NEW MEXICO LAW REVIEW

Volume 7
Issue 2 *Summer 1977*

Summer 1977

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Gerald T. E. Gonzalez

INDIAN SOVEREIGNTY AND THE TRIBAL RIGHT TO CHARTER A MUNICIPALITY FOR NON-INDIANS: A NEW PERSPECTIVE FOR JURISDICTION ON INDIAN LAND

GERALD T. E. GONZALEZ*

> Government is an affair of human loyalties. These loyalties Indian tribes cannot command if, in the important economic decisions of their lives, the members of the tribe must look elsewhere for opportunity and guidance. The preservation of tribally owned lands, where such ownership exists, and the fostering of Indian land-use under tribal guidance, are essential if the younger generation is to continue to look to the tribe for aid in life's economic struggles.[1]

INTRODUCTION

Poverty has become a too-familiar affliction to the American Indian: contemporary Indians are as haunted by its pervasive maleficence as were their predecessors.[2] This condition and the historical events which produced or accompanied it have recently begun to receive widespread attention.[3] At the same time, developmental schemes designed to produce tribal income have begun to appear. These schemes are the apparent result of tribal searches for new sources of income, and of federal legislation favoring such approaches—legislation reflecting congressional dissatisfaction with the burdens Indian poverty has imposed on the federal budget.[4] The developmental schemes have commonly attempted to capitalize on tribal land, one of the few Indian assets. Such schemes have been generally dependent on long-term lease arrangements because aliena-

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*Member, New Mexico Bar. B.S., New Mexico Highlands University, 1963; J.D., Harvard Law School, 1976.

1. F. Cohen, The Legal Conscience 222, 224 (1960).

2. *See, e.g., Hearings on H.R. 166 Before the House Comm. on Indian Affairs,* 78th Cong., 1st Sess., pt. 1 (1943); *Hearings on H.R. 166 Before the House Comm. on Indian Affairs,* 78th Cong., 2d Sess., pts. 2, 2A, 3 & 4 (1944); A. Sorkin, American Indians and Federal Aid (1971).

3. *See, e.g.,* V. Deloria, Custer Died For Your Sins (1969); V. Vogel, This Country Was Ours (1972); V. Deloria, Behind the Trail of Broken Treaties (1974).

4. *See* M. Price, Law and the American Indian (1973) [hereinafter cited as Price] at 602:

> Jobs on the reservation were an important, but not the exclusive, reason for the impetus toward development. In the 1950's (Section 415 [providing authority for long-term leases] was passed in 1955), Congress was interested in ending federal responsibility and federal economic support for reservation life. It was argued that Indian tribes and individual Indians should make fuller use of their lands and obtain greater income from them. By leasing the land—often for non-Indian industrial and residential use, there would be, it was thought, less dependence on federal largesse.

tion of Indian land is usually proscribed by federal statutory restrictions.[5]

Serious problems have surfaced in developmental schemes based on the leasing of Indian land. Unless resolved, these problems seriously complicate or slow developmental efforts, thereby retarding or reducing the flow of leasing revenues to Indian lessors.[6] Consider, for example, the following situations:

Situation 1: An Indian tribe badly in need of income agrees to lease substantial acreage to a real estate developer. The agreement is approved by the Department of the Interior in accordance with federal statutory requirements. Under the terms of the agreement the developer is to create a recreational community on the reservation and then sublease homes or homesites. The sublessees are principally retirees, people desiring vacation homes, and commuters willing to travel from tranquil reservation homesites to hectic urban worksites. Virtually all will be non-Indians. The tribal Indians have their own community on another part of the reservation. They are distrustful of non-Indians and they fear the disintegration of their traditional way of life under the impact of contemporary non-Indian culture. Thus they guard against any attempted intrusion of state (non-Indian) jurisdiction onto tribal land or into their lives. The result is that the tribal government requires the developer to agree that the recreational community will possess a local government which has been chartered by the Indian tribe. The State, believing that the tribal chartering of such a community on the reservation may be the harbinger of a movement to locate developmental or other business schemes on reservations as a way of avoiding state regulations and taxation, sues in federal district court to void the lease agreement. The State also challenges the power of the tribe to charter a municipality, claiming that such a power has not been conferred by federal statute and is not an inherent power of Indian sovereignty.

Situation 2: The non-Indian residents of the reservation recreational community want the Indian-chartered community government to provide the same services they have come to expect from local governments elsewhere. One of these services is law enforcement. The tribal government refuses to allow the tribal police to provide this service because this would tax the already strained tribal budget, and would pose jurisdictional headaches for tribal police and gov-

5. *See, e.g.*, 25 U.S.C. § § 391 through 416 (1970).

6. *E.g.*, the Pueblo of Tesuque, an Indian tribe, entered into a developmental scheme involving the lease referred to in text at note 9, *infra*, and subject to the litigation described in text at notes 30 through 34, *infra*. Since that litigation, development has been at a standstill and now appears unlikely to resume.

ernment. The tribe also refuses to allow state law enforcement authorities to furnish police services on the reservation because this would enlarge the area of state governmental (non-Indian) intrusion into reservation life, and might invite such intrusion in other areas. Thus the community government sets up its own police force, hiring non-Indian police officers from outside the reservation. Shortly afterwards, recreational community residents make a strong protest to the community government about frequent late night drag-racing on the community's streets. The community government then passes an ordinance prescribing traffic rules, speed limits and traffic signs. On patrol one night after the traffic signs have been erected, a community police officer observes three cars race with each other through a stop sign. The officer gives chase, stopping all three cars. One driver is a reservation Indian. Another is a non-Indian resident of the recreational community. The third is a non-Indian who resides off the reservation. All three drivers protest that the officer has no right or authority to stop them, issue a citation, or arrest them.

Situation 3: The recreational community's government council originally consists of members selected by the developer from among its non-Indian employees. As the community population grows, council members selected by the developer are gradually replaced by elected community residents until all council members are residents. The tribal council discovers that one of the developmental community residents is a member of a satanic religious sect. Witchcraft is greatly feared by tribal members because of tribal religious beliefs; tribal customary law forbids practicing withcraft. The tribal council urges the community council to pass an ordinance forbidding the practice of witchcraft within the territorial confines of the leasehold community. The community council refuses, claiming that this would be an interference with "freedom of religion." The tribal council then notifies the community council that if the ordinance is not passed, the charter of the community's local government will be suspended or revoked. The community council is contemplating filing an action against the tribal council to enjoin a suspension or revocation of its charter. The member of the satanic sect also contemplates action against the community council—and perhaps the tribal council, as well—to enjoin charter suspension and revocation and enforcement of the contested ordinance.

As may be surmised from the preceding situations, a primary source of difficulty in developmental schemes based on creating non-Indian leasehold communities has been jurisdictional conflicts and uncertainties. Particularly heated contests have involved state governments on one side and tribal lessors or developer lessees on the

other.[7] Where the latter cannot claim the tribe possesses jurisdictional supremacy through a federal grant of power by virtue of the Supremacy Clause, such supremacy may be claimed under the doctrine of Indian sovereignty. With respect to claims made under the rubric of Indian sovereignty, tribes and developers alike have taken the position that powers of Indian sovereignty supersede state governmental powers not only with respect to affairs which involve only Indian interests, but also with respect to leasehold interests and associated activities involving non-Indian lessees. Adherence to this position by the Indian tribes and developers has led to at least one instance of a tribal government issuing a charter to a municipal government designed to provide for the needs of a non-Indian developmental community being created on a long-term leasehold in tribal land.[8] At least one other lease prescribes such a government once development is successfully progressing.[9]

A growing number of cases has involved the convoluted jurisdictional and sovereignty issues just described. The manner in which Indian lands subject to developmental leases may be gradually wrested from Indian control is nowhere more aptly illustrated than in California. California is somewhat unique among the southwestern states in that it assumed broad civil and criminal jurisdiction over Indian affairs pursuant to Public Law 280.[10] The provisions of this law were amended to require Indian consent as a precondition to assumption of such jurisdiction before any of the other southwestern states assumed jurisdiction under its provisions.[11] The major statutory limitation on California's jurisdiction is that state laws cannot be applied to Indian trust lands where those laws constitute encumbrances on the lands.

What is important with respect to the California cases is the

7. *See, e.g.*, Note, *Need for a Federal Policy in Indian Economic Development*, 2 N.M.L. Rev. 71 (1972); Comment, *Indians–State Jurisdiction over Real Estate Developments on Tribal Lands*, 2 N.M.L. Rev. 81 (1972) [hereinafter cited as New Mexico Comment]; Chambers & Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 Stan. L. Rev. 1061, 1088-94 (1974) [hereinafter cited as Chambers & Price].

8. Amendment to lease between Pueblo de Cochiti and Great Western Cities, Inc. (August 18, 1970), approved by Assistant Secretary of the Interior, Harrison Loesch (April 25, 1970).

9. Lease between Pueblo of Tesuque and Sangre de Cristo Development Company, Inc. (April 17, 1970), approved by Walter O. Olson, Albuquerque Area Director, Bureau of Indian Affairs (May 24, 1970) pursuant to delegation of approval authority from Commissioner of Indian Affairs (May 20, 1970).

10. 18 U.S.C. § 1162 (1970) and 28 U.S.C. § 1360 (1964, 1970), *as amended by* Act of Aug. 15, 1953, ch. 505, 67 Stat. 588.

11. 25 U.S.C. §§ 1321-22 (1970), *as amended by* Act of Apr. 11, 1968, Pub. L. No. 90-284.

process by which the state's exercises of jurisdiction have gradually swallowed whole any Indian control over their lands. An early case in this process was *Agua Caliente Band of Mission Indians v. County of Riverside*[12] which was an action to enjoin the assessment and collection of a possessory interest tax which had been levied by Riverside County, California, on the developer-lessees of the Agua Caliente Indians. The Indians argued that the tax was a levy on the land and thus a statutorily prohibited encumbrance—the tax added a financial burden which made it impossible for the developer-lessee to pay the agreed rental, thereby decreasing the value of the land. The Ninth Circuit held that no congressional purpose forbade this type of tax which was not a levy on the land itself, but on the cash value of the lessee's interest.

A contemporaneous California state court case was *People v. Rhoades.*[13] In *Rhoades* an Indian living on trust lands had been convicted of violating a state statute requiring anyone owning a building on forested land to maintain a firebreak around the building. The defendant appealed, contending that the statute constituted an encumbrance. The California Court of Appeals found that the statute was not an encumbrance because there was no basis for concluding that the firebreak requirement would depreciate the value of the property.[14]

In *Rincon Band of Mission Indians v. County of San Diego*[15] the Indian tribe sought declaratory and injunctive relief from enforcement of a county gambling ordinance on reservation land after the tribe adopted its own ordinance authorizing the establishment on the reservation of a card room where games not proscribed by a state gambling statute would be played. The federal district court held that the county ordinance was not a zoning ordinance and was not an encumbrance. "Encumbrance," said the court, was a burden on the land imposed by third persons which might impair alienability of the fee, e.g., mortgages, liens or easements. Two contemporaneous

12. 442 F.2d 1184 (9th Cir. 1971), *cert. denied,* 405 U.S. 933 (1972), *aff'g* 306 F. Supp. 279 (N.M.C.D. Cal. 1969).

13. 12 Cal. App.3d 720, 90 Cal. Rptr. 794 (1970), *cert. denied,* 404 U.S. 823 (1971).

14. The court carefully distinguished Snohomish County v. Seattle Disposal Co., 70 Wash.2d 668, 425 P.2d 22, *cert. denied,* 389 U.S. 1016 (1967). The *Snohomish* court had defined "encumbrance" to mean any burden on land depreciative of its value such as a lien, easement or servitude, which, while adverse to the landowner's interest, does not conflict with his conveyance of the land in fee. The *Rhoades* court found this definition of encumbrance too narrow to cover the restrictions of the statute at issue there.

15. 324 F. Supp. 371 (S.D. Cal. 1971), *rev'd on other grounds,* 495 F.2d 1 (9th Cir. 1974).

non-zoning cases taking similar views were *Ricci v. County of Riverside*[16] and *Madrigal v. County of Riverside.*[17]

The question of whether zoning laws, themselves, constitute encumbrances was confronted thereafter in *Agua Caliente Band of Mission Indians' Tribal Council v. City of Palm Springs.*[18] This was an action by the tribe seeking a declaration that the zoning laws of the City of Palm Springs did not apply to Indian lands located within the city limits. The district court held that: the Indian lands were legally included within the city upon the city's incorporation under California law in 1938;[19] application of the zoning ordinance did not constitute an unlawful interference with tribal sovereignty or encumber Indian land;[20] and Public Law 280 did not deny due process of law by producing different treatment of Indian lands in different states, or violate the constitutional provision giving Congress the power to regulate commerce with the Indians by delegating a non-delegable power.

The obvious result of this line of California cases[21] has been the loss of Indian control over Indian land. As one authority commented regarding Riverside County (where the City of Palm Springs and the Agua Caliente tribe are located), a county which has generated a disproportionate share of the California litigation: "The exhaustive integration of the reservations into Riverside County is tantamount to an annexation of one government by another."[22]

16. Civil No. 70-1134-EC (C.D. Cal. 1971) (upholding county power to impose its building code on allotted Indian land).

17. Civil No. 70-1893-EC (C.D. Cal. 1971) (upholding application to Cahuilla Reservation of county rock festival ordinance).

18. 347 F. Supp. 42 (C.D. Cal. 1972), *vacated and remanded* (9th Cir. Jan. 24, 1975) (by unpublished order).

19. *But see* Your Food Stores, Inc. v. Village of Española, 68 N.M. 327, 361 P.2d 950 (1961), *cert. denied,* 368 U.S. 915 (1961) (village could not extend boundaries to include leased Indian land or impose sales tax on sales and services on leased land).

20. *But see* Snohomish County v. Seattle Disposal Co., 70 Wash.2d 668, 425 P.2d 22 (1967), *cert. denied,* 389 U.S. 1016 (1967) (county zoning ordinance was encumbrance on Indian land prohibited by federal statute).

21. Other related cases include: Palm Springs Spa, Inc. v. Riverside County, 18 Cal. App.3d 372, 95 Cal. Rptr. 879 (1971) (taxpayer action against county to recover taxes paid under protest on leasehold in lands held in trust by federal government for Indians); Guardianship of Prieto v. City of Palm Springs, 328 F. Supp. 716 (C.D. Cal. 1971) (action by Indian alloted land geographically within city boundaries for damages for interference with reasonable expectancy of leasing stemming from city's restrictive zoning); Sessions, Inc. v. Morton, 348 F. Supp. 694 (C.D. Cal. 1972), *aff'd,* 491 F.2d 854 (9th Cir. 1974) (Secretary of the Interior in representing United States as trustee for Indian lands, could terminate lease with Indians).

For discussion of California cases in the leasing context, *see* Chambers & Price, *supra* note 7, at 1089-96.

22. Price, *supra* note 4, at 283.

It may have been with an eye toward the early California cases[23] and a desire to avoid the litigation and loss of control over Indian land which they seemed to portend that the developmental leases negotiated by two New Mexico tribes—the Pueblo de Cochiti[24] and the Pueblo of Tesuque[25]—required that the non-Indian developmental communities possess municipal governments chartered by the tribe. Nevertheless, the New Mexico leases have generated substantial litigation. The first such suit, *New Mexico v. Russell,*[26] was an action filed by the Attorney General of New Mexico against officials of the Department of the Interior and Bureau of Indian Affairs seeking a declaratory judgment that they acted without proper authority in approving an amended lease which required the chartering of a developmental municipality government by the Pueblo de Cochiti's tribal government. The suit, which maintained that the actions of the federal officials were void and that the State had exclusive authority to create a municipality within its boundaries, was dismissed with prejudice pursuant to a stipulation entered into by the developer, the "municipality," and the State of New Mexico.[27] The stipulation purported to recognize state jurisdiction over various activities of the developer and the municipality (including construction, civil and criminal disputes involving non-Indians, and taxation of the developer-lessee's interest in the leasehold), and also contained an agreement by the developer to purchase its water from non-Indian sources.[28] Neither the tribe nor the federal agencies were a party to the stipulation.[29]

Sangre de Cristo Development Corp. v. City of Santa Fe[30] was an action instituted by a developer-lessee to enjoin a city and a board of county commissioners from exercising subdivision, platting and planning authority pursuant to state statute over a developmental leasehold located in land of the Pueblo of Tesuque, an Indian tribe. The

23. The original lessee in the lease with the Pueblo of Cochiti was, significantly, a California corporation. Lease between Pueblo de Cochiti and California Cities, April 15, 1969, approved by Melvin Nelander, Acting Albuquerque Area Director, Bureau of Indian Affairs, April 12, 1969, pursuant to delegation of approval authority from Secretary of Interior dated April 7, 1969.

24. Note 8, *supra.*

25. Note 9, *supra.*

26. Civil No. 8745 (Dist. Ct. N.M., filed Dec. 4, 1970) (dismissed Jun. 4, 1971).

27. Stipulation of Great Western Cities, Inc. and Town of Cochiti Lake, New Mexico v. Russell, Civil No. 8745 (Dist. Ct. N.M., filed Dec. 4, 1970). For discussion of the legal effects of this stipulation, *see* New Mexico Comment, *supra* note 7.

28. New Mexico Comment, *supra* note 7, at 82.

29. *Id.*

30. 84 N.M. 343, 503 P.2d 323 (1972), *cert. denied,* 411 U.S. 938 (1973).

New Mexico Supreme Court held that the United States had preempted control of subdivision, planning and platting of leased Indian land, thus foreclosing any exercise of state jurisdiction. The Attorney General of New Mexico responded by filing another action in federal district court, *Norvell v. Sangre de Cristo Development Co.*,[31] in which it joined various Department of the Interior and Bureau of Indian Affairs officials with the developer lessee as defendants. The State's action contended that by approving the lease and development plans the federal officials had acted beyond their lawful authority and that the developer-lessee had failed to comply with applicable state statutes. The district court found that there was no federal preemption to the extent that state action did not touch the tribe or its members, and then held that the state statutes applied to the developer-lessee's activities. The Tenth Circuit reversed,[32] holding that the case was not a case or controversy for purposes of federal jurisdiction, and that the declaratory judgment sought by the plaintiffs was not a proper remedy.

The Tenth Circuit's case or controversy holding was based in part on the contention that the lease had not been approved in compliance with National Environmental Protection Act requirements which had been held to apply to the contested lease in a connected case, *Davis v. Morton.*[33] The Tenth Circuit found that it was speculative when, or even whether, the National Environmental Protection Act requirements would be met inasmuch as developmental activities were at a virtual standstill. The holding that declaratory judgment was an improper remedy relied on the contention that the ongoing activity—or lack of activity—in the matters being litigated, i.e., the uncertainty concerning compliance with the National Environmental Protection Act, might radically alter the fact pattern in the future.[34]

Both developers and Indian tribes appear to favor Indian-chartered community governments for a number of reasons other than mere ideological espousal of the doctrine of Indian sovereignty. These reasons include: (1) the need to satisfy the desires of non-Indian

31. 372 F. Supp. 348 (D.N.M. 1974).

32. 519 F.2d 370 (10th Cir. 1975).

33. 469 F.2d 593 (10th Cir. 1972).

34. The New Mexico cases have presumably been of concern to the Navajo tribe, which has expressed interest in developing a community on its reservation in conjunction with certain proposed coal gasification complexes which would probably employ a large number of non-Indian personnel. State concern over the Navajo interest appears to have led to a meeting between New Mexico State Planning Office personnel, representatives of the Navajo tribe, and other state and private parties in interest on Jun. 6, 1975 at which jurisdictional questions and related issues were on the agenda. Letter from Eve Taggart, Field Coordinator for the New Mexico intergovernmental Services Division to Graciela Olivarez, New Mexico State Planning Officer, Jun. 4, 1975.

lessees and sublessees to have an organ of local government responsive to their needs and sensitive to local problems or conditions, and yet do so without compromising Indian sovereignty and authority on tribal land;[35] (2) a desire to minimize what Indians perceive to be culturally corrosive contact with non-Indian culture by providing a non-Indian instrument of local government to which the non-Indians can turn with complaints or suggestions concerning their community; (3) the need for a governmental institution which will be available to provide community services the non-Indians expect or contracted for under their leases after the developer is no longer available for such purposes; (4) and the desire for a local government which does not have to respond to state developmental policies or assertions of authority, but which instead is responsive to those policies and guidelines set by the Indian tribe, and which, while adhering to tribal policies and guidelines, will provide a structured forum for tribe/developer/non-Indian community interaction.[36]

35. *See* Chambers & Price, *supra* note 7, at 1089:

> State jurisdiction seems threatening to Indian autonomy and culture because it reduces the probability that a relatively impoverished culture can retain its land base. State taxation, like zoning, is an obvious illustration; state property taxes would result in tax liens and foreclosure sales if the constraints of a cash economy were imposed on the reservation. The same effect can be seen with respect to state building codes or zoning ordinances; compliance with these provisions becomes costly for an Indian community. State jurisdiction may make development leases less attractive, thus reducing revenue to the tribe. The state, for example, might legislature to restrain Indian preference clauses or to prohibit developments that conflict with a state land use plan. (Footnote omitted.)

