

Judicial Toolkit on Indian Law
An Overview of Key Federal Indian Law Cases
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I. The Foundational Cases: *The Marshall Trilogy*

Johnson v. M'Intosh, 21 U.S. 543 (1823) – the foundational legal principle laid out in *Johnson* is “that discovery gave title to the government by whose subjects or by whose authority, it was made, against all other European governments, which title might be consummated by possession.” The opinion incorporates the principles of the doctrine of discovery into United States law: the exclusive rights of the discovering European nation to acquire the soil from the Indians; the diminished sovereignty of tribes resulting as a consequence of discovery; and the Indian right of occupancy. Under this doctrine, the Indians’ “title of occupancy” is not a fee simple; it can only be conveyed to the discovering sovereign; but unless “recognized” by treaty, statute, or executive order, it can be “taken” by the federal government free of the strictures of the just compensation clause of the Fifth Amendment of the U.S. Constitution.

Cherokee Nation v. Georgia, 20 U.S. 1 (1831) – the Court held that tribes are not foreign states, as that term is used in the Constitution, in describing the court’s original jurisdiction over “controversies” between a state (here, the state of Georgia) and “foreign states.” Rather, Justice Marshall’s opinion holds that tribes are “domestic dependent nations,” whose relations with the U.S. resemble that of a “ward to his guardian.” Marshall’s language represents the genesis of the trust doctrine in federal Indian law, which holds that the U.S. has a trust responsibility to act on behalf of Indian Tribes.

Worcester v. Georgia, 31 U.S. 515 (1832) – the Court held that the “laws of Georgia could have no force” in Cherokee territory. Here, Marshall defines Indian nations as “distinct political communities, having territorial boundaries within which their authority is exclusive.” This seems to suggest that discovery, and the colonial charter grants under the doctrine of discovery, did not extinguish the inherent sovereignty of the Indians, and that the Cherokee’s acts of entering into treaties and associating with a stronger nation for its protection likewise do not strip itself of the right of governing itself. Marshall states that tribes retain “their original natural rights as the undisputed possessors of the soil from time immemorial.” Marshall also finds that the U.S. Constitution grants Congress the exclusive authority to regulate Indian affairs.

II. Shifting Law and Policy

Ex Parte Crow Dog, 109 U.S. 556 (1883) – in examining a habeas petition where one Indian was convicted in federal court for the killing of another Indian on an Indian

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reservation, the Supreme Court determined that the United States' treaty with the tribe did not provide for U.S. criminal jurisdiction over crimes committed by one tribal member against another. The Court came to this conclusion by examining the treaty language that allowed the U.S. to deduct from the accused tribe's annuities compensation to be paid to a non-tribal-member victim. Such a provision did not provide jurisdiction over crimes where the injured party is of the same tribe as the accused. The U.S. intended by the treaty to secure to Indian tribes "an orderly government," to create self-governing societies, and to allow "the regulation by themselves of their own domestic affairs." Dicta further justifies this decision by suggesting Indians are racial inferiors, incapable of understanding the white man's law, and that the Court therefore should not force them to be subject to it.

In response to *Crow Dog*, Congress passed the Major Crimes Act in 1885, granting the U.S. criminal jurisdiction over a set of enumerated "major" crimes committed within Indian country by one Indian against another.

United States v. Kagama, 118 U.S. 375 (1886) – affirming Congress' power to enact the Major Crimes' Act, this is a seminal case signaling a clear shift away from tribal sovereignty. The Court appears to deny the existence of tribal sovereignty, and affirms Congress' power to regulate tribes, not through the Commerce Clause, but because "the Indians are within the geographical limits of the United States." This case appears to create the congressional plenary power doctrine, wherein Congress' authority over Indian tribes flows from the guardian/ward relationship and exists because such a relationship has "never existed anywhere else."

United States v. Sandoval, 231 U.S. 28 (1913) – The Court confirmed that the Pueblo Indians' lands were "Indian country" over which Congress has legislative authority, even though the Pueblos' lands, unlike Indian reservations, were owned communally in fee simple by the Pueblos under grants from the Spanish government, later confirmed by Congress. In so holding, the Supreme Court noted that the Pueblos were still Indians by virtue of race, customs, and domestic government. Therefore, they are an "inferior people... requiring special consideration and protection like other Indian communities."

