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AN INTRODUCTORY NOTE: JENSEN VS. POORE

Readers unfamiliar with Indian law will miss a lively debate if they pass over the articles that follow. To orient those readers, we offer this brief overview.

Last winter, we published an article by James A. Poore, III, entitled *The Constitution of the United States Applies to Indian Tribes*.¹ No one doubts that the federal government is bound by the Constitution when it deals with individuals who are members of Indian tribes. But Mr. Poore raised a different matter: does (or should) the Constitution bind tribes in their governmental dealings with non-members? With their own members? The standard view, represented in this issue by Professor Erik M. Jensen, is that the Constitution does not bind Indian tribes. The tribes pre-exist the Constitution, they never signed it or swore to abide by it as the States did, and the federal government has never ceased to recognize tribes' existence, at least to some extent. Mr. Poore argues that the United States' territorial, military, and political ascendancy terminated the tribes' pre-constitutional existence and launched them into a new era, so that they now exist entirely at the sufferance of Congress; consequently, Poore concludes, they must be bound by the same document that binds Congress.

Mr. Poore's argument is directed at the doctrine of "retained sovereignty," the principle that the tribes still have some inherent authority which is neither created nor bound by Congress, the courts, or the Constitution. Under this doctrine, Congress' relations with the tribes are governed by the Constitution, not because *tribes* must respect the Constitution, but because *Congress* must.

Retained sovereignty is significantly limited by its doctrinal opposite, Congress' "plenary power" over Indian affairs. This power is given to Congress by the Constitution and by Chief Justice Marshall's interpretation of it in the three foundational

1. 59 MONT. L. REV. 51 (1998).

cases of Indian law.² Retained sovereignty under the plenary power doctrine might be compared to the clever, three-legged pig under the farmer's care:

"That pig sounds the alarm when the weasel comes to kill all the chickens. He milks all the cows and watches the kids when we go out in the fields. And he rescued me and my family when our house caught on fire."

"But why does your pig have a wooden leg?"

"Why, you wouldn't eat a wonderful pig like that! Not all at once!"

The authors agree that retained sovereignty is subject to limitation or defeasance by Congress and the courts, but they disagree as to the true extent of tribal sovereignty's actual and potential limitation. Poore insists that tribal sovereignty simply is not on all fours with respect to normative conceptions of sovereignty. Congress or the courts could do away with it at any moment; indeed, Poore argues that both Congress and the courts have an obligation to enforce the Constitution against the tribes, whether such enforcement infringes on tribal sovereignty or not. Jensen insists that retained sovereignty, despite its truncation, is alive and well, with a reasonably favorable prognosis. Even if the courts interpreted the Constitution to permit Congress to eliminate tribal sovereignty – a doubtful proposition for most Indian law scholars – Congress' active promotion of tribal self-government indicates that it will not do so.

In a larger sense, the debate here concerns the proper balance of logic and history in constitutional interpretation. Does logic trump history so decisively that Congress cannot undertake to protect historically pre-federal entities like Indian tribes, as Poore suggests? Or does history give rise to a logic of its own, so that the tribes occupy a special status which the Constitution requires Congress to respect, as Jensen proposes? Is constitutional logic to be derived from the United States' history of conquest or the tribes' history of survival?

Read the articles, and judge for yourself.

2. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).