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THE CONSTITUTION OF THE UNITED STATES APPLIES TO INDIAN TRIBES: A REPLY TO PROFESSOR JENSEN

James A. Poore III*

I. INTRODUCTION

In this issue of the Montana Law Review, Professor Erik M. Jensen challenges my initial article, describing it as "an enjoyable flight of fancy."1 He also describes the position that the Constitution applies to Indian tribes as "dead wrong."2

Needless to say, I disagree. Since Professor Jensen had some fun with my article, it is only fair that I have some fun with his. One of my legal mentors, who had a master's degree in taxation from Harvard, advised me that logic applied to all areas of law, except tax law. Professor Jensen, who teaches and writes about Indian law, also teaches and writes in the area of taxation.3 He would add Indian law to the list of those areas of the law where logic does not apply.4 Things are the way they are, because that is the way they are. Actually, what Professor Jensen says is "the way Felix Cohen described things is the way they are."5

I recognize that the Supreme Court has not directly held that the Constitution of the United States applies to Indian tribes. If it had, we would not be writing these articles. But the basis of my initial article was that application of the

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2. Id. at 16.
4. Despite his disclaimer that "I don't mean to suggest that logic plays no role (and no, I'm not going to cite Holmes on the insignificance of logic in the law)." Jensen, supra note 1, at 6 n.15.
5. Jensen, supra note 1, at 5-6.
Constitution to Indian tribes flows logically from the Constitution, acts of Congress, and the decisions of the Supreme Court of the United States.

What Professor Jensen contends, however, is that logic does not get us anywhere with respect to this issue.6 Professor Jensen notes "I'm not going to cite Holmes on the insignificance of logic in the law,"7 but then says "[I]f life and the law are full of anomalies that won't satisfy a logician. So what?"8

To respond in the words of Justice Black:

[when] Justice Holmes [commented] that "[t]he life of the law has not been logic: it has been experience,' Justice Holmes was not there talking about the Constitution; he was talking about the . . . common law . . . ."9

I suggest that the cornerstone of constitutional law is reasoning or logic.

As Mr. Chief Justice Taney commented more than a century ago, a constitutional decision of this Court should be 'always open to discussion when it is supposed to have been founded in error, (so) that (our) judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.'10

Certainly, it was Chief Justice Marshall's logic in Marbury v. Madison,11 not the exact language of the Constitution, which led to judicial review of legislation to determine its constitutionality.12 It was the power of that logic which framed this country's constitutional law.13

In this second article, in light of Professor Jensen's comments, I revisit the issue of whether the Constitution of the United States applies to Indian tribes. In my initial article, I

6. Professor Jensen concedes "anyone can knock logical holes in the idea that tribes are sovereign. Poore does that job perfectly well." Jensen, supra note 1, at 5.
7. Jensen, supra note 1, at 6 n.15.
11. 5 U.S. (1 Cranch) 137 (1803).
13. Not everyone agrees with the logic of Marbury. See Jensen, supra note 1, at 11 n.39.
recognized that *Talton v. Mayes*\textsuperscript{14} implies that the Constitution does not apply to Indian tribes, but I did not challenge the decision itself.\textsuperscript{15} In this article, I question whether *Talton* was correctly decided.\textsuperscript{16} Again I address the issue of tribal member citizenship and constitutional protections, and again I reach the conclusion that the power of Indian tribal government is limited by the Constitution of the United States. The Constitution itself, and the obligation of the United States and Congress to citizens of the United States, Indian citizens and non-Indian citizens, compel the result that the Constitution applies to Indian tribes.\textsuperscript{17} The logic and reasoning compelling this result flow initially from Chief Justice Marshall's decisions with respect to the essential nature of the Constitution.

\section*{II. \textit{Talton} Revisited}

According to the "logic" of *Talton v. Mayes*, sovereignty was not "operated upon" by the Constitution because the sovereignty of tribes preceded the adoption of the Constitution.\textsuperscript{18} It may be argued that *Talton* was wrongly decided.