36. In New Mexico, at least, an additional reason for disfavoring state-chartered municipalities is the possibility of a bar to incorporation because of the leasehold municipality's inability to comply with all the statutory procedures surrounding state municipal corporations. The difficulty stems not from incorporation procedures, but from statutory procedures for disincorporation. At the expiration of a tribal residential development lease there would be a de facto disincorporation (not provided for by statute), and improvements on the leasehold would follow the land in reverting to the tribe. Under present federal case law, such Indian property is exempt from state taxation. Thus, after lease expiration there will be little, if any, taxable property remaining on the former leasehold. Yet N.M. Stat. Ann. § 14-4-9 (1953) specifies:

> If insufficient money is received from the operation of the property of the disincoroporated municipality to pay [municipal] obligations . . . the board of county commissioners [of the county where the municipality was located] shall levy a tax on all taxable property within the boundary of the municipality at the time of its disincorporation. This tax shall be sufficient to pay the obligations incurred in the operation of the property of the municipality and to comply with the terms and conditions of the evidences of the bonded indebtedness. . . .

The probable result under the statute would be the inability of creditors of the municipality to collect. This potential difficulty could complicate the municipality's problems with borrowing transactions. Other states' statutory schemes apparently present similar incorporation problems. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians,* 22 U.C.L.A.L. Rev. 535, 581 (1975).

Considering the weight which developers and Indian tribes have attached to these reasons—as evidenced by the number of cases which have been generated—it is important that the validity of such municipalities be placed on a sound legal footing. It is also important that a means of analyzing the murky jurisdictional issues be provided. This paper will attempt to do this. In the course of this attempt, an effort will be made to bring a fresh perspective to the doctrine of Indian sovereignty. Nevertheless, that doctrine remains firmly rooted in the jurisprudential work of Chief Justice Marshall and Felix S. Cohen. Felix Cohen's work still remains a constant in the shifting sands of Indian law and federal Indian policy, marking the distance come since Chief Justice Marshall first trod this difficult ground. Yet the social and political situation in this country has undergone dramatic change since Felix Cohen's study of Indian law first came to print in 1941.[37] New legal tools with the capacity for more refined and discerning analysis are now needed to supplement or supplant the old. By attempting to introduce a new analytical tool into Indian law, this paper strives to enable our jurisprudential system to keep pace with these changes.

THE DOCTRINE OF INDIAN SOVEREIGNTY EXAMINED

The Existence and Nature of Indian Sovereignty

There is no federal statute which expressly grants Indian tribes the power to create a municipality, although there is statutory provision for tribes to become corporate business entities chartered by the federal government in certain circumstances.[38] The search for such a power calls for a close examination of another major source of tribal powers—Indian sovereignty.

A. Foundations of the Doctrine of Indian Sovereignty

Discussion of Indian sovereignty must continue to return to the judicial wellspring from which it began to flow, *Worcester v. Geor-*

37. F. Cohen, Handbook of Federal Indian Law (1971) [hereinafter cited as Cohen]. It is the reprint edition of Cohen's work which is cited in this paper.

This has been the pattern of change in our system of laws. If any man of the preceding jurisprudential generation could have seen and understood this, it would have been Felix Cohen. *See, e.g.*, F. Cohen, Ethical Systems and Legal Ideals 35 (1933):

> [E]lementary logic teaches us that every legal decision and every finite set of decisions can be subsumed under an infinite number of different general rules, just as an infinite number of different curves may be traced through any point or finite collection of points. Every decision is a choice between different rules which logically fit all past decisions but logically dictate conflicting results in the instant case.

38. 25 U.S.C. § 477 (1970) (tribes organized under constitutions and bylaws adopted under 25 U.S.C. § 476 may become federally-chartered business corporations).

gia.[39] There, analyzing the relationship between Indian tribes and the federal government, and the interference of Georgia statutes with that relationship, the Supreme Court stated:

> The Indian nations have 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, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed. . . .[40] (Emphasis supplied.)

Continuing its analysis, the Supreme Court then said:

> [T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to a self-government—by associating with a stronger and taking its protection. A weak state, in order to provide for its safety, may place itself under the protections of one more powerful, without stripping itself of the right of government, and ceasing to be a state. . . . "Tributary and Feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority, are left in the administration of the state."[41]

The Supreme Court's language in *Worcester* clearly indicates that whatever the sovereign powers of an Indian tribe may be, they derive from the inherent, original powers of the tribe as a distinct, independent, self-governing entity, not from some federal constitutional, statutory, or other delegation of power.[42] As to which of those inherent powers the tribes may still exercise, post-*Worcester* decisions[43] sustain the view expressed by Felix Cohen that:

39. 31 U.S. (6 Pet.) 515 (1832). In *Worcester,* the United States Supreme Court reversed the conviction of a white missionary living (with the approval of the Cherokee nation and permission of the President of the United States) on Cherokee land for doing so without a license from the State of Georgia and without having taken an oath to support and defend Georgia's laws and constitution.

40. *Id.* at 559.

41. *Id.* at 560-61.

42. Cohen, *supra* note 37, at 122 states:

> Perhaps the most basic principle of all Indian law, supported by a host of decisions . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*

43. *See, e.g.,* Ex parte Crow Dog, 109 U.S. 556 (1883) (no federal court jurisdiction to try Indian for murder of another Indian); Jones v. Meehan, 175 U.S. 1 (1889) (tribe had authority to adjudicate Indian inheritance); Morris v. Hitchcock, 194 U.S. 385 (1904) (tribe had authority to tax non-Indian lessees of tribal lands); United States v. Quiver, 241 U.S. 602 (1916) (tribe had authority to regulate domestic relations of its members); Williams v.

> 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 power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, *i.e.*, its powers of self-government. . . .[44] (Footnote omitted.)

B. Judicial-Congressional Shaping of the Doctrine of Indian Sovereignty

The present status of Indian sovereign powers is not solely a product of federal adjudication. It is largely the product of the interplay between federal judicial and legislative forces.[45] State legislatures have played a lesser role as is discussed *infra*.[46]

Through the first half of the nineteenth century, Congress was more concerned about Indian removal to the West[47] than with Indian political status: as long as the option of westward removal remained open there was little incentive to grapple with complex questions revolving around relationships with Indians living in close proximity to non-Indians. In 1853, however, the Gadsden Purchase[48] fixed the final boundaries of the continental United States. Contemporaneously, there was a change in the emphasis of congressional Indian policy from removal to containment.[49] Containment

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Lee, 358 U.S. 217 (1959) (no state court jurisdiction to hear suit by non-Indian for unpaid balance of Indian customer); Organized Village of Kake v. Egan, 369 U.S. 60 (1962) (state could regulate off-reservation, but not on-reservation fishing by Indians); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (state may tax off-reservation tribal enterprise if tribal self-government not involved).

44. Cohen, *supra* note 37, at 123. And see text accompanying note 126-131 *infra*.

45. *See* Comment, *Indian Law: The Application of the One-man, One-vote Standard of Baker v. Carr to Tribal Elections*, 58 Minn. L. Rev. 668 at 670 (1970) [hereinafter cited as Minnesota Comment] *and* Comment, *The Indian Battle for Self-Determination*, 58 Calif. L. Rev. 445 at 463-71 (1970) [hereinafter cited as California Comment].

46. See text accompanying notes 137-170 *infra*.

47. *See, e.g.*, Treaty of July 8, 1817 with the Cherokees, 4 Stat. 156, in which part of the Cherokee nation, pressured by white encroachment on their traditional way of life, petitioned the federal government for vacant land across the Mississippi River; Treaty of Oct. 3, 1818 with the Delaware nation, 4 Stat. 188, marking the first treaty requiring an Indian tribe to remove west of the Mississippi River at the behest of the federal government; *and* Act of May 28, 1830, ch. 148, § 1, 4 Stat. 411, which specified at 411-12:

> *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west of the river Mississippi, not included in any state or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nation of Indians as may choose to exchange the lands where they now reside, and remove there; . . .

48. Gadsden Treaty with Mexico, Dec. 30, 1853, 10 Stat. 1031.

49. Containment, a policy which sought to tie Indian groups to restricted geographic

reflected an acceptance of a permanent Indian presence within the borders of American society. It also spurred congressional concern with Indian political status, leading to legislation which abolished the presidential power to treat with the Indians, declaring:

> No Indian Nation or Tribe within the territory of the United States, shall be acknowledged or recognized as an independent Nation, Tribe or power with whom the United States may contract by treaty. . . .[50]

The federal courts responded by upholding the sovereignty doctrine in *Ex parte Crow Dog*.[51] Required to determine whether the killing of one Indian by another in Indian country was an offense under a federal statute providing the death penalty for murders committed in any place under exclusive federal jurisdiction, the Supreme Court held there was no exclusive federal jurisdiction in Indian country within the meaning of the statute, notwithstanding the legislation restricting recognition of Indian sovereignty and abolishing the presidential Indian treaty-making power.[52] The Court was not saying, however, that the tribes were free of federal control. Its opinion also recognized as valid and not infringing Indian sovereignty a con-

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locations designated as reservations, was expressed in various congressional enactments. *See, e.g.*, Act of July 20, 1867, ch. 32, § 2, 15 Stat. 17:

> *And be it further enacted*, That said commissioners [of the commission to treat with hostile Indians] are required to examine and select a district or districts of country having sufficient area to receive all the Indian tribes now occupying territory east of the Rocky Mountains, not now peacefully residing on permanent reservations under treaty stipulations, . . .

and Act of Mar. 3, 1875, ch. 132, § 4, 18 Stat. 420:

> That hereafter, for the purpose of properly distributing the supplies appropriated for the Indian service, it is hereby made the duty of each agent in charge of Indians and having supplies to distribute . . . to give out supplies to the heads of families, and not to the heads of tribes or bands, and not to give out supplies for a greater length of time than one week in advance.

The purpose of the latter enactment was to tie nomadic tribes more closely to Indian agent stations located on the reservations by preventing them from going more than a half week's travel time away from the station if they wanted their next ration of supplies.

50. 25 U.S.C. § 7 (1970) (originally enacted as Act of Mar. 3, 1871, ch. 120, 16 Stat. 544). Every Indian treaty is a substantive affirmation of Indian sovereignty as it recognizes a sovereign power, the power to treat. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832):

> The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation," are words . . . having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense.

51. 109 U.S. 556 (1883).

52. *Id.* at 565-568. See text accompanying note 50 *supra*.

gressional-made 1877 agreement with the Sioux tribe[53] in which Congress pledged to secure to them an orderly government and subject them to the laws of the United States. The Court then went on to hold that the federal district court lacked jurisdiction to bring the indictment against the prisoner, that the conviction and sentence were void, and that the imprisonment was illegal.[54]

The Supreme Court's position in *Crow Dog* was clarified the following year in *Elk v. Wilkins.*[55] In *Wilkins* the Court held that the first sentence of the Fourteenth Amendment[56] did not apply so as to make an Indian born on a Nebraska reservation a Nebraska citizen. The Court relied on sovereignty doctrine in reaching its holding:

> The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign States; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through act of Congress in the ordinary forms of legislation.[57]

With respect to the legislation abolishing the President's power to make treaties with Indians, the Court found that this action was merely a consequence of separation of powers:

> The provision of the act of Congress of March 3, 1871, ch. 120, that "hereafter no Indian nation or tribe ... shall be acknowledged or recognized as an independent ... power with whom the United States may contract by treaty," is coupled with a provision that the obligation of any treaty already lawfully made is not thereby invalidated or impaired; and its utmost possible effect is to require the Indian tribes to be dealt with for the future through the legislative and not through the treaty-making power.[58]

Reading *Wilkins* and *Crow Dog* together, the doctrinal position which emerges is that, while Indian tribes might be subject to some constitutional and legislative provisions, such provisions must be

53. Act of Feb. 28, 1877, ch. 72, 19 Stat. 254. The agreement was enacted by statute rather than ratified as a treaty because of the proviso in the Act of Mar. 3, 1871, ch. 120, 16 Stat. 544 which purported to abolish the presidential power to treat with the Indians. The 4th and part of the 6th article of the agreement were not ratified since they were not agreed to by the Indians. Ex parte Crow Dog, 109 U.S. 556, 565-66 (1883).

54. *Id.* at 572.

55. 112 U.S. 94 (1884).

56. That sentence reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const. amend. XIV, § 1.

57. 112 U.S. 94 at 99.

58. *Id.* at 107.

carefully examined for applicability, not applied automatically merely because they apply to the states, state citizens or the United States. As the Supreme Court said in *Crow Dog* in discussing the congressional agreement with the Sioux,

> it was no part of the design [of this agreement] to treat the individuals as separately responsible and amenable, in all their personal and domestic relations with each other, to the general laws of the United States, outside of those which were enacted expressly with reference to them as members of an Indian tribe.[59]

The decisions in *Wilkins* and *Crow Dog* were rendered when public and congressional sentiments were turning from concern with Indian containment to assimilation. Thus, congressional response to these decisions was not long in coming. In 1885 Congress passed the Major Crimes Act providing that

> all Indians, committing against . . . another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; . . . and all such Indians committing any of the above crimes . . . within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner . . . as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.[60]

The validity of this act was confirmed in the same year by the Supreme Court in *United States v. Kagama,*[61] a case involving the indictment of two California Indians for the murder of another Indian on the same reservation. After *Kagama* was decided, sentiment for Indian assimilation continued to rise and finally culminated in the General Allotment Act of 1887[62] which prescribed the allot-

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59. 109 U.S. 556 at 570.

60. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385, *as amended* 18 U.S.C. § 1153 (1970). The present version of the act includes the crimes of incest, assault with a dangerous weapon, and robbery. 18 U.S.C. § 1153 (1970).

61. 118 U.S. 375 (1885). The case arose on a demurrer to the indictment. It reached the Supreme Court by certificate of division of opinion between the judges of the circuit court of the United States for the district of California.

62. Act of Feb. 8, 1887, ch. 119, § 1, 24 Stat. 388 (codified in scattered sections of 25 U.S.C.).

ment of Indian lands in severalty as a desirable means of "civilizing" the Indians.[63]

After passage of the General Allotment Act, the Supreme Court adhered to its policy of defending Indian sovereignty[64] while popular pressure for assimilation continued and congressional legislation slowly nibbled at what the Court was attempting to preserve.[65] By 1934, however, it had become starkly apparent that the congressional assimilative policies were drawing the Indian tribes ever more deeply into a socioeconomic quagmire.[66] The result of this realization was enactment of the Indian Reorganization Act of 1934.[67] That act prohibited any further allotment of Indian lands, returned to tribal ownership lands withdrawn from homestead entry but not claimed, allowed tribes to form or formalize tribal governments, and permitted them to incorporate for business purposes.[68] For a time, it seemed, both Congress and the federal courts were espousing policies which were at least nominally designed to protect Indian cultural, economic and governmental integrity.

By 1953, however, the pendulum of congressional policy had begun to swing back toward assimilation and termination of reservation status again came into favor. These ideas first received formal congressional endorsement in House Concurrent Resolution 108,[69]

63. For a detailed history of the events leading up to enactment of the General Allotment Act, its administration after passage, and the results it produced up to 1900, *see* Otis, *The Dawes Act and the Allotment of Indian Lands* (Prucha ed. 1973) [hereinafter cited as Otis].

64. For example, in Talton v. Mayes, 163 U.S. 376, 382 (1896), the Supreme Court concluded the fifth amendment of the Constitution did not apply to invalidate Cherokee legislation prescribing criminal grand juries of five persons:

> The case in this regard . . . depends upon whether the powers of local government exercised by the Cherokee nation are Federal powers created by and springing from the Constitution of the United States, and hence controlled by the Fifth Amendment . . . , or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress. The repeated adjudications of this court have long answered the former question in the negative.

65. *See, e.g.,* Act of Feb. 28, 1891, ch. 383, § 3, 26 Stat. 795 (partly codified in 25 U.S.C. § 397 (1970)), introducing a system of leasing Indian allotted lands which led to abuses such as exploitation of Indian lessors by Indian and non-Indian lessees. These abuses are discussed in Otis, *supra* note 63 at 98-123.

66. Total Indian landholdings were reduced from 136,397,985 acres in 1887 to 48,000,000 acres by 1934. *Hearings on S. 2755 Before the Senate Comm. on Indian Affairs,* 73d Cong., 2d Sess. (1934), at 16.

67. Act of Jun. 18, 1934, ch. 576, § 17, 48 Stat. 988 (codified in 25 U.S.C. § § 461-79 (1970)).

68. *Id.* The act, while providing sorely needed changes, may nevertheless be criticized for certain inadequacies. *See* text accompanying notes 111-127 *infra* for more detailed discussion.

69. H. Con. Res. 108, Aug. 1, 1953, 67 Stat. B132, stating in part:

> Whereas it is the policy of Congress, as rapidly as possible, to make the

and were subsequently embodied in Public Law 280,[70] also passed in 1953, which allowed five states to assume criminal and civil jurisdiction over Indian tribes within their borders, and permitted other states to acquire similar jurisdiction upon compliance with certain procedures.[71] The following year, Congress enacted legislation which withdrew all federal services and Bureau of Indian Affairs support from certain reservations in order to induce those Indians to enter the mainstream of American society.[72] And in 1955, Indian lands were opened to long-term leasing for a wide number of purposes in accordance with permissive new legislation,[73] thus exposing reservations more broadly to non-Indian influences.

In this changed policy climate the federal courts initially signaled their continuing affirmation of Indian sovereignty.[74] However, the 1959 Supreme Court opinion in *Williams v. Lee*[75] may have provided a foreboding glimpse of the changes an altered political climate might work in Indian sovereignty doctrine. There, the Court held that a state court did not have jurisdiction over a dispute between a

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> Indians . . . subject to the same laws and . . . privileges and responsibilities as . . . other citizens of the United States . . . and
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> Whereas the Indians . . . should assume their full responsibilities as American citizens: Now, therefore, be it
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> *Resolved by the House of Representatives (the Senate concurring),* That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes . . . located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes . . . , should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians: [the Flathead, Klamath, Menominee and Potowatamie tribes, and the Chippewa tribe on Turtle Mountain Reservation].

70. 18 U.S.C. §§ 1151, 1162, and 28 U.S.C. §§ 1331, 1360 (1970) *as amended by* Act of Aug. 15, 1953, ch. 505, 67 Stat. 588.

71. *Id.* Later amendment of Public Law 280 resulted in requiring tribal consent before states could acquire the jurisdiction permitted by the act. 25 U.S.C. §§ 1321-1322 (1970).

72. *See* Act of June 17, 1954, ch. 303, 68 Stat. 250, 25 U.S.C. §§ 891-901 (1970) (Menominee termination); Act of Aug. 13, 1954, ch. 732, 68 Stat. 718, 25 U.S.C. § 564 (1970) (Klamath termination); Act of Aug. 23, 1954, ch. 831, 68 Stat. 768, 25 U.S.C. § 721 (1970) (termination of Texas tribes); Act of Sept. 1, 1954, ch. 1207, 68 Stat. 1099, 25 U.S.C. §§ 741-60 (1970) (Paiute termination).

73. Act of Aug. 9, 1955, ch. 615, 69 Stat. 539 (codified at 25 U.S.C. § 415(a) (1970)).

74. *See, e.g.,* Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 94 (8th Cir. 1956) where, in holding the Oglala Sioux Tribe had the power to impose a grazing tax on non-Indian lessees of reservation land and to possess tribal courts with jurisdiction over the crime of adultery by tribal members, the Eighth Circuit stated:

> As late as 1940 the Supreme Court, in the case of United States Fidelity & Guarantee Co., 309 U.S. 506, 60 S. Ct. 653, 84 L. Ed. 894, recognized the *quasi* sovereignty of Indian nations in holding that they possessed the sovereign exemption from suits and cross-complaints excepting where authorized. . . . We accordingly are of the opinion that the plaintiffs cannot prevail. . . . We hold that Indian tribes, such as the defendant Oglala Sioux Tribe . . . still possess their inherent sovereignty. . . . (Quotation omitted.)