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) – The Court held that in cases involving a controversy between Indians and the government, Congress has the unquestioned power under U.S. law to unilaterally abrogate an Indian treaty. The case also held that the regulation of Indian affairs is a political question, government by Congress and not subject to judicial review. The Court must presume Congress will only exercise this plenary power in good faith.

III. Tribal Sovereignty and Jurisdiction

Solem v. Bartlett, 465 U.S. 463 (1984) – Reservations lands/ Indian country does not necessarily coincide with Indian fee ownership: this case lays out the analysis as to

whether the non-Indian purchase of land necessarily diminishes the Indian's reservation lands. First, only Congress can divest a reservation of its land and diminish its boundaries. Second, a clear intent by Congress to change boundaries must be shown before the diminishment of lands is allowed. The most probative evidence of this congressional intent is the statutory language. When clear language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian for the land, there is an almost insurmountable presumption that Congress meant for the tribe's land to be diminished. Likewise evidence that non-Indian settlers have flooded into the opened portion, is also probative that diminishment occurred.

Carciari v Salazar, 555 U.S. 379 (2009) – The Indian Reorganization Act (“IRA”) enacted in 1934, allows the Secretary of the Interior to acquire land and hold it in trust “for any recognized Indian tribe *now* under Federal jurisdiction” (emphasis added). The Court found that this limited the Secretary's authority to take land into trust only for tribes that were under federal jurisdiction in 1934. Since the Narragansett Indian Tribe was not federally recognized in 1934, it was not entitled to the benefits. The court refused to see any ambiguity and refused to entertain any policy arguments.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) – the Court denies tribes criminal jurisdiction over non-Indians who committed crimes within reservation boundaries. The Court held that the power to prosecute nonmembers was an aspect of the tribes' external relations, part of the tribal sovereignty that was divested by treaties and by Congress when they submitted “to the overriding sovereignty” of the United States. Even though there are no treaties or statutes explicitly forbidding tribes from exercising criminal jurisdiction over non-Indians, the implied limitations on tribal sovereignty arise out of their dependent status. It is up to Congress to decide whether Indian tribes should be authorized to try non-Indians.

Montana v United States, 450 U.S. 544 (1981) – the Court held that the Crow tribe could not exclude by regulation non-Indians from fishing and hunting on reservation lands owned in fee by non-Indians. The Court determined that the Indians' sovereign rights as a nation within the U.S. have necessarily been limited to no longer include the right “to determine their external relations. . . . They involve *only the relations among members of a tribe.*” (emphasis in original). From this, the tribes do not have “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations” unless Congress expressly grants it. The Court listed two exceptions: a tribe may regulate the activities of nonmembers on fee lands who enter a consensual relation with the tribe through commercial dealing; the tribe also may civilly regulate where the conduct of non-Indians on fee lands “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”

Brendale v. Confederated Tribes and Bands of Yakima, 492 U.S. 408 (1989) – An Indian tribe attempted to enforce its zoning laws in a “closed area,” which was

primarily trust land and mainly undeveloped forest; and in an “open area,” which was about half fee land, and contained towns, and airport. In a fractured decision, the Court found that, while a tribe had the inherent authority to zone fee-land in the closed area, the tribe did not have the authority to zone fee-land in the open area. Stevens’ opinion, allowing regulation on the closed area, found that the tribe’s power to exclude nonmembers from lands that retained the tribe’s “‘traditional’ tribal ‘character’ includes the lesser power to define the character of that area.” However, the tribe lost that power over the open land because the “subsequent alienation” of that land, by allowing nonmember to own it in fee, had produced an integrated community that was not “economically or culturally delimited by reservation boundaries.”

Duro v. Reina, 495 U.S. 676 (1990) – the Court further limited the scope of tribal criminal jurisdiction beyond that in *Oliphant*, holding that the retained sovereignty of the tribe to govern its own affairs does not include the authority to impose criminal sanctions against an Indian who is not a tribal member, even if that individual commits crimes within the reservation’s boundaries.

Duro was subsequently overridden by congressional legislation in 1991 recognizing and affirming the power of tribes to exercise criminal jurisdiction within their reservations over all “Indians.” This statute is colloquially known as the “Duro fix.”