For *Talton* to be valid, it was necessary for the Supreme Court to assume that tribes retain sovereignty after tribes and tribal territory were incorporated into the United States. It was also necessary for the Court to assume that once tribes became part of the United States, Congressional action was required to impose the Constitution on tribes.

The Constitution itself and other constitutional cases of the Supreme Court, both before and after *Talton*, make it clear that neither premise is correct. The Supreme Court has held in several cases that tribes are not sovereign at all.\textsuperscript{19} The Court

\begin{thebibliography}{99}

\bibitem{14} 163 U.S. 376 (1896).
\bibitem{16} Professor Jensen acknowledges that some case law would indicate that tribes are not sovereign. See Jensen, \textit{supra} note 1, at 7 n.20 (discussing United States v. Kagama, 118 U.S. 375 (1886)).
\bibitem{17} Professor Jensen, on the other hand, does not think citizenship makes a difference. See Jensen, \textit{supra} note 1, 14 & nn.59-62 and accompanying text.
\bibitem{18} See \textit{Talton}, 163 U.S. at 384. See also Poore, \textit{supra} note 15, at 53. It should be emphasized that *Talton* recognized a very limited tribal sovereignty – that of "local self government when exercising their tribal functions" – and advised that "thus far" this limited sovereignty had not yet been subject to the laws of the Union. 163 U.S. at 384 (citing Cherokee Nation v. Southern Kansas Ry. Co., 135 U.S. 641 (1890)).
\bibitem{19} See, e.g., United States v. Rogers, 45 U.S. (4 How.) 567 (1846); United States v. Kagama, 118 U.S. 375 (1886).
\end{thebibliography}
has also recognized that, pursuant to the Property Clause of the Constitution, tribes are subject to complete territorial and political control by the United States. Because of this territorial control, the Supremacy Clause requires that the Constitution apply to Indian tribes.

Supreme Court cases prior to Talton did not recognize tribes as sovereigns. In United States v. Rogers, the Court viewed tribes not as sovereigns, but only as a “race” subject to the complete control of the United States. Even Professor Jensen recognizes, citing United States v. Kagama, that “yes, there have been Supreme Court cases that can reasonably be interpreted as denying the existence of any form of tribal sovereignty.” In Kagama, the Court recognizes only two sovereigns – the United States and the states of the Union:

But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the states of the Union. There exists within the broad domain of sovereignty but these two.

The Kagama Court, holding that tribes were under the political control of the government of the United States, relied both on Rogers and on Chief Justice Marshall’s decision in

20. 45 U.S. 567 (1846).
21. Chief Justice Taney wrote:
The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control.

It would be useless at this day to inquire whether the principle thus adopted is just or not; or to speak of the manner in which the power claimed was in many instances exercised. It is due to the United States, however, to say, that while they have maintained the doctrines upon this subject which had been previously established by other nations, and insisted upon the same powers and dominion within their territory, yet, from the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race . . . .

45 U.S. at 572.
22. 118 U.S. 375 (1886).
23. See Jensen, supra note 1, at 7 & n.20. Professor Jensen also cites Daniel L. Rotenberg’s American Indian Tribal Death – A Centennial Remembrance, 41 U. MIAMI L. REV. 409 (1986) (acknowledging that Kagama held that tribes did not have sovereignty but arguing it was wrongly decided).
24. Kagama, 118 U.S. at 379.
American Ins. Co. v. Canter. Both Rogers and American Ins. Co. assumed that the complete power of the United States to govern territory is based on its acquiring and holding that territory.

Even after Talton, the Supreme Court continued to recognize the acquisition and holding of territory as a basis for complete control over Indian tribes. In Federal Power Commission v. Oregon, the Supreme Court held that the United States, through the Federal Power Commission, had the power to license dams on Indian reservations. The Court based its decision on the “ownership and control” of the lands and on the Property Clause of the United States Constitution: “The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.”