75. 358 U.S. 217 (1959).

non-Indian trading post owner-creditor, and debtor Indians. But the Court reformulated the rule by which states could extend their authority onto the reservation, allowing the extension provided it did not interfere with the right of Indians to make and abide by their own laws on the reservation.[76] Two subsequent cases decided in 1962 and 1965 respectively, *Organized Village of Kake v. Egan*[77] and *Warren Trading Post v. Tax Commission,*[78] generally affirmed the doctrinal stance of *Williams.*[79]

In 1968 Congress contributed significantly to the erosion of Indian sovereignty by legislating the Indian Civil Rights Act of 1968.[80] That act has the effect of attempting to impose certain constitutional contraints on tribal government.[81] Two cases litigated in the Supreme Court since passage of the Indian Civil Rights Act, *McClanahan v. Arizona State Tax Commission*[82] and *Mescalero Indian Tribe v. Jones,*[83] added to concerns over recent shifts in federal attitudes toward Indian sovereignty. *McClanahan,* which concluded that state personal income taxes cannot be imposed on reservation Indian income derived wholly from reservation sources, raised particular concern that it was tolling the impending death of Indian sovereignty. In *McClanahan* the Supreme Court relied on the 1868 federal treaty with the Navajos, the Arizona Enabling Act, and other federal statutes in disposing of the tax liability issue,[84] indicating that the sovereignty doctrine, while still relevant, provided a "backdrop against which the applicable treaties and federal statutes must be read."[85]

A unified reading of four post-*McClanahan* Supreme Court cases, *United States v. Mazurie,*[86] *Fisher v. District Court of Sixteenth Judicial District,*[87] *Moe v. Confederated Salish and Kootenai Tribes,*[88] and *Bryan v. Itasca County,*[89] has helped place *McClana-*

76. *Id.* at 220.
77. 369 U.S. 60 (1962).
78. 380 U.S. 685 (1965).
79. *See* text accompanying notes 142-154 *infra* for a more detailed analysis of these cases.
80. 25 U.S.C. § § 1301-41 (1970).
81. *See* text accompanying notes 111-126 *infra* for further discussion of this act. *See also* Reiblich, *Indian Rights Under the Civil Rights Act of 1968,* 10 Ariz. L. Rev. 617 (1968) for an early expression of reservations over the act's potential effects.
82. 411 U.S. 164 (1973).
83. 411 U.S. 145 (1973).
84. 411 U.S. 164, 173-81. *See* discussion in text accompanying notes 155-163 *infra.*
85. 411 U.S. 164 at 172.
86. 419 U.S. 544 (1975).
87. 424 U.S. 382 (1976).
88. 425 U.S. 463 (1976).
89. 426 U.S. 373 (1976).

han in perspective, assuaging concerns for the vigor of Indian sovereignty doctrine. Upholding tribal power to enact legislation forbidding sales of liquor on reservation land without a tribal liquor license, the *Mazurie* court indicated Indian sovereignty was still a trenchant doctrinal force.[90] *Fisher,* an adoption dispute between reservation Indians where one party petitioned for adoption in a state district court and the other opposed the state proceeding on the grounds of exclusive tribal court jurisdiction, resulted in a holding that the tribal court possessed exclusive jurisdiction since a contrary result would infringe tribal sovereignty.[91] *Moe* was a tribal attack on imposition of a state vendor's license fee and precollected sales tax on tribal members selling cigarettes on their reservation. Referring to *McClanahan's* "backdrop" of sovereignty statement, the *Moe* court held the General Allotment Act did not permit imposition of the license fee or the sales tax as applied to sales to Indians, but the state could require Indian vendors to add sales tax to any sales made to non-Indians.[92] In *Bryan* a tribal member residing on trust land sought a declaratory injunction to prevent the county and state from levying a personal property tax on the Indian's mobile home. Footnoting a reference to *McClanahan's* "backdrop" of Indian sovereignty as additional support for its decision,[93] the *Bryan* court declared the tax invalid, there being no congressional grant of power to the states allowing taxation of reservation Indians.[94]

Read against the *Williams* and *McClanahan* decisions, these four post-*McClanahan* cases indicate that where some direct assertion of tribal sovereignty is involved, sovereignty doctrine is a primary consideration. However, where the state is seeking to exert its own authority, the first consideration should be whether the state has even been granted the power to act. In essence, the Supreme Court appears to be employing a review doctrine similar to those doctrines it often resorts to in deciding an issue without having to pass upon questions of constitutionality,[95] i.e., if it can dispose of the issue of the state's authority to act without having to decide any questions of tribal sovereign power, it will do so. Where the tribe is directly asserting a sovereign power, however, issues of sovereignty must be faced.

90. 419 U.S. at 557.
91. 424 U.S. 382 (1976).
92. 425 U.S. at 475, 483.
93. 426 U.S. at 376.
94. *Id.* at 393.
95. *See, e.g.,* Ashwander v. TVA, 297 U.S. 288, 346-48 (1936), where Justice Brandeis, in a concurring opinion, sets out seven such doctrines.

C. Culturocentric and Politicocentric Bias in Judicial and Congressional Transactions with Indian Sovereignty

Sovereignty arises out of different circumstances among different peoples and the manner in which it is manifested may consequently differ.[96] Such differences are often not perceived, or self-deceptively not admitted, thus posing an obstacle to understanding the problems which are imbedded in social and political matrices far different from one's own. The result is to impose one's own views of what is felt *ought to be* on what *is*. This ethnocentrism has certainly compounded the federal and state governments' problems over Indian relations, and even permeates the views of the federal judiciary in generally unrecognized fashion. For example, under the federal judicial view of sovereignty the people are the ultimate sovereign who have delegated their sovereign powers to the state and federal governments with the Constitution indicating how those powers are to be distributed and exercised.[97] This view is part of the bedrock of federal constitutional interpretation. The courts' analyses have retained this traditional perspective even though they have been deferential toward tribal customs and law whenever passing on some action involving an Indian tribal government.[98] This can lead to an

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96. *See generally, e.g.,* B. De Jouvenel, Sovereignty (J. Huntington trans. 1957); I. Delupis, International Law and the Independent State 3-18 (1974); H. Heller, La Soberania (M. de la Cueva trans. 1965). The very meaning of "sovereignty" has varied with its social and historical context. *See, e.g.,* D. Ninčič, The Problem of Sovereignty in the Charter and in the Practice of the United Nations 2, n. 2 (1970) (discussing sovereignty in classical Greece and Rome). The roots of contemporary notions of sovereignty date back to the fifteenth and sixteenth centuries. *Id.* at 3, n. 4. Despite the emergence of broad modern theories of sovereignty, the actual manner in which sovereignty arises and is manifested still varies. *Cf.* Kohn, *The Sovereignty of Liechtenstein,* 61 Am. J. Int. L. 547, 549 (1967), with C. Baroch, The Soviet Doctrine of Sovereignty (1970).

97. *See, e.g.,* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404-405 (1819):

> The government of the Union, then . . . is, emphatically and truly, a government of the people. . . . [I]t emanates from them. Its powers are granted by them. . . . The principle, that it can exercise only the powers granted to it, would seem . . . apparent. . . .

and Scott v. Sandford, 60 U.S. (19 How.) 393, 401 (1857):

> [A]lthough [the government of the United States] is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty. . . . Certain specified powers, enumerated in the Constitution, have been conferred on it; and neither the legislative, executive, nor judicial departments . . . can lawfully exercise any authority beyond the limits marked out by the Constitution.

See also text accompanying notes 167-169 *infra.*

98. *See, e.g.,* the Supreme Court's language in Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) (probing customary modes and places of fishing by Indians in adjudicating Indian fishing rights).

improper outcome[99] or to incorrect reasoning.[100]

99. *See, e.g.*, Minnesota Comment, *supra* note 45 (questioning federal court's actions in applying one-man, one vote principal to tribal election).

100. As an example, consider the language and analysis employed in adjudicating various parties' rights to participate in a tribal trust fund distribution in the Cherokee Intermarriage Cases, 203 U.S. 76 (1906). Examining applicable Cherokee law, the Supreme Court wrote at 203 U.S. 84-85:

> *Assuming that the [Cherokee] National Council had authority under the Cherokee constitution of 1839 and the amendments of 1866* to confer on white intermarried citizens the privilege of purchasing a right in the soil and funds of the Nation, that privilege was withdrawn in two years. . . . As to the [Negro] Freedmen, their participation in property distribution was secured by the terms of the treaty of 1866, . . . *and of the constitutional amendments thereupon adopted.* The Court of Claims referred to them thus . . . : "[*The constitutional amendment] is not necessarily prospective, and does not impose limitations upon the legislative power* with regard to the naturalization . . . of aliens as citizens [by the Cherokees]. Under the policy of the Cherokees citizenship and communal ownership were distinct things. The citizen who annually received an annuity derived from the communal fund . . . and the citizen who never received a dollar from the fund or never so much as thought of receiving it, *formed a concrete object lesson in constitutional law* [with respect to distinguishing citizenship from communal property ownership] not easily effaced from the common mind." (Emphasis supplied.)

After implicitly finding the 1866 amendments were properly adopted, the Court concluded that except for two persons who purchased rights to share in the distribution, no non-Indians intermarried into the tribe were entitled to participate. It is curious that the Court did not conclude the 1866 amendments were invalid because their adoption violated Cherokee constitutional procedure: that constitution required amendments to be promulgated among tribal members six months before being voted on; if the amendments were approved by the tribal membership, two-thirds of each branch of the tribe's bicameral legislature also had to approve, whereupon the amendments became law. Cherokee National Council, The Act of Union Between the Eastern and Western Cherokee, the Constitution and Amendments, and the Laws of the Cherokee Nation, Passed During the Session of 1868 and Subsequent Sessions 4 (1870). However, the 1866 amendments were approved in advance by the tribal legislature and subsequently ratified by a convention of the Cherokee people—apparently to bypass the six month constitutional waiting period needed to make them effective. *See id.* at 17-18. Manifestly unconstitutionally adopted under standards of federal constitutional interpretation, *e.g., cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.") *and* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328 (1816) ("The language of the [third article of the Constitution] is manifestly designed to be mandatory upon the legislature. . . . [C]ongress could not, without a violation of its duty, have refused to carry it into operation."), it is fairly certain that the amendments' validity was raised before the Supreme Court. Brief for Appellants at 13, Cherokee Intermarriage Cases, 203 U.S. 76 (1906). The Court could have easily concluded the amendments were validly adopted by viewing the Cherokee constitution of 1839 not as a binding document with respect to distribution and exercise of tribal sovereign powers—the federal constitutional approach—but, rather, as a more fluid document which was generally to be adhered to yet which could be deviated from at the behest of the tribal legislature provided the tribal membership ultimately approved. Prevented from adopting such an approach by its politicocentric and culturocentric view of sovereignty, the Court could only apply traditional constitutional analysis and language.

Exercise of a federal constitutional perspective in relation to Indian affairs has not been confined to the judiciary. The early lack of a constitution by most Indian tribes[101] for whom governing authority was often vested in institutions more or less unfamiliar to non-Indians—institutions such as a tribal council or non-hereditary leaders chosen by band or tribal consensus for life—apparently triggered a congressional desire to make familiar the unfamiliar. The inevitable result was the Indian Reorganization Act of 1934 which not only provided needed reforms with respect to Indian landholdings, but also encouraged Indian tribes to remold their traditional institutions of government into constitutional ones.[102]

The Indian Reorganization Act provided that acceptance of its provisions was to be optional.[103] For those tribes which accepted the provisions, the act specified:

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe.[104]

101. Notable exceptions were the constitutions of the Iroquois Confederacy and the members of the Five Civilized Tribes. The constitution of the Iroquois Confederacy predates the federal Constitution by an approximate two hundred years, but differs from the federal Constitution in that it remained oral until the nineteenth century, when it was transcribed. W. Moquin, *Constitution of the Iroquois Federation*, Great Documents in American Indian History 20-26 (1973); A. C. Parker, *The Constitution of the Five Nations*, 184 New York State Museum Bulletin (1916). The constitutions of the members of the Five Civilized Tribes post-date the federal Constitution by short periods of time and have occasionally figured in judicial litigation. *See, e.g.*, Journeycake v. Cherokee Nation and United States, 28 Ct. Cl. 281 (1893); *Ex parte* Tiger, 2 Ind. T. 41, 47 S.W. 304 (1898); McCurtain v. Grady, 1 Ind. T. 107, 38 S.W. 65 (1896).

102. *See* note 67 *supra*. At least one author has argued that the act signaled the extirpation of Indian sovereignty. W. Schaab, *Indian Industrial Development and the Courts*, 8 Nat. Res. J. 303, 306-30 (1968) delivered a resounding attack on Indian sovereignty, arguing for unrestricted application of the Constitution to Indians and adoption of a new Indian policy based on congressional attitudes favorable to assimilation. No consideration was given the great fluctuations in congressional policies, the countervailing stabilizing influence of the federal judicial approach which has been firmly rooted in sovereignty doctrine, or the drastic consequences sure to follow the wholesale unleashing of contemporary society upon an Indian population committed to different values.

103. 25 U.S.C. § 478 (1970) specifies:

> Sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

104. 25 U.S.C. § 476 (1970).

Not all tribes accepted the terms of the Indian Reorganization Act.[105] Nor did all those tribes which accepted the act adopt constitutions, a forbearance which was plainly sanctioned by the language of the act as set out above.[106] For those tribes which do not have a constitution adopted pursuant to the terms of the Indian Reorganization Act, the traditional modes of exercising their internal sovereignty are not obfuscated by tribal constitutional standards and remain limited only by applicable federal constitutional provisions, treaties and acts.

Those tribes which adopted a constitution pursuant to the Indian Reorganization Act must not only look to applicable federal constitutional provisions, treaties and acts, but they must also respond to the strictures of their tribal constitutions. If some power they seek to exercise has been addressed by a tribal constitutional provision, then it must be exercised in accordance with the dictates of appropriate tribal constitutional interpretation.[107] The federal courts will often

105. During the statutory period for accepting or rejecting the act, 181 tribes representing a total of 129,750 Indians voted to accept its provision, while 77 tribes representing a total of 86,365 Indians (including the approximately 45,000 Navajo Indians) voted to reject the provisions. U.S. Indian Service, Department of the Interior, Tribal Relations Pamphlet No. 1, Ten Years of Tribal Government Under I.R.A. 3 (1947).

106. By 1947, thirteen years after passage of the Indian Reorganization Act, only 93 tribes had adopted constitutions. *Id.*

107. Pursuing this argument, if it appears that a tribal constitution's due process of law provision is applicable to a particular tribal governmental action, "due process of law" must be determined in the context of what "due processes" were customarily observed within the tribal socio-governmental framework. As Justice Cardozo commented in Snyder v. Massachusetts, 291 U.S. 97, 116-17 (1934):

> Due process of law requires that proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. . . . What is fair in one set of circumstances may be an act of tyranny in others. (Citations omitted.)

See also. Spencer v. State of Texas, 385 U.S. 554, 564 (1967) (quoting *Snyder*). Thus, if it has been customary within a particular tribe for the tribal council to unilaterally determine which tribal members can attend a particular ceremonial function of social and religious significance, exclusion of a particular individual from the function, even if effected unilaterally without a hearing, and even though affecting certain tribal property rights or status, would not be a violation of due process. *Cf.*, Daly v. United States, 483 F.2d 700 (8th Cir. 1973) (equal protection clause of Indian Civil Rights Act not violated by higher blood requirement for holding tribal office than for tribal membership).

One might argue that where a tribal constitution uses the phrase "due process," the traditional federal interpretation of that phrase has been incorporated by reference. This argument merits weight when applied to state and non-Indian local governments as these entities and their participants share certain fundamental beliefs concerning the process and structure of democratic majoritarian government. *See* text accompanying note 236 *infra.* But this argument is generally inappropriate for tribal governments: tribal societies span the spectrum in terms of cultural assimilation; among even the most assimilated there is often a peculiar sense of difference; these differences are deeply rooted in political and social institutions originating in thousands of years of pre-Constitution tradition and environment. Thus, when a tribal constitution employs the term "due process," there is little certainty that the complex set of explicit and implicit beliefs accompanying that phrase in non-Indian

assert jurisdiction to review such exercises of tribal power or tribal constitutional interpretations where the tribe is arguably subject to some federal statutory authority.[108] If examination of tribal constitutional provisions during the course of federal judicial review discloses that those provisions resemble the provisions of the federal Constitution in some way, it is likely that the federal courts will find it difficult to resist the application of familiar federal constitutional standards, whether appropriate or not.[109] Yet if it is remembered that the tribal constitutions adopted in accordance with the Indian Reorganization Act embody not only the format of formal, written governmental instruments (so strongly approved of by the prevailing culturocentric and politicocentric societal and governmental attitudes in this country), but also unique Indian attitudes and approaches to substantive and procedural law which are the distillate of cultural and social experiences which predate the United States by hundreds, or even thousands of years,[110] it follows that federal courts must endeavor to interpret the actions of tribal governments in the unique context of tribal customs and traditions, rather than blindly and analogously apply federal constitutional standards to tribal constitutions. Thus if a tribe purports to charter a municipality for non-Indians on Indian land, any potentially applicable tribal constitutional provision must be read in the light of relevant Indian experience.

Enactment of the Indian Civil Rights Act of 1968[111] has presented American Indian cultures with their greatest single culturo-

minds and jurisprudence is intended by that term. Incorporation by reference *may* be possible, but verbal identity is an insufficient basis for invoking this interpretive tool.

108. *See, e.g.*, Johnson v. Lower Elwha Tribal Community, 484 F.2d 200 (9th Cir. 1973) (district court had jurisdiction under Indian Civil Rights Act and 28 U.S.C. § 1343(4)). Absention is not presently an active doctrine in Indian litigation. *See, e.g.*, Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-17 (1976). However, one recent case invoked a rule of exhaustion of tribal remedies. *See* O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973) (Indian Civil Rights Act did not affect generally recognized policy of preserving authority of tribal courts). *But see* McCurdy v. Steele, 353 F. Supp. 629 (D. Utah 1973) (exception to the exhaustion rule).

109. *See, e.g.*, McCurdy v. Steele, 353 F. Supp. 629 (D. Utah 1973) (equal protection and due process clauses of Indian Civil Rights Act prohibit tribal governments from ignoring their own election rules); White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973) (Indian Civil Rights Act embraces one-man, one-vote principle which applies where tribe adopted voting procedures closely paralleling those of Anglo-American law); Daly v. United States, 483 F.2d 700 (8th Cir. 1973) (equal protection clause of Indian Civil Rights Act prohibits large variation in population among tribal councilman districts). *See also* Minnesota Comment, *supra* note 45 (questioning federal court's action in *White Eagle* as having created new procedures, not enforcing existing ones).

110. For example, the centuries-old rules governing tribal council procedure and organization at Laguna Pueblo were reduced to written constitutional form in 1908 without altering the structure of tribal life. F. Cohen, The Legal Conscience 222, 222-23 (1960).

111. 25 U.S.C. § § 1301-41 (1970).

centric and politicocentric onslaught of this century. This act immeasurably enlarged the reach of federal constitutional standards and reasoning into everyday Indian life and tribal governmental action, and, unlike the Indian Reorganization Act, is potentially not restricted in its application to those situations where a tribal constitution is present, or acceptance of the act's statutory provisions has taken place. Prior to passage of the Indian Civil Rights Act, Indian life was governed to a much greater extent by the application of federal statutory provisions enacted under federal constitutional authority, than by direct application of federal constitutional provisions. While only certain federal constitutional provisions could be said to authorize such statutory enactments,[112] nevertheless, those constitutional prescriptions were so broad in scope that characterization of federal power over Indian tribes as "plenary" was conceded as "practically justified" by Felix Cohen.[113] And yet a certain check over federal constriction of Indian powers of self-government and federal control of internal tribal affairs was provided by the fact that the standards applied to measure tribal actions were predominantly statutory, rather than constitutional.[114] Thus, those tribal

112. Cohen observed, *supra* note 37 at 89:

> In addition to the constitutional sources of authority over commerce with Indian tribes, expenditures for the general welfare, property of the United States, and treaties . . . , other constitutional grants of power have played a role in Indian litigation. Most important, perhaps, are the power of Congress to admit new states and (inferentially) to prescribe the terms of such admission, and to make war. Congressional powers of lesser importance . . . include the power to establish post-roads, to establish tribunals inferior to the Supreme Court, and to establish a "uniform rule of naturalization." (Footnotes omitted.)

113. *Id.* at 91. *But cf.* Delaware Tribal Business Comm. v. Weeks, No. 75-1301 slip op. at 10 (Sup. Ct. Feb. 23, 1977) ("The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.").

114. For an example of pre-Indian Civil Rights Act restricted application of the Constitution to Indian affairs, *see* Talton v. Mayes, note 64 *supra*. The view expressed there regarding selective fededal constitutional applicability was followed in subsequent federal decisions. *E.g.*, Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res., note 74 *supra*. Cohen, *supra* note 37, at 124 sketched the outlines of pre-Indian Civil Rights Act federal constitutional applicability:

> The decision in *Talton v. Mayes* does not mean that Indian tribes are not subject to the Constitution. . . . [A]n Indian tribe is subject to the Federal Constitution in the same sense that the city of New Orleans . . . is. . . . The Federal Constitution prohibits slavery absolutely. This . . . applies to an Indian tribe as well as to a municipal government and it has been held that slaveholding within an Indian tribe became illegal with the passage of the Thirteenth Amendment. It is, therefore, always pertinent to ask whether an ordinance of a tribe conflicts with the Constitution. . . . Where, however, the United States Constitution levies particular restraints upon federal courts or upon Congress, these restraints do not apply to the courts or legislatures of the Indian tribes. Likewise, particular restraints upon the states are inapplicable to Indian tribes.

institutions and social patterns not regulated by Congress were relatively unaffected by federal actions and could thereby be retained. This was undoubtedly a major factor in the abilities of various Indian tribes to maintain some semblance of cultural integrity.

