CASENOTES

INDIAN LAW — Indian Tribes Have No Inherent Authority to Exercise Criminal Jurisdiction Over Non-Indians Violating Tribal Criminal Laws Within Reservation Boundaries — Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

In their quest for greater autonomy and self-determination, American Indians have recently attempted to exercise a greater measure of legal authority over non-Indians residing on Indian reservations.1 Since American

1. Most Indian tribes have functioning governments in some form, but the scope of their power varies from tribe to tribe. See generally American Indian Lawyer Training Program, Indian Tribes As Governments (1975) (publication of limited circulation available at the American Indian Lawyer Training Program, Washington, D.C.). Many tribes organized governments pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 476, 477 (1976), which allowed tribes to adopt a constitution and by-laws or incorporate under federal supervision. See generally V. Deloria Jr., Behind the Trail of Broken Treaties 187 (Delta ed. 1974). Others, such as the Pueblos in New Mexico, continue to operate some form of their traditional government. See J. Sando, The Pueblo Indians 8 (1976). Traditional governments differ widely in structure and organization, but generally may be distinguished from governments formed under the Reorganization Act in their method of selecting tribal leaders.

The 1970 Census set the Indian population in the United States at 792,730. Many people believe the actual number today to be close to one million. AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 90 (1977) [hereinafter cited as COMMISSION REPORT]. Twenty-eight percent live on reservations ranging in size from the 15.4 million acre Navajo Reservation in Arizona to the one-quarter acre Golden Hill Reservation in Connecticut. Forty-six percent live in urban areas. Id. at 90-91. Indian land comprises more than 50 million acres, excluding Alaska. Id. at 99. There are 268 reservations created by treaty or Executive Order and several created by state action. Id. at 90.

The Indian's unique legal status is defined by a voluminous and complex body of treaties, federal statutes, administrative regulations and federal and state judicial decisions generally granting special rights as members of organized, federally recognized tribes. See, e.g., Morton v. Mancari, 417 U.S. 535 (1974)(Indian preference in Bureau of Indian Affairs hiring practices under 25 U.S.C. § 472 (1976) is constitutional); Winters v. United States, 207 U.S. 564 (1908)(the right to use sufficient water from the Milk River for irrigation purposes is implied in the Agreement of May 1, 1888, 25 Stat. 113 (1888) with the Gros Ventre tribe); United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), motion denied, 66 F.R.D. 477 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086, rehearing denied, 424 U.S. 978 (1976)(provision in treaties with certain Northwest tribes reserving the "right of taking fish, at all usual and accustomed grounds and stations . . ." means that members of those tribes have the right to 50% of the harvestable fish from their customary fishing areas, even if outside the reservation). See generally F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1971); M. Price, LAW AND THE AMERICAN INDIAN (1973). Although the total percentages of non-Indian owned land and non-Indian populations on
courts have consistently held that Indian tribes possess certain attributes of inherent sovereignty, retained until relinquished by treaty or extinguished by Congress, 2 a significant number of Indian court systems functioning on reservations today 3 purport to extend criminal jurisdiction over non-Indians violating tribal criminal laws while residing within reservation boundaries. 4 Because federal law does not specifically authorize the exercise of such authority, 5 these tribal assertions of criminal jurisdiction over non-Indians have been based on claims of inherent sovereignty within reservation territory. 6 Last term, the Supreme Court in *Oliphant v. Suquamish*

reservations are not available, non-Indians own much Indian reservation land and comprise a substantial part of the total reservation population in some areas. Figures for individual reservations have been compiled by the National Tribal Chairmen's Association. *See* Brief for National Tribal Chairmen's Association as Amicus Curiae at Appendix, *Oliphant v. Suquamish* Indian Tribe, 435 U.S. 191 (1978) [hereinafter cited as Chairmen's Ass'n Brief].

