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The curious position of the American Indian tribe in the federal system is evolving rapidly toward precise definition. This is chiefly caused by the politics of Indian country which has forced otherwise quiet observers to take note of the tribal presence. The resulting congressional, judicial, and administrative activity has enormously advanced the timetable within which legal issues of substantial importance are resolved.

This article chronicles the emerging contours of tribal self-government[1] since the publication of my survey on the nature and scope of tribal governmental power.[2] It then predicts the probable outcome of the most[3] critical nonproprietary[4] issue which separates contemporary tribal advocates from the dominant non-Indian interests—the assertion of tribal civil regulatory authority and jurisdiction over nontribal members.

I. Transition From Shield to Sword

The maintenance of Indian cultural identity was thought to depend upon the existence of tribal relations. The existence of tribal relations, in turn, was thought to rest upon tribal government of members in areas essential to the preservation of the Indian way of life. State law, otherwise applicable to its

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1 The words "tribal self-government" are used throughout the text to emphasize the limitation to "self" feature of the doctrine. Tribal advocates, however, have used the political words "tribal sovereignty" so extensively that by "semantic infiltration" even some of their adversaries have adopted their language. Since the frequent use of labels tends to affect judgments about their underlying content, this word game is no trivial matter.

2 Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?* 51 NOTRE DAME LAW. 600 (1976).

3 Less immediate, but important, nonproprietary issues are plentiful. Among them is the whole notion of tribal separatism even if tribal power is limited to tribal members. *Compare* 1 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT (1977) [hereinafter cited as FINAL REPORT] *with* S. BRAKEL, AMERICAN INDIAN TRIBAL COURTS, THE COSTS OF SEPARATE JUSTICE (1978). Another is tribal immunity from suit, even as the doctrine is abandoned for the United States and foreign states. *Compare* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) *with* 5 U.S.C. § 702 (1970), 28 U.S.C.A. §§ 1602-1611 (Supp. 1978), *and* FINAL REPORT, *supra,* at 362. A third is the anomaly of federal insulation of tribal members from the application of the laws of the states of which they are citizens. *Compare* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) *with* 8 U.S.C. § 1401(a)(2) (1970) *and* U.S. CONST. amend. XIV, § 1.

4 Yet to be resolved are such proprietary interests as tribal claims to land and water. Though of potential economic importance to the United States and the Indian tribes, these interests, however resolved, do not implicate first principles of enduring value. As to interests in realty, *compare* Joint Trib. Coun. of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), *with* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); Hynes v. Grimes Packing Co., 337 U.S. 86 (1949) *and* Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942).

As to interests in water, *compare* Arizona v. California, 373 U.S. 546 (1963) *with* United States v. New Mexico, 98 S. Ct. 3012 (1978). *See* H.R. 9951, 95th Cong., 1st Sess. (1977).

Indian citizens, was preempted by the Congress as unnecessary within this framework. Hence, tribal self-government was for years asserted by tribal members as a defense to the assertion of state power and jurisdiction while on trust property.[5]

Although the doctrine of tribal self-government was insufficient independently[6] to thwart state jurisdiction, tribal advocates in the early 1970's argued its content was sufficient to support tribal jurisdiction over nonmembers of the tribe. The shift from the defensive use of the doctrine of tribal self-government to its offensive use is a new phenomenon—born of the politics of the present.

II. Outcome Determinative Rules

The debate over the limits of tribal power has always centered around a fundamental dispute over the rule by which the legitimacy of the assertion of tribal power is tested. Tribal advocates argue that a tribe possesses all powers generally associated with sovereignty, except those expressly withdrawn by treaty or statute.[7] The perceived advantage to the tribe of such a rule is obvious. The Congress never understood itself to be operating under the supposed rule, nor did the draftsmen of the Constitution understand this to be the rule, and therefore the range of residual power would be infinite.

Federalism is based upon the assumption that within the universe of governmental powers allocation is dual: federal or state or both, but no other. Illustrations of this assumption abound in the Constitution. For example, article I, § 8, grants the Congress the power to coin money. Article I, § 10, prohibits the states from exercising this specific power. If the rule advanced by tribal advocates prevailed, a tribe could coin money, absent a federal statute to the contrary.

Similarly article II, § 2, grants to the President the power to make treaties, provided two-thirds of the Senate concur. Article I, § 10, however, prohibits the states from entering into treaties.[8] No such express prohibition exists with respect to Indian tribes. If, therefore, the rule advanced by tribal advocates prevailed, a tribe could engage in treaty making with a foreign power, though not with the United States itself.[9]

Broad rules, such as those advanced by tribal advocates, easy to apply, but without self-limiting features, are usually doomed to short lives once the test of experience has built exception after exception through adjudication and legislation. What then is to be the self-limiting feature applicable to the rule governing the legitimacy of tribal power? The municipal analogue, the famous Dillon's rule,[10] may be unduly restrictive. Dillon's rule might require the contrary—

5 Since extended by the Supreme Court to the broader concept of "Indian country" as defined for federal criminal purposes in 18 U.S.C. § 1151 (1970), without consideration of the different purposes served by federal criminal jurisdiction, in the broader area, and lack of state jurisdiction in the narrower area. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

6 McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973). Federal preemption fulfilled the task. *See generally* Fisher v. District, 424 U.S. 382 (1976) and Martone, *supra* note 2.

7 *See* FINAL REPORT, *supra* note 3, at 100-03.

8 With congressional consent, a state could enter into other agreements with foreign powers. U.S. CONST. art. I, § 10, cl. 3.

9 25 U.S.C. § 71 (1970).

10 In a state under a Dillon regime, in contrast to "home rule," a municipal corporation possesses only those powers expressly granted by enabling legislation, those necessarily implied

express federal legislation authorizing each discrete exercise of tribal power, even as to purely internal matters affecting only members of the tribe and their property.

