Multiple sovereignties: Indian tribes, states, and the federal government

Although often unrecognized, three entities within the territory that constitutes the United States—Indian tribes, states, and the federal government—have forms of sovereignty. The rich and complex relationships among these three sovereignties need to become integrated into the discussion and law of federalism.

by Judith Resnik

Federal law about Indian tribes tends to be considered separately from the body of law about federal-state relations. But the problems of coordination, cooperation, deference, and preclusion—central to the law of federalism—are also pivotal when contemplating the authority of Indian tribes and their courts. At issue are the respective arenas of Congress and the executive branch, as well as the allocation of power among tribes, states, and the federal government, the attributes and prerogatives of sovereigns, and the deference and comity entailed in intercourt relationships.

In the context of either state-federal or tribal-federal law, the task is to work out relations among sovereigns that share land and history. Yet equation of prospective arenas of Congress and the states and tribes would be erroneous, for profound differences of history, and prerogatives of sovereigns, and their courts. At issue are the relations among sovereigns that fit the history. Tribes did not partake of sovereignty. The rich and complex relationships among these three sovereignties need to become integrated into the discussion and law of federalism.

Tribes and the Constitution

The U.S. Constitution appears to recognize tribes as having a status outside its parameters, as entities free from the taxing powers of states and of the federal government and with whom the federal government shares commercial relations and makes treaties. Some Indian law scholars argue that the net result is constitutional recognition of a third domestic sovereign, while others describe the relationship as existing outside the Constitution. At issue is whether international law, rather than internal rules, provides the appropriate paradigm for evaluating relations between the United States and Indian tribes. The image of tribes as not a part of the United States constitutional story fits the history. Tribes did not partake in the Constitutional Convention or

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2. U.S. Const. art. I, §2, cl. 3 (excluding Indians "not taxed" for purposes of apportioning members of House of Representatives among the states); U.S. Const. amend. XIV, §2 (giving Congress the power to regulate commerce with the Indian Tribes); U.S. Const. amend. XIV, §2 (reiterating the exclusion of "Indians not taxed" for purposes of apportionment). For interpretations of other clauses as referring to tribes, see Charles F. Wilkinson, Civil Liberties Guarantees when Indian Tribes Act as Majority Societies: The Case of the Winnabayo Retrocession, 21 CREIGHTON L. REV. 773, 774-75 (1988).


4. See, e.g., Milner S. Ball, Constitution, Court, Indian Tribes, 1987 AM. B. FOUND. RES. J. 1 (analyzing the imposition, without constitutional bases, of both federal judicial and legislative authority over tribes).

join in the federation of powers. By the end of the 19th century, however, Congress was in the business of regulating the internal affairs of tribes, and the Supreme Court was upholding such regulation as properly within the powers of Congress to protect its "wards."6

Years earlier, Chief Justice John Marshall cast the claim of federal "plenary power" over Indian tribes in terms of the right of "discovery,"7 but as Joseph Story noted, "it seems difficult to perceive, what ground of right any discovery could confer."8

The uncomfortable truth, referred to in several Supreme Court decisions, is that federal power derived from conquest. As Justice Stanley Reed put it, "Every American schoolboy knows... it was not a sale but the conquerors' will that deprived [Indian tribes] of their land."9 By virtue of its physical force, the federal government took land, removed people from their homes, attempted to dissuade them from observing their customs, and imposed its rule.

The principle usually relied on to justify exercise of governmental powers within the United States is consent of the governed, but it does not much apply in the Indian tribal context. Unlike states, which ceded some sovereignty with the passage of the Constitution,10 Indian tribes did not. Yet, as William Canby explains, "the sovereignty of the tribes is subject to exceptionally great powers of Congress to regulate and modify the status of the tribes."11 Moreover, ac-

6. See, e.g., United States v. Kagama, 118 U.S. 375, 384 (1886) (because Indian communities were "dependent on the United States," state lacked jurisdiction to try a tribal member for murder).


