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Tribal Court Criminal Jurisdiction over Non-Indians: Testing the Limits of Retained Sovereignty

Richard A. Samuels

TRIBAL COURT CRIMINAL JURISDICTION OVER NON-INDIANS: TESTING THE LIMITS OF RETAINED SOVEREIGNTY

The concept of inherent tribal sovereignty occupies a prominent position in the development of American Indian law.[1] Despite its significance, the limits of retained sovereign power remain uncertain because of a history of inconsistent judicial, congressional, and administrative approaches to the status of Indian tribes. The assertion of tribal court jurisdiction over non-Indian offenders on Indian territory illustrates this confusion. In *Oliphant v. Suquamish Indian Tribe,*[2] the U.S. Supreme Court excluded criminal jurisdiction over non-Indians from the sphere of sovereign authority. The Court grounded its decision on the "inherent limitations on tribal powers"[3] and ignored the interest of the tribe in exercising jurisdiction.[4] In so doing, the Court declined the opportunity to formulate a reasonable scheme of jurisdiction and severely limited the force of the concept of inherent sovereignty.

This Note first examines the jurisdictional issue in the context of the concept of inherent sovereignty. The Note then proposes a jurisdictional theory that avoids the pitfalls of *Oliphant*.

I

CRIMINAL JURISDICTION OVER NON-INDIANS

A. Development of the Principle of Retained Sovereignty

In 1940, nearly a century after the U.S. Government finally reduced the American Indian to the status of its ward, the Department of the Interior stated the fundamental principles of retained sovereign power:

> (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, . . . but does not by itself affect the internal sovereignty of the tribe. . . . (3) These [internal] powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus

1. *See* F. Cohen, Handbook of Federal Indian Law 122-50 (1942); Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?,* 51 Notre Dame Law. 600 (1976).

2. 435 U.S. 191 (1978).

3. *Id.* at 209.

4. *See id.* at 212.

> expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[5]

This statement merely describes the theory of retained sovereignty; it fails to distinguish between external and internal powers. The limits of retained sovereignty are to be found in this distinction.

Rooted in the conquest and territorial acquisition by the Europeans, retained sovereignty was firmly established through the Federal Government's recognition of the inherent sovereign power of the Indian tribes.[6] Between 1778[7] and 1871,[8] the United States ratified 370 Indian treaties.[9] Until the last decade of the treaty period, the Federal Government drafted Indian treaties in the terms of international diplomacy,[10] regulating war powers, boundaries, passports, extradition, and foreign relations.[11] Many of the early treaties expressly recognized Indian jurisdiction over non-Indians dwelling on Indian lands.[12] The use of the treaty power,[13] as well as the form and scope of the treaties, reflected an implicit assumption that the tribes, although subject to the sovereign powers of the United States, retained attributes of sovereignty.

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5. F. COHEN, *supra* note 1, at 123 (footnotes omitted). The 1958 revision of the HANDBOOK contains an identical characterization. *See* U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 398 (1958).

6. The claim to inherent sovereignty, recognizing that Indian tribes were once sovereign states, has its origin in traditional doctrines of international law. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 4 (1965), which defines "state" as "an entity that has a defined territory and population under the control of a government and that engages in foreign relations." *See generally* J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 155-56 (6th ed. 1967).

Further analysis of retained sovereignty in terms of international law is unproductive, however, because retention of internal powers does not ordinarily follow complete conquest. One commentator, applying the general rules of territorial acquisition to the history of North American Indians, concluded that "the effect of conquest and cession leaves the Indian tribes with no internationally recognizable claim to sovereignty over any of the territory now part of the United States. The fact is that Indian tribes were conquered, subjugated, and cast into a position of virtual subordination." Martone, *supra* note 1, at 602.

7. Treaty between the United States and the Delawares, Sept. 17, 1778, 7 Stat. 13.

8. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, codified at 25 U.S.C. § 71 (1976). The Act provided that, prospectively, no tribe would be recognized as an independent nation with which the United States may contract by treaty.

9. Martone, *supra* note 1, at 605.

10. F. COHEN, *supra* note 1, at 39. Similarly, Chief Justice Marshall noted that the words "treaty" and "nation" in U.S. CONST. art. I, § 8, cl. 3, and art. VI, cl. 2, apply to Indians in the same sense as to other nations. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832).

11. F. COHEN, *supra* note 1, at 39-40.

12. *See, e.g.,* Treaty between the United States and the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Weeas, Kickapoos, Piankashaws, and Kaskaskias, Aug. 3, 1795, art. VI, 7 Stat. 49, 52; Treaty between the United States and the Cherokees, July 2, 1791, art. VIII, 7 Stat. 39, 40; Treaty between the United States and the Creeks, Aug. 7, 1790, art. VI, 7 Stat. 35, 36. *See also,* Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective,* 17 ARIZ. L. REV. 951, 953-55 (1975).