In a later case, Federal Power Commission v. Tuscarora Indian Nation, the Court, citing Federal Power Commission v. Oregon, relied on the Property Clause as the basis of the United States’ power over Indian territory. The issue was whether the Federal Power Commission had the authority to condemn tribal lands. The Court, citing an earlier case sustaining the right of a government licensee to take Indian lands in derogation of treaty terms, stated:

It would be very strange if the national government, in the execution of its rightful authority, could exercise the power of eminent domain in the several states, and could not exercise the same power in a territory occupied by an Indian nation or tribe, the members of which were wards of the United States, and directly subject to its political control. The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it,

26. See Rogers, 45 U.S. at 572; American Ins. Co., 26 U.S. at 543 (“The right to govern, may be the inevitable consequence of the right to acquire territory.”).
28. See id. at 443.
29. U.S. CONST. art. IV, § 3, cl. 2.
32. It is difficult to believe that the United States, as part of its fiduciary obligations to tribal members, is not obligated to provide them with Constitutional protections.
provided only that they are not taken without just compensation being made to the owner.\textsuperscript{33}

Because tribes, upon their incorporation into the United States, had no territory or property, they had no basis for sovereignty. Beginning with Chief Justice Marshall's opinion in \textit{Johnson v. McIntosh},\textsuperscript{34} the Supreme Court has held that Indian tribes do not have ownership and control of lands within the United States but have only a right of occupancy.\textsuperscript{35} In \textit{Tee-Hit-Ton Indians v. United States},\textsuperscript{36} the Supreme Court held that the "right of occupancy" described in \textit{Johnson v. McIntosh} was subject to taking by the United States without compensation, because tribes had no property rights which were protected by the Fifth Amendment.\textsuperscript{37} Thus tribes legally hold no property or territory.

Ownership and control of territory is the basis of sovereignty. In the words of Chief Justice Marshall:

\begin{quote}
This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects.\textsuperscript{38}
\end{quote}

\begin{footnotes}
34. 21 U.S. (8 Wheat.) 543 (1823).
35. \textit{See id.} at 585. In the opinion, Chief Justice Marshall states:
\begin{quote}
While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.
\end{quote}

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.

\textit{Id.} at 574. Chief Justice Marshall also made it clear that lack of ownership and control by Indian tribes diminished their sovereignty (\textit{see id.}) and further indicated that the United States had the exclusive right to extinguish any Indian right of occupancy (\textit{see id.} at 585).

37. \textit{See id.} at 285.
\end{footnotes}
Thus, when tribes were incorporated into the territory of the United States, they lost their territory, and thus their sovereignty. What remained were tribes within the territory of the United States, which were subject to the complete sovereignty of the United States.

Because Indian tribes are not sovereign within the United States and the United States has complete physical and political control over Indian tribes, Indian tribes may not have laws or political power inconsistent with the Constitution. The Supremacy Clause of the Constitution requires such a result. The Constitution is the supreme law of the United States, and there may be no law within the United States which is inconsistent with the Constitution. In the words of Chief Justice Marshall, "The nullity of any act, or law, inconsistent with the Constitution, is produced by the declaration, that the Constitution is the supreme law." In McCulloch v. Maryland, the Chief Justice made it clear that the Constitution applied to all subordinate governments:

It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view, while construing the constitution.

There is no question that tribal government is a subordinate government. Thus, the Property Clause and the Supremacy Clause of the United States Constitution, as interpreted by Chief Justice Marshall and in later decisions of the United States Supreme Court, compel the conclusion that tribes may

39. Where Indians or tribes have obtained actual title, that title has been granted by the United States. Tee-Hit-Ton Indians, 348 U.S. at 277-78. Any use of land received from the United States would likewise be subject to Constitutional restraints. See Poore, supra note 15, at 69-74.
40. Except to the extent they have been granted limited sovereignty by the United States, subject to the Constitution. See Poore, supra note 15, at 69-74.
42. 17 U.S. 316 (1819).
43. Id. at 427 (emphasis added).
44. Talton itself describes the Cherokee Nation as "subject always to the paramount authority of the United States . . . ." 163 U.S. 376, 380 (1896).
not have powers or laws which are inconsistent with the Constitution.\textsuperscript{45}