By imposing on Indian activities constraints the language of which is drawn from the First and Fourth through Eighth Amendments,[115] the Indian Civil Rights Act has perturbed the clarity of the standards to be applied in evaluating tribal actions for propriety. The act can be read as seeking to impose direct constitutional restraints on tribal governmental organization and activities previously subject only to statutory restraints. Yet the degree to which those constitutional restraints are applicable is uncertain.[116] The decree of applicability which emerges from the litigation will be important to activities surrounding reservation leasehold communities. For example, in *Situation 3*, a broad interpretation of the "free exercise of religion" clause of the Indian Civil Rights Act[117] might prohibit tribal action restricting the practice of witchcraft, and thereby threaten the cultural integrity and psychic well-being of the tribal members.[118] On the other hand, a narrow interpretation might produce a loss of expectation for the non-Indian satanic sect member.

How then, should the Indian Civil Rights Act be interpreted? A case worth noting in this regard is *Johnson v. Lower Elwha Tribal*

> It has been held that the guaranty of religious liberty in the First Amendment . . . does not protect a resident of New Orleans from religious oppression by municipal authorities. Neither does it protect the Indian against religious oppression on the part of tribal authorities. . . . (Footnotes omitted.)

Thus, prior to the Indian Civil Rights Act, the provisions of the Constitution authorizing federal control of Indian affairs were: first, those whose language specifically addressed Indian affairs (of which there are only two instances–the Article 2, Section 2, clause 2 treaty-making power and the Article 1, Section 8, clause 3 power to regulate commerce with the Indians); and second, those whose language was not restrictively addressed to limitations on only the federal government (e.g., the sixth amendment), the states (e.g., article 1, section 10, clause 3), some other non-Indian entity (e.g., the second amendment), or a combination thereof (e.g., the fourteenth amendment). The relevant constitutional provisions were relied on chiefly to support federal statutory regulation of Indian affairs, rather than directly invoked to limit those affairs (as was unsuccessfully attempted in Talton v. Mayes). Consequently, Indian affairs were largely governed by *statutory*, not *constitutional* restrictions, and those affairs went untrammeled wherever Congress had not acted. Even where Congress acted pursuant to an appropriate constitutionally-granted power, however, it was still subject to ordinary constitutional restraints. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 551 (1974) (attack grounded in fifth amendment).

115. 25 U.S.C. § 1302 (1970).

116. *See* Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 Harv. L. Rev. 1343 (1969).

117. 25 U.S.C. § 1302(1) (1970).

118. *See, e.g.*, A. Ortiz, The Tewa World 15, 70-72, 87, 108-9, 140 n. 4, 157 n. 6, 163 n. 12, 168 n. 10 (1969) for a description of witchcraft and associated fears among the Rio Grande Tewa Pueblo tribes.

Community.[119] *Lower Elwha* was a suit by an Indian against his tribal council seeking to set aside its cancellation of an assignment to him of a tract of tribal land for failure of the council to comport with due process and equal protection as set forth in the Indian Civil Rights Act. The Ninth Circuit Court of Appeals interpreted the act broadly, stating in a footnote:

> During oral argument, . . . appellee urged that due process within the meaning of 25 U.S.C. § 1302 did not have the same meaning as traditional notions of due process under the Fourteenth Amendment.
>
> There may be some provisions of the Indian Civil Rights Act that under some circumstances may have a modified meaning because of the special historical nature of particular tribal customs or organization. However, this is not one of them. The Hearings on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess.: "Rights of Members of Indian Tribes," at 17 (1968), . . . state that:
>
> > ". . . any Indian tribe in exercising its powers of local self-government shall, with certain exceptions, be subject to the same limitations and restraints . . . imposed on the Government . . . by the Constitution."
>
> It thus appears [that] . . . it was the clear intention of [the House Subcommittee] that the due process restrictions of the bill should be interpreted in the same way when applied to a tribe as when applied to the United States or to the states.
>
> The legislative history states:
>
> * * * * *
>
> > ". . . the substitute bill would grant to the American Indians enumerated constitutional rights and protection from arbitrary action in their relationship with tribal governments, . . ." 2 U.S. Code Cong. & Admin. News at p. 1864 (1968).[120]

The language quoted from the legislative history of the Indian Civil Rights Act by the court of appeals can support an alternative construction of that act, i.e., that the purposes of the act—"to protect individual Indians from arbitrary and unjust actions of tribal governments . . . by placing certain limitations on an Indian tribe . . . the same as those imposed on the Government of the United States"[121]

119. 484 F.2d 200 (9th Cir. 1973). The suit alleged violations of equal protection and due process under the Constitution, the Indian Civil Rights Act, and the Lower Elwha tribal constitution.

120. *Id.* at 202 n. 4.

121. The quoted language is taken from a discussion of the purpose of the constitutional language in the Senate version of the Indian Civil Rights Act. *Hearings on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 14 (1968).

—are to be served by applying the constitutional language to tribal governments in the light of tribal customs and traditions. And where such application would help preserve some aspect of traditional tribal organization or structure, it would seem compelled by statements of the Senate Subcommittee on Constitutional Rights who introduced the Senate version of the act:

> I realize that the All Indian Pueblo Council of New Mexico has voiced serious objections to the provisions of [the proposed act which employ language taken from the First and Fourth through Eighth Amendments] and has asked to be exempt from that Title. In all sincerity, I do not believe that [their fears] can be justified. The Pueblo Indians have a rich, colorful form of government founded on tradition and wise experience. *In no conceivable way is it my intention, through the provisions of [this act], to hamper, weaken or destroy the Pueblo tribal traditions or any Indian tribal governments in this Nation.*[122] (Emphasis supplied.)

A number of decisions have adopted a harmonious interpretive viewpoint.[123] Such a viewpoint is further supported by the rule established for Indian litigation involving statutory interpretation in *Squire v. Capoeman*[124] that doubtful statutory expressions relating to Indian affairs are to be resolved in favor of the Indians.[125]

Regardless of how the Indian Civil Rights Act is ultimately interpreted, it can only be construed as confirming the continued vitality of Indian sovereignty doctrine: the legislative history and the act itself refer repeatedly to tribal powers of self-government.[126] This congressional recognition of Indian sovereignty is a factor which must be given a strong, if not determinative role in future Indian litigation.

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122. Statement of the Hon. Sam J. Ervin, Jr., U.S. Senator from North Carolina, concerning the amended Senate version of the act. *Id.* at 134.

123. *E.g.*, Slattery v. Arapahoe Tribal Council, 453 F.2d 278 (10th Cir. 1971) (Indian Civil Rights Act concerned primarily with administration of tribal justice, not particular aspects of tribal structure or office-holding); Janis v. Wilson, 385 F. Supp. 1143 (D. S.D. 1974) (meaning and application of Indian Civil Rights Act with respect to tribes necessarily differs from established Anglo-American jurisprudential meaning); Wounded Head v. Tribal Council of Oglala Sioux Tribe of Pine Ridge Res., 507 F.2d 1079 (8th Cir. 1975) (equal protection clause of Indian Civil Rights Act not coextensive with Equal Protection clause).

124. 351 U.S. 1 (1956) (suit by Indians to recover federal income tax assessed and paid on capital gains from sale of timber removed from individual land allotment made under General Allotment Act).

125. *Id.* at 9.

126. *Compare* the language quoted from the legislative history by the Lower Elwha court, in text accompanying note 120 *supra, and* the first phrase of the Indian Bill of Rights, 25 U.S.C. § 1302(1) (1970), *with* the language found in Worcester v. Georgia, in text accompanying note 41 *supra,* and in Crow Dog, 112 U.S. 556 at 568-69. The latter two cases demonstrate the equivalency in federal litigation of powers of "local self-government" and "Indian sovereignty" over internal affairs.

D. The Reach and Content of the Doctrine of Indian Sovereignty

Having concluded that Indian sovereignty is a living doctrine, the *standards* to be applied to the exercise of tribal sovereign powers must be distinguished from the actual reach and content of those powers. The standards govern the manner in which tribal powers of sovereignty are exercised; the reach and content of those powers indicates the spectrum of objectives which such powers can be used to accomplish. Standards for the exercise of tribal sovereign powers are found in the provisions of tribal constitutions, or the traditions and customs of the tribe (especially for non-constitutional tribal governments such as those of some of the Rio Grande pueblos), or both—since the full panoply of tribal powers to which the standards are to be applied may not be fully enumerated in a tribal constitution. Standards may also be imposed from without by federal constitutional, statutory or regulatory authority.[127]

The reach of tribal sovereign powers has been reduced to zero for external powers.[128] However, with respect to internal powers of sovereignty, i.e., the powers of local self-government,[129] their reach should be unlimited within their sphere of influence, except to the extent checked by applicable federal statutory or regulatory provisions.[130] Thus, except where so checked, the tribal government should be able to undertake any action which is necessary to the administration of internal tribal affairs, assuming the exercise of that power has not been prohibited by applicable federal or tribal law, and assuming the action is conducted in conformity with the standards applicable to the tribal power involved. This conclusion is strengthened by observing that tribal sovereign powers over internal affairs are not divided in any way resembling the federal-state dichotomy prescribed by the federal Constitution—a dichotomy which

127. An example of the standards which may be imposed by federal regulatory provisions issued pursuant to federal statutory authority is 25 U.S.C. § 454 (1970) (relating to Secretary of Interior's authority to set standards for contracts between tribes and non-Indian entities).

128. *See* text accompanying note 44 *supra*.

129. *See* note 126 *supra*.

130. There are no applicable federal constitutional provisions here because the Constitution does not address the objectives for which tribal powers can be exercised, with the possible exception of commerce. *See* U.S. Const. art. I, § 8 (giving Congress power to regulate commerce with Indians). Federal regulatory provisions authorized by statutes such as that cited in note 127 *supra* can, of course, impose standards or affect the reach of tribal sovereign powers by virtue of Congress' plenary authority over Indian affairs. *See* text accompanying note 113 *supra*.

The "sphere of influence" language of the text appears in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("[t]he government of the Union, though limited in its powers, is supreme within its sphere of action."), and is applied by analogy, cognizant of the dangers involved in reasoning by analogy where Indian sovereignty is concerned.

limits the sovereign powers possessed by each—but instead, are gathered under one governmental roof. The consequence of the absence of a federal-state dichotomy should be to permit a tribal government to undertake actions with respect to internal tribal affairs which would not be analogously possible for either the federal or state governments.[131]

The content of Indian sovereignty is the range of powers inherently at the disposal of a tribal government by virtue of its internal sovereignty. The federal courts have found a wide variety of such powers.[132] Other sovereign powers over internal affairs have been recognized in various Indian treaties.[133] Significantly, some Indian

131. *Cf.* text accompanying notes 167-169 *infra*. An example might be the extra-constitutional procedure used to adopt the 1866 amendments to the Cherokee constitution. *See* note 100 *supra*.

132. Powers judicially recognized have included the powers to: (1) define powers and duties of tribal officials, and the manner in which tribal authority is invoked and exerted, *e.g.*, Pueblo of Santa Rosa v. Fall, 273 U.S. 315 (1927); (2) nullify a provision in a treaty with the federal government by contravening tribal enactment, *e.g.*, the Chickasaw Freedmen, 193 U.S. 115 (1904); (3) determine tribal membership, *e.g.*, Delaware Indians v. Cherokee Nation, 193 U.S. 127 (1904); (4) determine rights of participation in tribal property, *e.g.*, Cherokee Intermarriage Cases, 203 U.S. 76 (1906); (5) regulate divorce, *e.g.*, Barnett v. Prairie Oil & Gas Co., 19 F.2d 504 (8th Cir. 1927); (6) prescribe the manner of inheritance, *e.g.*, Jones v. Meehan, 175 U.S. 1 (1899); (7) determine adoption rights, *e.g.*, Fisher v. District Court, 424 U.S. 382 (1976); (8) impose license requirements for doing business on reservation land, *e.g.*, United States v. Mazurie, 419 U.S. 544 (1975); (9) impose property tax on non-Indians on Indian land, *e.g.*, Morris v. Hitchcock, 194 U.S. 384 (1904); (10) exclude non-Indians from Indian land, *e.g.*, United States v. Rogers, 23 F. 658 (D. Ark. 1885); (11) determine validity of contracts between tribal members, *e.g.*, Crabtree v. Madden, 54 F. 426 (8th Cir. 1893); (12) exercise criminal jurisdiction over offenses involving Indians or Indians and non-Indians, committed on Indian land, *e.g.*, United States v. Kagama, 118 U.S. 375 (1886); Toy Toy v. Hopkins, 212 U.S. 542 (1909); Donnelly v. United States, 228 U.S. 243 (1913).

133. In general, such powers cannot be read as deriving from the federal government. The treaties were negotiated between political, albeit not necessarily military, equals, *see* text accompanying notes 40-42 *supra*, so it would be presumptuous to see them as providing grants of power from the federal government to the tribes. This would also contravene the rule of Carpenter v. Shaw, 280 U.S. 363, 367 (1930) that doubtful expressions in the treaties are to be interpreted in favor of the Indians. Furthermore, what may have been viewed as federal grants of power in the past, whether in statute or treaty, may actually have been nothing more than transmutations of Indian sovereign powers through the imposition of standards on their exercise or limitations on their reach.

Powers over tribal internal affairs recognized in various treaties include the powers to: (1) punish non-Indians attempting to settle on tribal land without authorization, *e.g.*, Treaty of Jan. 21, 1785 with the Wiandot, Delaware, Chippawa and Ottowa Nations, 7 Stat. 16, 17; (2) allow Indians of another tribe to live on tribal land, and to dispossess the same, *e.g.*, Treaty of Jan. 9, 1789 with the Wiandot, Delaware, Ottowa, Chippewa, Pattawatima and Sac Nations, 7 Stat. 28, 32; (3) separate and remain distinct from other parts of same Indian nation, *e.g.*, Treaty of Sept. 13, 1815 with the portion of the Sac Nation Indians residing on the Missouri River, 7 Stat. 134; (4) give a power of attorney for conducting tribal business, *e.g.*, Treaty of July 8, 1817 with the Cherokee Nation, 7 Stat. 156; (5) change tribal laws and system of government, *e.g.*, *id.*; (6) lease tribal property to non-Indians, *e.g.*, Treaty of Oct. 19, 1818 with the Chickasaw Nation, 7 Stat. 192, 193; (7) establish tribal schools, *e.g.*,

treaties recognize tribal powers to: charter a corporate entity;[134] undertake public works and improvements for the benefit of the tribe;[135] and determine sites for the location of tribal industries—a zoning analog.[136] The range of recognized tribal powers indicates that federal regulation of those powers has only touched the surface of a vast reservoir of tribal powers, leaving a huge reserve of sovereign powers at the command of tribal governments.

Indian Sovereignty and State Jurisdiction

This discussion has so far centered on Indian sovereignty and its federal restrictions which emanate from a long sequence of congressional-judicial interactions. However, the shaping of Indian sovereignty doctrine has not entirely been confined to the arena of Indian-federal transactions. Congress has periodically authorized state jurisdiction over certain tribal activities.[137] Of equal significance, independent of any explicit congressional authorization, state jurisdiction over some matters involving Indians has been viewed as proper.[138] Felix Cohen summarized:

> While the general rule . . . is that plenary authority over Indian affairs rests in the Federal Government to the exclusion of state

Treaty of Oct. 20, 1820 with the Choctaw Nation, 7 Stat. 210, 212; (8) create tribal police force to enforce tribal law on tribal land against both Indians and non-Indians, *e.g., id.* at 213; (9) void a treaty provision with the federal government, *e.g.,* Treaty of Jan. 24, 1826 with the Creek Nation, 7 Stat. 286; (10) prohibit non-Indians from conducting business on Indian land or introducing liquor onto Indian land, *e.g., id.* at 335; (11) invest tribal funds, *e.g.,* Treaty of Oct. 20, 1832 with the Chickasaw Nation, 7 Stat. 381, 385; (12) prescribe property rights, rights of inheritance and rights of alienation, *e.g.,* Treaty of May 24, 1834 with the Chickasaw Nation, 7 Stat. 450, 452-53.

134. *See* text accompanying notes 189-202 *infra.*

135. The Treaty of Apr. 23, 1836 with the Wyandot Tribe of Ohio, 7 Stat. 502, provides:

> Art. 5. Such portion of the monies arising from the sales [of Indian land] as the chiefs may deem necessary for the rebuilding of mills, repair and improvement of roads, establishing schools, and other laudable public objects for the improvement of their condition shall be properly applied under their direction, ...

136. Treaty of Oct. 6, 1818 with the Miame Nation of Indians, 7 Stat. 189, 191:

> Art. 5. . . .
>
> The United States will cause to be built for the Miamis one grist-mill and one saw-mill, at such proper sites as the chiefs of the nation may select. . . .

137. *E.g.,* 28 U.S.C. § 1360 (1970) provides:

> Each of the States . . . listed . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over other civil causes of action, and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State. . . .

138. *See, e.g.,* In re Wolf, 27 F. 606, 610 (D. Ark. 1886) (conspiracy by tribal members to obtain money from tribe by false pretenses).

> governments, [there are] two major exceptions to this general rule: First, where Congress has expressly declared that certain powers over Indian affairs shall be exercised by the states, and second, where the matter involved non-Indian questions sufficient to ground state jurisdiction.
>
> In proceeding to analyze this latter exception to the general rule, we may note that . . . the sovereignty of a state over its own territory is plenary and therefore the fact that Indians are involved . . . does not *ipso facto* terminate state power. State power is terminated only if the matter . . . falls within the constitutional scope of exclusive federal authority.
>
> A case in which the factors of situs, person and subject matter all point to exclusive federal jurisdiction [is one where] the basis of exclusive federal power is clear. . . . [W]here all three factors point away from federal jurisdiction, the power of the state is clear. There exists, however, a broad twilight zone in which one or two of the three elements noted . . . point to federal power and the remainder to state power. These are the situations which require analysis . . . . (Footnotes omitted.)[139]

The doctrine of Indian sovereignty pronounced in *Worcester v. Georgia*[140] appears to have been formulated in response to the Supreme Court's perceptions of the potentially octopodal nature of state jurisdiction.[141] Nevertheless, the recognition and enlargement of state jurisdiction with respect to matters in the twilight zone where the factors of situs, person and subject matter noted by Cohen do not add up to a clear case of either state or federal jurisdiction has steadily proceeded. The *Williams v. Lee*,[142] *Organized Village of Kake v. Egan*,[143] and *Warren Trading Post v. Tax Commission*[144] trilogy of cases signaled the beginning of recent attempts by the Supreme Court to bring order to the jurisdictional issues in this murky area.

Two themes run through the trilogy: federal preemption of state jurisdiction over Indian affairs, and the scope of Indian sovereignty.[145] A common pre-*Williams* presumption had been that the *general* federal interest in Indian affairs preempted all state attempts to exercise power over Indian affairs on Indian reservations, except

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139. Cohen, *supra* note 37, at 119.

140. 31 U.S. (6 Pet.) 515 (1832).

141. It was the assertion of state jurisdiction which precipitated the litigation in *Worcester*. *See* note 39 *supra*.

142. 358 U.S. 217 (1959).

143. 369 U.S. 60 (1962).

144. 380 U.S. 685 (1965).

145. *See* California Comment, *supra* note 45, at 477-78.

when the state acted with express congressional authorization.[146] *Williams,* an action originally brought in Arizona state court to collect on a debt contracted on a reservation between an Indian debtor and a non-Indian trader-creditor, left open the possibility that the state might act with respect to Indians on reservations in the absence of explicit congressional authorization—provided the states' actions did not infringe on tribal rights of self-government.[147] *Williams* upset the presumption of federal preemption, but this outcome was consistent with the views of Cohen, who had concluded:

> (1) *In matters involving only Indians on an Indian reservation, the state has no jurisdiction in the absence of specific legislation by Congress.*
> (2) *In all other cases, the state has jurisdiction unless there is involved a subject matter of special federal concern.*[148]

In *Kake,* a challenge to the applicability to Indians of Alaskan laws regulating off-reservation fishing, the Supreme Court intimated that a state *may* exert off-reservation jurisdiction over Indians without congressional authorization wherever the federal government has not acted.[149] *Kake's* outcome was no less consistent with Cohen's conclusions than *Williams.* However, neither case indicated what factors would give rise to federal preemption, i.e., neither elaborated on the subject matter factor of Cohen's situs, person, subject matter analysis other than to indicate that general federal interest in Indian reservation affairs was not enough.