13. U.S. CONST. art. II, § 2, cl. 2.

Retained sovereignty, an inference raised by the U.S. Government's use of the treaty power, has been recognized by the U.S. Supreme Court in varying degrees.[14] Chief Justice Marshall gave the earliest complete judicial characterization of the political status of the Indian tribes in *Worcester v. Georgia*.[15] The State of Georgia had imprisoned a New England missionary who had settled on Cherokee land with tribal consent. The Court held that this imprisonment exceeded the authority of the state on the basis of the exclusive federal power to regulate intercourse with Indians.[16] The Court construed the treaties and acts of Congress as establishing that Indian nations "had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power."[17] The U.S. Government recognized Indian authority within tribal boundaries to be "exclusive."[18]

Marshall did not expressly state whether the tribal powers of self-government derived from the Cherokee treaties or from inherent Indian sovereign power not divested by the Federal Government, and his broad discourse on sovereign powers within the context of a discussion of treaties muddles the opinion.[19] Nevertheless, the Cherokee nation was recognized as a semi-autonomous political entity exercising sovereign powers over a defined territory.

Cherokee Nation v. Georgia[20] reflects the difficulty that would continue to plague the Court so long as it attempted to resolve controversies on the basis of the "status" of Indian tribes. Chief Justice Marshall, writing for a majority of the Court, stated that the Cherokee nation was not a foreign state for the purpose of invoking the original jurisdiction of the Court, but

14. The judicial development and reaffirmation of inherent tribal sovereignty may be traced from Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 554-55 (1832). *See* United States v. Mazurie, 419 U.S. 544, 557 (1975); Williams v. Lee, 358 U.S. 217, 219-20 (1959) (no state civil jurisdiction over Indian lands absent federal statute); Talton v. Mayes, 163 U.S. 376, 382-83 (1896) (Bill of Rights inapplicable to Indians); United States v. Kagama, 118 U.S. 375, 381-82 (1886). *But see* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973) (noting erosion of the concept of inherent sovereignty).

15. 31 U.S. (6 Pet.) 515 (1832).

16. *Id.* at 559-61.

17. *Id.* at 559.

18. *Id.* at 557.

19. *See* F. COHEN, *supra* note 1, at 123; Martone, *supra* note 1, at 621. Cohen's analysis of *Worcester* as an unequivocal affirmation of inherent sovereignty represents the time-honored view. Martone suggests that the basis of the holding in *Worcester* was a treaty guarantee of self-government.

20. 30 U.S. (5 Pet.) 1 (1831).

occupied an uncertain middle ground that he characterized by the phrase "domestic dependent nation."[21]

Subsequent Court decisions[22] reaffirmed the uncertain status of Indian tribes:

> They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations.[23]

More recently, the Court recognized that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."[24]

United States v. Wheeler,[25] decided shortly after *Oliphant,* presented the issue of whether tribal power to enforce criminal laws against tribal members derives from the retained inherent sovereignty of the tribe or from the sovereignty delegated to it by the Federal Government. Concluding that tribal judicial power flows from retained sovereign powers, Justice Stewart wrote:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.[26]

B. LIMITS OF RETAINED SOVEREIGNTY

Despite the Court's repeated affirmations of the quasi-sovereign status of the tribes, the limits of retained tribal sovereignty remain uncertain. Affirmative acts of Congress constitute the principal express limitations on retained sovereign powers; limitations implicit in the conflict between tribal sovereignty and the superior sovereignty of the United States are the major sources of the uncertainty.

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21. *Id.* at 17.

22. *See* cases cited in note 14 *supra.*

23. United States v. Kagama, 118 U.S. 375, 381-82 (1886) (congressional assumption of federal jurisdiction over Indians pursuant to the Indian Appropriation Act of Mar. 3, 1885, § 9, 23 Stat. 362 (now codified as the Major Crimes Act, 18 U.S.C. § 1153 (1976)), upheld on basis of plenary federal power over Indian affairs).

24. United States v. Mazurie, 419 U.S. 544, 557 (1975) (congressional delegation of power to a tribe to regulate sale of alcoholic beverages on the reservation upheld) (citation omitted).

25. 435 U.S. 313 (1978).

26. *Id.* at 323.