Federal jurisprudence and Indian tribes

The U.S. Constitution, the starting point for federal jurisprudence, recognizes tribes as having a status outside its parameters, as entities with whom the U.S. government conducts commerce and makes treaties and as entities freed from the taxing powers of state or federal governments.

The Constitution explicitly refers to Indians in:

- Article I, Section 8, Clause 3: [The Congress shall have power to] regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

- Amendment XIV, Section 2 [reiterating Article I, Section 2, Clause 3]: Representatives shall be apportioned among the several States...according to their respective Numbers...excluding Indians not taxed....
According to the Supreme Court, "Congress has the power to abrogate Indian treaty rights."12

For judges, lawyers, and scholars practiced in considering constitutional allocations of powers, the Supreme Court's repeated statement of the enormity of federal "plenary" power over tribes is both stunning and dislocating. Consider the holding of a 1985 opinion: “[A]ll aspects of Indian sovereignty are subject to defeasance by Congress.”13 When making such a statement, ordinary constitutional exegesis would oblige the Supreme Court to refer to a constitutional provision or to another legal document, such as a treaty, granting power to the federal government. Even when constitutional theorists assert that a branch of the federal government has unfettered powers (such as prosecutorial discretion), reference is usually made to other forms of constraint (such as political recall or dependence on voter confidence).

A relevant example of expansive constitutional power and its limits comes from the jurisdictional field itself. Congress is often said to have "plenary" power over federal court jurisdiction, but that power is limited—if not by Article III then by other constitutional provisions, such as the Fourteenth Amendment. A standard of law school classes is the proposition that, however broad reaching Congress's Article III power is, Congress can surely not use race as a category of jurisdiction. But move to the arena of the federal relationship with tribes and even that seemingly easy assumption requires revision. Both the courts and Congress have recognized the use of tribal membership as a basis of federal court jurisdiction. One might argue that such decisions rest on a political rather than a racial identity. But jurisdictional rules that rely on some amount of "Indian blood" demonstrate that, at the time such policies were crafted, tribes were seen from the colonizers' perspective as racial groupings. Moreover, jurisdictional authority tied to one's political affiliactions is also troubling. Yet some contemporary jurisdictional rules continue to rely on whether a litigant is or is not an "Indian."17

In short, federal law on Indian tribes sits uneasily within a context of commitment to legal constraints on governmental powers. Given a desire to trump one's national heritage, it is difficult to grapple with events deeply embarrassing to those committed to a vision of the United States as founded upon consent and dedicated to non-discriminatory treatment. No comforting milestones are available. No transformative moments, akin either to the enactment of the Fourteenth Amendment or to Brown v. Board of Education, make easy the beginning of a revised narrative. Instead, once federal courts jurisprudence includes discussion of federal-tribal relations, the claim that the U.S. Constitution sets all the limits of federal power is undermined.

Changing parameters

Congress and the Supreme Court have shifted policies toward Indian tribes many times within the last century. In 1887, under the General Allotment Act, Congress authorized the president to "allot" land to individual Indians. The land was to be held in trust for a period of time and then freed for conveyance. As Justice Sandra Day O'Connor has explained, the legislation "seem[ed] in part animated by a desire to force Indians to abandon their nomadic ways...to 'speed assimilation'...and...to free new lands for further white settlement."18

By the 1990s, Allotment Act policies had diminished Indian land holdings from 138 million to 48 million acres. Criticism of the policy resulted in congressional enactment in 1934 of the Indian Reorganization Act,20 which stopped allotment, proclaimed congressional support for Indian self-government, and provided for creation of tribal constitutions.

