Tribal Law Journal

Volume 20 Article 1

1-1-2021

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Few Indian law decisions have evoked as much scholarly attention as *Santa Clara Pueblo*.[1] Shepard's pulls up over 1000 law review references, and Google reports almost 3,000,000 hits.[2] It is a major case in all Indian law treatises and casebooks and is important in several other books.[3] Most analyze the decision as an event and focus on its principal holding, denying a federal cause of action for civil enforcement of the Indian Civil Rights Act.[4] Policy discussions parse tribal sovereignty and discrimination against women.[5]

My focus here is rather to situate the decision in the ongoing development of the issues it addressed and related matters. Three subjects are pertinent: evolution of the law on implied federal remedies (Sec. I) , tribal jurisdiction over non-Indians and nonmember Indians (Sec. II), and tribal sovereign immunity from suit (Sec. III).

[†] Eds. note: This paper draws on Professor Richard B. Collins' remarks delivered at the *50 Years of the Indian Civil Rights Act, Protection and Denial of The Civil Rights of Native Americans* Symposium, co-sponsored by the Tribal Law Journal and the Law and Indigenous Peoples Program, UNM School of Law, March 8-9, 2018 at Isleta Pueblo Resort and Casino. Professor Collins provided historical and background remarks and the Symposium organizers recognized him for his many years of work in the field of Indian law on March 8, 2018. Collins argued Santa Clara v. Martinez on behalf of Respondent, Ms. Julia Martinez and her daughter, Audrey, before the U.S. Supreme Court.

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[1] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[2] *See* https://advance.lexis.com/shepards/shepardspreview/?pdmfid=1000516&crid=fb1f06d4-2f59-418a-a381-25ee80d24001&pdshepid=urn%3AcontentItem%3A7XW4-F4K1-2NSF-C0P5-00000-00&pdshepcat=initial&action=sheppreview&ecomp=Lg85k&prid=77c2d52e-447c-4028-962e-cb187aee9b9a (Shepard's); https://www.google.com/search?q=Santa+Clara+Pueblo+v+Martinex&ie=utf-8&oe=utf-8 (Google) (both last visited Jan. 14, 2018).

[3] *See* NELL JESSUP NEWTON ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW INDIAN LAW *passim* (2012); CONFERENCE OF WESTERN STATE ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK § 7.6 (2018 ed.); ROBERT ANDERSON ET AL.,, AMERICAN INDIAN LAW 334-51 (3rd ed. 2015); CHARLES WILKINSON ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 434–41 (7th ed. 2017); SARAH SONG, JUSTICE, GENDER AND THE POLITICS OF MULTICULTURALISM115-20 (2007).

[4] Santa Clara Pueblo, 436 U.S. at 59-72 (interpreting 25 U.S.C. §§ 1301-1302 (2012)).

[5] *See, e.g.*, Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 *passim* (1989); Maria Noel Leoni Zardo, *Gender Equality and Indigenous Peoples' Right to Self-Determination and Culture*, 28 AM. U. INT'L L. REV. 1053, 1073-74, 1085 (2013).

Basic facts of the case are well known. In 1935, Santa Clara Pueblo adopted a tribal constitution that accorded membership to "all children of mixed marriages between members of Santa Clara Pueblo and nonmembers, provided such children have been recognized and adopted by the council."[6] But in 1939 the Santa Clara Pueblo Council passed a law granting automatic membership to all children of male members in mixed marriages, denying membership to all children of female members married to outsiders, and forbidding naturalization of persons not made members by the ordinance.[7] The rule was challenged by Julia Martinez, a member whose husband Myles was Navajo. After their marriage, the couple lived on the Pueblo. Their children grew up there and participated fully in tribal life, culture, and language. Julia first challenged the rule soon after birth of her daughter Audrey in 1946. She and other women made continuous efforts to overturn the rule that the *Martinez* trial court summarized.[8] An incident that helped provoke the lawsuit was denial of medical coverage by the Indian Health Service to the Martinez children for lack of enrollment. The crucial issue in the lawsuit was whether the Martinez children would have any right to live on the Pueblo after Julia's death. Health coverage was accorded to the family, but efforts to compromise on habitation failed.[9] Thus, the original case was filed against HUD, which in turn sued the All-Indian Pueblo Housing Authority.[10] However, short-term housing issues reached an accommodation by the time of trial. The case proceeded to trial on the question whether the Pueblo's male membership preference was overridden by the Indian Civil Rights Act. The Pueblo won the case and maintained the 1939 rule until 2012, when it was changed based on a referendum vote of Pueblo members.[11]

I. Federal Remedy and Tribal Membership

A. *The Ruling in Santa Clara Pueblo*

[6] CONSTITUTION AND BYLAWS OF THE PUEBLO OF SANTA CLARA, NEW MEXICO, ART. II § 1 (Dec. 20, 1935), available at https://thorpe.law.ou.edu/IRA/nmsccons.html (last visited Jan. 14, 2018). As the link states, the constitution was adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 16 (2012). Santa Clara is one of the seven northern New Mexico pueblo tribes that speak the Tewa language and have occupied the area for several thousand years. *See* JOE S. SANDO, PUEBLO NATIONS: EIGHT CENTURIES OF PUEBLO INDIAN HISTORY (1992).