1. Express Limitations of Sovereign Power

In 1934, the Solicitor of the Department of the Interior analyzed the relationship between tribal sovereignty and acts of Congress:

> Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which . . . these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content.[27]

The power of Congress to limit the retained sovereign powers of Indian tribes, unquestioned by the Court,[28] flows from the superior sovereignty of the Federal Government in the guardian-ward relationship. In a recent decision, *Santa Clara Pueblo v. Martinez,*[29] the Court acknowledged the breadth of congressional power, stating that "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."[30] Although express limitations of sovereign power by treaty or statute are conclusive, a history of inconsistent and ill-conceived Indian legislation has promoted confusion in the area of criminal jurisdiction.[31]

Early treaties commonly addressed three jurisdictional situations.[32] First, Indians who committed the murder or robbery of U.S. citizens were to be delivered to federal authorities and tried according to state or territorial law. Second, U.S. citizens who committed murder or robbery of Indians were to be tried in the same manner. Third, U.S. citizens illegally settling on Indian lands forfeited federal protection and the tribe might "punish [them] or not, as they please."[33] Later treaties typically did not contain express provisions for federal jurisdiction.[34] Only one treaty, the first entered into between the United States and an Indian tribe, provided

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27. Powers of Indian Tribes, 55 Interior Dec. 14, 19 (1934).

28. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565-68 (1903); Talton v. Mayes, 163 U.S. 376, 379-80, 384 (1896); United States v. Kagama, 118 U.S. 375, 379-81 (1886).

29. 436 U.S. 49 (1978).

30. *Id.* at 56 (citation omitted).

31. *See generally* Clinton, *supra* note 12; Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze,* 18 ARIZ. L. REV. 503 (1976).

32. *See, e.g.,* Treaty between the United States and the Creeks, Aug. 7, 1790, arts. VI, VIII, IX, 7 Stat. 35, 36-37; Treaty between the United States and the Wiandot, Delaware, Ottawa, Chippewa, Pattawatima and Sac Nations, Jan. 9, 1789, arts. V, IX, 7 Stat. 28, 29-30; Treaty between the United States and the Cherokees, Nov. 28, 1785, arts. V, VI, VII, 7 Stat. 18, 19.

33. Treaty of Aug. 7, 1790, *supra* note 32, art. VI.

34. *See, e.g.,* Treaty between the United States and the Pottawatomies, Nov. 15, 1861, 12 Stat. 1191; Treaty between the United States and the Dwamish, Suquamish, and other Tribes, Jan. 22, 1855, 12 Stat. 927.

for tribal court jurisdiction over non-Indians other than those illegally settled on Indian land.[35] Thus, in any particular jurisdictional controversy, express provisions of a treaty may or may not provide federal criminal jurisdiction.

Among legislation expressly limiting tribal sovereign powers,[36] three statutes profoundly affect the criminal jurisdiction of tribal courts: 18 U.S.C. § 1152,[37] the Major Crimes Act,[38] and the Indian Civil Rights Act of 1968.[39] Section 1152 extends the general criminal laws applicable in federal enclaves to Indian land, but excepts certain classes of Indian offenders. Section 1152 does not expressly deprive tribal courts of criminal jurisdiction; nor does it indicate whether the federal jurisdiction that it confers is exclusive or concurrent. Application of the rule that Indian legislation should be construed in the Indian interest[40] leads to the conclusion that federal jurisdiction under section 1152 is concurrent.[41] Ultimately, the statute fails to establish a concise distribution of jurisdiction.

Ex parte Kenyon,[42] the only federal case prior to *Oliphant* involving tribal court criminal jurisdiction over non-Indians, supports the opposing position that section 1152 confers exclusive federal jurisdiction. Kenyon, a

35. Treaty between the United States and the Delawares, Sept. 17, 1778, art. IV, 7 Stat. 13, 14. *See* 435 U.S. at 199 n.8. *See generally* F. COHEN, *supra* note 1, at 45-46; Clinton, *supra* note 12, at 953-57.

36. *See also* 25 U.S.C. § 1321 (1976). Section 1321 permits a state to exercise criminal and civil jurisdiction over Indian country with the consent of the tribe affected. State exercise of criminal jurisdiction in compliance with the terms of this section precludes the assertion of tribal court jurisdiction.

37. Originally enacted as § 25 of the Indian Trade and Intercourse Act of 1834, 4 Stat. 729, 18 U.S.C. § 1152 (1976) provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States . . . shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

38. 18 U.S.C. § 1153 (1976). The original statute, the Indian Appropriation Act of Mar. 3, 1885, § 9, 23 Stat. 362, was enacted in response to consternation over the U.S. Supreme Court's decision in Ex Parte Crow Dog, 109 U.S. 556 (1883) (denying federal jurisdiction over an Indian who committed murder on a reservation). F. COHEN, *supra* note 1, at 147.