2. *See* cases discussed in notes 22-70 and accompanying text *infra.*

3. The 127 tribal courts fall into the following categories: 71 tribal courts established under the tribe's inherent legislative power; 30 courts established under federal regulations, 25 C.F.R. § 11.1 (1978); 16 courts of the traditional Pueblos; and 10 conservation courts. *See* Chairmen's Ass'n Brief, *supra* note 1 at 34-35. For general information about modern Indian court systems, see S. Brakel, *American Indian Tribal Courts* (1978).


5. Under federal statute, jurisdiction over certain major crimes committed on Indian reservations by Indians is vested in the federal courts. 18 U.S.C. § 1153 (1976). The statute covers the following offenses: murder; manslaughter; kidnapping; rape; carnal knowledge of any female not his wife, who has not attained the age of sixteen years; assault with intent to commit rape; incest; assault with intent to commit murder; assault with a dangerous weapon; assault resulting in serious bodily injury; arson; burglary; robbery; and larceny. Two cases have held that federal jurisdiction over these crimes is exclusive. *Felicia v. United States*, 495 F.2d 353 (8th Cir. 1974), *cert. denied*, 419 U.S. 849 (1974); *Sam v. United States*, 385 F.2d 213 (10th Cir. 1967). Jurisdiction over minor offenses not covered under 18 U.S.C. § 1153, such as traffic offenses, trespass, violations of tribal hunting and fishing regulations, disorderly conduct and simple assault are governed by tribal criminal laws. *See, e.g., Suquamish Law and Order Code*, ch. III. Brief for Petitioners at 22a, *Oliphant v. Suquamish* Indian Tribe, 435 U.S. 191 (1978). This jurisdiction, however, is limited by the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301 to 1341 (1976). Section 1302 specifies six months in jail or a $500 fine or both as the maximum penalty an Indian court may impose for conviction.

6. In international law, sovereignty is defined as the supreme authority to govern people and territory. *See* 1 Oppenheim's *International Law* 114 (7th ed. 1948) [hereinafter cited as Oppenheim]. In its external aspects, sovereignty is the power of a state to maintain relations with other states. In its internal aspects, sovereignty is the power of a state to exercise authority over its citizens living within or without its territorial boundaries. *Id.* at 254-56.
Indian Tribe\(^7\) refused to recognize these well-established principles of inherent and retained sovereignty and held that Indian courts have no authority to punish non-Indians committing criminal acts on the reservation.

The controversy culminating in *Oliphant* began in 1973 when the Suquamish Tribe in the State of Washington enacted a Law and Order Code that extended criminal jurisdiction over non-Indians.\(^8\) Pursuant to this jurisdiction, tribal police officers in 1973 and 1974 arrested two non-Indian residents of the Tribe's Port Madison Reservation for assault and recklessly endangering another person.\(^9\) Both defendants sought habeas corpus relief in the district court for the Western District of Washington, attacking the Tribe's authority to exercise criminal jurisdiction over non-Indians. The district court denied relief, and the United States Court of Appeals for the Ninth Circuit affirmed.\(^10\) The Court of Appeals reasoned that the power of the Suquamish Tribe to try and punish non-Indians was an attribute of inherent sovereignty, its authority neither extinguished by Congress nor voluntarily relinquished by treaty.\(^11\)

In an opinion by Justice Rehnquist, the Supreme Court reversed. The Court found that the Suquamish tribal court, established pursuant to tribal legislative authority, possessed no inherent power to try and punish non-Indian violators of tribal criminal laws.\(^12\) Reasoning that Indian tribes submitted to the sovereignty of the United States when their lands were incorporated into the territory of the United States, the Court concluded that jurisdiction over non-Indians could not be assumed absent specific congressional authorization.\(^13\)

In dissent, Justice Marshall, joined by Chief Justice Burger, argued for affirmance. Absent an affirmative withdrawal by treaty or statute, he maintained that Indian tribes have the right to try and punish all persons violating tribal laws within the reservation.\(^14\) As examination of the applicable law and policy considerations will show, the dissent conforms to established case law recognizing the inherent and retained sovereignty of