A few decades later, federal policy shifted again. In addition to efforts resulting in "termination" of tribes as entities recognized by the federal government, in 1968 Congress enacted the Indian Civil Rights Act,21 which provided individuals with rights against tribes akin to the protections of the Bill of Rights. Many advocates of tribal sovereignty saw the Indian Civil Rights Act as intrusive on tribal self-determination, while others supported some aspects of the legislation as appropriately constraining tribal governments and recognizing distinctive tribal traditions.22

Executive, judicial, and legislative action since the late 1960s has altered the tone once again. In 1968, President Lyndon Johnson termed the Indian "the forgotten American," and in 1970, President Richard Nixon's executive order steered federal policies toward tribal sovereignty by supporting greater autonomy.23 In a series of cases, the Supreme Court announced some rules of deference to tribal courts' civil jurisdiction,24 permitted only limited powers in criminal cases,25 and circumscribed tribal regulatory activities.26


21. South Dakota v. Bourland, 113 S. Ct. 2309, 2315 (1993) (concluding that, by taking land within the Cheyenne River Sioux Reservation to build a dam, the United States limited the tribe's power to regulate non-Indian hunting and fishing on that land).


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32. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").


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Interdependencies of norms

In the annals of federal Indian law,
several major recent jurisdictional
markers require attention. A first is
the 1978 case, Santa Clara Pueblo v. 
Martinez. 31 In 1959, the Santa Clara
Pueblo adopted an ordinance detail­
ing its membership rules. Children
of female members who married out­
side the pueblo would not be “Santa
Claran,” while children of male
members who married outside the
pueblo would be. Two years later,
At one level, Santa Clara Pueblo is an "easy" case, identifiably a triumph for tribal self-governance. As the district judge had put it, "In deciding who is and who is not a member, the Pueblo decides what it is that makes its members unique, what distinguishes a Santa Clara Indian from everyone else in the United States." Similarly, Justice Marshall spoke of the "often vast gulf between tribal traditions and those with which federal courts are more intimately familiar." But the line between the United States and the Santa Clara Pueblo is not so easily drawn. The construction of the 1939 membership rules is not only an artifact of the pueblo as a political entity constituting itself. When in 1934 the Indian Reorganization Act was passed, the Santa Clara Pueblo (like many other tribes) organized under its provisions. In 1935, as required by this act, the secretary of the interior approved a newly written Santa Clara Pueblo Constitution that begins: "We, the people of the Santa Clara Pueblo, in order to establish justice, promote the common welfare and preserve the advantages of self-government, do ordain and establish this Constitution." Under that document, Santa Clara members could include "children of mixed marriages between members of the Santa Clara pueblo and nonmembers" if the tribal council so decided, as well as "persons naturalized as members of the pueblo." In 1939, however, the secretary of the interior approved an amendment changing membership rules by limiting them to children either of two Santa Claran parents or "born of marriages between male members...and non-members." The sources of the change in membership rules are not available from the case records. What is known is that the Bureau of Indian Affairs was much involved in creating tribal constitutions; its models and "boilerplate provisions" were often adopted without much alteration. Further, in the 1930s, the Department of the Interior recommended that tribal membership rules be restrictive. More recent editions of the BIA instruction manual suggest that membership rules be explained in tribal constitutions. When such rules make significant changes in the size of a tribe, the BIA's central office, rather than its branches, must approve the alterations.

The point here is neither to debate the authority of a sovereign—here, the Santa Clara Pueblo—to change its rules nor to claim homogeneity among tribes. The more than 400 federally recognized tribes, as well as the many other tribes, have a range of membership and of other rules. The point, rather, is to make plain that Santa Clara Pueblo's rule making should not be seen as a completely autonomous action. Federal policies urged written constitutions and promoted restrictive membership definitions. The idea of membership itself was central to federal law that linked the provision of federal benefits to membership status. According to the trial court opinion in Santa Clara Pueblo, the "most important of the material benefits" sought by the family were "land use rights." Without the membership status conferred by the pueblo, the Martinez children could not receive federal health benefits or federal assistance in building homes on pueblo land.