In \textit{Rasmussen v. United States},\textsuperscript{46} the United States contended that Congress could choose not to apply the Constitution to the District of Columbia or other territories of the United States.\textsuperscript{47} The Court held that the Constitution was "self-operative" in its application to Territory of the United States and that Congress did not have the power to change that result.\textsuperscript{48} Rather, the Court held the Constitution always applied:

 Without attempting to examine in detail the opinions in the various cases, in our judgment it clearly results from them that they substantially rested upon the proposition that \textit{where territory was a part of the United States} the inhabitants thereof were entitled to the guaranties of the 5th, 6th, and 7th Amendments, and that the act or acts of Congress purporting to extend the Constitution were considered as declaratory merely of a result which existed independently by the \textit{inherent operation of the Constitution}.\textsuperscript{49}

The inescapable conclusion of these cases is that once tribes resided in territory which had become part of the United States, the Constitution limited tribal sovereignty in any way which was inconsistent with the Constitution. Thus, the \textit{Talton} decision was wrong. The "logic" in \textit{Talton} is inconsistent with both the Property Clause and the Supremacy Clause. The Constitution of the United States, in fact, "operated upon" tribal sovereignty, imposing constitutional requirements.

\section*{III. Citizenship Has Everything to Do With It}

Professor Jensen questions why, when Congress made tribal members citizens of the United States, it necessarily imposed the Constitution on Indian tribes. He states "[p]erhaps constitutional protection should apply in tribal courts, but it is hard to see what the citizenship status of American Indians has

\textsuperscript{45} The analysis that forms the basis for this conclusion has not been rejected, or even considered, by \textit{Talton} or the other cases recognizing the continuing existence of pre-constitutional sovereignty.

\textsuperscript{46} 197 U.S. 516 (1905).

\textsuperscript{47} \textit{See id.} at 526-27.

\textsuperscript{48} \textit{See id.}

\textsuperscript{49} \textit{Id.} (emphasis added). Note that the Court speaks of "territory" in general, not "the territory," as it would of an area which later became a State.
to do with that issue.”50 As Professor Jensen views the issue, citizenship provided tribal members only with the right to vote in state and federal elections and to run for federal office.51 Indians already had constitutional protections in state and federal courts because they were “persons.”52 He asks: “Does a Frenchman have to become a U.S. citizen to be entitled to procedural protections in a U.S. court? Of course not.”53

With respect to a tribal member’s relationship with his tribe, this discussion misses the point. Even if we assume, arguendo, that Talton was correctly decided,54 and tribes were still sovereigns which were not required to provide constitutional protections to their members, that changed when tribal members became citizens of the United States.

When Congress has the power to provide constitutional protection for its citizens, it is obligated to do so and is presumed to do so. Because of Congress’ plenary power over Indian tribes, when it made tribal members citizens of the United States, Congress was obligated to provide constitutional protections for those citizens vis-a-vis their tribes. The granting of citizenship itself provided those protections.

In my initial article I cited Reid v. Covert55 for this proposition. Reid questioned the constitutionality of agreements with foreign governments requiring civilian dependents of military personnel to be tried by courts martial. The Supreme Court concluded that the Constitution entitled its citizens, even when abroad, to full constitutional protection.56 The Court, rejecting the proposition that constitutional rights of citizens could be bargained away when dealing with another sovereign, stated:

Article VI, the Supremacy Clause of the Constitution declares: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which

50. Jensen, supra note 1, at 14.
51. See Jensen, supra note 1, at 13.
52. See Jensen, supra note 1, at 14.
53. See Jensen, supra note 1, at 14.
54. If Talton were not correctly decided, and tribal members already had Constitutional protections from tribal government, then Professor Jensen may be correct and being a “person” would be sufficient to provide anyone, including tribal members and Frenchmen with Constitutional protections as against tribal governments.
55. 354 U.S. 1 (1957); see Poore, supra note 15, at 71.
56. “In summary, we conclude that the Constitution in its entirety applied to the trials of Mrs. Smith and Mrs. Covert.” Reid, 354 U.S. at 18-19 (emphasis added).
shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . . ."