United States v. Lara, 541 U.S. 193 (2004) – the Court affirmed Congress’s authority to enact the “Duro fix,” finding that under the Constitution’s “plenary grants of authority over Indian affairs, Congress has the power “to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority.” Breyer was careful to note that Lara did not raise the more difficult issue of the “potential constitutional limits on congressional efforts to legislate far more radical changes in tribal status.” However, the opinion did note that “the Constitution does not dictate the metes and bounds of tribal autonomy,” which raises the question as to whether there are any judicially enforceable protections from Congress’ actions regarding tribal sovereignty.

IV. Tribal and State Conflicts over Civil Regulatory and Adjudicatory Jurisdiction

Nat’l Farmers Union Ins. Cos. v Crow Tribe, 471 U.S. 845 (1985) – the Supreme Court held that exhaustion of tribal remedies is required before a federal court may entertain a claim that a tribal court has exceeded its jurisdiction. The existence and extent of a tribal court’s jurisdiction “will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions;” the Court felt that the long-standing federal policy of supporting tribal self-government favored allowing the tribal court to conduct this examination first.

Strate v. A-1 Contractors, 520 U.S. 438 (1997) – a heavily criticized case, the Court, chose to applying *Montana v United States*, 450 U.S. 544 (1981), which applies a presumption against tribal jurisdiction over non-members on non-member land on reservations. Using this presumption, the Court denied an Indian tribe’s inherent power to adjudicate a civil lawsuit brought by a non-Indian plaintiff against a non-Indian defendant for personal injuries arising from an automobile accident on a state highway within reservation boundaries. The first exception *Montana*, allowing tribal jurisdiction over non-members who enter a contractual relationship with the tribe, did not apply because the suit sounded in tort. Likewise, the second exception, which allows tribal jurisdiction over matters that substantially affect the tribe, did not apply because Ginsberg felt allowing this exception in this case would swallow the rule.

Nevada v. Hicks, 533 U.S. 353 (2001) - In this case, the Court denied tribal jurisdiction over an Indian’s claim against a state official regarding the Indian’s civil rights claims (under tribal and federal law) when the officers entered tribal land to execute a state search warrant. The Court repeatedly relied on *Oliphant’s* principle of implicit divestiture of tribal powers lost to the United States’ sovereignty to justify this expansion, stating that “where nonmembers are concerned, the ‘exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” (emphasis supplied by Justice Scalia).

At least one lower court has confined *Hicks* to the limited situation of state officers entering the reservation to enforce off-reservation law. *Water Wheel Camp Recreational Area, Inc. v. Larance*, 642 F.3d 802, 812-813 (9th Cir. 2011).

Plains Commerce Bank v Long Family Land and Cattle Co., Inc., 554 U.S. 316 (2008) – the Court held that the tribe could not exercise jurisdiction over a claim brought by an Indian-owned entity to recover rights to its land upon which a Bank had foreclosed. Although the company claimed the bank had violated tribal tort law by subjecting the company to discriminatory mortgage lending practices, the Court characterized the tribal court action as an effort to regulate the sale of non-Indian fee land on the reservation. Once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it, so therefore the tribe had no regulatory of this sale. The Court specifically found that *Montana’s* first exception allowing civil jurisdiction over nonmembers with consensual relationships with the tribe did not apply, as this exception has only been applied to nonmember “conduct” inside the reservation and not contests with nonmembers over land ownership.

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) – a Choctaw woman gave birth to twins off of the reservations, and the parents (both Choctaw) signed adoption papers for the children to be adopted by a non-Indian couple. ICWA provides exclusive jurisdiction over Indian child custody cases where the children are “domiciled” on the reservation, and the Choctaw tribe interceded here claiming jurisdiction. Even though the children had never been on the reservation, the Court

found that the children were domiciled on the reservation because their parents were domiciled on the reservation, and the tribe had jurisdiction. The Court found that “[t]ribal jurisdiction under the ICWA was not meant to be defeated by the actions of individual members of the tribe,” specifically noting that Congress’ concern in enacting the ICWA “was based in part of evidence of the detrimental impact on the children themselves of such placements outside their culture.”