Warren indicated that the boundaries for federal preemption were those defining areas covered by acts of Congress or strong congressional policies concerned with particular reservations.[150] The *Warren* court struck down Arizona's attempt to tax the gross income of a non-Indian trader doing business on a reservation because it found that the requisite acts and policy existed.[151]

The relationship between Indian sovereignty and state authority, the second theme of the trilogy, has already been briefly adverted

146. *See, e.g.,* Office of the Solicitor, U.S. Dep't of the Interior, Federal Indian Law 501 (1958) (Department of the Interior revision of Cohen's original work).

147. "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 own laws and be ruled by them." 358 U.S. at 220.

148. Cohen, *supra* note 37, at 121.

149. [E]ven on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. . . . State authority over Indians is yet more extensive or activities . . . not on any reservation.
369 U.S. at 75.

150. 380 U.S. at 690-91, 691 n.18.

151. *Id.* at 691-92.

to.[152] *Williams* allowed states to extend jurisdiction onto reservations where this did not interfere with tribal self-government.[153] *Kake* turned on federal preemption and did not address Indian self-government, perhaps because the Supreme Court was unable to perceive self-government issues in a case involving off-reservation Indian activities.[154] *Warren* would have permitted discussion of Indian sovereignty, but instead, the Court relied on preemption principles for its decision. In consequence, neither *Kake* nor *Warren* added substance to *Williams'* allusion to the existence of independent tribal self-government interests which might be strong enough, of themselves, to block attempts to exercise state jurisdiction on Indian reservations. The trilogy's lack of strong emphasis on Indian sovereignty is the apparent result of the Court's striving for narrow bases for its decisions prior to placing Indian sovereignty in a newer doctrinal context—a task left to succeeding companion cases, *McClanahan v. Arizona Tax Commission*[155] and *Mescalero Indian Tribe v. Jones.*[156]

In *McClanahan* the court interpreted the treaties and statutes which provide the skeletal framework for post-trilogy preemption in a broad manner and to the favor of the Indians. It concluded that, at least with respect to Indians residing on reservations and deriving their income solely from reservation sources, the state of Arizona could not impose an income tax.[157] On the subject of Indian sovereignty, the Court indicated that tribal interests in self-government, while not determinative by themselves of on-reservation state jurisdiction, were required to be considered—although largely as a "backdrop"—in conjunction with the treaties and statutes relevant to federal preemption.[158] *McClanahan*, thereby, provided some independent weight for Indian interests in self-government.

Mescalero, like *Williams,* rejected the notion that a general federal interest in Indian affairs preempted state jurisdiction over tribal

152. *See* text accompanying notes 75-79 *supra.*

153. *See* note 147 *supra.*

154. *See* California Comment, *supra* note 45, at 478. One authority has indicated that *Kake* must be carefully distinguished because of the peculiar legislative position of the Alaska Indians. *See* Comment, *Indians–State Jurisdiction over Real Estate Developments on Tribal Lands,* 2 N.M.L. Rev. 81, 85 (1974).

155. 411 U.S. 164 (1973).

156. 411 U.S. 145 (1973).

157. 411 U.S. at 173-79.

158. "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." *Id.* at 172 (emphasis added).

enterprises.[159] In discussing Indian sovereignty, the *Mescalero* court summarized *Kake, Williams* and *McClanahan* in slipshod fashion:

> The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester* . . . has given way to more individualized treatment of particular treaties and specific federal statutes . . . as they, taken together, affect the respective rights of States, Indians, and the Federal Government. See *McClanahan*, . . . *Kake*. . . . The upshot has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. (Citations omitted.)[160]

These cases did not squarely hold that state laws may be applied *unless* that application would interfere with Indian self-government or federal law;[161] they were more conditional, indicating that non-interference with self-government or federal authority was a minimum precondition for application of state laws, thus leaving room for consideration of other factors. The Court would have been more clearly on the mark by simply referring to *McClanahan* which, unlike *Mescalero,* was directly concerned with on-reservation state jurisdiction. While true, as was pointed out in *Mescalero,* that *McClanahan* involved the "special area of state taxation,"[162] it is equally true that *McClanahan's* preemption analysis lends itself readily to other situations involving on-reservation assertions of state power, and probably was intended to be so applied.

Mescalero did underscore *McClanahan's* indication that there exist differences between federal preemption as applied to Indian reservation activities and activities off the reservation in that federal preemption provides a larger protective penumbra on the reservation than off.[163] Examining the relevant law, presumably from this perspective, the *Mescalero* court concluded that the Indian Reorganization Act of 1934 did not permit New Mexico to collect a use tax for permanent improvements to an off-reservation tribal ski resort, but did allow collection of a gross receipts tax.

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159. 411 U.S. at 147-48. The *Mescalero* court also rejected the argument that the Indian Reorganization Act of 1934 "rendered the Tribe's off-reservation ski resort a federal instrumentality constitutionally immune from state taxes of all sorts." *Id.* at 150.

160. *Id.* at 148.

161. *See* text accompanying notes 147-149 *supra.*

162. Mescalero Apache Tribe v. Jones, 411 U.S at 148.

163. "But tribal activities conducted outside the reservation present different considerations. 'State authority over Indians is yet more extensive over activities . . . not on any reservation.' " *Id.* (quoting *Kake,* 369 U.S. at 75).

In sum, *Mescalero* and *McClanahan* gave Indian interests in self-government post-*Williams* impetus. They also established a difference in breadth between on-reservation and off-reservation federal pre-emption, thus refining Cohen's situs and subject matter factors. With respect to the person factor it is important that both cases involved only Indians as the objects of attempted exercises of state jurisdiction. *McClanahan* clearly indicated that where both Indians and non-Indians were the objects of jurisdictional contention there would be greater difficulty in parsing out the jurisdiction.[164]

Confirmation of the *Mescalero-McClanahan* position favoring greater on-reservation subject matter preemptive powers, as well as a boost for Indian sovereignty, was provided by the 1975 Supreme Court decision in *United States v. Mazurie*.[165] There the Court held constitutional a federal statute which gave the tribes involved authority to regulate alcoholic beverages. Pursuant to the statute the tribes had prevented liquor dealers who lacked a tribal license from selling liquor on the reservation, even though their tavern was located on privately owned land within the reservation. In discussing the federal interests involved and Indian sovereignty doctrine, the *Mazurie* court stated:

> This Court has recognized limits on the authority of Congress to delegate its legislative power. . . . Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, Worcester v. Georgia . . . ; they are "a separate people" possessing "the power of regulating their internal and social relations . . . ," United States v. Kagama . . . ; McClanahan v. Arizona State Tax Comm'n . . . .
>
> . . . These same cases . . . make clear that when Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life . . . . We need not decide whether this

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164. [E]ven if the State's premise [that taxing individual Indians—as opposed to the tribe or reservation—does not infringe on tribal self-government] were accepted, we reject the suggestion that the *Williams* test was meant to apply in this situation. . . . [C]ases applying the *Williams* test have dealt principally with situations involving non-Indians. . . . In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

411 U.S. at 179.

165. 419 U.S. 544 (1975).

> independent authority is itself sufficient for the tribes to impose [their ordinance requiring tribal liquor licenses]. It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority .... Cf. United States v. Curtiss-Wright Export Corp.... (Citations omitted.)[166]

Several conclusions may possibly be drawn from the *Mazurie* language, above, which cites *United States v. Curtiss-Wright Export Corp.*[167] as support for the proposition that Indian sovereignty can prevent invalidation of certain delegations of congressional power to tribal governments:

(1) While residual Indian sovereignty is strong enough to govern activities involving internal affairs, it must be exercised in conformity with applicable externally-imposed federal restrictions. Just as the President possesses independent external powers of sovereignty,[168] the Indian tribes possess independent internal sovereign powers. The exercise of these powers is subject to limitations in both cases: for the President, there are constitutional limitations which regulate internal powers and affairs and can thus reach the internal actions the President must take to oversee external affairs; for Indian tribes, the limitations come from the legislative branch of the government

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166. *Id.* at 556-57. The citation of *McClanahan* in conjunction with *Kagama* and *Worcester* in the language quoted from *Mazurie* underlines *McClanahan's* attribution of independent weight to tribal interests in self-government.

167. 299 U.S. 304 (1936). In *Curtiss-Wright*, a congressional resolution provided that if the President found prohibiting the sale of arms to certain countries engaged in armed conflict would contribute to re-establishing peace, and if the President made a proclamation to that effect, it would be unlawful to make such a sale except under conditions the President prescribed. After the proclamation was issued, the defendant, Curtiss-Wright Export Corporation, was indicted for conspiring to sell arms in violation of the congressional resolution and presidential proclamation. The defendant demurred, claiming the congressional delegation of authority to the President was invalid because its grant of discretion to him abdicated an essential legislative function. On appeal the Supreme Court noted that the resolution related to external (foreign) affairs and elaborated on the nature of internal and external sovereign powers: constitutional restriction of federal authority to the enumerated powers only applied to internal powers; the Constitution absorbed the internal federal powers from the states, leaving with them the unenumerated internal powers; pre-constitutional state powers never included powers over external affairs since these passed directly to the federal government from the Crown through the Continental Congress, and then to the executive—the nation's representative in external affairs. *Id.* at 315-19. Since the proclamation involved the joint exercise of external powers of sovereignty and delegated internal legislative powers, the resulting dual authority allowed the President discretionary latitude over external affairs which could not be tolerated for internal affairs. *Id.* at 320-21. This latitude was also required by the practicalities of overseeing foreign relations. *Id. But see* Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 Yale L.J. 467 (1946) (criticizing the theory of extra-constitutional external powers).

168. *See* note 167 *supra.*

which reduced to zero the reach of their external sovereign powers and assumed guardianship of their external affairs.[169]

(2) Indian sovereignty has an enhancing or synergistic effect in combination with the assertion of federal authority. This could mean that even where the exercise of federal authority has not preempted some activity involving Indians, the combination of a small amount of delegated federal authority and active exercise of Indian sovereign powers relative to that activity may so occupy that field that the exercise of state jurisdiction is precluded.

(3) The most obvious conclusion is that the existence of Indian sovereignty allows Congress to vest a portion of its legislative authority with fewer restrictions, or to a larger extent than it could with respect to other entities, when an Indian tribe is involved.

In short, *Mazurie* reaffirmed Indian sovereignty doctrine and may have broadened federal preemption doctrine, at least with respect to on-reservation matters, by pointing to a previously unilluminated enhancing or synergistic function of Indian sovereignty where Congress delegates authority to tribal governments. However, *Mazurie* did not bring clarity to a most critical issue: resolution of on-reservation state-tribal jurisdictional conflicts where both Indians and non-Indians are involved.

Fisher v. District Court[170] has shed additional light on the meaning of *McClanahan's* statement that tribal interests in self-government, i.e., tribal sovereignty, were "backdrop" against which applicable federal statutes and regulations were to be read. In *Fisher* the Indian respondents initiated proceedings in a Montana state district court to adopt a minor Indian placed in their temporary custody by the tribal court. The petitioner, a member of the same tribe and mother of the minor in temporary custody, moved to dismiss for lack of subject matter jurisdiction. The state district court certified to the tribal appellate court the question whether an ordinance of the tribe conferred jurisdiction upon the district court in this matter. The tribal court indicated it did not, and the district court dismissed for lack of jurisdiction. The respondents filed in the Montana supreme court for a writ to set aside the dismissal. The state supreme court granted relief, holding the district court possessed jurisdiction. The Supreme Court reversed, holding that

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169. The alternate analogy—that the reach of Indian external sovereign powers is unaffected and permits their exercise absent prohibitive federal law, but that sovereign powers over internal tribal affairs remain inviolable is not supported with respect to internal sovereign powers by *Mazurie's* facts or the prior history of Indian litigations. *But cf.* text accompanying notes 127-129 *supra.*

170. 424 U.S. 382 (1976).

> [s]tate-court jurisdiction plainly would interfere with the powers of self-government conferred upon the . . . Tribe and exercised through the Tribal court. It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves. . . . [I]t would create a substantial risk of conflicting adjudications affecting the custody of the child and would cause a corresponding decline in the authority of the Tribal court. (Footnote omitted.)[171]

In reaching its holding, the Court indicated how *McClanahan's* "backdrop" analysis was to be applied. Tribal sovereignty (the backdrop) was the starting point for analysis. The pertinent sovereign powers were to be kept in sight as successive screens of federal and tribal law were superimposed. After all appropriate federal statutory and regulatory provisions, and tribal constitutional and statutory provisions had been overlaid, the unscreened sovereign powers were what remained to be considered in determining whether tribal self-government interests were being interfered with.[172]

Two 1976 cases also addressed federal preemption and Indian sovereignty. *Moe v. Confederated Salish and Kootenai Tribes*[173] was a consolidation of two actions instituted in federal district court by a confederated tribe and certain tribal members seeking declaratory and injunctive relief against imposition of Montana's cigarette retailers' licensing requirements and cigarette sales tax on on-reserva-

171. *Id.* at 387.

172. In litigation between Indians and non-Indians arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of state and tribal courts has depended, absent a governing act of Congress, on "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." . . . Since this litigation involves only Indians, at least the same standard must be met before the state courts may exercise jurisdictions.

The right of the . . . Tribe to govern itself independently of state law has been consistently protected by federal statute. As early as 1877, Congress ratified an agreement between the Tribe and the United States providing that "Congress shall, by appropriate legislation, secure to [the tribe] an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life." . . . This provision remained unaffected by the act enabling Montana to enter the Union, and by the other statutes specifically concerned with the . . . Tribe. In 1935, the Tribe adopted a Constitution and By-Laws pursuant to § 16 of the Indian Reorganization Act . . . a statute specifically intended to encourage Indian tribes to revitalize their self-government. . . . Acting pursuant to the Constitution and By-Laws, the Tribal Council . . . established the Tribal Court and granted it jurisdiction over adoptions "among members of the . . . Tribe."

Id. at 368-87 (footnotes and citations omitted). The argument in the text here resonates with the argument in note 133 *supra*.

173. 425 U.S. 463 (1976).

tion Indian cigarette vendors, and a Montana personal property tax on the property of tribal members living on the reservation. Preliminarily, the Court held that the vending activities did not involve activities of a federal instrumentality such as would allow jurisdiction under one federal statutory provision relied on by the district court, but jurisdiction had been properly assumed under a separate federal statutory provision also relied upon by the district court.[174]

Turning to *McClanahan's* preemption "backdrop" analysis, the Court observed that the state sought to avoid *McClanahan's* result on two grounds. The first was by arguing that the reservation in *Moe* had developed in a manner different from the reservation in *McClanahan,* resulting in the tribal Indians in *Moe* being so completely integrated with non-Indians that there was no basis for treating the Indians there differently from non-Indians.[175] The second was by arguing that the General Allotment Act of 1887[176] gave the state power to tax at least those tribal members living on fee patented lands.[177] The first argument was rejected because the Court perceived it to be the same argument made in *McClanahan.*[178] The second argument was rejected because it would result in the impractical pattern of "checkerboard jurisdiction" found untenable in prior cases.[179]

The tribe raised the issue of Indian sovereignty by arguing that imposition of the cigarette sales tax on sales to non-Indians made the Indian retailer an "involuntary agent" of the state for collecting taxes owed by non-Indians, constituting a gross interference with the tribe's freedom from state regulation.[180] The tribe relied on *Warren* as controlling,[181] but the Court disagreed. *Warren* involved a special congressional policy concerning Indian trading posts and a tax imposed directly on the seller, while here no trading posts were

174. *Id.* at 471-72. *See also id.* at 474 n.13:

> The proper basis for the protection asserted here, of course, is not the federal-instrumentality doctrine eschewed in *Mescalero,* but is that which *McClanahan* identified, *i.e.,* that state taxing jurisdiction has been preempted by the applicable treaties and federal legislation.

175. *Id.* at 476.

176. *See* text accompanying notes 62 & 63 *supra.*

177. 425 U.S. at 476-77.

178. *Id.* at 477.

179. *Id.* at 478 (citing Seymour v. Superintendent, 368 U.S. 351 (1962); United States v. Mazurie, 419 U.S. 544 (1975)). The state also argued that tax immunity for the Indians would constitute invidious discrimination prohibited by the Fifth Amendment. The Court disagreed, holding that the immunity satisfied the proper test for this issue, i.e., that the special treatment be rationally tied to "fulfillment of Congress' unique obligation toward the Indians." 425 U.S. at 480 (quoting Morton v. Mancari, 417 U.S. 535, 555 (1974).

180. 425 U.S. at 481.

181. *Id.* at 482.

involved and the tax presented "a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller" would avoid payment of "a concededly lawful tax."[182] The Court found that *Mescalero* was not violated because the burden here was not really a tax, and *Williams* was not violated because there was nothing in the burden "which frustrates tribal self-government."[183]

Bryan v. Itasca County[184] was an action by a tribal member seeking a declaratory judgment that Minnesota and one of its counties lacked authority to impose a personal property tax on his mobile home located on tribal trust land. The state relied on Public Law 280,[185] a different federal statute than was involved in *Moe*, for its authority. Applying a *McClanahan* preemption analysis, the Court noted that the act's spare legislative history suggested Congress did not intend the act's grant of civil jurisdiction to the state to include taxing authority.[186] The Court also found support for this holding in the recent shift away from assimilation in congressional Indian policy,[187] and in the fact that such a wholesale extension of state jurisdiction as would result from the state's reading of Public Law 280 could undermine or destroy tribal governments.[188]

Moe points out that in order to rely on arguments that tribal sovereignty precludes assertions of state jurisdiction in transactions between Indians and non-Indians, the tribes will have to carefully define the tribal interests interfered with. *Moe* also suggests that states may be able to use tribal members to enforce state statutory requirements or policy involving non-Indians if the states are careful to characterize the statutes or policy as being directed specifically toward non-Indians. Thus, to this extent, states may be able to exert on-reservation jurisdiction over Indians without congressional authorization. Taken in conjunction with *Moe*, *Bryan* indicates that the federal courts will look with disfavor on wholesale assertions of state jurisdiction, especially where only Indians are affected.

Of all the cases just discussed, *Mazurie* is singularly important because it indicates that Indian sovereignty rises above the level of "backdrop" where it is the *tribe* which is seeking to actively assert some sovereign power. Where the state is asserting one of its own

182. *Id.* at 483.
183. *Id.*
184. 426 U.S. 373 (1976).
185. *Id.* at 375, 378. *See* text accompanying notes 10 and 11 *supra*. Like California, Minnesota assumed the prescribed jurisdiction under the unamended act.
186. 426 U.S. at 381-86.
187. *Id.* at 387-88.
188. *Id.* at 388 & 388 n. 14.

powers, the other cases indicate that *McClanahan's* preemption analysis is the paramount decisional tool. However, taken as a whole, these cases have done little to facilitate resolution of complex on-reservation state-tribal jurisdictional disputes involving both Indians and non-Indians and both tribal and state assertions of power.

SOVEREIGNTY AND THE TRIBAL POWER TO CREATE MUNICIPALITIES

Having determined that Indian sovereignty has retained its vibrancy despite recent congressional and judicial transactions with that doctrine, it remains to determine whether tribal sovereign powers encompass the power to create municipalities. The lack of a definite determination invites litigation of the sort hypothesized in *Situation 1.*

The Tribal Power to Charter a Municipality Recognized in the Cherokee Resolution of March 8, 1813.

The Treaty of February 27, 1819 with the Cherokee Nation[189] incorporated the Cherokee Resolution of March 8, 1813,[190] which provided:

> We, the undersigned Chiefs and Councillors of the Cherokees in full council assembled, do hereby give, grant, and make over unto Nicholas Byers and David Russell, who are agents in behalf of the States of Tennessee and Georgia, full power and authority to establish a Turnpike Company, to be composed of them, the said Nicholas and David, Arthur Henly, John Lowry, Atto. and one other person, by them to be hereafter named, in behalf of the state of Georgia; and the above named persons are authorized to nominate five proper and fit persons, natives of the Cherokees, who, together with the white men aforesaid, are to constitute the company; which said company, when thus established, are hereby fully authorized by us, to lay out and open a road from . . . the Tennessee River . . . which said road, when opened and established, shall continue and remain a free and publick highway . . . for the full term of twenty years . . . after which time said road, with all its advantages, shall be surrendered up, and reverted in, the said Cherokee nation. And the said company . . . are hereby authorized, to erect their publick stands, or houses of entertainment on said road. . . . And the said Turnpike Company do hereby agree to pay the sum of one hundred and sixty dollars yearly . . . for the aforesaid privilege. . . . The said

189. 7 Stat. 195.
190. *Id.* at 198.

> company are to have the benefit of one ferry on Tennessee river, and such other ferry or ferries as are necessary on said road . . . .[191]

This resolution will be construed by showing that of the three types of business organizations likely to have been designated a "Turnpike Company"—a partnership, a joint-venture, or a corporate entity—two do not fit the facts surrounding the resolution, leaving the conclusion that this was a corporation or proto-corporation.