[7] Santa Clara Pueblo, 436 U.S. at 52.

[8] Martinez v. Romney, 402 F. Supp. 5, 10-11 (D.N.M. 1975).

[9] *See id*. at 14-15.

[10] *See id*.

[11] *See* Tom Sharpe, *Santa Clara Pueblo Vote on Member Rules Leaves Loose Ends*, SANTA FE NEW MEXICAN (May 1, 2012), (www.santafenewmexican.com/news/local_news/santa-clara-pueblo-vote-on-member-rules-leaves-loose-ends/article_3ea83343-5059-5f87-aa25-a473d336aac1.html).

Julia and Audrey Martinez sued the Pueblo and its Governor in federal district court in 1973. The suit invoked the Indian Civil Rights Act (ICRA), passed by Congress in 1968, which provides that "No Indian tribe in exercising powers of self-government shall . . . deny to any person the equal protection of its laws . . ."[12] At the time suit was filed, ICRA had been reviewed in numerous lower federal courts but not in the Supreme Court. Under the precedents, tribal sovereignty was respected in two ways; litigants had to exhaust tribal remedies before seeking civil remedies under the act, and federal courts gave some deference to tribal tradition in applying provisions such as the statute's equal protection clause.[13] But jurisdiction of federal courts to reach the merits after exhaustion was well established.[14] In *Santa Clara Pueblo*, tribal remedies had been exhausted.[15] Tribal membership is a core sovereign interest, so deference to the Pueblo was a serious issue that was the focus of the trial. The District Court reached the merits, then held that tribal sovereignty should sustain the Pueblo's preference for its male members.[16] The Court of Appeals reversed on the latter issue.[17] The Supreme Court granted review and ruled that federal jurisdiction to enforce ICRA is limited to its explicit provision for habeas corpus, no civil remedy should be implied, and the case must be dismissed.[18] The Court's opinion relied on its 1975 decision in *Cort v. Ash*,[19] which had limited implied federal remedies, and on federal policy in favor of tribal sovereignty.[20]

Lower federal courts had sustained authority based in part on the special federal jurisdiction applicable to civil rights cases. Its relevant text provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.[21]

A number of courts including the trial court in *Santa Clara Pueblo* had interpreted this statute to give the court subject matter jurisdiction and to

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[12] 25 U.S.C. § 1302 (2012).
[13] *See* Martinez v. Romney, 402 F. Supp. at 17.
[14] *See id*. at 10.
[15] *See id*.
[16] *See id*. at 18-19.
[17] *See* Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976), *rev'd*, 436 U.S. 49 (1978).
[18] 436 U.S. at 59-72.
[19] 422 U.S. 66 (1975).
[20] *See id*. at 59-72; *infra* notes 30-40 and accompanying text.
[21] 28 U.S.C. § 1343 (2012).

authorize remedies.[22] Litigants had operated on the same assumption. The *Cort v. Ash* decision and its theory did not catch up to the *Santa Clara Pueblo* case until it reached the Supreme Court.

As explained below, tribal sovereignty did not fare well in other contemporary decisions.[23] But restricting implied federal remedies or causes of action has enjoyed robust development in all fields of law. In the meantime, tribal membership has become a major subject of internal disputes within tribes, protected from external interference by *Santa Clara Pueblo* except for the special case of the Cherokee Freedmen.[24]

B. *Evolution of the Law of Federal Remedies*

We can trace evolution of federal law on implied federal remedies through the medium of the famous Federal Courts treatise by Professors Henry Hart and Hebert Wechsler and their successors.[25] The original edition published in 1953 discussed implied remedies for enforcement of federal statutes when the United States is plaintiff but made almost no reference to implied private remedies.[26] The second edition in 1973 added a three-page note on "Implication of Federal Remedies."[27] The leading case at that time was the unanimous 1964 decision in *J. I. Case Co. v. Borak*, which readily implied a private cause of action for civil enforcement of the Securities and Exchange Act of 1934.[28] The edition also recognized civil rights decisions in which private remedies had been implied.[29] The third edition in 1988