The dilemma of requiring congressional action to either extinguish tribal power or to grant it need not be faced. The former is intolerable to the dominant non-Indian majority while the latter is inconsistent with the decision to permit Indian tribes to exist as governing bodies in the first instance.

The answer lies in tying tribal power to its purpose. Thus limited, the exercise of tribal governmental power would have no impact on nonmembers, yet such exercise generally would be unfettered by congressional supervision within its proper sphere.

An examination of tribal purpose is fairly simple, though not free of controversy. It is undisputed that Congress has the power to extinguish the tribe as a self-governing entity.[11] It is also undisputed that although Congress frequently has taken such an approach in the past, its present policy is the preservation of tribal status.[12]

Why then do tribes exist in this last quarter of the twentieth century? Certainly it is not to govern the soil in the territorial sense. As to non-Indians in Indian country, federal and state criminal and civil jurisdiction is complete.[13] Indian tribes continue to exist because their members want them to exist. The tribe is the organic structure by which Indians can make their own laws and be ruled by them. It is feared that Indian norms of conduct would be impossible to preserve if reservation Indians were required to participate in the framework of state sovereignty along with all other Americans. In contrast to all other governmental powers in these United States, the tribe's powers of government are not shared by all of the people but only its members. Within its proper sphere, the tribe is unconstrained by the limitations of the Bill of Rights[14] and has been granted immunity from suit.[15] The tribe's power, then, is limited by its purpose and its purpose is to permit reservation Indians to function separately within the United States, free of most majoritarian demands. The scope of tribal governmental power then is limited to tribal members and their property. There is no federal purpose to be achieved in allowing Indian peoples to control the liberty and property of others.[16]

Once tribal power is tied to its purpose, the following rules apply in testing

as incident to the powers expressly granted and those indispensable to its declared purpose. I. J. DILLON, MUNICIPAL CORPORATIONS § 237, at 448-51 (5th ed. 1911).

11 United States v. Wheeler, 435 U.S. 313 (1978). *See* FINAL REPORT, *supra* note 3, at 106-07. *See also* 25 U.S.C. §§441-1236 (1970).

12 *See, e.g.*, Siletz Indian Tribe Restoration Act, 91 Stat. 1415, 25 U.S.C.A. § 711 (Supp. 1979). *But see* H.R. 9054, 95th Cong., 1st Sess. (1977).

13 *See* 18 U.S.C. § 1152 (1976) (federal). As to state, *see* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); New York v. Martin, 326 U.S. 496 (1946); Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney, 104 U.S. 621 (1882).

Admittedly, as to state civil jurisdiction the "infringement" test applies, 425 U.S. 465 (1976). The Court, however, has never found an infringement sufficient to preclude the assertion of state power over a non-Indian. Indeed, the very existence of the "infringement" test runs counter to the assertion of tribal power in the territorial, in contrast to the purposive, sense.

14 Talton v. Mayes, 163 U.S. 376 (1896).

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

16 FINAL REPORT, *supra* note 3, at 584-85 (1977) (separate dissenting views of Congressman Lloyd Meeds).

the validity of its assertion over persons. If the assertion of tribal power is over a tribal member, then unless expressly prohibited by federal law, and if otherwise consistent with the tribe's dependent status, the assertion is valid. If, on the other hand, the assertion of tribal power is directed to a nonmember, the assertion is invalid *per se* unless expressly granted by federal law. This framework permits the tribe to govern its own internal affairs free of federal supervision, but requires the tribe to acquire power from the Congress, and therefore from all the people, when it attempts to affect the liberty and property of those who do not participate in tribal government.[17]

III. The Supreme Court's Application of These Rules

In 1976, a divided panel of the United States Court of Appeals for the Ninth Circuit held that Indian tribes had jurisdiction over non-Indians who committed crimes on tribal lands within the boundaries of a reservation.[18] Another panel of the United States Court of Appeals for the Ninth Circuit held that Indian tribal courts and the United States district courts were not arms of different sovereigns for purposes of the double jeopardy clause of the United States Constitution.[19] Because of the storm of controversy over both the source and scope of tribal self-governmental power, the Supreme Court's review of both cases advanced the progress of federal Indian law with unusual speed.

At issue in *Oliphant v. Suquamish Indian Tribe,*[20] was the scope of tribal power. Oliphant, a non-Indian resident of the Port Madison Reservation in the State of Washington, was arrested by tribal authorities for violation of the tribe's law and order code. If, as the Ninth Circuit held, the tribe possessed all governmental power except as expressly withdrawn by the Congress, the tribe had criminal jurisdiction over him. If, on the other hand, the tribe's governmental power was limited to its own members, the tribe would have no jurisdiction over him since no federal statute granted such jurisdiction.

The Supreme Court reversed the judgment of the United States Court of Appeals for the Ninth Circuit, holding that tribal courts do not have criminal jurisdiction over non-Indians. The Court noted that tribal assertion of power over non-Indians was a new phenomenon and that it was the shared understanding of the lower federal courts, the executive branch, and the Congress that Indian tribes lacked such power. The Court conceded that Indian tribes "do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government,"[21] but rejected the proposed rule that a tribe's retained powers are such that they are limited only by specific restrictions in treaties or statutes. Instead, the Court stated that "Indian tribes are prohibited from exercising both those powers of autono-

17 These simple outcome determinative rules form the basis of the proposed Omnibus Indian Jurisdiction Act of 1977, H.R. 9950, 95th Cong., 1st Sess. (1977). For a general summary of this Act, *see* FEDERAL BAR ASSOCIATION, INDIAN LAW CONFERENCE 101-31 (1978).

18 Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976).

19 United States v. Wheeler, 545 F.2d 1255 (1976).

20 435 U.S. 191 (1978).