39. 25 U.S.C. § 1302 (1976).

40. "[L]egislation affecting the Indians is to be construed in their interest. . . ." United States v. Nice, 241 U.S. 591, 599 (1916). *See also* Powers of Indian Tribes, 55 Interior Dec. 14, 19 (1934) (statutes that "appear to limit the powers of an Indian tribe are not to be unduly extended by doubtful inference").

41. The ninth circuit used this approach and reached the same conclusion in *Oliphant.* Oliphant v. Schlie, 544 F.2d 1007, 1010 (9th Cir. 1976). The ninth circuit upheld tribal court jurisdiction on the basis of inherent tribal sovereignty. *Id.* at 1009.

42. 14 F. Cas. 353 (C.C.W.D. Ark. 1878) (No. 7,720).

non-Indian convicted in a Cherokee tribal court for an off-reservation larceny, filed a petition for habeas corpus. The occurrence of the offense outside of Cherokee territory provided sufficient grounds for the court's conclusion that the tribal court lacked jurisdiction.[43] Accordingly, the U.S. Supreme Court later noted that the assertion in *Kenyon* that tribal court jurisdiction extended only to Indian offenders,[44] made without reference to supporting authority, was dictum.[45] The Department of the Interior, however, relied on *Kenyon* to justify the broad conclusion that tribal courts lack criminal jurisdiction over non-Indians,[46] and administrative practice has been premised solely on the questionable authority of this nineteenth century source.[47]

The Major Crimes Act establishes federal jurisdiction over ten offenses committed by any Indian "against the person or property of another Indian or other person."[48] The Act reflects no congressional intent to create federal jurisdiction over major crimes committed by non-Indians. The apparent negative inference is that Congress assumed the basis of tribal court jurisdiction to be the citizenship of the offender rather than the territory on which the crime is committed. But a congressional presumption, raised by negative inference, is not conclusive on the jurisdictional issue.[49]

The Indian Civil Rights Act extends provisions similar to those of the Bill of Rights[50] to Indian tribal governments. The Act does not restrict the scope of sovereign powers that may be exercised but does limit their manner of exercise. The provisions of the Act, extending guarantees to "any person,"[51] neither expressly nor implicitly address jurisdiction.

No act of Congress has denied tribal court criminal jurisdiction over non-Indians. Indian legislation raises reasonable inferences of a presumed absence of jurisdiction, but inferences are ultimately inconclusive. Further-

43. *Id.* at 355.

44. *Id.*

45. Elk v. Wilkins, 112 U.S. 94, 108 (1884). In *Oliphant,* Justice Rehnquist, writing for the majority, was of the opinion that the *Kenyon* court "held" tribal court jurisdiction to be limited to Indian offenders. 435 U.S. at 200.

46. 77 Interior Dec. 113 (1970) (withdrawn 1974); *see* F. COHEN, *supra* note 1, at 148.

47. *See* M. PRICE, LAW AND THE AMERICAN INDIAN 171-74 (1973).

48. 18 U.S.C. § 1153 (1976). The offenses are murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny. *Id.*

49. 435 U.S. at 206. The Court has not yet considered whether the Major Crimes Act confers exclusive jurisdiction on the federal courts. *See* United States v. Wheeler, 435 U.S. 313, 325 n.22 (1978). Passage of the Indian Civil Rights Act of 1968 mooted the issue by limiting the punishment that can be imposed by tribal courts to a $500 fine and six months imprisonment. 25 U.S.C. § 1302(7) (1976).

50. U.S. CONST. amends. I-X. The Bill of Rights does not apply to Indian tribes. Talton v. Mayes, 163 U.S. 376 (1896).

51. Thus, should tribal courts be granted criminal jurisdiction over non-Indians, the guarantees of the Indian Civil Rights Act of 1968 would extend to non-Indians.

more, treaty provisions concerning jurisdiction reflect that presumption even less forcefully.

2. *Implicit Limitations of Sovereign Power*

Certain limitations on sovereign powers inhere in the conflict between tribal sovereignty and the superior sovereignty of the United States. Indian exercise of external sovereign powers, such as the conduct of foreign relations, would clearly conflict with federal interests.[52] At the opposite extreme, the sovereign power of internal self-government would not conflict with overriding federal sovereignty.[53]

No test to identify predictably those sovereign powers that have been implicitly lost has emerged from the Supreme Court. Justice Stewart recently noted that the "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."[54] The tribes, however, retain sovereign power over certain affairs affecting tribal nonmembers.[55] The jurisdictional question raised in *Oliphant* occupied a gray area of the law lying between external and internal powers.