[22] *See* Martinez v. Romney, 402 F. Supp. at 7 and cases cited.
[23] *See infra* part II.
[24] *See generally* DAVID E. WILKINS & SHELLY HULSE WILKINS, DISMEMBERED: NATIVE DISENROLLMENT AND THE BATTLE FOR HUMAN RIGHTS (2017); Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 ARIZ. L. REV. 383 (2015); Brooke Jarvis, *Who Counts as Native American?*, N.Y Times (Jan. 18, 2017), https://www.nytimes.com/2017/01/18/magazine/who-decides-who-counts-as-native-american.html; Gale Courey Toensing, *Washburn on Membership Disputes: Should US Trample on Sovereignty?*, INDIAN COUNTRY TODAY MEDIA (Mar. 4, 2014) (the HTML is inoperable at the time of publication). The Cherokee Freedmen case involves interpretation of a treaty and federal statute. *See* Cherokee Nation v. Nash, 267 F. Supp. 3d 86 (D.D.C. 2017); In re Effect of Cherokee Nation v. Nash, 15 Am. Tribal Law 102 (Cherokee Sup. Ct. 2017). *See also* Vann v. United States, 701 F.3d 927 (D.C. Cir. 2012); Vann v. Kempthorne, 534 F.3d 741 (D.C. Cir. 2008). However, authority to enforce Indian treaties has been routinely sustained.
[25] HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).
[26] *Id*. at 1114-22. The treatise did cite the few Supreme Court decisions that had implied private remedies, arising under the Railway Labor Act. *See id*. at 1227-29.
[27] PAUL M. BATOR, PAUL J, MISHKIN, DAVID L. SHAPIRO & HERBERT WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 798-800 (2nd ed. 1973).
[28] J. I. Case Co. v. Borak, 377 U.S. 426 (1964).
[29] *See* BATOR ET AL., *supra* note 26, at 1419-20.

expanded the note to eight pages to acknowledge significant changes crafted by Supreme Court decisions in 1974-75 and 1979.[30] These decisions severely restricted the Court's doctrine on implied remedies, a path followed since. As noted above, the decision crucial to *Santa Clara Pueblo* was *Cort v. Ash*. A unanimous Court proposed a general doctrine for implication of federal remedies in an opinion by Justice Brennan that was applied in *Santa Clara*.[31]

Civil rights laws are, or were, a distinct sub-category of statutes that raise disputes about rights of enforcement and causes of action. The influence of 28 U.S.C. § 1343(4) is noted above. The leading case became *Cannon v. University of Chicago*,[32] where the Court's four opinions reviewed the issue in great detail. The issue was whether Title IX of the Education Amendments of 1972, which forbids sex discrimination by colleges and universities, could be enforced by private civil action when the statute lacked an explicit right.[33] The majority opinion by Justice Stevens and concurrence by Justice Rehnquist held that the governing principle was implied intent of Congress, and, based on the *Borak* case, Congress had intended that the Court craft remedies for enforcement of the Civil Rights Act of 1964 and its progeny, which included Title IX.[34] Justice Powell's extended dissent argued that any implied remedy violated the Separation of Powers doctrine, and *Borak* should be overruled.[35] The fourth edition of the Hart-Wechsler treaties made *Cannon* a principal case,[36] and it has remained so in each later version of the treatise.[37]

Cannon made clear that the justices wanted Congress to take principal responsibility for determining remedies and causes of action to enforce federal statutes.[38] But it left in place the *Cort v. Ash* test that allowed implied remedies if its criteria were satisfied. The issue reached a more conservative Court in 2001. Alabama administered its driver license test in English only.[39] A lawsuit contended that this violated the Civil Rights Act of 1964 but on a

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[30] PAUL M. BATOR, DANIEL J. MELTZER, PAUL J, MISHKIN, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 943-50 (3d ed. 1988). The decisions, cited at pages 945-47, were Cannon v. University of Chicago, 441 U.S. 677 (1979); Cort v. Ash, 422 U.S. 66 (1975); Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1974), and National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974).
[31] 436 U.S. at 60-61.
[32] 441 U.S. 677 (1979).
[33] 20 U.S.C. § 1681 (2012).
[34] 441 U.S. at 711–12; *Id*. at 718 (Rehnquist, J., concurring).
[35] *Id*. at 735-36.
[36] *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 830 (4th ed. 1996).
[37] *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 724 (7th ed. 2015); *see id*. at 691 (6th ed. 2009).
[38] 441 U.S. at 717.
[39] Alexander v. Sandoval, 532 U.S. 275, 278 (2001).

disparate impact theory.[40] The Court held that no cause of action should be implied and distinguished *Cannon* as based on intentional discrimination.[41] That strengthened the *Cannon* dictum that Congress must make most remedies explicit.

II. Tribal Sovereignty

Retained tribal sovereignty is based on the Supreme Court's interpretation of Indian treaties with the United States in the celebrated Cherokee cases of 1831-32.[42] *Cherokee Nation v. Georgia* was dismissed, but the Court's opinion recognized the Cherokee Nation as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself . . . They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.[43] *Worcester v. Georgia* reaffirmed the Cherokees' sovereign character and held that within their territory the Cherokees retained their sovereign powers limited only by their treaties with the United States and by federal statutes.[44] In one of the few bright spots in 19th Century federal Indian policy, the theory of *Worcester* was applied to tribes lacking a treaty and to tribal territory set aside by statute or executive order.[45]