21 *Id.* at 208.

mous states that are expressly terminated by Congress *and* those powers *'inconsistent with their status.'* "[22] It noted that Indian reservations were part of the territory of the United States and that tribes held their reservations under the authority of the United States.[23] The Court stated that by submitting to the overriding sovereignty of the United States, Indian tribes necessarily gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.[24] Finally, the Court stated that the tribe's assertion of authority over a non-Indian ignored the fact that there exists within the United States but two sovereigns: the United States and the states.[25]

Oliphant clearly rejected the assertion that a tribe possesses all powers except those expressly withdrawn by Congress; it stated that the tribe was also without those powers inconsistent with its status. *United States v. Wheeler*[26] suggests what is *per se* inconsistent with a tribe's status. At issue in *Wheeler* was whether the double jeopardy clause of the fifth amendment bars the prosecution of an Indian in federal court when he has previously been convicted in a tribal court of a lesser included offense arising out of the same incident. If the source of tribal and federal power were the same, then jeopardy would attach and the subsequent criminal proceeding would be precluded. If, on the other hand, the source of tribal power was different than that of the United States, the separate sovereignty doctrine would permit the second prosecution. The Court held that the source of tribal power to punish its own members was a part of its residual sovereignty and not a delegated federal power.[27] Hence, the Court reversed the judgment of the United States Court of Appeals for the Ninth Circuit and permitted the federal prosecution.

What the Court said in *Wheeler* about the scope of tribal power was even more instructive, however, than what it said about its source. The Court stated that the power of a tribe to punish its own members was not lost by virtue of its dependent status because "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and *nonmembers of the tribe.*"[28]

The Court noted that the limitation with respect to nonmembers rested on the fact that the dependent status of Indian tribes within the territorial jurisdiction of the United States is necessarily inconsistent with their freedom independently to determine their external relations.[29] But since "the powers of self-government . . . involve only the relations among members of a tribe . . . they are not such powers as would necessarily be lost by virtue of a tribe's dependent status."[30]

Oliphant and *Wheeler,* read together, demonstrate that the Supreme Court has adopted the outcome determinative rules suggested above. *Oliphant* tells us that the tribe's retained powers are not only limited by specific restrictions in

22 *Id.* (emphasis in original).
23 *Id.* at 208-09.
24 *Id.* at 209.
25 *Id.* at 211 (quoting United States v. Kagama, 118 U.S. 375, 379 (1886)).
26 435 U.S. 313 (1978).
27 *Id.* at 328.
28 *Id.* at 326 (emphasis added).
29 *Id.*
30 *Id.*

treaties or statutes, but also by its dependent status.[31] *Wheeler* tells us that the assertion of tribal power over nonmembers is inconsistent with its dependent status because the power of self-government involves only relations among members of the tribe.[32]

In view of these two opinions, one could readily conclude that the controversy over the scope of tribal power is settled. Yet tribes continue to assert civil regulatory power and jurisdiction over nonmembers of the tribe, resulting in much federal litigation.[33] The issue, then, is whether, in the face of *Oliphant* and *Wheeler,* the assertion of tribal civil regulatory authority and jurisdiction over nontribal members is valid.

IV. The Tribe Is Without Civil Regulatory Authority and Jurisdiction Over Nonmembers

That the tribe is without any governmental power, including civil regulatory power and jurisdiction over nonmembers, is a conclusion which can be drawn from three available methods of analysis. First, it will be shown to be the inevitable result of the principles articulated in *Oliphant* and *Wheeler.* It will then be shown from an application of the methodology employed in *Oliphant.* Finally, the array of cases frequently employed by tribal advocates as authority for the assertion of power over nonmembers will be shown to be distinguishable as examples of expressly delegated federal powers, or as cases in which the tribe's authority is drawn from its capacity as a proprietor of land.

A. Oliphant *and* Wheeler *Permit No Other Principled Conclusion*

Oliphant cannot be limited in a principled way to criminal jurisdiction. The fundamental question in *Oliphant* was one of jurisdiction. The labels "criminal" and "civil" are the product of our own Anglo-American legal history and do not relate to jurisdiction, the power to act in the first instance. Doctrinally, a lack of criminal jurisdiction by definition means a lack of civil jurisdiction. As stated by Oliver Wendell Holmes in *Wedding v. Meyler,*[34] "jurisdiction, whatever else or more it may mean, is *jurisdictio,* in its popular sense of authority to apply the law to the acts of men." Clearly, if a tribe has no authority to apply its substantive criminal law to a non-Indian and enforce it with the coercive instruments of government, the tribe similarly has no power to apply civil regulatory authority to a non-Indian and enforce it with the coercive instruments of government. Surely the outcome cannot depend upon a labeling process describing conduct as criminal or in violation of civil regulatory power. Either the entity which purports to assert the power has authority to apply its law to the acts of men or it does not. As to an Indian tribe, *Oliphant* has answered this question.

31 435 U.S. at 208.
32 435 U.S. at 326.
33 *See, e.g.,* Trans-Canada Enterprises Ltd. v. Muckleshoot Indian Tribe, No. C77-882M (W.D. Wash., filed Nov. 3, 1978); Salt River Project Agricultural Improvement and Power Dist. v. Navajo Tribe of Indians, No. 78-352 (D. Ariz., filed July 11, 1978); and J. Gregory Merrion v. Jicarilla Apache Tribe, No. 77-292 (D.N.M., filed Dec. 29, 1977).
34 192 U.S. 573, 584 (1904).

That the Court would reject the assertion of tribal civil regulatory power and jurisdiction is clear from the assumptions articulated in its opinion. In rejecting the Suquamish Tribe's argument that a modification in the Indian Civil Rights Act of 1968[35] (guarantees extended from "American Indians" to "any person") confirmed inherent criminal jurisdiction over non-Indians, the Court said, "the modification merely demonstrates Congress' desire to extend the Act's guarantees to non-Indians *if* and *where* they come under a tribe's criminal *or civil* jurisdiction by either treaty provision or act of Congress."[36]

Even counsel for the Suquamish Indian Tribe acknowledged that no principled distinction could be made between the assertion of criminal and civil jurisdiction. The following colloquy between court and counsel occurred at oral argument before the United States Supreme Court in *Oliphant*.