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9. The Port Madison Reservation consists of over 7,000 acres, two-thirds of which are owned by non-Indians. The Reservation has a non-Indian population of approximately 3,000 and an Indian population of approximately 50. *Oliphant* v. Suquamish Indian Tribe, 435 U.S. 191, 193 n.1 (1978).
11. *Id.* at 1010-12.
12. 435 U.S. at 212.
13. *Id.* at 209.
14. *Id.* at 212. Justice Brennan did not participate.
Indian tribes. In contrast, the majority misused legal precedent and engaged in an unprincipled use of legislative materials to reach its opposite conclusion.

I. INDIAN SOVEREIGNTY UNDER UNITED STATES LAW

A. State Jurisdiction

Indian tribes were organized political entities with distinct governmental, social, and economic systems long before Europeans came to the United States. Most tribes had laws regulating property rights, domestic relations, crimes, and relations with other Indian governments, along with effective mechanisms for enforcement of these tribal laws. It is not surprising, therefore, that European countries dealing with Indian tribes before the creation of the United States treated them as sovereign nations. The existence of treaties between Indian tribes and European nations as well as those between Indian tribes and the United States evidences the sovereign character of the tribes.


16. See Clinton, Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze, 18 ARIZ. L. REV. 503, 553 (1976). Although most tribes lacked formal, written legal codes and constitutions, some developed highly sophisticated and complex governmental institutions. The Iroquois, for example, promulgated and adopted the Great Binding Law of the Five Nations which established a confederate form of government among five culturally-related Indian nations. See L. MORGAN, LEAGUE OF THE HO-DE-NO-SA-U-NEE OR IROQUOIS (1901).

17. See, e.g., 2 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF NEW YORK 712 (1858). It is estimated that over 800 treaties were made with Indian nations by European governments and the United States. Institute for the Development of Indian Law, Indian Sovereignty 6 (1978) (publication of limited circulation available at the Institute for the Development of Indian Law, Washington, D.C.) [hereinafter cited as Indian Sovereignty]. Under principles of international law, only sovereign nations are empowered to enter into treaties. OPPENHEIM supra note 6, at 795.

Indian treaties have played an important role in the development of Indian law. Federal policies such as removal, "civilization," assimilation, and self-determination have been implemented through treaties. See generally F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 33-67 (1971). Indian treaties are the "supreme law of the land" and have the same force and dignity as a federal statute. U.S. CONST. art. VI, § 2; Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832). Congress declared an end to formal treaty-making with Indian tribes in 1871. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified in 25 U.S.C. § 71 (1976)). The United States continued to make agreements with Indian tribes, however, until 1911. These agreements required approval of both houses of Congress. Indian Sovereignty, supra at 12. Under the plenary power doctrine, Congress may abrogate Indian treaties unilaterally. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). See note 18 infra. See generally Wilkinson & Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?, 63 CAL. L. REV. 601 (1975). It is well established that a treaty is not a grant of rights to the tribe from the United States, but rather
Although American courts consistently have recognized certain attributes of tribal sovereignty, the courts have also held that Congress has plenary, or almost absolute power to legislate in Indian affairs. Courts have refused to consider whether this plenary power exceeds congressional authority under the Constitution, characterizing the issue as a political question and placing it beyond the scope of judicial review under separation of powers principles. Consequently, no court has viewed Indian sovereignty as a limitation on Congress’ legislative power. Thus, under United States law, Indian tribes are sovereign only to the extent Congress allows them to be.

Indian sovereignty has received deference, however, in cases in which states have attempted to exercise civil jurisdiction over Indian reservations without express authorization by Congress. Chief Justice John Mar-

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18. See, e.g., Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). At issue in Lone Wolf was the validity of Congressional ratification of an agreement for the sale of land by the Kiowa Tribe to the United States which had been executed in violation of an earlier treaty requiring all future land sales to be approved by three-fourths of the adult male members of the Tribe. The Court upheld Congress' action on the ground that “[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.” 187 U.S. at 565.