Thus, for advocates of tribal autonomy, Santa Clara Pueblo is less a victory than it might seem. While a federal court had not mandated membership rules, federal policies created the incentives that framed the litigation; executive branch officials were part of the very process of developing membership rules. Further, federal law requires Interior Department approval of tribal constitutions, and federal rules determine what constitutes a "tribe" as a matter of federal law.

Santa Clara Pueblo also does not stand as an example of federal toleration of tribal norms deeply divergent from those of the United States. Link-
ing rights of children to their fathers was a feature of the common law, as was differential treatment of women and men. In short, the membership rule at issue in Santa Clara Pueblo needs be understood as akin to a joint venture, crafted under pressure from the federal government and not at odds with federal traditions.

Measures of sovereignty
Advocates of Santa Clara Pueblo as a guidepost to tribal sovereignty can fairly argue that, by limiting the role of federal courts when members of tribes object to their tribes’ practices, its holding has far-reaching implications. Under its holding, tribal courts rather than federal courts enforce most of the mandates of the Indian Civil Rights Act.

But how much to celebrate the decision depends on how one defines sovereignty and on what incidents of sovereignty one values. While the Court in Santa Clara Pueblo concluded that a narrow interpretation of the Indian Civil Rights Act was required to avoid what it viewed to be federal interference with a “tribe’s ability to maintain itself as a culturally and politically distinct entity,” just two months before, in Oliphant v. Suquamish Indian Tribe, the Court held that Indian tribes lacked authority to punish non-Indians who commit crimes on tribal reservations.

Oliphant arose when two non-Indian residents of the Suquamish reservation sought and won habeas corpus relief from convictions in the tribal courts. According to the majority opinion by then-Associate Justice William Rehnquist, to permit tribal courts to try non-Indians would be “inconsistent” with the status of Indian tribes. Tribal powers were limited not only by treaty but by some ill-defined prohibition that they not “conflict with [the] overriding sovereignty” of the United States. According to the majority, while “some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts,” tribal justice would not always comport with the due process requirements of federal law.

Oliphant contrasts sharply with Santa Clara Pueblo. Tribes are permitted to decide some “internal” matters, but the central problem of maintaining order on land (frequently populated, in part by virtue of federal Allotment Act policies, by members of many tribes and by individuals unaffiliated with tribes) is beyond their ken. The Court went further in Duro v. Reina, holding that tribal courts also lacked authority over non-tribal members, but that rule has been reversed by Congress. Currently, tribal courts have jurisdiction over those criminal

47. 25 U.S.C. §184 (1988) provides that when an “Indian woman” and a “white man” married prior to the enactment of the statute in 1897, their children would continue to have rights via their mothers to Indian tribal properties. That provision altered the common law practice, under which the “condition of the father prevails, in determining the status of the offspring....” Letter of George H. Shields, assistant attorney general (Nov. 27, 1891), in S. Exec. Doc. No. 59, 53d Cong., 2d Sess., In re Sioux Mixed Blood at 6.
48. 436 U.S. at 72 (footnote omitted).
50. Id. at 208-210.
51. Id. at 211-212.

defendants who are “Indians” and who have committed certain crimes within tribal lands.55

On the civil side, in the wake of Santa Clara Pueblo, the Supreme Court held in National Farmers Union Insurance Companies v. Crow Tribe66 and in Iowa Mutual Insurance Company v. LaPlante37 that federal courts should not exercise civil jurisdiction over activities arising on tribal lands, at least not if cases are pending in tribal courts and tribal remedies have been exhausted, and possibly not thereafter.58 Here the doctrines echo law generated in the context of state-federal relations. A basic proposition is that while federal courts do not lack jurisdiction, rules of comity and abstention mandate deference to another court’s decision.