The Supreme Court was almost silent on tribal sovereignty from the demise of the Indian Territory's tribal courts in 1898 until *Worcester* was reaffirmed in *Williams v. Lee* in 1959.[46] Uncertainties in the *Williams* opinion

[40] *Id*. at 278.
[41] *Id*. at 282, 291-92.
[42] Worcester v. Georgia, 31 U.S. 515 (1832): Cherokee Nation v. Georgia, 30 U.S. 1 (1831).
[43] 30 U.S. at 16.
[44] *See* 31 U.S. at 556-62.
[45] This statement cannot be linked to a deliberate decision by Government or Court. It is apparent from Government actions exercising authority over such tribes and their reservations from earliest years of the nation. It might derive from wording of the 1790-1834 Indian Trade and Intercourse Acts, which used comprehensive terms for Indians, tribes, and Indian country. *See* NELL JESSUP NEWTON ET. AL., COHEN'S HANDBOOK, § 1.03 (2012). For one of many modern cases treating an executive order tribe the same as treaty tribes, *see* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).
[46] 358 U.S. 217 (1959). Tribal courts in Indian Territory were abolished by the Curtis Act of June 28, 1898, ch. 517, §28, 30 Stat. 495, 504-05 (1898). But the tribes themselves continued to be recognized by the U. S., and their status was

were laid to rest in *McClanahan v. Arizona Tax Commission* in 1973.[47] Tribal authority over Indians in Indian country was held exclusive of state jurisdiction unless Congress clearly provided otherwise.[48] However, both opinions cited decisions in which the Court had sustained power of states or federal territories over non-Indians in Indian country in matters not directly affecting Indians or tribes.[49] These decisions were the background for challenges to modern assertions of tribal authority over non-Indians and nonmember Indians in their territory.

Santa Clara Pueblo was preceded in the October 1977 term by two other important decisions defining tribal sovereignty. First and more dramatic was *Oliphant v. Suquamish Tribe*.[50] The tribe had extended its civil and criminal jurisdiction over all persons within its territory. Two non-Indians were convicted of tribal misdemeanors and sought federal court review on habeas corpus based on the Indian Civil Rights Act.[51] The Federal District Court and Court of Appeals ruled against them,[52] but the Supreme Court reversed.

The main argument to the courts was federal preemption of tribal authority by the Indian Country Crimes Act.[53] The sole precedent on point had relied on that statute to bar tribal power to punish non-Indians in their territory.[54] That rationale would have answered the Court's main policy argument that tribal justice systems were vastly different from those that non-Indians would have expected.[55] But the Court failed even to mention that claim and instead invented a sweeping new theory of implied repeal of tribal

expressly preserved by the Five Civilized Tribes Act, ch. 1876, §28, 34 Stat. 137, 148 (1906). In modern times, the tribes have restored tribal courts. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 400–18 (4th ed. 1998) (describing the history of the modern tribal courts). One of the last Supreme Court decisions before 1898 strongly reaffirmed tribal sovereignty in Indian country. Talton v. Mayes, 163 U.S. 376 (1896).

[47] 411 U.S. 164 (1973). The Court recited and rejected the state's efforts to distinguish *Williams v. Lee*, attempting to restrict it to direct interference with tribal government. *See id*. at 166-67, 169-71.

[48] *Id*. at 177.

[49] *See, e.g.*, 358 U.S. 217 at 220; 411 U.S. at 168, 171, citing New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946); Thomas v. Gay, 169 U.S. 264 (1898); Utah & No. Railway Co. v. Fisher, 116 U.S. 28 (1886).

[50] 435 U.S. 191.

[51] 25 U.S.C. §§ 1301-1303 (2012).

[52] Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976), *rev'd*, 435 U.S. 191 (1978).

[53] *See generally id.* at 1010, interpreting 18 U.S.C. § 1152 (2012).

[54] Ex parte Kenyon, 14 F. Cas. 353, 355 (C.C.W.D. Ark. 1878) (referring to Rev. Stat. 2146, *superseded by statute*, Indian Civil Rights Act, 18 U.S.C. § 1152 (2012)). Even this decision should best be characterized as dictum because the court decided that the alleged offense was committed outside tribal territory. *Id*. at 354.

[55] *See* Suquamish Indian Tribe, 435 U.S. at 210-11.

authority over non-Indians or nonmembers within tribal territory.[56] Tribal sovereignty had been defined in the Court's *Worcester* opinion based on interpretation of the 1785 Treaty of Hopewell with the Cherokee Nation.[57] That treaty (and others) expressly agreed to exclude any relationship between the Cherokees and any foreign nation.[58] But nothing in *Worcester* or any other decision had interpreted tribal inclusion in the United States to limit internal tribal sovereignty by implication. Indeed, enactment of the Indian Country Crimes Act implied the opposite. Because the Court invented the new theory without any source in legal text, the theory is an open-ended ball of clay to be molded by its majority of the day.