There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. . . . It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights — let alone alien to our entire constitutional history and tradition — to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.57

_Reid_, therefore, stands for the proposition that if the United States has the power to provide constitutional protections to its citizens, it must do so.58

The Supreme Court and Congress have recognized and enforced the obligation to provide constitutional protections for its citizens as against tribes. For example, Congress and the Supreme Court protect United States citizens from unconstitutional tribal actions by limiting the tribes' criminal jurisdiction to tribal members. In _Oliphant v. Suquamish Indian Tribe_,59 the Supreme Court described the requirement that its citizens' constitutional rights be protected as follows:

The "general object" of the congressional statutes was to allow Indian nations criminal "jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side." . . .

[From the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty.60

57. _Id._ at 16-17.
58. _Reid_, 354 U.S. at 5-7, 16. It should be noted that although _Reid_ was a plurality opinion, it was followed and broadened by _Kinsella v. U.S._ ex. _rel._ _Singleton_, 361 U.S. 234 (1960). The decision in _Kinsella_ was written by Justice Clark, who wrote the dissenting opinion in _Reid_. _See Kinsella_, 361 U.S. at 241 n.6. _Reid_ was also followed in _Duro v. Reina_, 495 U.S. 676, 693 (1990), discussed _infra_, notes 85-93 and accompanying text.
60. _Id._ at 204, 209 (quoting _In re_ Mayfield, 141 U.S. 107, 115-16 (1891)) (emphasis added).

https://scholarship.law.umt.edu/mlr/vol56/iss1/9
The Court then concluded that the tribe had no jurisdiction to try a non-Indian citizen for a crime allegedly committed on the reservation.\textsuperscript{61}

I suggest that the reason the United States Supreme Court did not, from the beginning, require Indian tribes to comply with the Constitution\textsuperscript{62} is that Indian governments were not considered capable of implementing the Constitution. In \textit{Johnson v. McIntosh},\textsuperscript{63} Chief Justice Marshall first explained that, normally, when territory is obtained by conquest, the people of the territory are integrated into and become citizens of the conqueror. He then explained why this would not be possible for Indians:

\begin{quote}
The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people . . . .

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. \textit{To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible}, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.\textsuperscript{64}
\end{quote}

Likewise, in \textit{Oliphant}, the Court noted that early evidence concerning tribal jurisdiction over non-members is lacking because "[u]ntil the middle of this century, few Indian tribes maintained any semblance of a formal court system."\textsuperscript{65}

Of course, Indians are no longer considered incapable of participating in constitutional government. Congress recognized this fact when it granted citizenship to Indians. Indians are "full citizens."\textsuperscript{66} They have the same rights as any other

\begin{footnotes}
\item[61.] See \textit{Oliphant}, 435 U.S. at 212.
\item[62.] Even though required by the decisions cited \textit{supra}, notes 18-49 and accompanying text.
\item[63.] 21 U.S. (8 Wheat.) 543 (1823).
\item[64.] \textit{Id.} at 589-90 (emphasis added).
\item[65.] \textit{Oliphant}, 435 U.S. at 197.
\end{footnotes}
citizen.67 Tribal members have rights, both as citizens of the states within which they reside, and as citizens of the United States.68 They have the right to enforce their constitutional rights against the state they live in and against the United States, and courts ought to recognize that they have the same right as against their tribes.