> Question: Mr. Ernstoff, is there any way of distinguishing your case from a civil jurisdiction of the Tribe so that the Court could, in a principled way, say there was criminal jurisdiction here but not civil jurisdiction?
>
> Mr. Ernstoff: That is a very interesting question, Your Honor. I really do not know that they can, to be honest with you, I have been trying to do that because I thought it would be of benefit to me to come in with the most narrow case that I can possibly come in with.
>
> *To be intellectually honest, I do not think you really can and I do not think that you should.*[37]

Finally, the Court in *Oliphant* concluded with a profound observation which is as appropriate in the civil context as it is in the criminal context. The Court noted that the former federal policy of immunizing Indian peoples from the criminal jurisdiction of the United States was meant to avoid the unseemliness of judging culturally distinct peoples by standards "made by others and not for them" and of trying them "not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception."[38] The Court then said "[t]hese considerations, applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondents' contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs and procedure."[39]

If it is wise to immunize reservation Indians from the legal obligations of a dominant culture foreign to their own (the laws of the states), but in whose political affairs they may participate as citizens, then by stronger logic it also must be unwise and surely unjust to subject nonmembers of the tribe to the legal obligations decreed by peoples foreign to them and from whose political affairs they are barred. To subject some racial or ethnic groups to the general lawmaking, taxing, and enforcing power held by another racial or ethnic group is

35 25 U.S.C. § 1302 (1970).
36 435 U.S. at 195-96 n.6 (emphasis added).
37 Transcript of oral argument before the United States Supreme Court at 54-55 (emphasis added), Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (emphasis added).
38 435 U.S. at 210-11 (quoting Ex parte Crow Dog, 109 U.S. 556, 571 (1883)).
39 *Id.* at 211

offensive to our fundamental values. To the extent the Supreme Court appreciated this in *Oliphant,* it is exceedingly likely that the Court would appreciate it in the civil context.

If one is not persuaded that *Oliphant* alone is sufficient to preclude the assertion of tribal civil regulatory power and jurisdiction over nonmembers, *United States v. Wheeler*[40] should satisfy that doubt. In describing the powers retained by the tribe, the Court stated that the tribal "right of *internal self-government* includes the right to prescribe laws applicable to *tribe members.*"[41] The Court stated that the power of the tribe to prosecute its *members* for tribal offenses does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status.[42] This was so because "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and *nonmembers of the tribe.*"[43] The limitation on the tribe's power to deal with its own members rests "on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their *external* relations."[44] Since the power of self-government, however, involves *only* the relations among members of a tribe, the power of the tribe to impose its law on a member was not lost.[45]

Since the Court has limited tribal self-government to "the relations among members of a tribe,"[46] an attempt by a tribe to assert jurisdiction, criminal or civil, over a nonmember of the tribe is an attempt to go beyond the power of self-government, and affect the external relations of the tribe, in flat contradiction to the terms of *United States v. Wheeler.*[47]

It is my contention, therefore, that based upon *Oliphant* and *Wheeler* alone, no principled distinction can be made between criminal and civil regulatory power and jurisdiction. But the same conclusion can be reached by employing the analysis of *Oliphant.*

B. *The Methodology of* Oliphant *Produces the Same Result in the Civil Context*

In *Oliphant,* the Court held that because of the treaty-making process, congressional action, the presumptions shared by the Congress, the executive, and the judiciary, and the overriding sovereignty of the United States, Indian tribal courts do not have inherent criminal jurisdiction over non-Indians.

With respect to the treaty-making process, the Court examined representative Indian treaties and found that their history was consistent with the principle that Indian tribes could not assume criminal jurisdiction over non-Indians without the consent of Congress.[48] The Court noted that no Indian treaty expressly granted tribal criminal jurisdiction over non-Indians.

40 435 U.S. 313 (1978).
41 *Id.* at 322 (emphasis added).
42 *Id.* at 326.
43 *Id.* (emphasis added).
44 *Id.* (emphasis added).
45 *Id.*
46 *Id.*
47 *Id.*
48 435 U.S. at 197-98 n.8.

Similarly, no Indian treaty expressly grants tribal civil regulatory authority or jurisdiction over non-Indians.[49] To the contrary, treaties which secure the right of self-government to Indian tribes, including civil jurisdiction over persons and property, exclude persons (and their property) who are not by birth, adoption, or otherwise, citizens or members of the tribe.[50] There could be no better proof of the shared understanding of the executive and the congressional branches than these treaty provisions.

As to other congressional action, the Court in *Oliphant* traced the stages of congressional concern for crimes on the reservation, and concluded that while Congress never expressly prohibited tribal criminal jurisdiction over non-Indians, the absence of such jurisdiction was the underlying principle of congressional action.[51] The Court noted that the Congress did not initially address itself to the problem of tribal jurisdiction over non-Indians for the reason that there was little reason to be concerned with assertions of tribal court jurisdiction over non-Indians in light of the absence of formal tribal judicial systems.[52]

Similarly, Congress has not substantially addressed itself to the question of tribal civil regulatory power and jurisdiction over non-Indians because, until very recently, no tribe ever purported to have such jurisdiction. When the Senate addressed the problem of civil power and jurisdiction in the treaty ratification process, it uniformly excluded jurisdiction over nonmembers.[53] When the Congress created the Indian territory, it expressly limited tribal civil jurisdiction to actions in which no party was a nonmember of the tribe.[54]

The Court in *Oliphant* quoted a 1960 Senate Report which stated that *"Indian tribal law is enforcible against Indians only; not against non-Indians . . . [n]on-Indians are not subject to the jurisdiction of Indian courts."*[55] The Court noted that the three branches of the federal government were in apparent agreement that Indian tribes do not have jurisdiction over non-Indians and quoted with approval the dissenting views of Congressman Lloyd Meeds, Vice-Chairman of the American Indian Policy Review Commission, that "such general jurisdiction has generally not been asserted and . . . the lack of legislation on this point

49 *See* II C. KAPPLER, LAWS AND TREATIES (1904).