C. *OLIPHANT V. SUQUAMISH INDIAN TRIBE*

In *Oliphant,*[56] the U.S. Supreme Court addressed the question of whether tribal courts can exercise criminal jurisdiction over non-Indians for acts occurring on Indian reservations. Petitioner Oliphant, arrested by Su-

52. In *Cherokee Nation v. Georgia,* Chief Justice Marshall observed that Indian tribes are "so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility." 30 U.S. (5 Pet.) at 17-18.

53. United States v. Wheeler, 435 U.S. 313, 326 (1978) (sovereign power to prosecute tribal members for tribal offenses not implicitly lost); Williams v. Lee, 358 U.S. 217, 223 (1959) (assertion of state-court civil jurisdiction over action arising on Indian territory where tribal forum available is infringement on right of self-government).

54. 435 U.S. at 326.

55. In Williams v. Lee, 358 U.S. 217 (1959), a non-Indian store proprietor on the Navajo Reservation brought suit in state court to recover goods from Indian defendants despite the availability of a tribal forum. Although *Williams* involved a tribal-state jurisdictional question, the Court's reasoning is fully applicable to the issue of implicit divestiture: "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* at 223.

56. 435 U.S. 191 (1978). For commentary on the *Oliphant* decision, see Gross, *Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy,* 56 TEX. L. REV. 1195 (1978); McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests,* 13 HARV. C.R.-C.L. L. REV. 357 (1978); Note, *Oliphant v. Suquamish Indian Tribe: A Jurisdictional Quagmire,* 24 S.D.L. REV. 217 (1979), and *Tribal Sovereignty and the Supreme Court's 1977-1978 Term,* 1978 B.Y.U.L. REV. 911.

quamish tribal officers during a tribal celebration on the Port Madison Reservation, was charged with assaulting a tribal officer and resisting arrest.[57] A second petitioner was charged by tribal authorities with reckless endangerment and destruction of tribal property.[58] Both were non-Indian residents of the Port Madison Reservation.[59]

The Suquamish tribal government had adopted in 1973 a Law and Order Code conferring original jurisdiction on the tribal court, concurrent with federal jurisdiction, over the territory of the reservation and over persons, both Indian and non-Indian, located there.[60] Notices were placed at the entrances to the reservation warning that entry onto it would be deemed implied consent to tribal court jurisdiction.[61]

After examining the pertinent treaty and relevant statutes, Justice Rehnquist, writing for a majority of the Court, invalidated the exercise of tribal court criminal jurisdiction over non-Indians on the grounds of the existence of inherent limitations on Indian sovereign power. In their treaty,[62] the Suquamish "acknowledge[d] their dependence on the government of the United States" and "agree[d] not to shelter or conceal offenders against the laws of the United States."[63] The Suquamish did not expressly relinquish tribal court jurisdiction and the Court recognized that the treaty provisions "[b]y themselves . . . would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction."[64] Nevertheless, "the addition of historical perspective"[65] led the Court to deny the existence of such jurisdiction. After reviewing the prominent case authorities,[66] the Court concluded that the "history of Indian treaties . . . is consistent with the principle that Indian tribes may not assume criminal jurisdiction over non-Indians without the permission of Congress."[67] Accordingly, treaties silent on the jurisdictional question are interpreted as reflecting the general recognition that the tribes could not

57. 435 U.S. at 194. Tribal court proceedings were stayed pending decision on a writ of habeas corpus filed in the district court. *Id.* Both the district court and the court of appeals denied Oliphant's petition. *Id.*

58. *Id.*

59. Non-Indians owned approximately 63% of the reservation land and constituted 98% of the population. *Id.* at 193 n.1.

60. *Id.* at 193.

61. *Id.* at 193 n.2.

62. Treaty between the United States and the Dwamish, Suquamish, and other Tribes, Jan. 22, 1855, 12 Stat. 927.

63. *Id.*, art. IX, 12 Stat. at 929.

64. 435 U.S. at 208.

65. *Id.* at 206.

66. *Id.* at 207-11. *See* text accompanying notes 14-24 *supra.*

67. 435 U.S. at 197 n.8.

assert such jurisdiction.[68] Thus, the provisions of the Treaty of Point Eliot,[69] placed in historical perspective, suggested the absence of Suquamish criminal jurisdiction.[70]

A review of federal legislation[71] led the Court to conclude that Congress shared the presumption of the executive branch and the lower courts that tribal courts lack criminal jurisdiction over non-Indians.[72] The Court determined that Congress believed that the prohibition of tribal assertions of jurisdiction was "the necessary result of its repeated legislative actions."[73] The Court recognized that this shared presumption is not conclusive, however,[74] and ultimately rested its decision on the concept of implicit limitations of sovereign powers.