But reflective of the differing histories of states and tribes, the fit is far from exact. On the civil side, Supreme Court opinions arguably demonstrate greater federal deference to tribal courts than to state courts. If a tribe is found to have jurisdiction, then its holdings on the merits, even when implicating federal law, cannot be reviewed by the U.S. Supreme Court.59 But in some contexts, federal courts accord less deference to decisions of tribal courts than to those of state courts. Unlike the full faith and credit accorded to state court decisions about their own jurisdiction, federal courts have retained power to decide the question of tribal jurisdiction anew.60

Moreover, the deference accorded states on the criminal side, exemplified by Younger v. Harris61 and by a growing body of federal habeas law insulating state decision making, is not paralleled in the tribal context. While state criminal laws can be applied to non-citizens within state borders (but not always to Indian tribe members), under Oliphant, tribes cannot enforce their criminal laws against non-Indians but must instead depend on another sovereign's law-enforcement interests.62

In addition, while the Supreme Court has imposed exacting standards when Congress has attempted to limit state sovereign immunity,63 the Court has a more relaxed standard for interpreting statutes involving limits on tribal powers. Even with the rule that because of the “dependent” status of tribes, statutes are to be construed in their favor, the Court’s statutory inquiries rely on a wider range of materials and principles than when states’ sovereign powers are at stake.64 It is not only limits on jurisdiction that demonstrate ongoing federal control. Tribal courts themselves have a history of federal oversight. A first step

58. See Stock West Corp. v. Taylor, 964 F.2d 912 (9th Cir. 1992) (en banc) (describing the discretion of the federal court and finding abstention proper there); Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 814 (7th Cir.), cert. denied, 114 S. Ct. 621 (1993) (requiring examination of “factual circumstances of each case...in order to determine whether the issue in dispute is truly a reserva­tory matter entitled to exhaustion doctrine”).
59. See Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. at 20-22 (Stevens, J., concurring and dissenting).
60. See also Santa Clara Pueblo, 436 U.S. at 66 n.21 (judgments of tribal courts may be due full faith and credit in certain situations ‘properly within their jurisdiction’); In re Larch, 872 F.2d 66, 68 (4th Cir. 1989) (noting authority supporting the proposition that tribes constitute “territories” due full faith and credit under the Parental Kidnapping Prevention Act); Taper v. Superior Court, 810 F.2d 1050 (9th Cir. 1987) (honoring Navajo court certifi­cates compelling attendance of witnesses at trial under the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings).
61. As the Ninth Circuit put it, “[T]he question of tribal court jurisdiction is a federal question.” FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314 (9th Cir. 1990), cert. denied, 499 U.S. 943 (1991) (establishing de novo review for “federal legal questions” and a more deferential “clearly erroneous standard of review for factual ques­tions.”).
64. “[S]ome Indian tribal courts have become increasingly sophisticated and resemble in many respects their state counterparts.” Oliphant, 435 U.S. at 211-12.

The deference accorded states on the criminal side is not paralleled in the tribal context.
Pueblo’s membership rule is influenced by federal law but is not simply federal, so tribal courts are formed by more than federal regulation. Many Indian tribal courts have aspects not familiar to those schooled in federal court practices. While contemporary discussions celebrate some of these forms of justice, such as the Navajo peacemaker,69 both non-Indian lawyers and federal judges occasionally rebel at the modes of decision making in tribal courts.70 Bills have been introduced into Congress to limit the reach of Santa Clara Pueblo—to provide that, upon exhaustion of tribal court remedies and a showing of a failure of the tribal court to be “fully independent” from legislative or executive authority or of a failure to provide certain forms of process, an individual could obtain a new decision making from a federal court.71 The language of such proposals is akin to the federal habeas statute,72 and the issues—when should federal norms trump state decision-making processes and outcomes, and when should federal courts defer—are parallel.