Two weeks after *Oliphant*, the Court reported its decision in *United States v. Wheeler*.[59] In its holding and most aspects of its opinion, the decision was a win for tribal sovereignty. Mr. Wheeler was a Navajo who was convicted on a guilty plea of a misdemeanor offense in a Navajo Nation trial court. He was thereafter indicted for the federal felony of statutory rape. He moved to dismiss based on the defense of double jeopardy and prevailed in the Federal District Court and the Ninth Circuit.[60] The Supreme Court unanimously reversed based on the doctrine of separate sovereigns. It is established law that the Double Jeopardy Clause does not bar state and federal prosecutions for the same acts. The *Wheeler* Court held that tribal and federal sovereignty were likewise separate.[61] But the Court's otherwise robust reaffirmation of tribal sovereignty inserted the seed of later restrictions on it. The opinion described tribal sovereignty as applicable to "tribe members" rather than, as in most prior decisions, including *Oliphant v. Suquamish Tribe*, to all Indians.[62] The Court's sole prior reference to tribal authority over "members," cited in *Wheeler*, was in a context not directly reviewing tribal sovereignty.[63] That opinion was written by then-Justice Rehnquist, who also authored the novel opinion in *Oliphant*. Did he plan the restriction to members and sell the Court on it?

The Court's next applications of the new theories adopted in *Oliphant* and *Wheeler* occurred in a 1980 decision. Tribes in Washington State had begun to sell cigarettes free of state tax, attracting lots of non-Indian

[56] *See id.* at 197-211.
[57] Worcester, 31 U.S. 515 at 551-54.
[58] *Id*. at 551-52, 560-61.
[59] 435 U.S. 313 (1978).
[60] *Id*. at 315-16.
[61] *Id*. at 329-30.
[62] *See id*. at 322-29 (referencing "members" eight times). .
[63] The prior use, cited in *Wheeler*, was a single mention in *United States v. Mazurie*, 419 U.S. 544, 557 (1975). The change of terms was not at issue in either case, so of course it was not briefed by the federal government, and no tribe was a party to either *Wheeler* or *Mazurie*. Wheeler, 345 U.S. at 323.

customers.[64] The Court had previously held that states could require tribal members selling cigarettes to collect and remit Montana's cigarette tax imposed on sales to non-Indians.[65] The Washington tribes tried to avoid that ruling by imposing a tribal tax and designating the tribes as sellers, to create sovereign interests that were not present in the prior case. The Court rejected the distinction and upheld the state tax. The opinion did say that the tribal tax was valid when collected from willing, non-Indian buyers.[66] But the decision also imposed its new members-only theory, holding that the state could tax Indians belonging to other tribes because their status was equivalent to that of non-Indians.[67]

The theory of implied divestiture invented in *Oliphant* was extended to civil jurisdiction in *Montana v. United States* in 1981.[68] The Crow Reservation, set aside by treaty in 1868, is bisected by the Big Horn River, a navigable stream. A federal dam created a popular fishery within the Reservation, and in 1974 the Tribe asserted authority to forbid hunting and fishing within the Reservation by anyone not a tribal member. The United States filed suit to resolve the ensuing conflict between the State of Montana and the Tribe. The tribe claimed the right to exclude nonmembers from land it owned, and the Court agreed.[69] But this was a marginal victory because the Tribe's claim to own the beds and banks of the Big Horn River was rejected based on a series of decisions that limits tribal ownership of navigable waterways: only fishing tribes' ownership has been sustained.[70] The tribe also claimed civil authority to regulate all persons on land within the reservation that it did not own, including Big Horn River land. The Court rejected this claim, extending its new implied divestiture theory to civil matters. Federal law precedents, including its own, had sustained tribal civil authority over non-Indians in Indian country. These were distinguished as power to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members."[71] The Court added that a tribe "may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee (non-trust) lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the heath or welfare of the tribe."[72] Both purported exceptions to divestiture showed the magic of the invented theory: it can be molded and adapted to distinguish

[64] Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 141-42, 154 (1980).
[65] Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 483 (1976).
[66] 447 U.S. at 154.
[67] *Id.* at 161.
[68] 450 U.S. 544, 564-67 (1981).
[69] *Id.* at 557.
[70] *Id.* at 556. The law on tribal ownership of the beds and banks of navigable waterways is explained in COHEN'S HANDBOOK, *supra* note 3, at § 15.05(3).
[71] 450 U.S. at 565.
[72] *Id.* at 566.

precedents and let the majority of the day craft a common-law code for Indian country.