The court of appeals recognized in its *Oliphant* decision that the tribes retain "those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress."[75] Powers "inconsistent with their status" are those that would "interfere with or frustrate the policies of the United States."[76] The court found the exercise of tribal court criminal jurisdiction to be consistent with tribal status. First, the provisions of the Suquamish Law and Order Code under which Oliphant was charged did not "punish conduct otherwise privileged or authorize actions otherwise illegal under federal law."[77] Second, the exercise of tribal court jurisdiction was consistent with recent federal policy encouraging tribal governance.[78]

The "inconsistent with their status" test fails to provide principled guidelines for its application. Because the status of the tribes is ill-defined, the test amounts to little more than a conclusory label. Justice Rehnquist

68. *Id.*

69. *See* note 62 *supra.*

70. The Court acknowledged that courts should construe treaty provisions in favor of the tribes, 435 U.S. at 208 n.17, but interpreted the provisions here consistently with its view of the historical perspective.

71. *Id.* at 201-06. In addition to 18 U.S.C. § 1152 (1976), *see* note 37 and text accompanying notes 39-47 *supra,* the Major Crimes Act, *see* note 38 and text accompanying notes 48-49 *supra,* and the Indian Civil Rights Act of 1968, *see* note 39 and text accompanying notes 50-51 *supra,* the Court considered at length the unenacted Western Territory Bill, *see* H.R. REP. NO. 474, 23rd Cong., 1st Sess. 36 (1834).

72. 435 U.S. at 206.

73. *Id.* at 204.

74. *Id.* at 208. Justice Rehnquist noted that the shared presumption "carries considerable weight" but failed to indicate how that weight figured in the decision. *Id.* at 206. It is probable that he conducted the historical review to buttress the independent judicial conclusion that tribal court jurisdiction is inconsistent with the status of the tribes.

75. Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976).

76. *Id.* at 1012.

77. *Id.*

78. *Id.* at 1013.

applied the ninth circuit's test but reached the opposite result. He started from the premise that the United States' interest in protecting its citizens against "unwarranted intrusions on their personal liberty" is "central to the sovereign interests of the United States."[79] He then noted that the power to try and criminally punish non-Indians, a restriction of personal liberty, is an "important manifestation" of U.S. sovereignty.[80] By yielding their full sovereign status to the United States, then, Indian tribes relinquished this attribute of sovereignty. Permitting the exercise of tribal criminal jurisdiction over non-Indians "would belie the tribes' forfeiture of full sovereignty in return for the protection of the United States."[81] Thus such tribal court jurisdiction could not be exercised.

Three weaknesses are apparent in the Court's analysis. First, implicit in the Court's argument is the unsubstantiated assumption that tribal courts are unable to protect U.S. citizens against unwarranted intrusions on their personal liberty.[82] But the Indian Civil Rights Act of 1968 guarantees Indians and non-Indians freedom from such unwarranted intrusions.[83] Second, the Court acknowledged but refused to give weight to the tribal interest in asserting criminal jurisdiction over its territory.[84] Third, the Court's rationale would support the argument that Indians, as U.S. citizens, are entitled to federal rather than only tribal criminal forums for protection against unwarranted intrusions on their personal liberty.[85] Such a result would severely limit the scope of the retained sovereign power of self-government. Thus a jurisdictional scheme should be developed that adequately balances the competing federal and tribal interests.

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79. 435 U.S. at 210.

80. *Id.*

81. *Id.* at 211.

82. *Id.* at 210-11. Justice Rehnquist relied on the antiquated language of Ex parte Crow Dog, 109 U.S. 556 (1883) to suggest that racial and social differences negate the possibility of a fair trial in tribal court for a non-Indian.

83. 25 U.S.C. § 1302 (1976). The provisions of the Indian Civil Rights Act of 1968 are substantially equivalent to those of the Bill of Rights, with exceptions rendered immaterial by other federal statutory limits on the powers of Indian tribal governments. For example, 25 U.S.C. § 1303 (1976) provides that the writ of habeas corpus shall be available for federal court review of the legality of detention by an Indian tribe. The Act does not, however, require that its provisions be judicially interpreted identically to the Bill of Rights. *See* Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976); Howlett v. Salish and Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976).

84. 435 U.S. at 212. The Court considered this balancing to be a legislative function.

85. The argument would not be likely to succeed in the form of an equal protection challenge. In Washington v. Yakima Indian Nation, 439 U.S. 463 (1979), the Court upheld a Washington statute that created a "checkerboard" pattern of tribal and state-court civil jurisdiction, holding that the statute "is fairly calculated to further the State's interest in providing protection to non-Indian citizens living within the boundaries of a reservation while at the same time allowing scope for tribal self-government on trust or restricted lands." *Id.* at 502.