50 Treaty with the Seminole Indians, March 21, 1866, art. 2, 14 Stat. 755 (1868); Treaty with the Creeks and Seminoles, August 7, 1857, art. 15, 11 Stat. 699 (1864); Treaty with the Choctaws and Chickasaws, June 22, 1855, art. 7, 11 Stat. 611 (1864); Treaty with the Cherokee, December 29, 1835, art. 5, 7 Stat. 478 (1848). *Cf.* Treaty with the Navaho, September 9, 1849, arts. VI, IX, 9 Stat. 974 (1854); Treaty with the Comanche, May 15, 1846, art. 2, 9 Stat. 844 (1854); Treaty with the Chickasaw, May 24, 1834, art. III, 7 Stat. 450 (1848). As to treaties with tribes in the Indian Territory (Oklahoma), *e.g.*, Treaty with the Cherokee Indians, July 19, 1866, 14 Stat. 799 (1868); Treaty with the Choctaw and Chickasaw, April 28, 1866, 14 Stat. 769 (1868); *see* In Re Mayfield, 141 U.S. 107 (1891). The scheme in the Indian Territory vested civil jurisdiction in tribal courts over actions in which *only* Indians were parties. Any action to which a nonmember was a party was to be brought in federal court. *Id.* at 115-16.

51 435 U.S. at 202-06.

52 *Id.* at 201.

53 *See* note 50 *supra.*

54 Act of May 2, 1890, ch. 182, §§ 30-31, 26 Stat. 81, 94 (1891); *see* Alberty v. United States, 162 U.S. 499, 503 (1896). *See generally* F. COHEN, FEDERAL INDIAN LAW 382 (U.N.M. ed. 1942).

55 435 U.S. at 206 (quoting S. REP. No. 1686, 86th Cong., 2d Sess. 2-3 (1960) (emphasis in original)).

reflects a congressional assumption that there was no such tribal jurisdiction."[56] The Court relied on *In re Mayfield*,[57] for the proposition that congressional action in regulating jurisdiction in Indian reservations demonstrated an intent to forbid tribal jurisdiction over non-Indians.[58] Yet *Mayfield* was not directed to solely criminal jurisdiction. In describing the jurisdiction of the tribe and that of the United States the Court said:

> The general object of these statutes is to vest in the courts of the nation [Cherokee Tribe] jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side.[59]

With respect to the assumptions of the executive branch, its treaties uniformly excluded tribal civil jurisdiction over nonmembers.[60] More recently, Felix S. Cohen, former Assistant Solicitor of the Department of Interior, and author of the major treatise on federal Indian law, acknowledged that the jurisdiction of tribal courts was limited to Indians.[61] This is particularly revealing in light of his role in the development of federal Indian law.

Finally, as to the most crucial element in *Oliphant,* the overriding sovereignty of the United States, the Court said that "from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty."[62] Yet in the face of the *Talton v. Mayes*[63] holding that Indian tribes were not limited by the Bill of Rights, and the *Santa Clara Pueblo v. Martinez*[64] holding which essentially eviscerated the Indian Civil Rights Act of 1968, the congressional cure for the *Talton v. Mayes* problem, a non-Indian would be unable to challenge assertions of tribal civil regulatory and taxing power on the basis of a denial of fundamental rights. Hence, the overriding sovereignty of the United States mandates that Indian tribes lack civil regulatory power and jurisdiction over nonmembers, for otherwise citizens of the United States would not be protected from "unwarranted intrusions on their personal liberty."[65]

C. *All Other Cases Cited by Tribal Advocates in Support of Tribal Civil Regulatory Power and Jurisdiction Are Inapposite*

There are a series of cases upon which tribal advocates frequently rely in order to assert tribal civil regulatory power and jurisdiction over nonmembers. In

56 *Id.* at 205 n.15 (quoting FINAL REPORT, *supra* note 3, at 587 (dissenting views of Congressman Lloyd Meeds)).
57 141 U.S. 107, 115-16 (1891).
58 435 U.S. at 204-05.
59 141 U.S. at 116.
60 *See* note 50 *supra.*
61 F. COHEN, *supra* note 54, at 148, 382.
62 435 U.S. at 210.
63 163 U.S. 376 (1896).
64 436 U.S. 49 (1978). The Court held that no private cause of action cognizable in federal court was created by the Indian Civil Rights Act.
65 435 U.S. at 210.

order that they may be properly understood, two simple but fundamental distinctions must be drawn.

First, Congress does have the power to delegate its power to an Indian tribe, where the delegation is not otherwise proscribed by the United States Constitution. Secondly, to the extent an Indian tribe enjoys an interest in real property, the tribe possesses those nongovernmental powers of a proprietor normally associated with the particular real property interest. For example, where a tribe enjoys a right to possession, whether by treaty, statute, executive order, or lease, the tribe would have the powers associated with a possessor of land. This would include a right to exclude others, a right to sue for trespass damages, and a right to condition entry by contract upon the payment of a fee or other exaction. These proprietary powers belong to any possessor of land in the United States, and are not true governmental powers.

Having made these observations, it is readily demonstrated that the array of cases frequently employed by tribal advocates to support assertions of tribal civil regulatory power and jurisdiction over nonmembers does not support the assertion. The classical delegation case is *United States v. Mazurie*.[66] There the Court held that since Congress has the power to regulate the sale of alcoholic beverages in Indian country and Indian tribes are entities with some independent authority over matters that affect the *internal* and social relations of tribal life, Congress could constitutionally delegate its own authority over alcoholic beverages to the tribe.