The *Montana* exception for tribal authority over non-Indians who enter consensual relationships with tribes enjoyed temporary success in two decisions that sustained tribal taxes imposed on lessees of tribal oil and gas resources.[73] But the Court later took away the value of those decisions by allowing states to tax the same interests.[74] The latter decision revealed an emerging conservative majority on the Court that is much more hostile to tribal sovereignty.[75]

A year later the Court applied its members-only theory to forbid tribal prosecution of an Indian who was not a member of the governing tribe.[76] The Court's opinion invoked its implied divestiture theory but this time based on a manifestly false rendition of history.[77] The decision's alternative theory was that tribal authority could be imposed based only on consent, so that only members could be governed.[78] However, this time Congress reacted by amending federal law to empower tribes to prosecute nonmember Indians.[79] On review, the Court sustained the amendment's validity, albeit by a split vote.[80] Justice Kennedy, author of the deeply flawed opinion in *Duro*, thought more about the issue and wondered whether the status of Indians of any tribe is a voluntary choice that might justify the amendment.[81] Since 1879, whether status as tribal members is subject to federal authority over Native people is untested.[82] The statute restored criminal jurisdiction over nonmember Indians, but its possible effect on civil jurisdiction remains untested.

Many federal decisions since 1990, including several by the Supreme Court, have reviewed tribal claims to civil authority over non-Indians based

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[73] *See* Kerr-McGee v. Navajo Tribe, 471 U.S. 195 (1985); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).
[74] Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).
[75] The three dissenters in the *Merrion* decision anchored a new majority in *Cotton*. The remaining members of the *Merrion* majority dissented in *Cotton*. *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1635 (1996) (commenting on Justice Stevens' views in the *Merrion* dissent and *Cotton* majority).
[76] Duro v. Reina, 495 U.S. 676 (1990).
[77] *See* Richard B. Collins, *Never Construed to Their Prejudice: in Honor of David Getches*, 84 U COLO. L. REV. 1, 53–54 (2013) (claim that jurisdiction had been historically defined by membership incorrect).
[78] *See* 495 U.S. at 693.
[79] 25 U.S.C. § 1301(2), (4) (2012). The amendment passed about six months after the *Duro* decision.
[80] *See* United States v. Lara, 541 U.S. 193 (2004); *Id.* at 226 (dissenting opinion of Souter, J. joined by Scalia, J.).
[81] *See id.* at 214 (Kennedy, J., concurring).
[82] *See* United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891) (stating Standing Bear had the right to renounce tribal status).

on the *Montana* exception for persons who enter into consensual relations with tribes. Tribes have lost almost all of them. The Supreme Court has been particularly hostile. A 5-4 conservative majority denied tribal authority on strong facts in a 2008 case involving a claim against a non-Indian owned bank based on the bank's loan to an Indian-owned business.[83] In 2014, the Fifth Circuit sustained jurisdiction of a tribe over a corporation doing business on the tribe's reservation in a case arising from a contract between the tribe and the corporation.[84] The Supreme Court affirmed by an equally divided vote that would have gone against the tribe had Justice Scalia remained on the Court.[85]

At the time *Santa Clara Pueblo* was decided, and later, there has been speculation about the relationship between the denial of federal judicial remedies to enforce ICRA and the Court's new implicit divestiture theory.[86] *Oliphant* had stressed due process rights.[87] A case can be made that the three 1978 decisions were crafted together to isolate tribal sovereignty.

In 2010 and 2013, Congress expanded tribal criminal jurisdiction but on conditions connected to ICRA. Original ICRA limited tribal punishments for one offense to six months imprisonment and $500 fine-expanded in 1986 to one year and $5000.[88] The Tribal Law and Order Act of 2010 amended ICRA to expand these limits to three years imprisonment and $15,000 but only on condition that tribes assuming the additional authority provide defendants "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution," provide indigent defendants with appointed counsel at tribal expense, require judges in such proceeding to have "sufficient legal training" and be "licensed to practice law by any

[83] Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008).
[84] Dolgen Corp., Inc. v. Mississippi Bank of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014), (*aff'd per curiam* by an equally divided Court in Dollar General Corp. v. Mississippi Band of Choctaw Indians, 136 S. Ct. 2159 (2016)).
[85] Bethany R. Berger, *Hope for Indian Tribes in the U.S. Supreme Court?: Menominee, Nebraska v. Parker, Bryant, Dollar General … and Beyond*, U. ILL. L. REV. 1901, 1904 (2017) ("From [Scalia's] remarks at oral argument and his previous opinions, one can predict that his vote would have led to a ruling against tribal jurisdiction in Dollar General.").
[86] *See, e.g.*, Ryan Dreveskracht, *Tribal Court Jurisdiction and Native Nation Economies: A Trip Down the Rabbit Hole*, 67 NAT'L LAW. GUILD REV. 65, 68-69 (2010); Robert Laurence, *A Quincentennial Essay on Martinez v. Santa Clara Pueblo*, 28 IDAHO L. REV. 307, 338-39 (1992) ("Martinez leaves tribal power unfettered by Anglo-American norms, but Oliphant destroys part of the power itself. Duro destroys it further. Montana v. United States even further. National Farmers Union potentially even further."); Amy Conners, Note, *The Scalpel and the Ax: Federal Review of Tribal Decisions in the Interest of Tribal Sovereignty*, 44 COLUM. HUM. RTS. L. REV. 199, 203 (2012).
[87] 435 U.S. at 210-11.
[88] 25 U.S.C. § 1302 (B) (2012).