20. Congress has eroded Indian sovereignty on several occasions. For example, Congress has vested federal courts with jurisdiction over certain major crimes committed by Indians on reservations, which, as a practical matter divested the tribes of such jurisdiction. See 18 U.S.C. § 1153 (1976). Similarly, the Indian Civil Rights Act of 1968 forbids tribal laws from violating certain constitutional provisions and limits the maximum penalties Indian courts may impose. 25 U.S.C. § 1302 (1976). See generally Comment, Inherent Indian Sovereignty, 4 Am. Ind. L. Rev. 311 (1976).

21. Congress has authorized states to assume jurisdiction in certain cases. Under Public Law 280, enacted in 1953, 12 states have assumed some measure of criminal and civil jurisdiction over all or most of the Indian land within their boundaries. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (1953). For six states—Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin—the assumption of jurisdiction was mandatory. Section seven of the Act authorized any other state to assume civil and criminal jurisdiction by express enactment of its legislature. Section seven also gave congressional consent to the repeal of disclaimers of
shall's now famous opinions in two cases involving the Cherokee Nation established the governing principles in this area, which, with slight modification, remain the law today. In *Cherokee Nation v. Georgia*, the Cherokee Nation sued in the United States Supreme Court for an injunction to restrain Georgia from enforcing its laws within Cherokee Territory. The threshold jurisdictional issue was whether the Cherokee Nation constituted a "foreign state" under Article III of the Constitution, which extended the Court's original jurisdiction to controversies "between a State or the Citizens thereof, and foreign States, Citizens or Subjects." Marshall held that the Court lacked jurisdiction because the framers of the Constitution, when they adopted Article III, did not intend to include Indian nations within the meaning of the term "foreign States." *Cherokee Nation*, however, does not stand for the proposition that Indian tribes are not nations. On the contrary, Marshall expressly recognized their national character:

So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges been completely successful. They have been uniformly treated as a state from the settlement of our country.

The question left unanswered in *Cherokee Nation*—whether Georgia law could be enforced within the territory of the Cherokees—came before the Court again in *Worcester v. Georgia*. Worcester, a citizen of Vermont and a resident of the Cherokee Territory, was convicted by a Georgia court of violating a state law prohibiting non-Indians from residing within the territorial boundaries of the Cherokee Nation without first obtaining a li-


24. 30 U.S. (5 Pet.) at 19. Marshall reasoned that Indian nations could not be considered foreign to the United States for the simple reason that many tribes were geographically surrounded by the boundaries of the United States. Id. at 17.
25. Id. at 16. While recognizing the sovereignty of the Cherokee Nation, Marshall, in dicta, characterized Indian tribes as "domestic, dependent nations." Id. at 17.
cense from state authorities. Worcester sued for a writ of error, arguing that because treaties between the Cherokee Nation and the United States recognized the right of the Cherokee Nation to govern itself without interference from states, the law under which he had been convicted was unconstitutional. The Court held that the laws of Georgia could have no force within Cherokee Territory for three reasons. First, the Court recognized Indian tribes as “distinct political communities, having territorial boundaries within which their authority is exclusive . . . .” Second, Georgia’s assertion of jurisdiction over Indian lands forcibly interfered with the relations established between the United States and the Cherokee Nation, “the regulation of which are committed exclusively to the government of the union . . .” by Article I, section 8 of the Constitution. Finally, Georgia’s actions also conflicted with treaties establishing the territorial boundaries of the Cherokee Nation and guaranteeing to them all land contained therein.