In *Mazurie* Congress had enacted legislation allowing Indian tribes to regulate the introduction of liquor into Indian country as long as state law was not violated.[67] Despite the denial of his application for a tribal liquor license, a non-Indian introduced liquor into Indian country. Accordingly, he was in violation of federal criminal law and subject to federal prosecution, not tribal prosecution, if the congressional delegation to the tribe were valid. While the Court upheld the congressional delegation to the tribe, it specifically stated that "[w]e need not decide whether this independent authority [the tribes'] is itself sufficient for the tribes to impose Ordinance No. 26 [requiring retail liquor outlets within Indian country, including those on non-Indian land, to obtain a tribal license]."[68] Hence, far from supporting the assertion of tribal civil regulatory authority over non-Indians, *Mazurie* is a pure delegation case, a principle recognized in *Oliphant* itself.[69]

The tribe's ability to exercise prerogatives with its real property interests is illustrated by *Morris v. Hitchcock*.[70] There, non-Indian owners of cattle and other animals brought an action against the Secretary of the Interior and other federal officials seeking to restrain them from removing their cattle from the lands of the Chickasaw Tribe. At issue was the Curtis Act,[71] under which no ordinance or resolution of the Choctaw or Chickasaw tribes affecting the land of the tribe or

66 419 U.S. 544 (1975).
67 18 U.S.C. § 1161 (1976).
68 419 U.S. at 557.
69 435 U.S. at 211.
70 194 U.S. 384 (1904).
71 Act of June 28, 1898, ch. 517, 30 Stat. 495 (1899).

the rights of any person who had taken an oath of allegiance to the United States should be of any validity until approved by the President of the United States. Under the treaty between the Chickasaw tribe and the United States, the tribe had the right to exclude trespassers, and the United States had the duty to protect the tribe from non-Indians who were "not subject to their jurisdiction and laws."[72] The tribe enacted an ordinance imposing a tax on livestock owned by noncitizens of the tribe as part of its "power to attach conditions to the presence within its borders of persons who might otherwise not be entitled to remain."[73] The ordinance of the tribe was approved by the President of the United States, and the Secretary of the Interior promulgated regulations incorporating the tribal ordinance and authorizing the Department of the Interior to remove livestock upon which the tax was not paid. Hence, the plaintiffs were attacking the power of the Secretary under regulations promulgated pursuant to express congressional authority. The Court upheld the power of the Secretary to remove the livestock on which the tax was not paid. It is to be noted that pursuant to the Secretary's regulations, the tax was to be paid to the United States and not to the tribe.[74]

Hence, *Morris v. Hitchcock* stands for the proposition that while an Indian tribe cannot subject non-Indians to its jurisdiction and laws,[75] it can condition the presence of nonmembers on tribal lands, not as an act of governmental power, but merely as a consequence of the power of a proprietor of land, and that the enforcement of such conditions must be pursuant to express congressional delegation. It is clear, therefore, that the tribal "tax" in *Morris v. Hitchcock* was not a tax imposed by the tribe in a governmental capacity, but rather was a trespass fee exacted by the tribe in its capacity as a proprietor of land seeking to impose conditions on entry. Even with respect to this proprietary power, the tribe had no power to enforce, but required enforcement by the United States. Indeed, in *Oliphant,* the Supreme Court cited *Morris v. Hitchcock* for the proposition that tribal courts do not have the power to try non-Indians.[76] Obviously, where the tribe has no possessory interest in the relevant locus (such as land within Indian country not owned by the tribe, land which is owned but leased to others, and land to which conditions of entry have already been attached by contract or otherwise), the tribe has no proprietary interest upon which a fee or other exaction can be based.

Cases in the lower federal courts have followed the *Morris v. Hitchcock* governmental/proprietary distinction. In *Buster v. Wright,*[77] the Creek tribe imposed a permit tax, approved by the President of the United States, for the privilege it offered noncitizens to trade within the borders of its reservation. The court described the exaction as more of the nature of a license than of a tax.[78] Relying on *Morris v. Hitchcock* the court held that the tribe had the authority to require the payment of the tax as a condition precedent to the privilege of trading within the reservation, and the United States had the power to enforce

72 194 U.S. at 389.
73 *Id.*
74 *Id.* at 385 n.1.
75 *Id.* at 389.
76 435 U.S. at 206.
77 135 F. 947 (8th Cir. 1905).
78 *Id.* at 949.

the payment of the tax through the Secretary of the Interior. The court said that the "law of the Creek Nation was in legal effect a law of the United States, because it was authorized by treaties, acts of Congress, and judicial decisions of this nation."[79]

Hence, like *Morris v. Hitchcock, Buster v. Wright* is a case in which an Indian tribe conditioned the presence of nonmembers on the reservation upon the payment of a license fee or tax. The court perceived the tax to be a federal tax,[80] and the United States was the proper party to enforce it.

In *Maxey v. Wright,*[81] non-Indian lawyers brought an action against a United States Indian inspector seeking to enjoin him from collecting an occupation tax imposed by the Creek tribe. The court upheld the tax, not as an incident of governmental power, but simply as part of the tribe's power to exclude trespassers or condition the presence of nonmembers on their reservation. Indeed, the court cited an opinion of the Attorney General which likened a similar tax to the right of a hotelkeeper to prescribe rules and charges for persons who become his fellow occupants.[82] The enforcing authority was the United States, not the tribe, and the only remedy was the removal of the lawyer from the reservation as a trespasser.[83] Hence, it is clear that the Court of Appeals of the Indian Territory viewed the tax not as an act of government, but merely as a condition imposed by a landowner on one who had no right to be present on the land.