At the time Congress granted citizenship to Indians, citizens of the United States were protected from abridgment of their constitutional rights by a number of federal civil rights statutes. These included the predecessors to 18 U.S.C. §§ 241 and 242, and the predecessors to 42 U.S.C. 1981, 1982 and 1983.69 In interpreting these statutes, the Supreme Court consistently held that they were enforceable by citizens of the United States and by the United States on behalf of its citizens.70

For example, in *Logan v. United States*, the United States had charged the defendants with criminal interference with the constitutional rights of citizens of the United States when they assaulted persons being held for larceny in Indian country.71 The Supreme Court held that the detained citizens were properly in the custody of the United States and were entitled to the protection of their constitutional rights.72 The defendants argued that the United States did not have the power to protect these citizens.73 The Court, reiterating a prior opinion, responded:

> It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the states. *Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government.* We hold it to be an incontrovertible principle that the government of the United

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71. *See Logan*, 144 U.S. at 265.

72. *See id.* at 285.

73. *See id.* at 267-68.
States may, be [sic] means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. 74

In United States v. Waddell, 75 the Supreme Court held that one of these civil rights statutes could be used to prosecute individuals who were attempting to prevent a citizen from establishing a homestead under the Homestead Act. When the authority of the United States to protect this citizen was questioned, the Court responded:

It would, indeed, be strange if the United States, under the [Property Clause], being the owner of unsettled lands larger in area than the most powerful kingdoms of Europe, and having the power “to dispose of and make all needful rules and regulations respecting this territory,” cannot make a law which protects a party in the performance of his existing contract for the purchase of such land, without which the contract fails, and the rights, both of the United States and the purchaser, are defeated. 76

These statutes provided constitutional protections for citizens of the United States “on every foot of American soil.”

Even without Congressional action, the Constitution itself creates remedies for its citizens to redress the unconstitutional use of power. In Bivens v. Six Unknown Named Agents, 77 the Court held that explicit Congressional authorization was not a prerequisite to the power of a federal court to enforce the Constitution. 78 The plaintiff sued federal agents for perpetrating an unconstitutional search and arrest. Both the district and the circuit court held that the complaint failed to state a cause of action. 79 In reversing, the Court stated: "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." 80 And, as discussed in the re-analysis of Talton, 81 the Court in

74. Id. at 294-95 (quoting Ex parte Siebold, 100 U.S. (10 Otto) 371, 394 (1879)) (emphasis added).
75. 112 U.S. 76 (1884).
76. Id. at 80-81.
77. 403 U.S. 388 (1971).
78. See id. at 397.
79. See id. at 390.
80. Id. at 392 (citations omitted).
81. See supra, notes 46-49 and accompanying text.
Rassmussen v. United States\(^{82}\) held that the Constitution applies to all territory of the United States by the "inherent operation"\(^{83}\) and the "self-operative application"\(^{84}\) of the Constitution. The constitutional rights of citizens of the United States are protected on every foot of territory of the United States.

This principle was enforced on Indian reservations and against a tribal government in Duro v. Reina.\(^{85}\) In Duro, the issue was whether an Indian who was not a tribal member, but who was a citizen of the United States,\(^{86}\) could be tried in a tribal court which might not provide constitutional protections.\(^{87}\) The Court held that an Indian citizen of the United States could not be subject to trial without constitutional protections. The Court stated, "[o]ur cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right."\(^{88}\) The Court, in reaching its conclusion, also recognized that any powers received by a tribe from Congress would be "subject to the constraints of the Constitution."\(^{89}\)

Having recognized that tribes may at times act in an unconstitutional manner or not be required to provide full constitutional protections, the Court, addressing rights of tribal member citizens then stated, *in dicta*:

> Tribal authority over members, who are also citizens, is not subject to these objections. Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in tribal government, the authority of which rests on consent.\(^{90}\)

This dicta is where the Court's logic fails. In my initial article, I cited *Johnson v. Zerbst*\(^{91}\) for the proposition that courts do not presume or assume waiver of constitutional rights. The effect of this dicta is the presumption that because an American