V. The Contours of Tribal Sovereignty

Talton v. Mayes, 163 U.S. 376 (1896) – the Court found that by virtue of the Cherokee Nation’s inherent sovereignty, the protections of the Bill of Rights of the United States Constitution do not apply to the actions of the Cherokee government. The Cherokees’ powers of self-government are not derived from the federal government.

Talton was later used as justification for the passage of the Indian Civil Rights Act (ICRA) in 1968, which subjected tribes to several provisions similar to those encompassed in the Bill of Rights.

United States v Wheeler, 435 U.S. 313 (1978) – the Court held that tribal criminal jurisdiction over a tribe’s own members arises out of the tribe’s retained sovereignty, and therefore the Double Jeopardy clause of the U.S. Constitution does not bar prosecution by both federal and tribal courts for the same acts. The Court stated, “[i]t is evident that the sovereign power to punish tribal offenders has never been given up by the Navajo Tribe and that tribal exercise of that power today is therefore the continued exercise of retained tribal sovereignty.” Therefore, “when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government.”

Santa Clara Pueblo v Martinez, 436 U.S. 49 (1978) – in this case, an Indian woman filed suit against her tribe in federal court stating that a tribal ordinance denying membership to children of female members who marry outside the tribe (while extending membership to children of male members who marry outside the tribe) violated the ICRA’s equal protection provision. The Court held that the sovereign immunity of the Indian tribes bars the tribes from suit, and that nothing within the Indian Civil Rights Act created a federal cause of action changing this. The Court noted that providing a federal civil forum would interfere with tribal autonomy and self-government beyond that which Congress created in the Act. The Court felt Congress intentionally only provided a federal forum for habeas detention cases to allow tribal courts to adjudicate the ICRA’s civil aspects.

Williams v. Lee, 358 U.S. 217 (1959) – the Court denied state jurisdiction over a civil matter between an Indian and a non-Indian over a transaction that took place on the reservation. The Court noted that the Navajo Courts of Indian Offenses exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants, and that at that time, no federal act had given state courts jurisdiction over

internal Indian affairs. Because the state court infringed “on the right of the reservation Indians to make their own laws and be ruled by them,” the state’s infringement would not be tolerated.

VI. Public Law 280

Bryan v Itasca County, 426 U.S. 373 (1976) – the Court held that Public Law 280, while granting certain civil powers to the State over Indians in Indian territory, did not include the right to levy a property tax on Indians within the reservation. The central focus of P.L. 280 was the provision for state criminal jurisdiction over offenses on the reservation. The legislative history suggested that the civil powers granted within P.L. 280 were for resolving private civil disputes and civil causes of action. The Court concluded that the primary intent of the subsection was only to grant jurisdiction over private civil litigation involving reservation Indians in state court. To decide otherwise would allow tribes to be “subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments” and potentially turn tribes into mere “private, voluntary organizations.”

VII. Challenges to Tribal Economic Development

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) – the Court found that a state law restricting gambling could not be applied to a reservation’s bingo operations. Public Law 280 grants criminal jurisdiction to states, but does not permit state civil regulation of tribes. P.L. 280 did not authorize the state to enforce its gambling statute within the reservations, because the gambling statute was civil/regulatory and not criminal/prohibitory in nature. The Court also found that a state couldn’t prevent Tribes from allowing non-members to gamble. A state law may preempt Indian Law if the “state interests at stake are sufficient to justify the assertion of state authority.” The Court did not find a compelling state interest to justify the intrusion of state law onto the reservation in this matter.

In 1988 Congress passed the Indian Gaming Regulatory Act, adopting the *Cabazon* holding, and dividing games into three classes based on the type of game and outlining the tribes’ and states’ discretion in accepting or rejecting the game on tribal land.

Seminole Nation v. United States, 316 U.S. 286 (1942) – the Court found that the U.S. government breached its fiduciary duty to the Seminoles when it continued to pay money to the tribal counsel even after the government discovered that the money has been misappropriated. The Court held that it has “recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people,” and then defined the scope of the government’s obligations within equitable trust principles. To continue to pay the tribe’s money when the government knew it was being fraudulently misspent was a violation of the government’s duty to the tribe.