It must first be remembered that the resolution arose, in part, out of a background of tribal law and customs. Thus, cautions which have already been expressed about applying legal analogies drawn from a federal constitutional, and, inferentially, common law jurisprudential tradition are to be particularly heeded. Nonetheless, the 1813 Cherokee Resolution bears a strong resemblance to the franchises written into many corporation charters of the nineteenth century.[192] Franchises can be granted to individuals (and individuals in the guise of partnerships and joint ventures) or corporations,[193]

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191. *Id.* at 198-99.

192. *Compare* the language contained in the Cherokee Resolution of March 8, 1813, as set out in the text, *with* the language of the Georgia legislative act which incorporated the non-Indian parties to the Resolution:

> AN ACT To authorise Russell Goodrich, Nicholas Byers, David Russell, Arthur H. Henley and John Lowry, to open a road . . . and to incorporate them into a company by the name of the Unaca, or Unacoi Turnpike company.
>
> § 1. . . .
>
> § 2. . . . said company are vested with full power and authority . . . to adopt such regulations and concert such measures, as to them shall seem useful for the institution, not inconsistent with the Constitution and the laws of the state.
>
> § 3. . . . the aforesaid company . . . are hereby entitled to occupy and enjoy all the privileges and advantages arising from said road for the term of twenty years . . . agreeably with their treaty with the Cherokee Indians. . . .
>
> § 4. . . . the aforesaid company are hereby authorised to erect a Turnpike at such place on said road, within the chartered limits of this state, as to them shall seem most convenient.
>
> § 5. . . . said company shall be entitled to receive the following toll and rates at said Turnpike, . . .
>
> § 6. . . .
>
> § 7. . . . if any person or persons shall refuse to pay any, or either of the foregoing rates . . . he, she or they so offending, for every such offence, shall forfeit and pay a sum not exceeding twenty dollars, and . . . be liable to an action or indictment in any court of this state, . . .
>
> § 8. . . .
>
> § 9. . . . nothing contained in this act shall be so construed as to authorise any person, or persons, to intrude on the lands of the Cherokee Indians, contrary to the intent and meaning of this act . . . or the law of the United States.

Act of December 13, 1816 Ga. Sess. Laws.

193. *See, e.g.*, California v. Central Pacific Ry. Co., 127 U.S. 1 (1888); People's R.R. v. Memphis R.R., 77 U.S. (10 Wall.) 38 (1869).

but can only be granted by a sovereign entity.[194] The question is whether the franchise in the 1813 Cherokee Resolution was granted to individuals as partners or joint venturers, or to a corporation (or proto corporation) which was to be created by the same instrument.

Partnerships stem from agreements between individuals, resting on the common law right of those individuals to contract with one another.[195] Thus, if the 1813 Resolution had been directed at individuals or a partnership, it would have been sufficient to grant the franchise to the named individuals and say no more. Yet the resolution prefaces the granting of the franchise by providing "full power and authority to establish a Turnpike Company" in which five non-Indians and five Indians are to participate. It does not seem reasonable that such language would have been used to authorize individuals to do that which they could already contract to do among themselves.[196]

Joint ventures occupy a structural niche somewhere between partnerships and corporations and are of two types: those formed by common agreement of the members and those formed pursuant to

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194. *See, e.g.*, People ex rel. Metropolitan St. Ry. Co. v. State Tax Comm'rs, 174 N.Y. 417, 67 N.E. 69 (1903), *aff'd*, 199 U.S. 1 (1905) (involving challenge to state power to tax franchise); State v. Springfield Water Co., 345 Mo. 6, 131 S.W.2d 525, 530 (1939) (corporation's right to make special use of public streets for its equipment must have been specially conferred by the state in form of franchise). *See also* 12 E. McQuillin, Municipal Corporations § 34.10, at 32 (3d rev. ed. 1970).

195. *See, e.g.*, J. Barrett & E. Seago, Partners and Partnerships: Law and Taxation ch. 1, § 3.3, ch. 2, § 2, ch. 4, § § 2-2.3, ch. 8, § 2 (1956) [hereinafter cited as Barrett & Seago]; J. Crane & A. Bromberg, Law of Partnership § § 4, 5(b) (1968); R. Sugarman, Sugarman on Partnership § 2 (4th ed. 1966).

196. Since two of the non-Indians authorized to establish the company were also agents for the states of Georgia and Tennessee, it may be instructive to examine the case law of those jurisdictions. Significantly, in two 19th and one 20th century Georgia cases, a strong tendency to read *company* to mean *corporation* appears. *See* Franklin Bridge Co. v. Wood, 14 Ga. 80 (1853) (discussing state statute providing for self-incorporation and use of certain powers upon incorporation); Wilson & Co. v. Sprague Mowing Mach. Co., 55 Ga. 673 (1876) (failure of complaint to allege plaintiff was either partner or corporation did not make complaint defective as use of term "company" implied a corporation); Mattox v. State, 115 Ga. 212, 41 S.E. 709 (1902) (name ending in "company" imports corporation; there is a difference between such names for corporations and those indicating partnerships or other natural persons). *But see* Singer Mfg. Co. v. Wright, 97 Ga. 114, 25 S.E. 249 (1895) (sewing machine "company" as used in state statute applies to every sewing machine "man").

In Tennessee, the tendency to read *company* to mean *corporation* appears in case law later than in Georgia. Nevertheless, at least one 19th and two 20th century cases indicate such a trend. *See* Blue Grass Canning Co. v. Wardman, 103 Tenn. 179, 52 S.W. 137 (1899) (plaintiff sued "company" as corporation rather than partnership; suit dismissed, but this error may indicate popular tendency to read *company* as *corporation*); Cope v. Wilkinson, 166 Tenn. 63, 59 S.W.2d 528 (1933) ("West Nashville Ready-to-Wear Company" imports a corporation); Citizens' Bank & Trust Co. v. Scott & Sanders, 18 Tenn. App. 89, 72 S.W.2d 1064 (1933) ("Citizens' Bank & Trust Company" indicates "corporation," not "partnership").

statutory provisions.[197] Where the respective interests of the members are represented by transferable shares, the term "joint stock company" is preferred.[198] On one hand, joint ventures—particularly contractual joint ventures—so strongly resemble partnerships that partnership law is deemed generally applicable to them.[199] On the other hand, statutory joint ventures and corporations strongly resemble each other in that both are creatures of sovereignty.[200] It is obvious that whatever entity the 1813 Resolution contemplated, that entity was to be a creation of Indian sovereignty (providing another reason for ruling out a partnership as the intended form of business organization). But was a sovereign-created joint venture or corporate entity contemplated? Among the characteristics which would rule out a joint venture are

> co-ownership of the enterprise; the relation of principal and agent will not suffice to create a joint adventure; likewise, the creation of a creditor-debtor relationship does not meet the requirements of a joint adventure. The latter requires that the parties risk their respective capital as a part of the undertaking.[201]

The language of the 1813 Resolution plainly did not anticipate a principal-agent relationship between the five Indians and five non-Indians. Nor did the resolution appear to contemplate a creditor-debtor relationship unless the five Indians were to act as representatives or trustees of the tribal creditor to whom the "Turnpike Company" owed an annual payment of $160. If the Indians were to act in such a capacity, a joint venture would be ruled out. Assuming, however, that the five Indians were to participate as individuals in the contemplated company, were they also to participate as co-owners, or parties risking their respective capital in the company's operations? The 1813 Resolution does not indicate that those five Cherokees were to be nominated or appointed to the company based on their ability to provide investment capital. Thus, if the five Indians participated in the company as individuals, a joint venture is again ruled out. The only type of business organization left for consideration is a corporation, or some form of proto-corporate entity. Significantly, that corporate entity was to have embraced both Indians and non-Indians. If the power to create a business corpora-

197. A. Frey, Cases and Materials on Corporations and Partnerships 102 (1951) [hereinafter cited as Frey]. *See* Barrett & Seago, *supra* note 195, at ch. 2, § 3.1.

198. *See* Frey, *supra* note 197, at 102.

199. *E.g.*, E. Latty & G. Frampton, Basic Business Associations 605-06 (1963).

200. *Compare* Barrett & Seago, *supra* note 195, at ch. 2, § § 3, 3.1 and Frey, *supra* note 197, at 102, *with* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 410 (1819).

201. Barrett & Seago, *supra* note 165, at ch. 2, § 7.

tion implies the power to create a public or municipal corporation,[202] the 1813 Resolution thus indicates that an Indian tribe may charter a municipal corporation which embraces non-Indians as citizens or members.

The Tribal Power to Charter a Municipality as an Inherent Power of Sovereignty

Examination of the general powers of sovereignty also leads to the conclusion that a tribe has the power to charter a corporate entity. The principal authority for this proposition is the early case of *McCulloch v. Maryland*[203] where the issue was the authority of Congress to charter a federal bank. There the Supreme Court stated:

> The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. . . . No city was ever built, with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never sued for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.[204]

It follows from this reasoning in *McCulloch* that an Indian tribe may create a corporation to carry out some purpose encompassed by the tribal powers of internal sovereignty. Thus, if the purposes of tribal self-government are served by the creation of some private corporate entity, such an entity may be created; if tribal self-government would be furthered by chartering a public or municipal corporation, the corporation can be chartered.

The tribal power to create a corporation received judicial sanction in *Namekagon Development Co., Inc. v. Bois Forte Reservation Housing Authority.*[205] In *Namekagon,* the plaintiff, a contractor hired by a tribal housing authority—a corporation chartered by the tribal local government—to build housing units on the reservation sued the federal government, the tribal local government, and the reservation housing authority for damages for breach of the contract. The federal district court dismissed in favor of the federal government because the plaintiff's claim exceeded a jurisdictional amount

202. *See* text accompanying notes 203-213 *infra.*
203. 17 U.S. (4 Wheat.) 316 (1819).
204. *Id.* at 411.
205. 395 F. Supp. 23 (D. Minn. 1974), *aff'd,* 517 F.2d 508 (8th Cir. 1975).

limitation, and in favor of the tribal government because its sovereign immunity had not been waived. The district court reserved a ruling on the reservation housing authority's motion for dismissal. In its opinion, however, the district court noted the denial of that motion, holding that the housing authority was a corporation separate from the tribe and not cloaked with the tribe's sovereign immunity because the tribal ordinance creating the corporation had included a sue-and-be-sued clause not unlike the conventional clause used by the federal government in similar kinds of contracts. As for the validity of the incorporation of the housing authority, the district court wrote:

> Did the [tribal local government], as distinguished from the Tribe, have power to create a legally responsible corporation? We think it did. It merely consented to waive the immunity of one corporation—a corporation fully funded by the federal government to build a housing project on a reservation fully controlled by the [tribal local government]. The scope of the waiver was thus exceedingly narrow and could not obligate any of the Tribal assets. The Court believes that the power to grant such a limited waiver was inherent in the [tribal local government's] power to establish a corporation.[206]

The Eighth Circuit affirmed the district court in an opinion written the following year. Although the appellate court did not directly address the tribal power to create a corporation, it did discuss the issue of sovereign immunity which the lower court had seen to be enmeshed in the incorporation issue:

> [T]hough the defendant [housing authority] could, and did, refuse to relinquish its general immunity from levy and execution, it did relinquish that immunity as to all funds it received from HUD for payment of its contractual obligations to Namekagon by Article IX of their contract.[207]

Other tribes than the one involved in *Namekagon* have created corporate entities. Among these are the Navajo Housing Authority[208] and the Standing Rock Sioux Development Corporation.[209] The latter entity stimulated a Department of the Interior Solicitor's Opinion affirming the power of an Indian tribe to charter a corporate entity distinct from the tribe itself.[210]

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206. 395 F. Supp. at 27.
207. 517 F.2d at 510.
208. 6 Navajo Tribal Code § § 351-376 (1969).
209. Standing Rock Sioux Tribal Ordinance 39.
210. U.S. Dep't of the Interior, Solicitor's Opinion M-36781 (1966).

None of the entities discussed in connection with the 1813 Cherokee Resolution, *McCulloch, Namekagon,* or the Navajo and Standing Rock Sioux tribes were municipal corporations. All can be characterized as public or private corporations. Are the power to create a public or private corporation and the power to create a municipal corporation correlative as was suggested in discussing *McCulloch,* supra? While some authorities trace the roots of municipal corporations to the time of the Roman Empire,[211] it is fairly clear that the contemporary private-public-municipal corporation trichotomy is of historically recent vintage, the roots of these entities being merged in pre-American Revolution English history so that all may be seen as having partly emerged from the same antecedents.[212] Thus, at least in accordance with Anglo-American legal history, there is no reason to divorce any one of these powers from the others in the absence of some constitutional or statutory prescription to this effect. Furthermore, there are indications in American Indian history that some tribes historically possessed autonomous settlements which can be characterized as municipal corporations or their archetypal precursors.[213]

Conceding that Indian tribes possess the inherent sovereign power to create or charter a municipality, do they possess jurisdictional power over non-Indians so as to permit such a municipality to be

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211. *See* Tooke, *The Status of the Municipal Corporation in American Law,* 16 Minn. L. Rev. 345-46 (1932).

212. *See* 1 W. Fletcher, Cyclopedia of the Law of Private Corporations § 1 (1974).

213. *See, e.g.,* the preamble to the Treaty of July 8, 1817 with the Cherokee Nation, 7 Stat. 156, which begins:

> Whereas in the autumn of [1808], a deputation from the Upper and Lower Cherokee *towns,* duly authorized by their nation, went on to the city of Washington, the first named to declare to the President of the United States their anxious desire to engage in the pursuits of agriculture and the civilized life . . . : The deputies from the lower *towns* to make known their desire to continue the hunter life. . . . (Emphasis added.)

At least one authority concluded the Cherokee towns were municipal corporations. J. Reid, A Law of Blood 32 (1970). This conclusion receives support from the primitive charter for Cherokee tribal government adopted May 6, 1817, which begins:

> WHEREAS, fifty-four towns and villages have convened in order to deliberate and consider on the situation in our Nation, in the disposition of our common property of lands, without the unanimous consent of the members of Council, and in order to obviate the evil consequences resulting in such course, we have unanimously adopted the following form for the future government of our Nation.

Laws of the Cherokee Nation: Adopted by the Council at Various Periods 4 (1852). The charter's language implies that Cherokee towns and villages were imbued with attributes of sovereignty sufficient to permit them to adopt a form of national constitution. The action of the convention of Cherokee towns and villages is analogously reminiscent of the delegates from the colonies to the Second Continental Congress which adopted the Articles of Confederation. *See* O. Barck & H. Lefler, Colonial America 557-58, 654-55 (2d ed. 1968).

created for non-Indian residents of tribal lands? Apart from the 1813 Cherokee Resolution there exists authority to support such jurisdiction and power. A case upholding the tribal power to require a tribal liquor license in order to operate a tavern within a reservation is already familiar: *United States v. Mazurie.*[214] There is also a series of cases dealing with tribal taxation of non-Indians or their property located on Indian land: *Crabtree v. Madden,*[215] *Maxey v. Wright,*[216] *Morris v. Hitchcock,*[217] *Buster v. Wright,*[218] *Iron Crow v. Oglala Sioux Tribe*[219] and *Barta v. Oglala Sioux Tribe.*[220]

Crabtree was an action brought by an Indian tribe and its tax collector in the United States Court for the Indian Territory to collect a tribal tax from a non-Indian doing business on the reservation as a licensed trader. The trial court dismissed the action and the Eighth Circuit affirmed, holding that the federal courts lacked jurisdiction to enforce a tribal tax, and stating in its opinion:

> The tax which it is sought to collect by this action was imposed by the laws of this tribe. If the tribe had lawful authority to impose it, it had equal power to prescribe the remedies and designate the officers to collect it.[221]

In *Maxey* non-Indian attorneys residing on a reservation sought an injunction in the United States Court for the Indian Tertitory to prevent the tribe from collecting an annual occupation tax. The Court of Appeals of the Indian Territory upheld the dismissal of the action by the trial court, holding the Department of the Interior had a duty to remove the delinquent taxpayer from the reservation as an intruder. The tax was found to be valid, but a federal treaty was relied on in reaching this conclusion.[222]

Morris involved a tribal tax on animals owned by non-tribal members and located within the reservation. Certain non-Indians whose cattle and horses were grazing on tribal land under contracts with individual tribal members brought the action to enjoin the Department of the Interior from seizing or ejecting the animals after the plaintiffs failed to pay the tax. The Supreme Court held the tax was a valid exercise of tribal power and did not run afoul of the provision

214. 419 U.S. 544 (1975). *See* text accompanying notes 165-169 *supra.*
215. 54 F. 426 (8th Cir. 1893).
216. 54 S.W. 807 (Ct. App. Indian Terr. 1900), *aff'd,* 105 F. 1003 (8th Cir. 1900).
217. 194 U.S. 384 (1904).
218. 135 F. 947 (8th Cir. 1905), *appeal denied,* 203 U.S. 599 (1906).
219. 231 F.2d 89 (8th Cir. 1956).
220. 259 F.2d 553 (8th Cir. 1958), *cert. denied* 358 U.S. 932 (1959).
221. 54 F. at 429.
222. 54 S.W. at 808-10.

of the Commerce Clause allowing Congress to regulate trade with the Indians. It is unclear to what extent the Court relied on the applicable treaties with the tribe in reaching its holding. As the Court cryptically said toward the end of its opinion in discussing the effect of legislation making it the Department of the Interior's duty to eject cattle pastured on tribal land without a tribal license:

> Viewing [that congressional act] in the light of the previous decisions of this court and the dealings between the [tribe] and the United States, we are of opinion that one of the objects occasioning the adoption of that act by Congress, having in view the peace and welfare of [the tribe], was to permit the continued exercise, by the legislative body of the tribe, of such a power as is here complained of, subject to a veto power in the President over such legislation as a preventive of arbitrary and injudicious action.[223]

A permit tax imposed by a tribe on non-Indians for the privilege of trading within its borders was considered by the Eighth Circuit in *Buster*. The *Buster* court made it clear that the power to tax being considered by it was an inherent power of tribal sovereignty:

> The authority of the [tribe] to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.[224]

The *Buster* opinion also contains language pertinent to the issue of tribal power to charter a municipality for non-Indians. The language, which appears in a discussion of whether a tribal agreement permitting town sites to be laid out within the reservation and lots in them sold to non-Indians removed the town sites and lots from the reservation, is as follows:

> But the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes, and to enact and enforce municipal ordinances. *Neither the United States, nor a state, nor any other sovereign loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the*

223. 194 U.S. at 393.
224. 135 F. at 950.

> *usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners.* (Emphasis supplied.)[225]

Buster thus provides strong support for the inherent power of an Indian tribe to create a municipality which can encompass and exercise jurisdiction over non-Indians.

A tribal grazing privilege tax imposed on non-tribal lessees of tribal land was the subject of separate Eighth Circuit decisions in *Iron Crow* and *Barta*. In *Iron Crow* the Eighth Circuit upheld the tribe's power to impose the tax as an inherent power of tribal sovereignty which had never been taken away by any federal action, but rather, had been implemented through the tribe's adoption of a constitution pursuant to the Indian Reorganization Act which empowered such taxation.[226] In *Barta* the Eighth Circuit upheld the tax in the face of a contention that it violated the Fifth and Fourteenth Amendments.[227]

Another set of cases dealing with tribal jurisdiction over non-Indians is of more recent origin and arises in the context of tribal law enforcement. The first case is *Long v. Quinalt Tribe,*[228] a memorandum decision of a federal district court. In *Long* a non-Indian who owned property entirely within the boundaries of a reservation was cited by a tribal officer for trespassing on tribal property. While a hearing before the tribal court on this charge was pending, the non-Indian brought an action in the federal court seeking relief from the assertion of tribal jurisdiction. The district court dismissed the action, indicating that the non-Indian had not shown that he lacked a meaningful remedy in the tribal court, and absent special circumstances, the federal courts should require exhaustion of tribal remedies before considering such matters.[229]

A year after *Long* was decided the Ninth Circuit reached a harmonious result in *Oliphant v. Schlie.*[230] The issues in *Oliphant* reached the appellate court by a petition for habeas corpus of a non-Indian awaiting trial before a tribal court on a charge of assaulting a tribal officer and resisting arrest. The petitioner contended that the tribal court lacked the necessary jurisdiction to try him on the charges. The *Oliphant* court began its inquiry into the issues by noting that

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225. *Id.* at 951-52.
226. 231 F.2d at 98-99.
227. 259 F.2d at 556-57.
228. No. C75-67T (D. Wash. Sep. 2, 1975).
229. *Id.* at 2.
230. 544 F.2d 1007 (9th Cir. 1976).

> [t]he proper approach to the question of tribal criminal jurisdiction is to ask "first, what the original sovereign powers of the tribes were, and, then, how far and in what respects these powers have been limited."[231]

The *Oliphant* court then concluded that the jurisdiction sought to be asserted by the tribe had been such an original power of sovereignty:

> Surely 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 [tribe] originally possessed.[232]

Going on to examine the relevant treaties and federal legislation, the *Oliphant* court concluded that neither the treaties nor legislation had taken away the tribal power to deal with non-Indians who violated the provisions of the tribal law and order code at issue there. The denial of the writ of habeas corpus was affirmed.