Despite Worcester’s basic policy of tribal sovereignty, states have exercised jurisdiction over reservations in criminal cases involving only non-Indians. In United States v. McBratney, for example, the Court recog-

27. The statute read in pertinent part:
all white persons, residing within the limits of the Cheerokee nation on the 1st day of March next, or at any time thereafter, without a license or permit from his excel-

28. Id. at 538-39.
29. Id. at 557.
30. Id. at 561. Article I, § 8 provides: “The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.” U.S. Const. art. I, § 8, cl. 3.
31. 31 U.S. (6 Pet.) at 562. The Court relied principally on the Treaty of Hopewell, November 28, 1785, 7 Stat. 18 (1785), and the Treaty of Holston, July 2, 1791, 7 Stat. 39 (1791). The Treaty of Holston delineates the boundary between the territory of the Cherokees and that of the United States (Article IV) and declares that the “United States solemnly guarantee[s] to the Cherokee nation, all their lands not hereby ceded.” (Article VII). Article IX provided that no United States citizen could travel through Cherokee territory without a passport obtained from an authorized United States official. After reviewing the various treaty provisions, the Court concluded that Georgia’s attempt to assert jurisdiction over Cherokee territory was:
in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all their land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself.
32. 104 U.S. 621 (1881).
nized the jurisdiction of Colorado tribunals to prosecute a murder of one non-Indian by another committed on a reservation within the state. *McBratney* and its progeny, however, should not be read to erode *Worcester*'s basic policy. Because the disputes involved non-Indians exclusively, the tribal courts did not attempt to assert jurisdiction. Rather, the jurisdictional dispute in each case was between a state and federal court. Furthermore, the United States Supreme Court subsequently reaffirmed Indian sovereignty as a bar to state jurisdiction over Indian lands in *Williams v. Lee.*

Lee, a non-Indian, operated a store on the Navajo Reservation under a license required by federal law. He brought suit in a superior court of Arizona against a Navajo man and his wife to collect payment for goods sold to them on credit. The United States Supreme Court held that the suit should have been dismissed because the Navajo tribal court was the proper forum to adjudicate civil disputes arising on the reservation, even when a non-Indian was involved. Arizona courts could not entertain the suit because "to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."

Although the principle of inherent sovereignty as established in *Cherokee Nation* and *Worcester* remains intact, other legal theories have emerged as a primary basis for modern jurisdictional decisions. *McClanahan v. Arizona State Tax Commission* marks the transition from reliance on inherent sovereignty to a focus on treaties and federal statutes as a basis for limiting state jurisdiction. Arizona sought to collect its state income tax

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33. *See, e.g.*, New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946)(affirming state court conviction of a non-Indian for the murder of a non-Indian on the Allegany Reservation); Draper v. United States, 164 U.S. 240 (1896)(jurisdiction over a crime committed on Indian lands by and against non-Indians properly lies in the state courts). This line of cases has come to be known as the McBratney trilogy. *See Clinton, supra* note 16 at 524.


35. 25 U.S.C. § 262 (1976) provides:

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

Trade regulation statutes are intended to protect Indians from exploitation by unethical traders. *See generally* Rockbridge v. Lincoln, 449 F.2d 567, 570 (9th Cir. 1971); F. Prucha, *American Indian Policy in the Formative Years* (1962).

36. 358 U.S. at 223. In *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 179 (1973), the Court limited the applicability of the *Williams* infringement test to situations involving non-Indians. For further discussion of *McClanahan*, see notes 37-44 and accompanying text infra.

from a Navajo woman whose income was derived solely from reservation sources. Noting a recent trend toward less reliance on inherent sovereignty as a bar to state jurisdiction, the Supreme Court reasoned that an 1868 treaty guaranteeing the Navajos the right to self-government, and certain federal statutes, left the regulation of conduct on the reservation exclusively to the federal government and the tribe and held the tax illegal. Although declining to base its decision squarely on the doctrine of Indian sovereignty, the McClanahan Court admitted that "it would vastly oversimplify the problem to say that nothing remains of the notion that reservation Indians are a separate people to whom state jurisdiction . . . may not extend." Instead, the Court used the doctrine of Indian sovereignty as an aid to statutory and treaty interpretation: "The Indian sovereignty doctrine is relevant . . . not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop


39. See, e.g., Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965). In that case, Arizona's sales tax was held inapplicable to the Warren Trading Post Company, operating a retail business on the Navajo Reservation under a license granted by the Commissioner of Indian Affairs, on the ground that "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws . . . ." Id. at 690.