jurisdiction in the United States," publish their criminal laws and laws of evidence and criminal procedure, and make an adequate record of trials.[89]

The 2013 statute gave tribes jurisdiction over non-Indians with ties to a tribe who are accused of crimes of domestic violence and dating violence against Indian victims in Indian country.[90] This jurisdiction is conditioned on the same added protections found in the 2010 act and adds a requirement of trial by an impartial jury that reflects "a fair cross section of the community" including non-Indians.[91]

III. Tribal Sovereign Immunity

The Court's *Santa Clara Pueblo* opinion held that tribal sovereign immunity barred federal court jurisdiction over the Pueblo, but federal courts can hear claims for prospective relief against tribal officials such as the Pueblo's governor.[92] Because the Court ordered the case dismissed, some commentators have asserted that the latter statement was dictum.[93] This seems incorrect. The first issue in federal district courts is always jurisdiction, and rulings on it are holdings even if a case is dismissed on other grounds.[94] For example, the trial court in *Santa Clara Pueblo* sustained its jurisdiction, and this was a holding despite that court's judgment against plaintiffs.[95] The Supreme Court ruled on immunity before deciding that ICRA has no implied federal cause of action for civil enforcement. In other decisions, the Court has made clear that immunity is jurisdictional and thus a prerequisite to reach the merits of a case including the issue of federal remedy or cause of action.[96] Hence *Santa Clara Pueblo*'s immunity rulings were holdings. The characterization is of little importance, however, because both immunity rulings are consistent with numerous other decisions and authorities on point.

Examples of these authorities go back at least as far as Alexander Hamilton's essay No. 81 in the Federalist which declared, "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual with-out its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union."[97] The issue was less certain than

[89] 25 U.S.C. § 1302 (a)(7)(C), (c).
[90] 25 U.S.C. § 1304 (2012).
[91] *Id.* at § 1304 (c)-(d) (2012).
[92] 436 U.S. at 59.
[93] *See, e.g.*, Catherine Baker Stetson & Jennifer L. Chino, *Waiving Sovereign Immunity Grows Trickier*, 43 ROCKY MOUNTAIN MIN. L. FOUND. J. 53, 58 (2006).
[94] *See* Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 93–94 (1998) (federal court cannot decide on cause of action before establishing jurisdiction).
[95] *See* Martinez v. Romney, 402 F. Supp. at 11, 18-19.
[96] Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475 (1994); Puyallup Tribe, Inc. v. Washington Dep't of Game, 433 U.S. 165, 172 (1977).
[97] THE FEDERALIST NO. 81, at 548-49 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

Hamilton claimed. Most states had not yet addressed the issue, and his essay preceded ratification of the federal Constitution.[98] However, in the decades after ratification, federal courts and those of every state accepted sovereign immunity as domestic law.[99] The special case of state immunity to suit in federal courts generated the 11th Amendment. Its specific terms bar only diversity cases, but the Supreme Court held that it is representative of a general principle of state immunity that is implicit in the original Constitution.[100]

In the first reported decision involving immunity of an Indian tribe, plaintiff tried to avoid immunity by suing the tribal chief, but the Supreme Court held that the tribe was the real party in interest and could not be sued without its consent.[101] Other federal decisions through the 19th and first half of the 20th centuries consistently sustained immunity of tribes and of tribal officers sued for damages.[102] Dicta in some opinions said that Congress could override tribal immunity, and Congress concurred by enacting waivers of immunity for specific suits against tribes.[103] When the Court finally reviewed a suit against tribes by name, it held tribal immunity to be jurisdictional, as is that of the federal government.[104]

Litigants also sought to avoid federal and state immunity by suing officials instead of a government. After back and forth through the 19th Century, the Court settled on the principle that suing an officer for damages or other retroactive relief that would run against the government is barred

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[98] *See* Maeva Marcus & Natalie Wexler, *Suits Against States: Diversity of Opinion in the 1790s*, 1993 J. SUP. CT. HIST. 73; During the Confederation period, only one reported case ruled on immunity, Nathan v. Virginia, 1 Dall. 77 (Pa. Ct. Common Pleas 1784). The court sustained Virginia's immunity to suit in a Pennsylvanian court. *See* CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 13 (1972).

[99] *See* CIVIL ACTIONS AGAINST STATE GOVERNMENTS § 2.2 (Wesley H. Winborne, ed. 1982); Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L. J. 1, 6 (1924); Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1858).

[100] Hans v. Louisiana, 134 U.S. 1, 14-16 (1890).

[101] Parks v. Ross, 52 U.S. 362 (1850).

[102] Adams v. Murphy, 165 F. 304 (8th Cir. 1908); Thebo v. Choctaw Tribe of Indians, 66 F. 372, 375 (8th Cir. 1895); Chadick v. Duncan, No. 15,317 (App. D.C. Mar. 3, 1894) (available at Nat'l Archives & Records Admin. Record Group No. 376, Case File No. 314). *See* Turner v. United States, 248 U.S. 354 (1919) (dictum).