\(^{82}\) 197 U.S. 516 (1905).
\(^{83}\) *Id.* at 526.
\(^{84}\) *Id.* at 527.
\(^{85}\) 495 U.S. 676 (1990).
\(^{86}\) *See id.* at 692-93.
\(^{87}\) *See id.* at 693.
\(^{88}\) *Id.* (citing Reid v. Covert, 354 U.S. 1 (1957)).
\(^{89}\) *Duro*, 495 U.S. at 686.
\(^{90}\) *Id.* at 694.
\(^{91}\) 304 U.S. 458, 464 (1938); *see* Poore, *supra* note 15, at 60 n.49.
citizen is born as a tribal member on a reservation, he or she acquiesces to unconstitutional tribal government. Such acquiescence is obviously a fiction and contrary to Johnson.

What is more important, however, is that this dicta in Duro ignores some of the most fundamental constitutional precepts. Constitutions protect the minority against the will of the majority. The dicta in Duro implies that Indian citizens of the United States may be entitled to constitutional protections, but they may not have them if they lack sufficient votes to elect those who will grant them those protections. This is not right. As Chief Justice Warren stated, "[o]ne's right to life, liberty and property . . . and other fundamental rights may not be submitted to a vote, may depend on the outcome of no elections. A citizens' constitutional rights can hardly be infringed simply because a majority of the people choose that it be."93

The United States has the power and the obligation to protect its citizens' constitutional rights. Because Congress opened up Indian reservations for settlement by non-Indian citizens, and because Congress, pursuant to Article I of the Constitution, granted citizenship to tribal members, virtually all individuals living on, passing through, or doing business on Indian reservations are citizens of the United States. Over citizens of the United States, tribes have no power which is not subject to the Constitution.

When Congress provided that citizens could travel through and occupy Indian reservations and when it granted United States citizenship to tribal members, it diminished tribal sovereignty to the extent that sovereignty was inconsistent with citizenship. In Nevada v. Hall,94 the Court recognized that the rights of citizens limit sovereignty. The Court stated, "[T]he citizens in each state are entitled to all the privileges and immunities of citizens in the several states. . . . [E]ach of these . . .

92. It is interesting that the Duro Court's presumption that a citizen/tribal member waives his constitutional rights as against his tribal government is surprisingly similar to the "contacts" waiver test posited by the Court of Appeals to determine which non-member Indians might be subject to tribal jurisdiction. In rejecting this approach the Court stated that "The contacts approach is little more than a variation of the argument that any person who enters an Indian community should be deemed to have given implied consent to tribal criminal jurisdiction over him. We have rejected this approach for non-Indians." Duro, 495 U.S. at 695.


provisions places a specific limitation on the sovereignty of the several states. If citizenship diminishes the sovereignty of states, it likewise certainly diminishes the sovereignty of tribes. Congress, when it granted citizenship to tribal members, diminished the sovereignty of states, because states were required to accommodate the constitutional rights of their new citizens. It is clear that tribes were required to do the same.

The issue here is not whether a Frenchman would have constitutional rights in a federal or state court. The question here is whether citizens of the United States have constitutional rights in tribal courts and with respect to tribal government. The answer is that they do.

Professor Jensen debates whether imposing the Constitution on tribes would have some of the impacts I describe in my initial article. For example, I asserted that non-tribal members governed by a tribe living on a reservation should be entitled to vote in tribal elections. Jensen responds "Where does the Constitution say that?" To respond in the words of the Supreme Court, "[i]n decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."