II

A NEW JURISDICTIONAL THEORY: REASONABLENESS

At the time of the *Oliphant* decision, 33 of the existing 127 tribal court systems purported to extend criminal jurisdiction over non-Indians.[86] Far from reflecting traditional socio-religious rules or procedures,[87] tribal courts merely duplicate the function of nontribal legal systems.[88] Moreover, the tribal legal systems are beset by incompetence.[89] Thus, the current state of justice in tribal courts weighs against the expansion of their jurisdiction. But the *Oliphant* Court's denial of jurisdiction conflicts with the current federal policy of encouraging tribal self-government.[90] The Court's result also ignores the expressed fears of tribal members that non-Indians committing offenses on Indian land or against Indian persons are not adequately punished by nontribal legal systems.[91]

Oliphant accords with the trend away from a theory of jurisdiction based on territory towards a theory of jurisdiction based on citizenship.[92] Although the *Oliphant* Court did not directly address this distinction, its opinion amounts to an unqualified rejection of territorial jurisdiction. The choice of one of two extremes achieved a result that is definitive but, under some circumstances, unreasonable. A standard of jurisdiction that is more principled, flexible, and reasonable than that established by *Oliphant* is necessary.

The proposed jurisdictional approach is premised on notions of reasonableness and fairness: tribal jurisdiction is appropriate when the tribal

86. 435 U.S. at 196.

87. S. BRAKEL, AMERICAN INDIAN TRIBAL COURTS 9-10 (1978). The vast majority of tribes lost their traditional legal systems during the process of repeated physical displacement and exposure to white society. *Id.*

88. *Id.* at 91 n.86. Brakel notes that "[t]he Indian tribes in this country are fragmented remnants of a past culture almost wholly absorbed by and dependent on the surrounding contemporary culture; the tribal courts are almost wholly duplicative of surrounding nontribal institutions." *Id.* In addition, he argues that "the justice dispensed in the tribal courts represents nothing more or less than an effort to copy white man's precepts and white man's institutions." *Id.* at 92.

89. *Id.* at 104-11. Brakel attributes the sorry state of tribal legal systems to a lack of skilled and experienced personnel, insufficient funds, lack of a tradition of professionalism, and inadequate trial preparation.

90. For discussions of recent federal legislation implementing this policy, see Israel, *The Reemergence of Tribal Nationalism and its Impact on Reservation Resource Development,* 47 U. COLO. L. REV. 617, 624-30 (1976); McCoy, *supra* note 56, at 393-94.

91. *See* 435 U.S. at 212 n.18. The ninth circuit noted in its *Oliphant* opinion that non-Indians frequently go unpunished for minor offenses because of crowded court dockets, the confused jurisdictional scheme, and the distances separating witnesses and evidence from the courthouses. 544 F.2d at 1013-14.

92. Clinton, *supra* note 12, at 955.

interest in providing a forum outweighs the federal interest in providing a forum.[93] Focusing on the interests present in the particular controversy incorporates elements of the citizenship and territorial arguments but moderates those extremes to produce a jurisdictional continuum. Accordingly, criminal activity that is merely territorial, for example, a marijuana sale between non-Indian nonresidents in Indian territory, presents insufficient tribal interests to confer tribal court jurisdiction.

U.S. Supreme Court decisions provide guidelines for the distribution of jurisdiction on the basis of the interest of the forum in the controversy. The Court has balanced interests in both tribal-federal[94] and tribal-state[95] jurisdictional controversies, emphasizing the tribal interest in self-government. Similar principles governing jurisdiction have emerged in the area of state-court assertions of personal jurisdiction.[96] The Court's decisions focus on the level of defendant's activity within the forum and its relatedness to the litigation,[97] and the most practical and reasonable forum.[98] Thus concepts of reasonableness analogous to those proposed are well-developed in jurisdictional law.

The facts of *Oliphant* may be used to demonstrate the process of balancing the interests of the tribal forum against those of the Federal Government. Oliphant was charged with assaulting a tribal police officer and resisting arrest on Suquamish tribal land during a tribal celebration.[99] The

93. McCoy, *supra* note 56, at 399, notes that this balancing of interests is analogous to the interest-analysis approach developed by conflict of laws scholars. McCoy argues that interest-analysis is emerging as a useful approach to civil jurisdictional controversaries in tribal-state and tribal-federal relations, but does not propose that this approach should supplant the *Oliphant* decision in the area of criminal jurisdiction. Conflict of laws interest-analysis is not ordinarily applied to criminal law. No choice of law problem can arise because "[n]o state will punish a violation of the criminal law of another state." RESTATEMENT OF CONFLICT OF LAWS § 427 (1934). Nevertheless, the proposed approach to criminal jurisdiction draws upon considerations analogous to those used in conflict of laws interest-analysis.