VIII. Taxation and Regulation

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) – the Court upheld a tax imposed by the tribe on the oil and natural gas used or taken from the reserve by a non-Indian mining company. The Court found that “the power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.” The Court further stated that “Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember’s presence and conduct on Indian lands is conditioned by the limitations the Tribe may choose to impose.”

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) – Indian tribes in Washington had been permitted to possess unstamped cigarettes for resale, which they then sold at a lower price wholesale, plus levying their own tax. State authorities “seized as contraband” truckloads of cigarettes bound for the reservations. The Court ruled on a number of tax issues, finding: 1) tribes had the authority to levy a cigarette tax on non-tribal members, as the “power to tax transactions occurring on trust land and significantly involving a tribe or its members is a fundamental attribute of sovereignty;” 2) the state was allowed to impose sales and cigarette taxes on nonmembers who purchased cigarettes from the tribal smokeshops, as the principles guiding Indian law did not “authorize Indian tribes to market an exception from state taxation to persons who would normally do their business elsewhere;” 3) the state’s interest also allowed the state to impose sales and cigarette taxes on Indian residents of the reservation who were not enrolled in the governing tribe; and finally, 4) the Court upheld the state’s seizure of the cigarettes since it was done in response to the tribe’s “wholesale evasion of . . . valid taxes.” The Court noted that the tribes’ interest in raising revenues is strongest “when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.”

Wagon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005) – the state of Kansas imposed a fuel tax on distributors, and the distributors passed the cost of that tax to their customers, including a tribal fuel wholesaler and the wholesaler’s client, a tribal gas station on tribal land. States are categorically barred from placing the legal incidence of an excise tax on a tribe or on tribal members for sales made inside Indian country without congressional authorization. Even if the legal incidence of the tax is on a non-Indian seller, the tax may still be preempted if the transaction giving rise to the tax occurs on the reservation and the imposition of the tax fails an interest-balancing test. The tribe argued that the state tax should be preempted, as the lower Kansas Supreme Court had held that the legal incidence of the tax was on the tribe. However, the Court disagreed, upholding the tax, and finding that the preemption analysis did not apply since the legal incidence of the tax was off-reservation and on the distributor.

Montana v Blackfeet Tribe of Indians, 471 U.S. 759 (1985) – analyzing the Indian Mineral Leasing Act of 1938, the Court found that the State of Montana may not tax the Blackfeet Tribe’s royalty interests under oil and gas leases issued to non-Indian lessees. An earlier Act from 1924 authorized leases for terms not to exceed 10 years on Indian land and provided for the State to assess taxes. The 1938 Act did not contain a provision authorizing state taxation, but nor did it repeal the 1924 authorization. Under Indian law, and under the trust doctrine, States may tax Indians only when Congress has clearly manifested its consent; likewise, any ambiguity in such a provision must be construed in favor of the Indians. Since that consent was missing in this case, and since there was no indication in the legislative history that a tax was intended, no state taxation could be upheld.

IX. Indian Religion and Culture

Lyng v. Northwest Indian Cemetery Protective Association, 471 U.S. 759 (1985) – while admitting that a road and logging project by the U.S. Forest Service would “have devastating effects on traditional Indian religious practices,” the Court permitted the U.S. Forest Service to proceed with the project. The Court found that the project did not violate the Indians’ free exercise of religion under the First Amendment as no religious practices were prohibited. The Court noted that the Government was prepared to accommodate the religious practices to some extent, but that the Government could not to be entirely divested “of its right to use what is, after all, *its* land.” (emphasis in original). The Court also found no protection for the tribe under the American Indian Religious Freedom Act (AIRFA), holding that the congressional intent behind AIRFA was to insure the “basic right of the Indian people to exercise their traditional religious practices,” but not to “confer special religious rights on Indians.”

In response to this case, tribal religious advocates went to Congress and were able to get favorable amendments to several federal public land use planning statutes, the most important being the National Historic Preservation Act.

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) – the Supreme Court upheld Oregon state law prohibiting the religious use of peyote, finding that the Court had “never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” “To permit this,” Justice Scalia wrote, “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.” In reaching this conclusion, as in *Lyng*, the Court refused to apply the “compelling government interest test.”