The *Mazurie* through *Oliphant* cases just discussed all sustain the assertions by various tribal governments of what are traditionally viewed as exercises of judicial, executive and legislative governmental power. In each case, the powers sustained had been exercised over non-Indians. Moreover, the cases all involve matters peculiarly significant in terms of tribal self-government interests: licensing provisions enable tribes to regulate activities important to the tribe's welfare; taxation provides a fundamental means of nourishing the machinery of tribal self-government; and exercise of the police power is necessary if tribal interests are to be protected. Thus, these cases all support the conclusion already drawn from *McCulloch* that a tribe may charter a municipality which encompasses and exercises jurisdiction over non-Indians where this serves tribal self-government interests. Where the tribe needs the income such a developmental municipality can provide, and where such a tribally-chartered local government can satisfy a host of oher important tribal needs,[233] then there can be no doubt that the tribal power to charter the municipality exists and can be exercised.

BEYOND SOVEREIGNTY: A NEW APPROACH TO INDIAN JURISDICTIONAL PROBLEMS

The Inadequacy of Traditional Sovereignty Doctrine for Resolving Jurisdictional Conflicts

Indian sovereignty doctrine has gradually settled on the formula that tribal powers of internal sovereignty are synonymous with tribal

231. *Id.* at 1009.
232. *Id.*
233. *See* text accompanying notes 35 and 36 *supra.*

powers of self-government.[234] This formulation does not provide clear guidelines for determining the limits of tribal self-government. The result is that once the validity of a tribally-chartered municipality is established, there is still no ready means of resolving jurisdictional conflicts of the sort hypothesized in *Situation 2,* supra. This is a clear invitation to litigation. Litigation of this sort is certain to strain the abilities of the courts to sort through and order its complex intricacies. If traditional sovereignty doctrine is relied upon for this purpose, there will inevitably be a balancing of ill-defined "tribal self-government" interests against the state, individual non-Indian, and individual Indian interests which may also be involved. The long-term result is likely to be emasculation of the tribally-chartered municipal government for non-Indians.

These limitations indicate a compelling need for new doctrinal formulation. The beginnings of such a formulation can best be outlined by examining the democratic process of majoritarian government.

Analysis of the Democratic Process and Indian-Created Municipalities for non-Indians on Indian Land

A. The Democratic Process of Majoritarian Government

The authorities mustered up and examined thus far support the tribal power to create a municipality for non-Indians. Nevertheless, there remains a nagging intuition that further inquiry is necessary. There is, for example, a suspicion that states assert their claims to authority over reservation residential developments for non-Indians not only out of fear that reservations may become havens for those seeking to escape state authority, but also out of a sense that a duty of some sort is owed to non-Indian reservation development residents. This sense of duty appears to stem from a perception that non-Indian reservation residents come from a socio-political matrix differing in many important ways from the socio-political tribal matrix, thus raising in non-Indians expectation more nearly akin to those of the off-reservation state citizens—even where the non-Indian development residents come from out of state—than the expectations of tribal members. The apprehension that non-Indian expectations transcend state boundaries leads one to believe that these expectations are more political than social in nature since social lifestyles vary widely from state to state while political behavior in this country possesses a peculiar sense of commonality or federalism. What then, is the nature of this common political heritage? It cannot be

234. *See* text accompanying note 126 *supra.*

ascertained merely by examining the constitutional language governing relationships between the state and federal governments and federal citizens. It is now recognized, for example, that the Constitution's language does not capture the full spectrum of fundamental rights intrinsic to our democratic system of government.[235] Instead, the focus must be on some more implicit, yet fundamental political aspect of non-Indian federal citizenship: the process of democratic majoritarian government.[236]

The Supreme Court's opinion are an appropriate starting point for examining the democratic process familiar to non-Indian. The Court's views or perceptions, solidified into the verbal formulae of decisions also inevitably mold the processes they purport to interpret.[237] Close scrutiny of the Court's apposite decisions demonstrates that they flow from carefully disguised a priori reasoning. Focusing on these decisions' underlying concerns can help expose this reasoning enough to permit positing a consistent theoretical explanation of the decisions.

Two cases suitable for beginning the inquiry into the democratic process of majoritarian government are *Eubank v. City of Richmond*[238] and *Cusack Co. v. City of Chicago.*[239] *Eubank* involved a challenge by a building owner to a municipal ordinance providing that the city's committee on streets was to establish a building line for any street upon the petition of the owners of two-thirds of the frontage on that street. The plaintiff's bay window protruded across the building line for his street. The ordinance was passed pursuant to a state statute authorizing municipalities to prescribe and establish building lines. The Supreme Court held the ordinance was an improper delegation of legislative power:

> [The ordinance] leaves no discretion in the committee on streets

235. *E.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance").

236. While these terms are all commonly employed in discussing the nature of the American political and governmental system, the argument which will be developed here uses these terms in a sense which owes much to questions raised in F. Michelman & T. Sandalow, Materials on Government in Urban Areas 117-24 (1970) [hereinafter cited as Michelman & Sandalow].

237. *See* R. Dahl, Who Governs? 316 (1961):

> [D]emocratic beliefs, like other political beliefs, are influenced by a recurring *process* of interchange among political professionals, the political stratum, and the great bulk of the population. The process generates enough agreement on rules and norms so as to permit the system to operate, but agreement tends to be incomplete, and typically it decays. So the process is frequently repeated.

238. 226 U.S. 137 (1912).

239. 242 U.S. 526 (1916).

> as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. . . . This we emphasize. One set of owners determine not only the extent of use but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the proper rights of others, creates no standard by which the power thus given is to be exercised; . . .[240]

In *Cusack* a city ordinance prohibited erection of billboards on any block-long length of street where one-half of the buildings on that street were residential in character unless the owners of a majority of the frontage property gave their consent. The plaintiff, an outdoor advertising business, maintained that the ordinance involved an improper delegation of legislative power which allowed the owners of a majority of the frontage property to subject the minority property owners to restrictions in the use of their property at the whims of their neighbors. The Supreme Court found no infirmity in the ordinance:

> The plaintiff . . . cannot be injured, but . . . may be benefited by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute. He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property.[241]

The Court then distinguished *Eubank,* saying:

> A sufficient distinction between the ordinance there considered and the one at bar is plain. The former left the establishment of the building line untouched until the lot owners should act and then made the street committee the mere automatic register of that action and gave to it the effect of law. The ordinance in the case at bar absolutely prohibits the erection of any billboards in the blocks designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification.[242]

Careful examination of *Eubank* can discern that public safety, convenience and welfare was not the principle concern of the Court. What seemed to worry the Court most was the delegation of discretion to set governmental policy, i.e., the statute and ordinance

240. 226 U.S. at 143-44.
241. 242 U.S. at 530.
242. *Id.* at 531.

created no standard by which the power to control rights of use by others was to be exercised. In effect, a decision affecting a local area was made locally, but was seen as improper because it had not been filtered through the larger community government.

Two major political process theories can explain the Supreme Court's result. The first is the general will theory.[243] For purposes of analying *Eubank,* the essence of this theory is that a decision is improper where not made by a governmental body officially presumed disinterested in the issue being decided, viz., the community legislators.[244] The second major theory applicable to *Eubank* is the pluralist theory of political process.[245] The applicable essence here is that a legislator is the representative of the particular views of his constituents.[246] At first glance, *Eubank* appears to write the general will theory into the cannons of political process mandated by the Constitution. But closer examination of the pluralist theory shows that it does not have to be rejected to accept the result in *Eubank.* For pluralist theory also incorporates the view that the political

243. The term "general will," evidently coined by Rousseau, *see* J. Rousseau, The Social Contract (1962), was applied by him to describe the collective community moral and political values which a community government's policies must generally conform to if that government is to be considered legitimate. In Rousseau's ideal democracy, the general will would manifest itself in legislative decisions. Others have since applied the term to characterize their descriptions of the democratic process. *E.g.,* M. Follett, The New State (1918); J. Pennock, Liberal Democracy: Its Merits and Prospects (1950); Hartz, *Democracy: Image and Reality,* in Democracy in Mid-Twentieth Century 11-29 (W. Chamber & R. Salisbury eds. 1960).

244. *Compare* A. Bentley, The Process of Government 447 (1935):

> There is a theory . . . that all acts of government ought to be the product of clear, cold reasoning, and that the maximum detachment on the part of the legislator from the interests at stake will get the best results. We may say that this is "the" theory of political science, as it certainly is the professed point of view of most criticisms of government and of the theoretical statement of most schemes of reform which do not get into too close contact with immediate application.

with R. Young, American Law and Politics 421 (1967):

> The members of Congress, in other words, are constantly engaged in promoting a harmony of interests in the creation of law and should not be considered to be merely agents of their constituency.

245. Pluralist theory apparently owes its genesis to the pioneering work of A. F. Bentley. *See* A. Bentley, The Process of Government (1935), originally published in 1908.

246. *See, e.g.,* R. Dahl, Democracy in the United States: Promise and Performance 163 (2d ed. 1972):

> Yet it seems clear that if the principles of political equality and consent are to have any concrete meaning at all, voters should be able to select representatives who will reflect their views or values in legislative decisions. Certainly it would be incompatible with political equality and consent if the decisions of the legislature did not embody the basic preferences of a majority of the people but instead the conflicting preferences of some minority, whether that minority be the elected legislators themselves, other officials, or interest groups.

process involves log-rolling[247]—continual shifting of political alliances and majorities through trade-offs in political support from issue to issue—so that in the long run, no one comes away from the political process empty-handed. It is the log-rolling process which makes majority rule tolerable because it prevents the tyranny of a static majority. But in *Eubank,* the group responsible for the decision, i.e., the property owners with frontage on a block-long length of street, would never again vote as a single political unit on another issue affecting only that unit. There existed, in effect, a short-term static majority. While judicial review of the decision made by that majority was possible, there was no possibility of political review by voting the decision makers out of office.

Ignoring the Court's superficial beneficence-harm distinction and concentrating instead on political process analysis, it is difficult to reconcile *Cusack* with *Eubank* in terms of the general will theory. In terms of pluralist theory, however, reconciliation is possible by recognizing that this theory really asks whether every interest has had access to a forum which accommodates the log-rolling process. No one worries about the ability of the "billboard lobby" to find out what is going on in the community's legislative chambers and make its views known there, but where is a "bay window lobby" to be found?

The Supreme Court's legislative reapportionment cases have bolstered pluralist theory. *Reynolds v. Sims,*[248] for example, was a challenge to the constitutionality of the apportionment of the Alabama legislature. In an opinion holding that that state's legislature had been unconstitutionally apportioned, the Court appeared to validate the log-rolling concept:

> So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population

247. Log-rolling is a term of opprobrium. This is because it is used mainly with reference to its grosser forms. But grossness as it is used in this connection merely means that certain factors which we regard as of great importance are treated by the legislator as of small importance and traded off by him for things which we regard as a mess of pottage, but which he regards as the main business of his activity. Log-rolling is, however, in fact, the most characteristic legislative process.

A. Bentley, The Process of Government 370 (1935).

> Once it is recognized that the political process embodies a continuing stream of separate decisions, the most general model must include the possibility of vote-trading, or, to use the commonly employed American term, *logrolling.*

J. Buchanan & G. Tullock, The Calculus of Consent 132 (1962).

248. 377 U.S. 533 (1964).

> principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures vote. (Footnotes omitted.)[249]

The Court's language implicitly acknowledges that interest group affiliation may shift from issue to issue and that this must be allowed to happen to prevent the tyranny of static majorities which results from stifling the log-rolling process. The Court's opinion expresses a recognition that in general people, not interest groups, are the basic voting units. Care must be taken when choosing electoral boundaries not to choose a boundary which will freeze some interest group into a majority position. The inevitable result of this reasoning must be the one-person, one-vote rule first intimated in *Baker v. Carr*[250] and applied in *Reynolds v. Sims.*[251]

The principles of *Reynolds* were extended to local governments in *Avery v. Midland County.*[252] In that case the Supreme Court indicated how deeply it felt the democratic political process was embedded in the dictates of the Constitution and in the fabric of local government:

> That the state legislature may itself be properly apportioned does not exempt subdivisions from the Fourteenth Amendment. While state legislatures exercise extensive power over their constituents and over the various units of local government, the States universally leave much policy and decision making to their governmental subdivisions. . . . States characteristically provide for representative government—for decisionmaking at the local level by representatives elected by the people. And, not infrequently, the delegation of power to local units is contained in constitutional provisions for local home rule which are immune from legislative interference. In a word, institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens. We therefore see little difference, in terms of the application of the Equal Protection Clause and of the principles

249. *Id.* at 579-80.

250. 369 U.S. 186 (1962). *See* Auerbach, *The Reapportionment Cases: One Person, One Vote–One Vote, One Value,* 1964 Sup. Ct. Rev. 1; McCloskey, *The Reapportionment Case,* 76 Harv. L. Rev. 54 (1962).

251. 377 U.S. at 558.

252. 390 U.S. 474 (1968).

> of *Reynolds v. Sims*, between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns, and counties.[253]

In sum, wherever representative local government exists in communities governed by the Constitution, pluralistic democratic processes must be observed. This is not to say that wherever a local community exists there must be a representative local government based on these principles.[254] The concept of an inherent right of local self-government has been argued in the past, and although not conclusively disposed of, is at least presently not in vogue.[255] It may nevertheless be meaningful to note that in those instances where no recognized representative local government exists for non-Indians, there has still generally been a representative state, territorial or commonwealth government to guarantee a political forum for federal citizens.[256] These tendencies all urge the conclusion that even if there is no mandate that non-Indian federal citizens be provided a governmental forum which operates in accordance with the principles of the democratic political process, there is a strong presumption that such a forum will be provided wherever at all possible.

Non-Indian residents of tribally-created municipalities may owe political loyalty to two non-federal governmental forums: the local municipal government established by the tribe and the larger state government. Since reservation Indians can partake of the benefits of state citizenship,[257] there is no reason for denying dual citizenship to non-Indian reservation residents. There is also, of course, the model of dual state and federal citizenship. Upon close examination, dual citizenship status for non-Indian reservation development resi-

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253. *Id.* at 481.

254. *Cf.* Sailors v. Board of Education, 387 U.S. 105, 108 (1967) (upholding constitutionality of county school board whose members were chosen by local school board delegates where the local school districts represented by single delegates were of disproportionate sizes in terms of electors):

> We find no constitutional reason why state or local officers of the non-legislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by election.

255. *See, e.g.*, Michelman & Sandalow, *supra* note 236 at 179-85.

256. Examples of exceptions to this observation have generally involved newly-acquired federal territory. In the areas acquired in the southwestern United States during the Mexican War, federally-recognized state or territorial governments did not replace military rule for several years. *See, e.g.*, Perrigo, Our Spanish Southwest 203-13 (1960). Yet even under military rule some legislative bodies did function. In New Mexico (which under military rule also encompassed what was later to become the territory of Arizona), for example, a two-house legislative body elected by the people met once during the August, 1846-March, 1851 military period. T. Donnelly, The Government of New Mexico 2-3 (1953).

257. *See, e.g.*, McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Chambers & Price, *supra* note 7, at 1089.

dents may be required by the democratic process theory as non-Indian residents of tribal municipalities would not be entitled to full participation in the tribal, as opposed to municipal, government.[258] The consequence of the lack of such participation would be that the non-Indians might have adequate local interest representation, but without rights of participation in state government, might find themselves without adequate interest representation with regard to larger regional or statewide affairs which could have an impact on them. On the other hand, such interest representation could be found at the level of federal government. In any event, from the standpoint of democratic process theory there is nothing inconsistent about non-Indian dual municipal-state citizenship, but such citizenship does imply a state obligation to its non-Indian on-reservation citizens to assert its jurisdiction with respect to larger—as opposed to locally-oriented—concerns on the reservation. This would involve nothing new in Indian law; the test for assertions of state jurisdiction here would be the Indian self-government analysis which runs through the *Williams*-to-*Bryan* line of cases examined earlier.[259] The moment the state seeks to affect a locally-oriented interest where a tribally-created non-Indian municipality is concerned, however, the state has exceeded the bounds of interest-representation authority and state jurisdiction cannot be justified.[260]

Before turning to means of meeting democratic majoritarian objections to tribally-created municipalities for non-Indians on Indian land, there is one additional aspect of the democratic process of majoritarian government which will be briefly examined: judicial review.

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258. Not only are tribal governments not necessarily representative democracies in the sense that democratic majoritarian government is being used here, but tribal government has historically been viewed as a process in which only tribal members are entitled to full rights of participation. *Cf.* Chambers & Price, *supra* note 7, at 1088. Non-Indians have occasionally been given tribal membership status, but such status has ordinarily retained non-Indian vis-a-vis Indian distinctions, allowing non-Indian tribal members only limited rights of participation in the total sphere of tribal affairs. *See* Cherokee Intermarriage Cases, 203 U.S. 76 (1906). It is possible to argue that if non-Indians cannot become full-fledged tribal members, then the municipal polity they are a part of cannot validly be the object of delegated tribal powers. A response is that while non-Indians did not *generally* obtain full tribal membership status, in a *few* instances they did. *Id.* at 84. Thus, if a tribe has power to accord unrestricted tribal membership to non-Indians (barring federal statutory or regulatory restrictions), it should have the power to delegate certain governmental powers to a tribally-created municipal government for non-Indians possessing a special socio-political relationship with the tribe.

259. *See* text accompanying notes 137-188 *supra.*

260. Tribal interests in self-government are far more likely to be perceived where the tribe has actively asserted its powers of sovereignty. *See* C. Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians,* 40 Law & Contemp. Probs, 166, 172-73, 186-88 (1976).

If log-rolling is a critical cog in the machinery of the democratic process of government, the static majority is a potentially injurious misalignment of political gears. Since the nature of a static majority is self-perpetuation, then it is outside the legislative machinery that one must look for a corrective tool. This is the role the judiciary has traditionally occupied. As the Supreme Court commented in *Baker v. Carr* in addressing the political question doctrine:

> The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority.[261]

The requirement of adequate judicial review therefore appears to be an additional element of the democratic process which must find its way into consideration of Indian-chartered municipalities for non-Indians.[262]

B. Indian Government and the Democratic Process

There can be no presumption that Indian governmental processes must be conducted in accordance with the democratic processes of majoritarian government.[263] Such democratic principles may be required of Indian governmental processes only where those processes are regulated by the Constitution itself, or by the statutory imposition of constitutional standards, as with the Indian Civil Rights Act of 1968.[264] And the statutory standards of the Indian Civil Rights Act are intended to be applied cautiously and only to the extent that

261. 369 U.S. 217. Compare Justice Brennan's dissenting opinion in McGautha v. California, 402 U.S. 183, 270, (1971), *rehearing denied*, 406 U.S. 978 (1972), *vacated*, 408 U.S. 941 (1972) (rejection of challenges to constitutionality of standardless jury sentencing in imposition of death penalty):

> In my view, the cases discussed above establish beyond peradventure the following propositions. *First*, due process of law requires the States to protect individuals against the arbitrary exercise of state power by assuring that the fundamental policy choices underlying any exercise of state power are explicitly articulated by some responsible organ of state government. *Second*, due process of law is denied by state procedural mechanisms that allow for the exercise of arbitrary power without providing any means whereby arbitrary action may be reviewed or corrected. *Third*, where federally protected rights are involved due process of law is denied by state procedures which render inefficacious the federal judicial machinery that has been established for the vindication of those rights.

262. While judicial review is not required by any general tenets of democratic theory, *see* R. Dahl, Democracy in the United States: Promise and Performance 197-99 (2d ed. 1972), it has become firmly entrenched in the system of democracy practiced in the United States. *See id.* at 188. Judicially speaking, this country's tradition of such review is rooted in the Supreme Court's opinion in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

263. *See* text accompanying notes 96-110 *supra*.

264. *See* text accompanying notes 111-114 *supra*.

a particular tribal government may be said to have absorbed non-Indian democratic principles of government and political process.[265] It is this contrast between non-Indian democratic principles of majoritarian government, and Indian principles of tribal government and political process (which presumptively exhibit a wide variation in their degrees of similarity to non-Indian principles) which appears to account for the intuitive objections to Indian-created municipalities. More bluntly, the fear at the root of many objections to allowing Indian tribal governments to charter non-Indian municipalities is that Indians will not provide for non-Indian reservation leasehold residents the democratic processes of government which non-Indians have come to see as being at least constitutionally urged, and perhaps constitutionally mandated for them. If these objections can be met there should be no unmoderated need for urging state jurisdiction and control over such municipalities.