[103] *See, e.g.*, Thebo, 66 F. at 373. For statutes authorizing suits against tribes, *see* Appropriations Act of May 25, 1918, ch. 86, § 18, 40 Stat. 561, 583 (1918); Appropriations Act of May 29, 1908, ch. 216, 35 Stat. 444 (1908) §§ 2, 5, 16, 26, 27; Appropriations Act of June 20, 1906, ch. 3449, 34 Stat. 325, 344, 345, 365-66. For reported cases based on these statutes, *see* Garland's Heirs v. Choctaw Nation, 272 U.S. 728 (1927); Turner v. United States, 248 U.S. 354 (1919); Green v. Menominee Tribe, 233 U.S. 558 (1914); McMurray v. Choctaw Tribe of Indians, 62 Ct. Cl. 458 (1926), *cert. denied*, 275 U.S. 524 (1927).

[104] United States v. U.S. Fidelity & Guaranty Co., 309 U.S. 506, 514-15 (1940).

by immunity.[105] But suing an officer for prospective enforcement of constitutional or other paramount rights is allowed. The leading case of *Ex parte Young*[106] involved a federal case against a state official, but the same principle applies to federal suits against federal officers.[107]

Supreme Court review of tribal immunity resumed in the 1977 *Puyallup* case, in which Washington state courts had asserted jurisdiction over a fishing tribe and its fishermen.[108] The Court ordered the tribe dismissed as immune but sustained jurisdiction to grant prospective relief against the fishermen.[109] *Santa Clara Pueblo* followed a year later, holding that immunity barred suit against the tribe but allowing prospective relief against the tribe's governor.[110]

Since *Santa Clara Pueblo*, the Court has *sustained* tribal immunity in four holdings and in dicta in two cases.[111] In the same period, it has *allowed* suits against tribal officials for prospective relief in four decisions and in two cases by dicta.[112] Most controversial are decisions sustaining immunity of tribes for activities outside Indian country, limiting jurisdiction to actions against officers for prospective relief.[113] Subject to dissents, the Court has consistently held that any change is a matter for Congress.[114] Meanwhile, many tribes have adopted modern forms of consent to suit in their own courts and at times in state or federal courts.[115] However, active litigation on tribal immunity continues.[116]

Conclusion

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[105] *See* Louis L. Jaffe, *Suits Against Governments and Officers*, 77 HARV. L. REV. 1, 2-19 (1963).
[106] 209 U.S. 123 (1908).
[107] *See* Jaffe, *supra* note 105, at 2-19.
[108] Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 168 (1977).
[109] *Id*. at 173.
[110] 436 U.S. at 59 (relying on *Ex parte* Young, 209 U.S. 123 (1908).).
[111] Michigan v. Bay Mills Indian Comty., 527 U.S. 782, 798-99, 803 (2014); Kiowa Tribe v. Mfg. Tech., Inc., 523 U.S. 751, 754 (1998); Oklahoma Tax Comm'n v. Citizens Band Potawatomi Indian Tribe, 498 U.S. 505, 514 (1991); Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 890-91 (1986) (holdings); Lewis v. Clarke, 137 S. Ct. 1285, 1289 (2017); C & L Enters. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411, 418 (2001) (dicta).
[112] *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); Strate v. A-1 Contractors, 520 U.S. 438 (1997); South Dakota v. Bourland, 508 U.S. 679 (1993); National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) (holdings though issue not contested); Michigan v. Bay Mills Indian Community, 527 U.S. 782, 796 (2014); Oklahoma Tax Comm'n v. Citizens Band Potawatomi Indian Tribe, 498 U.S. 505, 514 (1991) (dicta).
[113] Michigan v. Bay Mills Indian Comty., 527 U.S. at 796 (2014); Kiowa Tribe v. Mfg. Tech., Inc., 523 U.S. at 754 (1998). *See also* Lewis v. Clarke, 137 S. Ct. 1285 (2017) (sustaining off-reservation suit against tribal employee personally that would not lie against tribe)
[114] *See* Michigan v. Bay Mill Indian Comty., 572 U.S. at 800-05 (2014).
[115] *See* COHEN'S HANDBOOK, *supra* note 3, at § 7.05(1)(c).
[116] *See, e.g.*, Lundgren v. Upper Skagit Indian Tribe, 138 S. Ct. 1649 (2018).

As this paper's review shows, *Santa Clara Pueblo* was much more than a one-time legal event. It was decided at a time of, and was connected to, major changes in federal Indian law and in implied federal causes of action. Tribal sovereignty was strengthened in *Santa Clara Pueblo* and in *Wheeler*.[117] But the Court's simultaneous invention of its implied divestiture theory severely limited tribal authority.[118]

[117] *See supra* notes 16-20, 58-60 and accompanying text.
[118] *See supra* notes 49-86 and accompanying text.