Two other cases from the United States Court of Appeals for the Eighth Circuit missed the governmental/proprietary distinction of *Morris v. Hitchcock,*[84] but their holdings have been repudiated by the rule of *Oliphant.*[85] In *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.,*[86] a reservation Indian brought an action against his tribe in federal court seeking to enjoin the imposition of a tribal tax on his non-Indian lessee. Relying on *Buster v. Wright* and *Morris v. Hitchcock,* the court upheld the power to tax. The court held that the tribal power to tax was not proscribed by any federal statute and, therefore, still existed. Obviously, the court was in error for at least two reasons.

Its reliance on *Buster* and *Morris* was wholly misplaced. As shown above, *Buster* and *Morris* were cases of express congressional delegation and federal enforcement, and the "tax" was upheld as a proprietor's trespass fee, not an act of true governmental power. Neither congressional delegation nor federal enforcement was present in *Iron Crow.*

Secondly, and perhaps more importantly, to the extent that *Iron Crow* upheld tribal power because no federal statute withdrew it, the holding was repudiated by the United States Supreme Court in *Oliphant* when it stated that:

> the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the court of appeals

79 *Id.* at 956.
80 *Id.*
81 54 S.W. 807 (Ct. App. Ind. Terr. 1900).
82 *Id.* at 809.
83 *Id.* at 812.
84 194 U.S. 384 (1904).
85 435 U.S. at 209.
86 231 F.2d 89 (8th Cir. 1956).

> recognized Indian tribes are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *"inconsistent with their status."*[87]

As shown above, *Oliphant* and *Wheeler* define the area of sovereignty which has not been divested as encompassing only those relationships between the tribe and its members. A tribal tax on nonmembers is inconsistent with the tribe's dependent status, and therefore cannot withstand the rule of *Oliphant* and *Wheeler.*

Similarly, the Eighth Circuit showed confusion in *Barta v. Oglala Sioux Tribe.*[88] There, the power to tax was based upon the tribe's proprietary rights in the land, not true governmental powers. The court relied upon *Buster* and *Morris,* both of which were cases involving congressional delegation, federal enforcement, and proprietary powers. Indeed, the tax in *Barta* went to the United States and not the tribe. Moreover, the case was brought by the United States on behalf of the tribe and not by the tribe itself. And, of course, like *Iron Crow,* to the extent that the court ruled that the tribe had all powers not expressly withdrawn by Congress, *Barta* has been rejected by the United States Supreme Court in *Oliphant.*[89]

To summarize, the pre-*Oliphant* cases relating to tribal taxation of nonmembers fall into two groups. *Morris v. Hitchcock* and its progeny merely uphold the tribe's right as a proprietor of land to condition entry, and do not uphold true governmental power.[90] Moreover, even as to proprietary powers, congressional delegation and federal enforcement were present.

The other group, the two Eighth Circuit cases, have confused proprietary rights with governmental powers. To the extent they uphold governmental power, the principle upon which they are based has been rejected by *Oliphant.*

V. Wise Public Policy Militates Against the Assertion of Tribal Civil Regulatory Power and Jurisdiction Over Nonmembers

To this point, the argument against the assertion of tribal civil regulatory power and jurisdiction over nonmembers has been based largely upon authority. There are, however, other compelling policy factors which would militate against the assertion of tribal civil regulatory power and jurisdiction over nonmembers.

It is to be recalled that unlike any other governmental entity in the United States an Indian tribe is a closed unit. Even a non-Indian owner of fee-patented land within the boundaries of an Indian reservation is not and cannot be a member of the tribe. Indeed, to permit such membership would wholly frustrate

87 435 U.S. at 208 (emphasis in original).

88 259 F.2d 553 (8th Cir. 1958).

89 *See* text accompanying note 87 *supra. Compare* Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res. and Barta v. Oglala Sioux Tribe *with* Crabtree v. Madden, 54 F. 426 (8th Cir. 1893), which held no federal jurisdiction existed to enforce a tribal tax against a nonmember. The Treaty with the Creeks and Seminoles, August 7, 1856, art. 15, 11 Stat. 699 (1864), specifically precluded tribal government of nonmembers. 54 F. at 429.

90 Even Felix S. Cohen, the champion of all tribal advocates, acknowledged that *Morris v. Hitchcock* and its descendants were based upon the proprietary power of a tribe to exclude nonmembers, and not tribal self-government. F. COHEN, *supra* note 54, at 266-67.

the purpose of permitting reservation Indians to make their own rules and be governed by them. As the court implies in *Oliphant*[91] the exercise of general tribal power over nonmembers raises enormous constitutional problems. There is perhaps no constitutional value more central to our notion of political justice than the principle that subjection to governmental power presupposes the right to participate on an equal basis in the control of that power. Government by consent of the governed is the central theme of American democracy and is also the universal goal of the global campaign for human rights.

The Supreme Court recently stated that "[i]n this nation each sovereign governs only with the consent of the governed."[92] Since neither the Bill of Rights nor the fourteenth amendment directly limits tribal governmental power over members,[93] and since the Indian Civil Rights Act, which was meant to cure this problem, has been deprived of vital content by the Court,[94] the assertion of tribal civil regulatory power and jurisdiction over nonmembers would deprive them of basic civil liberties.

If, on the other hand, *Oliphant* precludes the assertion of civil regulatory power and jurisdiction over nonmembers without the assent of Congress, the constitutional problem is avoided. Should the Congress then think it wise to grant such powers to Indian tribes, such powers would be expressly delegated federal powers, subject to the limitations contained in the Bill of Rights. Indeed, the result achieved in *Martinez* could only flow from the assumption that tribal power is limited to tribal members.[95] It would be strange indeed, if, while pursuing equal franchise around the world without regard to race, American policy encouraged, or even tolerated, tribal power over nonmembers who are excluded from membership on the basis of race.