95. Id. at 425.
96. The granting of citizenship is a diminishment of both state and tribal sovereignty by congressional action pursuant to Article I. While the sovereignty of states normally cannot be diminished by congressional act, the sovereignty of tribes can be. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 47 (stating that Congress has limited authority to change the sovereignty of states); Wheeler v. U. S., 435 U.S. 313, 323 (1978) (stating that tribes have yielded up sovereign powers by statute pursuant to the plenary power of Congress.)
97. It is ironic that Professor Jensen assumes that when Congress granted citizenship to tribal members, these citizens received constitutional rights as against states, but not as against their own tribes. He also contends that state sovereignty was diminished in that states were forced to allow these tribal citizens the Constitutional right to vote in state elections, yet he does not recognize a similar constitutional right for non-Indian citizens living on reservations to vote in tribal elections.
98. It took almost 60 years for the rights of citizens ignored in Plessy v. Ferguson, 163 U.S. 537 (1896), decided the same day as Talton, to be recognized by the Court in Brown v. Board of Education, 347 U.S. 483 (1954). Sometimes courts do not immediately recognize the rights of citizens. The Court has not yet completely recognized these rights, but they are rights required by the Constitution.
99. See Poore, supra note 15, at 77.
100. Jensen, supra note 1, at 13.
Professor Jensen argues that tribes can discriminate on the basis of race, citing *Morton v. Mancari*.\(^{102}\) *Morton*, however, was decided before *Adarand Constructors, Inc. v. Pena*\(^{103}\) made it clear that the federal (and thus tribal) standard for equal protection was the same as the standard established for states by the Fourteenth Amendment.\(^{104}\) In addition, the *Morton* court itself indicated that employment criteria issues were not decided on the basis of race. Rather, the Court stated, "[t]he preference, as applied, is granted to Indians not as a discreet racial group, but rather as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."\(^{105}\) The "logic" of *Morton* in fact supports the proposition that citizens should have a right to be involved in the selection of those who govern their lives, because the Court compared the employment preference to a residency requirement: "[t]he preference is similar in kind to the constitutional requirement that a United States Senator, when elected, be 'an inhabitant of the state for which he shall be chosen,' . . . or that a member of a city council reside within the city governed by the council."\(^{106}\)

Explaining why Indian tribes are not subject to the Constitution, Professor Jensen states: "Like it or not, Indian tribes have a special constitutional status."\(^{107}\) It is true that Indians and tribes have had a unique status, probably arising from the Indian Commerce Clause.\(^{108}\) The Supreme Court, however, has made it clear that the Indian Commerce Clause does not give tribes super-constitutional rights. For example, the Court has held that the Clause cannot be used to circumvent the Eleventh Amendment's limitations on federal jurisdiction.\(^{109}\) Similarly, it has held that the First Amendment must apply to all citizens alike, even if the result is devastating to traditional

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102. 417 U.S. 535 (1974); see also Jensen, supra note 1, at n.55.
104. See id. at 225.
106. Id. at 554 (quoting U.S. CONST. art. I, § 3, cl. 3).
107. Jensen, supra note 1, at 11.
108. U. S. CONST. art. I, § 8 gives to Congress the power "to regulate Commerce with Foreign Nations and among the Several States, and with Indian Tribes."
Indian religious practices. Whatever the status of Indian tribes, it is not sufficient to overcome the rights of citizens.

IV. CONCLUSION

On today's reservations, every citizen, Indian and non-Indian, may participate equally in federal and state government. All may vote in state elections. All may vote in national elections. All may run for local and state offices. All may run for Congress. All may run for President. Yet only a select few citizens may participate in tribal government.

All citizens are entitled to have their constitutional rights protected on every square foot of American soil. Indian tribes function within the United States and are subject to its complete control. The precedents of the Supreme Court and the language of the Constitution itself therefore require that citizens be protected from unconstitutional power and actions by Indian tribes. Tribes must function subject to the Constitution of the United States. The Constitution and logic require this result.

Courts must begin to protect citizens from unconstitutional exercises of powers by tribes. This obligation cannot be entrusted solely to Congress. Whatever may be the traditional way of looking at things, the fact is and always has been that the Constitution applies to Indian tribes.


111. See Reid v. Covert, 354 U.S. 1, 6-7, 17 (1954); see also supra, notes 55-58 and accompanying text.

112. But cf. Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc., 118 S.Ct. 1700, 1705 (1998) (recognizing that the Court's decisions with respect to tribal immunity from suit may be flawed but stating that the remedy must come from Congress). Congress, however, must set up and fund mechanisms necessary to accomplish constitutional protections.