Meeting Democratic Majoritarian Process Objections to Indian-Chartered Municipalities

A preliminary answer to the political process-based objections to Indian-created municipalities is for the tribal government to provide to the non-Indians a traditional, elective, majoritarian system of municipal government. Yet establishing such a government is not enough. A difficulty can be discerned in the municipal-tribal relationship: what the tribal government has provided, it may decide to take away, as in *Situation 2*, supra. It is this potential for arbitrary exercises of tribal power which makes mere establishment of majoritarian non-Indian government insufficient to ward off criticism or unease. A second difficulty can be noted by asking what is to prevent static majorities or other political irregularities from disrupting the log-rolling process in Indian-chartered municipalities? Methods of meeting these difficulties should next be examined.

A. Home Rule in Indian-Chartered Municipalities for Non-Indians

The relationships of tribal governments to their non-Indian municipalities are not the only varieties of intergovernmental relationships involving municipalities which possess the potential for arbitrary exercises of power. At times, this potential has attained reality in the relationships between states and their own municipalities. In the last century fears over the abuse of delegated powers by state municipalities led to the formulation of the "Dillon Rule" which specified that municipal corporations could possess and exer-

265. *See* text accompanying notes 116-126 *supra*.

cise only those powers which were (1) expressly granted, (2) necessarily or fairly implied, or (3) essential to the object and purposes of the corporation.[266] These fears of abuse at the state level also resulted in what has been termed the "local bill" system,[267] whereby state legislatures attempted to conduct local affairs from their legislative chambers. The double impact of the judicial application of the Dillon Rule and the legislative implementation of the local bill system resulted in the debilitation of municipal corporate government and led to early institution of municipal charters under what has been termed legislative home rule.[268] State constitutional prohibitions on special or local legislation followed,[269] and in 1875 the first state constitutional provision providing authorization for a city to frame and adopt a charter for its own government[270] made its appearance.

If the Dillon Rule is to be applied to Indian-created municipalities, the rationale must be some concern analogous to that which provoked the formulation of the rule in the domain of state-municipal relations in the first instance, e.g., a concern that the non-Indian municipal governments would become runaway polities which would interfere with, or ignore, tribal legislative policies. Such a course of events might be likely in the realm of state-municipal relations where state legislatures are usually physically remote from the bulk of state

266. *See, e.g.*, State v. Webber, 107 N.C. 962, 12 S.E. 598 (1890) (state statute providing aldermen may pass ordinances deemed necessary for better city governance did not empower towns to pass ordinances making it offense for owner or occupant of room to allow prostitution therein). The *Webber* court stated the Dillon Rule:

> In volume 1, § 89, (55,) Dillon says: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: *First*, those granted in express words; *second*, those necessarily or fairly implied; *third*, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

Id. at 965-66, 12 S.E. at 599.

267. 1 E. Yokley, Municipal Corporations, § 29, at 78-79 (1956).

268. While there is no universal agreement as to the meaning of the term "home rule," for purposes of this discussion home rule is assumed to mean a grant of municipal powers such that the adverse interpretive effects of the Dillon Rule are to some degree overcome. *Cf.* Rusco, Municipal Home Rule: Guidelines for Idaho 4 (1960) (the purpose of home rule is to assure cities some powers independent of state legislative control). Legislative home rule would thus be the granting of such powers by the legislature. Iowa, perhaps unwittingly, anticipated the crystallization of the Dillon Rule in judicial decision-making and pioneered legislative home rule with its adoption of a statutory home rule provision in 1851. *See* Iowa Code of 1851, ch. 42.

269. *E.g.*, N.M. Const. art. IV, § 24 ("The legislature shall not pass local or special laws in any of the following cases. . . ."). For further discussion of this issue, *see* Kneier, City Government in the United States 86 (3rd ed. 1957); Michelman & Sandalow, *supra* note 236, at 332-39.

270. Mo. Const. art. IX, § 20 (1875).

municipalities and where the state municipalities are too numerous to permit continued, detailed knowledge of their activities. But in the realm of tribal-municipal relations, there will normally be both geographic proximity and careful monitoring of municipal affairs by the tribe. If the Dillon Rule were applied to tribally-created municipalities, nevertheless, the result would certainly be a decrease in municipal autonomy, and perhaps a decrease in the effectiveness of municipal government similar to that which contributed to the rise of home rule in the state-municipal realm. The decrease in autonomy is even more worrisome in the tribal-municipal realm because of the particular concerns over interference with the majoritarian processes which are present there. These concerns point in the direction of home rule as a means of protecting the integrity of the democratic process of majoritarian government for non-Indian reservation residents. Nor are the autonomy gains restricted only to instances in which the Dillon Rule is applied. In order to assess any potential gains in autonomy, however, it is important to distinguish legislative home rule from constitutional home rule.

Since legislative home rule traditionally requires a charter—a legislative grant of power—from the granting authority, it can also be withdrawn by subsequent legislative action of the same authority. Nevertheless, until the charter is retracted, the municipality is free to act with respect to any local matters not the subject of legislation by the granting authority,[271] and it may act free of the Dillon's Rule presumption that a municipal legislative act is invalid unless it meets the rule's strict tests for validity.[272] Furthermore, there is likely to be more reluctance to withdraw authority delegated to a municipality where that authority comes cloaked in the label "home rule." These considerations indicate that while legislative home rule may not provide overwhelming gains in terms of the autonomy of Indian-created municipalities,[273] it may provide measurable improvement. A difficulty which must also be accounted for in the legislative home rule situation is that it has occasionally been held unconstitutional as an unlawful delegation of power.[274] However, this circumstance

271. *See* note 268 *supra.*

272. *See* Michelman & Sandalow, *supra* note 236, at 298-301, 308-313.

273. *But see* Vanlandingham, *Municipal Home Rule in the United States,* 10 Wm. & Mary L. Rev. 269, 277 (1968):

> Cities in the legislative home rule states of New Jersey, Virginia, and Delaware apparently possess more home rule than cities in such constitutional home rule states as Utah, Pennsylvania, Nevada, Hawaii, and Wisconsin. (Footnote omitted.)

274. *Id.* at 275.

must be weighed cautiously in the light of the unique nature of Indian law.[275]

The constitutional home rule charter is granted pursuant to procedures prescribed in the applicable provisions in the constitution of the granting polity. These provisions may be classified as self-executing, mandatory, or permissive.[276] Self-executing provisions allow municipalities to adopt and immediately exercise home rule powers without implementing legislation.[277] Mandatory, or non-self-executing, provisions require the legislature of the granting polity to enact implementing legislation.[278] Permissive provisions authorize home rule, but leave the granting of a home rule charter in the discretion of the legislature.[279] While the implementation procedures vary, the important observation here is that once constitutional home rule has been obtained, a constitutional amendment would ordinarily be required to withdraw a charter—unless the constitution provided some other means of withdrawal. Since amendments are more difficult to obtain than legislative enactments, constitutional home rule is likely to produce a greater gain in terms of autonomy than legislative home rule with respect to charter withdrawal. Constitutional home rule, like legislative home rule, has the effect of overcoming the Dillon Rule presumption regarding the invalidity of local government legislation.[280] However, it does not follow that constitutional home rule municipalities have greater freedom to act with respect to local affairs than legislative home rule municipalities. This will depend on the powers granted under the constitutional home rule provision, and any restrictions which have been placed on their exercise.

Clearly, then, home rule provides definite gains in terms of autonomy for municipalities and can provide worthwhile models for tribes contemplating the chartering of municipalities for non-Indians on their reservations. Since not all tribes possess constitutions, for those which do not the constitutional home rule model could still be roughly emulated by providing in the municipal charter, for example, that home rule would only be revoked by a two-thirds or three-fourths majority of the chartering legislative body. Other examples,

275. *See* text accompanying notes 96-126 *supra.*

276. *See* Vanlandingham, *Municipal Home Rule in the United States, supra* note 273, at 278.

277. *Id.*

278. *Id.*

279. *Id.* These distinctions are often difficult to make in actual fact, as home rule provisions vary greatly among states. *See id.* at 284-96; Michelman & Sandalow, *supra* note 236, at 302-04.

280. *See* note 236 *supra.*

equally effective, can readily be conceived;[281] the point being that given the peculiar nature of tribal government, the term "model" must be loosely employed.

Implementation of some form of home rule would allay some of the unease over the possibilities of tribal interference with the non-Indians' democratic process of majoritarial government. Closely followed, the constitutional home rule model would, of course, provide greater protection against withdrawal of the municipal charter than the model of legislative home rule. But the legislative model might result in the granting of a wider range of home rule powers since the tribe would have to worry less about interference with tribal interests by the vesting of such powers where it is more capable of correcting any abuse of those powers on the part of the municipality.

The home rule models do not completely eliminate tribal influence with respect to municipal governmental activities which affect larger tribal concerns and culture. Nor is it desirable that such influence be totally eliminated: tribally-created municipalities do, after all, rest within Indian land, and the non-Indian residents of those municipalities will generally have recognized at some point prior to acquiring their leasehold properties, that tribal jurisdiction on the reservation must be acknowledged and acceeded to in many ways, just as state jurisdiction must be elsewhere.

In sum, the presence of home rule, or an institution resembling home rule on the reservation, may provide an important means of eliminating the need for on-reservation state jurisdiction in order to secure the democratic process of majoritarian government for non-Indian reservation residents.

B. Judicial Review in Indian-Chartered Municipalities for Non-Indians

If the purpose of judicial review in the scheme of democratic majoritarian government is to prevent the disruption of the political process, where does this review fit in non-Indian reservation municipal government? Certainly a judicial forum is necessary at the municipal level. A municipal court not only provides a means for ensuring the enforcement of municipal law, but it also provides a

281. In the case of one tribe, the Pueblo de Cochiti, a charter was granted by the tribe as part of the contract with the developer. Lease between Pueblo de Cochiti and California Cities, April 15, 1969, approved by Melvin Nelander, Acting Albuquerque Area Director, Bureau of Indian Affairs, April 12, 1969, pursuant to delegation of approval authority from Secretary of Interior dated April 7, 1969. Withdrawal of such a charter could result in breach of the development contract and consequent loss of revenues and benefits for the tribe, an incentive for the tribe to temper any contemplated charter withdrawal.

means of adjudicating and correcting abuses of municipal governmental powers. A municipal court allows this jurisdiction to take place in a forum sympathetic to and possessing an intuitive understanding of non-Indian majoritarian interests.

Yet issues may occasionally arise which also involve larger tribal interests, or interpretations of tribal law (as with challenges to tribal delegations of power to the municipality). In these instances it is important that the tribal judicial establishment have at least the power to review decisions of the municipal court.[282] It is possible, however, that the tribal court or other judicial forum may tend to lose sight of non-Indian interests during the course of its review process. Thus, review by a more neutral forum of tribal judicial decisions involving the interests of non-Indian tribal municipality residents would seem required in some instances. A judicial authority which might possess a somewhat more neutral position in such adjudications than either municipal or tribal judicial forums, and which might also possess jurisdiction over both the Indian and non-Indian polities involved is the federal judiciary. Indeed, the Indian Civil Rights Act of 1968 gives the federal district courts subject matter jurisdiction over many of the categories of issues likely to require the sort of federal review being discussed here.[283] Furthermore, the Indian Civil Rights Act has been interpreted to protect the rights of non-Indians—as well as Indians—on the reservations.[284] In cases where the requisite federal jurisdiction has not been granted by the Indian Civil Rights Act, a case can be made that such jurisdiction is authorized by Article III, Section 2 of the Constitution[285] in a

282. *Cf.* Janis v. Wilson, 521 F.2d 724 (8th Cir. 1975) (exhaustion of tribal remedies may be required of non-Indian litigants before federal jurisdiction will be exercised).

283. 28 U.S.C. § 1343 (1970). *See* notes 108 *supra;* abstention is not only a minor difficulty as pointed out there, but it is unlikely to be invoked for an additional reason—the doctrine is not ordinarily employed where civil rights issues are involved. *See* G. Gunther & N. Dowling, Cases and Materials on Constitutional Law 165 (8th ed. 1970).

284. *See, e.g.,* Dodge v. Nakai, 298 F. Supp. 17 (D. Ariz. 1969) (Indian Civil Rights Act protects rights of non-Indians, as well as Indians, on the reservation).

285. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . —to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the Same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

manner analogous to that upholding federal jurisdiction over state court proceedings in *Cohens v. Virginia.*[286]

In summary, federal jurisdiction to review tribal appellate proceedings involving non-Indian municipal court actions seems necessary. Tribal appellate review of non-Indian municipal court proceedings also appears to be required,[287] but if not provided, federal jurisdiction would seem to lie here also.[288] And a municipal court for non-Indian reservation communities would be required by the judicial review principle of democratic majoritarian government. If these requirements are satisfied, there is less reason to allow state jurisdiction—at least with respect to non-Indian reservation residents—as a judicial system suitable for protecting non-Indian and Indian rights will have been provided.

A final point must be raised here in connection with disputes which might arise between a tribe and a non-Indian municipality which it has chartered. It is clear that the tribe itself enjoys sovereign immunity which operates to bar any suit against it in the tribal or federal courts,[289] unless a tribal statutory or constitutional provision provides to the contrary,[290] or there exists a waiver of tribal sovereignty pursuant to a congressional act. Such a federal provision has been found by implication in the Indian Civil Rights Act of 1968.[291] Thus, while a tribe itself might refuse to allow suit against it in either the municipal or tribal courts, such a suit might be possible in federal court where there is an alleged violation of some provision of the Indian Civil Rights Act which inures to the injury of the municipality.[292]

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286. 19 U.S. (6 Wheat.) 264 (1821).

287. It seems required both from the standpoint of balancing tribal and non-Indian interests, and by the doctrine of exhaustion of tribal remedies. *See* notes 108 and 282 *supra.*

288. On the premise that the municipal court is actually a tribal court possessing delegated tribal powers.

289. *See, e.g.,* United States v. United States Fidelity and Guaranty Co., 309 U.S. 506 (1940) (reversing rejections of claim by federal government on behalf of Indian tribes but allowing counter-claim of intervenor against tribes).

290. Suits between municipal and quasi-municipal entities which employ statutory provisions allowing suits against an arm of the state are not uncommon. *See, e.g.,* Michelman & Sandalow, *supra* note 236, at 751-76; Comment, *Governmental Immmunity from Local Zoning Ordinances,* 84 Harv. L. Rev. 869 (1971). *Cf.* Namekagon Dev. Co., Inc. v. Bois Forte Reservation Hous. Auth., 395 F. Supp. 23 (D. Minn. 1974), *aff'd,* 517 F.2d 508 (8th Cir. 1975) (permitting suit against tribally-created housing authority where tribe waived the immunity of the housing authority in the ordinance creating it).

291. *See, e.g.,* Johnson v. Lower Elwha Tribal Community, 484 F.2d 200 (9th Cir. 1973).

292. Various tests have been employed to determine whether a state municipality has standing to bring an action against another state entity. *See, e.g.,* Michelman & Sandalow, *supra* note 236, at 751-71. Where the municipality is bringing an action to represent the individual or private interests of its own citizens, rather than for the protection of its own

SITUATION ANALYSIS

What resolutions may be achieved in *Situations 1, 2* and *3,* assuming that something like non-Indian on-reservation municipal home rule and appropriate municipal-tribal-federal jurisdiction processes have been provided for?

In *Situation 1* there will be no reason for finding that the tribe cannot create its own municipality for the non-Indian residents of the leasehold there. Thus, the only reason to void the lease would be for a failure to comply with some indispensable federal statutory leasing requirement.[293] Contentions arising during such actions concerning the applicability of state zoning, subdivision or similar laws—laws clearly involving non-Indian statewide interests would have to be adjudicated by first examining the federal treaties and statutes for preemption, and if none were found, then determining whether a tribal interest in self-government were involved.[294] If such an interest were involved, the state would be precluded from applying its legislation to the non-Indian municipality. Such a self-government interest could well be involved where the state's assertion of jurisdiction would constitute a serious interference with a tribe's legal and political relationship with its own non-Indian municipality inasmuch as the municipality can readily be recognized to be a tribal instrumentality created to facilitate the attainment of important tribal objectives with respect to tribal land.

In *Situation 2,* the non-Indian community police officer would clearly have authority to act with respect to the driver who resided in the non-Indian municipality. With respect to the Indian driver, the police officer's authority to act would depend on whether the tribal government had delegated such power to the municipal government. A far-sighted tribe would retain such authority for itself if it wished to prevent the application of non-Indian political process (and law abased on their underlying assumptions) to tribal members. Tribal-municipal police cooperation would then be essential to maintain tribal-municipal harmony.

With respect to the non-Indian driver residing off the reservation,

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rights and interests, the rule has been established that it cannot do so in the absence of a statutory provision authorizing it to act for those purposes, or of a contractual right which it seeks to protect. *See, e.g.,* Parish of Jefferson v. Louisiana Dep't of Corrections, 259 La. 1063, 254 So.2d 582 (1971) (action by parish to enjoin state agency from purchasing certain property within parish's borders for use as a site for state corrections training institute).

293. *E.g.,* Davis v. Morton, 469 F.2d 593 (10th Cir. 1972) (residential leasehold development involved major federal action requiring environmental impact statement in accordance with National Environmental Protection Act).

294. *See* note 260 *supra.*

the municipal officer's ability to act will depend on whether the tribal police could act, and whether that authority to act could be seen as having been delegated to the municipality. In certain instances tribal authority to act has been recognized in treaty provisions.[295] The question of municipal police authority to act under the same provisions will hinge on a determination of whether the tribe has delegated the appropriate power to the municipality, and what the exact nature of the tribal power to act was in the first instance. However, recent cases have indicated that a tribe, and hence a non-Indian tribal municipality acting under an appropriate delegation of power, can exercise law enforcement jurisdiction over non-Indians provided no federal treaty or legislation has specifically denied this power to the tribe.[296] Indeed, because the non-Indian, non-reservation resident lawbreaker will share democratic process theory expectations with the members and officials of the non-Indian developmental municipality—expectations shared in very uncertain measure with tribal members—there should be even less objection to the exercise of non-Indian municipal law enforcement powers than tribal powers of law enforcement.

In *Situation 3,* if the municipal home rule is of the constitutional variety, the tribe's practical ability to revoke or suspend the municipal charter is reduced. Ultimately, however, that power would exist, whether municipal or legislative home rule were present.[297] As for the contemplated action of the municipality against the tribe, such an action would have to be raised in federal court as the tribe would be unlikely to entertain it in a tribal judicial forum. Standing of the municipality in such federal court actions will turn, in part, on whether the municipality is suing to protect its own rights, rather than the rights of its citizens.[298] There seems no basis for concluding that a municipality may enjoy free exercise of religion in a sense which would allow it to invoke the Indian Civil Rights Act as a basis for standing. The non-Indian municipal resident who belonged to the satanic sect, however, would clearly be in a position to make his way into federal court, since he meets the standing requirement. The ultimate disposition of this case will depend on an interpretation of the meaning of religious freedom in the context of tribal con-

295. *See, e.g.,* Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975) (tribal police had authority to place non-Indian found on reservation in custody until federal authorities arrived).

296. *See* text accompanying notes 228-232 *supra.*

297. There is a substantial deterrent present, however, in the fact that such revocation would only complicate the tribe's problems and disrupt the developmental scheme upon which it may depend for revenues.

298. *See* note 292 *supra.*

stitutional or traditional and customary law.[299] If tribal members have traditionally enjoyed no freedom to indulge in withcraft, then the satanic sect member will be subject to a municipal—or in the event of municipal failure to act—a tribal statute barring such religious practice. He may have no alternative than to terminate his non-Indian municipal residency and claim damages from the developer (assuming a basis for liability can be found), or the municipality (assuming the municipality does not enjoy immunity from suit).

CONCLUSIONS

Indian sovereignty as a live doctrine points to the tribal power to charter a municipality for non-Indians on Indian land. This is not entirely dispositive as the interests of the non-Indian municipal residents must also be accounted for and these interests include a strong, constitutionally-related presumption that where local government is provided to non-Indians, it must comport with the democratic processes of majoritarian government. If such a local government is provided, there is little need for state jurisdiction to be extended onto the reservation except where larger non-Indian regional or statewide interests are concerned. For such assertions of state jurisdiction the test—absent preemptive federal law—will be whether a tribal right related to self-government is being infringed. Serious interferences with tribal-municipal legal and political relationships would constitute such infringement.

Thus, if safeguards such as those proposed here are present, there is little reason for prohibiting tribes from creating non-Indian municipalities. Such actions will certainly provide much-needed revenue to the tribes and may ultimately enhance cross-cultural appreciation through resulting inter-cultural transactions. If certain rights non-Indians have come to expect—such as religious freedom—differ from tribal expectations so that some individuals are unable to reside in non-Indian municipalities because of personal beliefs, the small number of anticipated instances surely represents a small price to pay to secure the integrity of Indian cultures which have historically experienced their own denial of expected rights. Such a disappointment of non-Indian expectations would represent far less of an intrusion into the private lives of non-Indian citizens of this country than private discrimination conducted through protective covenants, or the public institutional discrimination which has been a concommitant of contemporary American society.

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299. *See* text accompanying notes 96-127 *supra*.