarily — perhaps only — vis-à-vis the States, not the United States. It may seem more difficult to explain why, absent express permission from the suzerain (the United States), State jurisdiction should cross Reservation boundaries at all, if Tribes are sovereigns of their territory. The answer must be that the State's right to punish or tax its non-Indian citizens, in respect of acts done in Indian country, is akin to the right asserted by some nations, including ours, to hold its citizens accountable for acts committed, or income earned, abroad. But, in principle, the State ought have no power to carry out *enforcement* of its laws within the boundaries of a Reservation, nor to pre-empt tribal regulation. That *would* be inconsistent with the territorial sovereignty of the Tribe. In this respect, the last holding of *Moe* is a blow to the sovereignty doctrine. Perhaps it can be overturned.

(d) What I have just said indicates that recognition of tribal territorial sovereignty does not necessarily preclude the State from taxing or otherwise controlling the activities of its non-Indian citizens in Indian country, provided it does not "invade" the Reservation to secure compliance. The sovereignty of the United Kingdom did not prevent the United States from taxing my income as an English barrister, however "essential" my services were to the British public and no matter that the economic burden of the tax might fall on my English client. If State taxation of non-Indians in respect of their dealings with Indians within a Reservation is barred, it must be on some basis other than tribal sovereignty. Here, we must rely on some doctrine of pre-emption by the "supreme law" of the United States.

VI

There is, of course, no mystery about the origins of Indian sovereignty: it is aboriginal. The critical question is: What body of law shields the residual sovereignty of tribes against State interference or destruction? And, also, what body of law precludes the State from regulating or taxing at least some non-Indian activities within a Reservation that the territorial sovereignty of the Tribe alone would not prevent? The usual answer these days is: "particular treaties and statutes." As I have already said, I find that response very flimsy

in most cases, and especially so in respect of Reservations established by Act of Congress or Presidential Order after the end of the treaty period. I feel much more secure with a *constitutional* basis, and I believe such a basis exists. I have very tentatively sketched out one aspect of it in our *amicus* brief in *Central Machinery* and the Court has not yet laughed it down. Time will tell. The bare bones are these.

(a) The Constitution expressly recognizes the separateness of Indian Tribes, as quasi-sovereign political entities. As Chief Justice Marshall noted long ago, the Supremacy Clause impliedly recognizes Indian Tribes as distinct political communities by effectively ratifying and continuing in force "treaties heretofore made," almost all which, in 1789, were Indian treaties, and by suggesting further that such treaties would be appropriate. So, also, the Commerce Clause, in speaking of "commerce with the Indian tribes" as something different from "commerce between the States," necessarily separates the Indian Tribes from the States. And, finally, the exclusion of "Indians not taxed" from the population on the basis of which a State's Representatives are apportioned, makes it clear that Indians maintaining tribal relations, even though within the boundaries of a State, are separate and exempt from State jurisdiction. Significantly, this provision was repeated in the Fourteenth Amendment, ratified in 1868.

Taken together, I believe it fair to say that these provisions reflect a constitutional understanding, agreed to by the original States for themselves and all future States to be admitted on an equal (and no more advantageous) footing, that the Indian Tribes and their remaining territory were separate sovereignties, off limits to State intervention.

(b) This reading of the Constitution might suggest that the United States, also, is prevented from infringing the sovereignty of the Tribes. That might have been a desirable result. But irreversible history has foreclosed the argument and we must find a constitutional justification for what has happened. Although (as the Supreme Court noted in *Kagama*[45]) the words are not entirely apt, the answer, I think, lies in the Indian Commerce Clause. We know that the present Clause is "shorthand," unduly contracted by the Committee on Style from Madison's wordier provision, which was, in turn, revising a more explicit provision in the Articles of Confederation. That document recognized federal power, not merely to "regulate trade," but also to "manage all affairs with the Indians." Even this is ambiguous. Yet, it comes close to asserting that, vis-à-vis the United States, the Tribes were deemed dependent and subject to regulation. At all events, we have the evidence of very early Congresses that the Indian Commerce Clause was believed to authorize the imposition of federal criminal law within Indian country – which sufficiently indicates that the Tribes were not deemed fully sovereign in respect of the United States.

45. United States v. Kagama, 118 U.S. 375 (1886).

And, according to *McIntosh*,[46] it was always understood that legal title to tribal land belonged to the United States – which placed the Tribes in a position of vassalage vis-à-vis the national sovereign.