94. *See* United States v. Wheeler, 435 U.S. 313, 332 (1978) ("tribal courts are important mechanisms for protecting significant tribal interests. Federal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government. . . .") *See also* McCoy, *supra* note 56, at 408-22.

95. *See* Williams v. Lee, 358 U.S. 217, 223 (1959):

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.

See also McCoy, *supra* note 56, at 401-08.

96. *See generally* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 HARV. L. REV. 1121 (1966).

97. Shaffer v. Heitner, 433 U.S. 186 (1977); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

98. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

99. 435 U.S. at 194. Suquamish authorities had anticipated crowd control problems dur-

Suquamish interests in asserting jurisdiction over Oliphant were sufficiently strong to support jurisdiction: the offense, although minor, significantly affected the integrity and capability of the tribal police; the offense directly disturbed the peace and security of the reservation community; and the offense was against tribal personnel. No overriding federal interest in providing a forum existed. The ninth circuit noted in its *Oliphant* opinion that federal law is not designed to regulate minor offenses, nor are federal authorities anxious to prosecute for such offenses.[100] In addition, the distance from the reservation to the federal courthouse may present a federal prosecutor with difficulties in gathering evidence and obtaining witnesses.[101] Under the proposed jurisdictional theory, the tribal court's jurisdiction would have been upheld.

The federal interest in asserting jurisdiction over perpetrators of minor crimes normally is nominal or nonexistent. Under the proposed jurisdictional scheme, tribal courts would extend jurisdiction to minor crimes that substantially affect law and order in the tribal community, involve tribal property and personnel, or concern matters of essential tribal policy. Federal jurisdiction would encompass those crimes not embraced by substantial tribal interests, matters of substantive federal policy regardless of tribal policy,[102] and crimes for which Congress has expressly provided federal or state jurisdiction.[103]

CONCLUSION

The *Oliphant* Court, free to identify those sovereign powers "inconsistent" with Indian tribal status, created an unreasonable distribution of jurisdiction between tribal and federal courts. Although it accords with the

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ing the celebration and had requested county law enforcement assistance. One deputy was assigned for one eight-hour period during the weekend. The Bureau of Indian Affairs responded to a request for assistance with neither funds nor personnel. Oliphant was arrested in the early morning hours when only tribal officers were available. 544 F.2d at 1013.

100. Federal law is not designed to cover the range of conduct normally regulated by local governments. Minor offenses committed by non-Indians within Indian reservations frequently go unpunished and thus unregulated. Federal prosecutors are reluctant to institute federal proceedings against non-Indians for minor offenses. . . .

Traffic offenses, trespasses, violations of tribal hunting and fishing regulations, disorderly conduct and even petty larcenies and simple assaults committed by non-Indians go unpunished.

544 F.2d at 1013-14 (quoting Brief for Appellee at 27-28).

101. *Id.*

102. For example, despite a tribal code prohibition on the sale of a drug and the substantial tribal interest in protecting the reservation community through its drug laws, the interest of the Federal Government in an integrated drug enforcement program may outweigh the tribal interest. Close cases should be resolved by granting jurisdiction to the superior sovereign.

103. *E.g.,* Major Crimes Act, 18 U.S.C. § 1153 (1976).

current trend away from jurisdiction based on territorial sovereignty, it fails to consider adequately competing tribal and federal interests. By eliminating the theories of territoriality and nationality from the jurisdictional test, irrational disparities of treatment based on race can be discarded and tribal law can be more consistently applied.

Tribal courts should be empowered to assert criminal jurisdiction over non-Indians within the limits of inherent sovereignty through an approach that weighs the interests of the tribe against those of the United States. Because judicial creation of a jurisdictional scheme on a case-by-case basis is prohibitively cumbersome, Congress should act to identify the proper forum for specific offenses or classes of offenses.[104] Congress must also address the present ineffectiveness of tribal courts to guarantee all criminal defendants meaningful justice.[105]

Richard A. Samuels

104. The Major Crimes Act, *id.*, is an example of such a statute.

105. Brakel offers recommendations for tribal court reform including improved legal training on the reservations, the use of lay advocates, mandatory factual investigations by judges, improved pre-trial screening of cases, improved judicial selection, and the use of local lawyers as appellate judges. S. BRAKEL, *supra* note 87, at 104-09.