The challenges unending

Again and again, in the context of the relationship between federal courts and either state or tribal courts, one can watch the interplay among multiple, overlapping court systems, between expansion and contraction of jurisdiction, sometimes to affirm diversity and sometimes to encourage assimilation by the application of nationwide norms.73 In both contexts, the enormity of federal power is displayed—even by the words used when describing the area of law. What might have been called “the law of federal-state relations” is instead termed “federal courts jurisprudence.” Similarly, the vantage point on tribal law comes not from the many tribes but by virtue of “federal tribal law.” In both instances, at issue is how “plenary” the power of Congress is and will be and when the Supreme Court will step in and declare Congress limited—in the state arena by the Constitution and in the tribal arena by some undefined but occasionally enforced cap on federal authority.

From one vantage point, the “other” courts, be they state or tribal, exist only at the grace of the federal courts’ willingness to defer. The power of these courts rely on the interpretative gestures of Erie v. Tompkins74 and Murdock v. Memphis75 (in the context of the states) and on Santa Clara Pueblo and LaPlante (in the context of the tribes). Under this view, many of this century’s jurisdictional developments reflect state and tribal courts (as well as the increasingly powerful private court system) as derivative of the national system. All rely on the federal courts for power and all are given power when federal courts themselves feel overwhelmed by the press of cases and are therefore eager to support other venues of decision making.76

But docket pressures are not the only factor animating jurisdictional authority. Just as federal policies about tribes have shifted, sometimes emphasizing assimilation and sometimes celebrating difference, parallel swings mark the relationship between state and national courts. When racial equality came to be seen as a national norm, toleration of any state’s claim of difference waned. When racial oppression was tied to the operations of state criminal justice systems, federal attention was turned to state conviction processes.77 And when federal interest in both racial equality and its impact on the administration of criminal justice either wanes or exhausts itself, the themes of state sovereignty reemerge. Thus, the most difficult issues for federal courts jurisprudence are to explain how to engage differences, when the federal government’s right to assert a baseline exists, and what the federal norm should be.

An alternative conception of this century’s history of intergovernmental relations does not trumpet federal power but rather remarks on the vitality and vibrancy of these “other” courts that have survived despite sustained assimilation pressures. Under this view, their power stems not so much from the vagaries of federal largesse as from the persuasive and compelling claims of tribes and states, claims of connection to peoples and law not federally generated. From this perspective, the federal courts are themselves “dependent sovereigns,” dependent on the multiple court systems within the United States for the legitimacy of the rule of law.78

As one watches the pendulum swing, one point remains constant. Given the interconnections of land, history, and cultures, neither federal, state, nor tribal courts are entities unto themselves. All are products of these exchanges, the promises made and broken, the interactions and interwoven among sovereigns that blur the sources of difference. Considering the relationships among tribes, states, and the national government can thus serve as a reminder of the importance of claims of difference and of the need to explore distinctions among sovereign authorities. Learning about the interaction between states, the federal government, and Indian tribes is more than an act of inclusion or a self-conscious exercise in penance. To consider the history and contemporary concerns about these court systems is to learn about forms of group identity and governance that survive in the midst of domination, and that survival of such identity and governance is a product of the decisions and interactions of the many sovereignties that are within the United States.79

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71. S. 517, 101st Cong., 1st Sess. (1989) (Indian Civil Rights Act Amendments grappling federal jurisdiction over civil rights actions alleging failures to comply with the act’s provisions).
74. 384 U.S. 64 (1966) (under diversity jurisdiction, federal courts have no authority to develop common law rules but must apply state law).
75. 87 U.S. (20 Wall.) 590 (1874) (independent state grounds insulate the highest rulings of state courts from Supreme Court review).
76. See, e.g., PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS, supra n. 29, at 15 (arguing for a need to control the growth of the federal courts because of a perceived “crisis” and then recommending to Congress that cases be shifted to Article I courts or administrative agencies and that most matters be resolved in state courts).
78. See Aviam Soifer, Law and the Company We Keep (1995) (analyzing the role of groups and communities in constituting the United States).