We may well doubt whether those who wrote the Constitution ever contemplated federal power unilaterally to dismember Reservations, to transfer jurisdiction to the States, and to "terminate" Tribes altogether. But we must accept that they did. However anomalous it may seem, it is essential to avoid suggesting that the constitutionally protected sovereignty of Tribes vis-à-vis the States is a like bar to congressional action. Else, the Court must reject the argument altogether.

(c) I also believe there is a constitutional basis for the special rule – not accounted for by recognition that Indian Tribes are "sovereign" within their Reservations – to the effect that, in some circumstances at least, non-Indians trading with Indians in Indian country are exempted from regulation and taxation by their State. This requires a finding that Tribes are under the special protection of the United States. I believe such a rule can be derived from the Indian Commerce Clause. That Clause, of its own force, arguably precludes State interference with white-Indian intercourse, until and unless Congress otherwise provides.

To be sure, this is not obvious on the face of the constitutional text. But it is familiar history that the Indian Commerce Clause was intended to eliminate the divided authority between the Nation and the States which was apparently condoned by the Articles of Confederation in respect of white-Indian relations. This is reflected in the debates of the Constitutional Convention and in *The Federalist*; more important, it has been noted by the Court in *Worcester*,[47] and as late in 1876 in *Forty-Three Gallons of Whiskey*.[48] The upshot is that regulation of the intercourse with the Indian Tribes is, by the Constitution, committed to the United States exclusively. The State can intervene only by leave of federal authority, and it bears the burden of showing such permission. In short, instead of looking for preemptive legislation (as in *Warren Trading Post*), we should be noting the *absence* of statutes delegating authority to the State.

Counsel for the Tribes advanced such an argument in *Colville*, and I have put it forward, alternatively, in *Central Machinery*. We must wait and see what, if anything, the Court says when those decisions come down.

I must add that this invocation of the Indian Commerce Clause directly reaches only white-Indian intercourse. It is not obvious that it can be extended to oust State jurisdiction over non-Indian permanent residents of a Reservation who are not engaged in any dealings with Indians. I very much doubt it – especially since the Allotment Acts and the other "opening" legislation can be

46. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).
47. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
48. United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876).

read as permitting State regulation and taxation to overstep Reservation boundaries with respect to these "colonists" who were "invited in" by Congress.

VII

To what extent the Court will accept any of these propositions is, at the moment, conjectural. But, it is not impossible to list factors that may increase the prospects of a favorable reception for any expansion of tribal rights, or, at the least, avoid the risk of an erosion of victories already won. I suggest the following catalog of considerations which are likely to influence the Court in the direction of preserving or consolidating tribal prerogatives.

- The extent to which the Tribe has revitalized its own institutions and is actually exercising governmental powers – without exaggerated pretensions.
- The avoidance of obvious discrimination or arbitrariness in tribal ordinances or the exercise of governmental functions.
- The fact that activities for which exemption from State regulation or taxation are claimed is conducted by, or at least controlled by, the Tribe for the common benefit, and not by a privileged few individuals for private profit.
- The degree to which the land of the territory involved is held by Indians, preferably in tribal ownership, or is in the process of being consolidated to reduce non-Indian ownership.
- The demonstrated willingness of Tribes, without relinquishing their reasonable jurisdictional claims, to enter into practical "working arrangements" with State authorities.

Accordingly, my advice to tribal leaders is to make every effort to consolidate the land base – not by expansion into new areas, but by eliminating the checkerboard pattern, so far as possible; and, in the meanwhile, to avoid excessive claims in the exercise of governmental powers, especially, blatant discrimination against non-voting residents, and to negotiate, where possible, a *modus vivendi* with willing State officials. To the lawyers, I say: win your cases in the lower courts, if you can; if your cases reach the Supreme Court, stress present realities and future problems, not past glories or ancient wrongs; and above all, avoid extreme arguments; don't frighten the Court with the specter of another constitutional crisis like that engendered by the *Cherokee* cases of 150 years ago. It is said that William Wirt brought tears to the eyes of Chief Justice Marshall in the *Worcester* case. But remember that, although the missionaries were ultimately released, the Cherokees lost their land. Their *lawyer* won a battle and the *Tribe* lost the war. Let us all learn from the cruel fate of the Cherokees.