Tribes often base their assertion of civil regulatory power and jurisdiction over nonmembers upon the perceived need to protect their members and property. Yet state and federal criminal and civil jurisdiction over non-Indians is complete.[96] And tribal property is already protected under state and federal law to the same extent as is property owned by others. A tribe can meet all its legitimate objectives in dealing with non-Indians, including non-Indian entities doing business on a reservation, as a matter of contract by carefully structuring its transactions with nonmembers. Hence, tribal power over nonmembers is as unnecessary as it is unwise.

Finally, should tribal civil regulatory power and jurisdiction over nonmembers be upheld, nonmembers would assert legitimate demands for participation in

91 435 U.S. at 211.

92 Nevada v. Hall, 47 U.S.L.W. 4261, 4266 (U.S. Mar. 5, 1979). This central principle finds expression in the "one person, one vote" cases which hold that any general purpose governmental entity must allow equal franchise to all persons. City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Hadley v. Junior College District of Metropolitan Kansas City, 397 U.S. 50 (1970); Kramer v. Union Free School District, 395 U.S. 621 (1969); Avery v. Midland County, 390 U.S. 474 (1968). *Cf.* Reynolds v. Sims, 377 U.S. 533 (1964) (inadequate state reapportionment scheme).

93 United States v. Wheeler, 435 U.S. 313 (1978); Talton v. Mayes, 163 U.S. 376 (1896).

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

95 For a summary of the policy and constitutional implications of allowing general tribal governmental power over nonmembers, *see* FINAL REPORT, *supra* note 3, at 583-89 (separate dissenting views of Congressman Lloyd Meeds).

96 *See* note 13 *supra.*

tribal government. The demands would have to be met as a matter of fundamental fairness, and therefore tribal government and separatism as we know it would eventually disappear. Hence, while the assertion of civil regulatory power and jurisdiction over nonmembers may appeal to tribes in the short run, it is clearly against their long-term interests in separatism.

Consider for illustrative purposes the proposed equal rights amendment to the United States Constitution. As drawn, it would limit federal and state power. Hence, even if adopted and ratified, it would not protect men and women from tribal conduct. If tribal power is limited to members, no problem emerges — the result is the price of separatism. If, on the other hand, tribal power extended to nonmembers, non-Indian citizens of the United States would seek to include the tribe within the E.R.A. Obviously the tribe can legitimately seek to be free of majoritarian demands only if it makes none of the majority.

What tribes must come to understand is that their claims to civil regulatory power and jurisdiction over nonmembers are perceived to be not only unreasonable, but offensive to American federalism. Tribal expectations are perceived to be so unrealistic that their failure of realization in a pluralistic society is inevitable. As a result, tribal advocates tend to attribute their setbacks in judicial and legislative arenas to backlash from the majority.[97] This represents a failure to understand that tribal separatism is not a value protected by our Constitution from unrestrained majoritarianism.[98] Beyond that, however, an attribution of backlash does a disservice to the American people among whom there is an enormous reservoir of good will. Americans are, by and large, exceedingly tolerant of tribal separatism, but tribes can continue to enjoy that tolerance only as long as tribal power does not affect them. While tribes can continue to expect tolerance of tribal separatism, it is unrealistic to expect enthusiasm. This is so because tribal separatism runs counter to the values which prevail in the dominant culture. For example, there is a paradox in federal policy which, pursuant to fifth and fourteenth amendment constraints, requires the busing of pupils on the basis of race while that same federal policy supports tribal separatism and a federal Indian school system. It can be urged that the maintenance of cultural identity in our cities is of equal value to the maintenance of tribal cultural identity. Yet Americans have, by and large, accepted this paradox.

While this unique exception to our dominant values may be constitutionally permissible[99] the tribes cannot expect enthusiasm for it. Since tolerance is all that can be reasonably expected of the majority, tribes and their advocates must come to learn that the tolerance for tribal separatism will survive only as long as its

97 *See* FINAL REPORT, *supra* note 3, at 615-17 (separate views of Senator James Abourezk).

98 Washington v. Confederated Bands and Tribes, 99 S. Ct. 740, 761 (1979) (the tribe's interest in self-government is not a fundamental right); *see* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 481 n.17 (1976). *See generally* Martone, *supra* note 2. While the security of the *tribe* is not guaranteed by the Constitution, it should go without saying that Indian *individuals,* along with all other persons in the United States, enjoy the limits on federal and state power contained in the Constitution. It is just that the interest of the group in the tribe is not among these.

99 *Compare* Morton v. Mancari, 417 U.S. 535 (1974) *with* Regents of University of California v. Bakke, 438 U.S. 265, 294, n.34 (1978) (acknowledging the deep resentment caused by classifications based on race).

effects do not affect the majority. Realistically, if tribal values are to survive at all, self-restraint is indicated.[100]

VI. Conclusion

We are closer now to an understanding of the nature and scope of tribal governmental power than we ever have been. By tying tribal power to its purpose, the rules applicable to the validity of the assertion of tribal power over persons are plain. If the assertion of tribal power is over a member, then unless expressly prohibited by federal law and if otherwise consistent with its dependent status, the assertion is valid. If, on the other hand, the assertion of tribal power is directed to a nonmember, the assertion is invalid *per se* unless expressly permitted by federal law. The Supreme Court appears to have come upon these simple outcome determinative rules in *Oliphant* and *Wheeler*.

Since no principled distinction can be drawn between the assertion of criminal power and jurisdiction, and civil regulatory power and jurisdiction, it is predictable that the Court will hold that tribes are without civil regulatory power and jurisdiction over nonmembers. Once this sensitive issue is resolved in this way, tribes will be free to govern their own internal affairs with less fear of running afoul of majoritarian demands for as long as their members choose to be separate.

100 This observation illustrates the real dilemma of federal Indian law and policy. The maintenance of tribal self-government is a precarious experiment, characteristic of the nobility of the American experiment itself. It is a delicate process which demands reason as well as sensitivity, and the paradox created appears insoluble because we can abandon neither.