40. The Navajo Treaty of June 1, 1868, Art. IV, 15 Stat. 667, provided that a reservation would be set aside "for the use and occupation of the Navajo Tribe of Indians" and that "no person except those herein so authorized . . . shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." Applying the rule of construction that ambiguous treaty provisions must be resolved in favor of the Indians, Carpenter v. Shaw, 280 U.S. 363, 367 (1930), the Court concluded that this treaty provision "was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision." 411 U.S. at 175.

41. The Court relied on the Arizona Enabling Act, Pub. L. No. 61-219, § 20, 36 Stat. 557 (1910)(Arizona disclaimed all right and title to Indian lands lying within its borders); the Buck Act, 4 U.S.C. §§ 105, 109 (1976)(states are authorized to impose an income tax on residents of federal areas contained within the state with the exception of Indians living on Indian lands); and Public Law 280, 67 Stat. 588 (1953)(states may assume jurisdiction over Indian lands but only with tribal consent).

42. 411 U.S. at 165. The Court reasoned that in the Buck Act, supra note 41, "Congress would not have jealously protected the immunity of reservation Indians from state income taxes had it thought that the States had residual power to impose such taxes in any event." Id. at 177. Furthermore, with regard to Public Law 280, supra note 41, the Court found that Congress would not have required tribal consent if states had been free to assume jurisdiction unilaterally by simple legislative enactment. The Court concluded that Arizona could not apply its income tax to the Navajos absent congressional authorization of state jurisdiction. Id. at 178.

43. Id. at 170.
against which the applicable treaties and federal statutes must be read.”

Thus, the McClaanahan approach to Indian sovereignty is merely a recognition of the practical reality underlying federal Indian law. Consequently, it has become largely unnecessary to resort to notions of inherent sovereignty to resolve state jurisdictional disputes since in almost every case, the decision may be based on treaties or federal statutes. Nowhere, however, does McClaanahan suggest that resort to the doctrine of Indian sovereignty would be inappropriate if treaties or statutes fail to furnish the basis for decision.

B. Tribal Power

The doctrine of Indian sovereignty also provides the legal foundation for the exercise of self-government by an Indian tribe. Because Indian tribes are “distinct, independent political communities,” they are entitled to govern themselves. In decisions in which the right to exercise tribal powers was at issue, courts have consistently relied on two premises. First, an Indian tribe’s powers of government derive from an inherent sovereignty, rather than from a delegation of authority by the federal government. Second, an Indian tribe possesses residual sovereignty—it retains all powers of a sovereign nation except when expressly relinquished by treaty agreement or expressly extinguished by Congress.

The principle that Indian tribes possess inherent rather than delegated powers dictated the Supreme Court’s ruling in Talton v. Mayes. In Talton, an Indian had been tried and convicted in a special Supreme Court of the Cherokee Nation for the murder of another Indian within Cherokee territory. He filed a habeas corpus petition in the District Court for the Western District of Arkansas, alleging that he had been indicted and tried in violation of certain fifth amendment rights. Relying on Chief Justice John Marshall’s landmark opinions in the early Cherokee Nation cases, the Court reasoned that the fifth amendment did not apply to governmental actions of the Cherokee Nation because their powers were not created.

44. Id. at 172.
45. The doctrine of Indian sovereignty retains vitality in state jurisdiction cases, especially when all the parties are Indians. Fisher v. District Court of the Sixteenth Judicial Dist. of Mont., 424 U.S. 382 (1976)(Montana courts have no jurisdiction over adoption proceedings in which all parties are Indians because state court jurisdiction would plainly interfere with the self-government of the Northern Cheyenne).
48. See cases discussed in notes 53-60 and accompanying text infra.
49. 163 U.S. 376 (1896).
by the Constitution, but rather existed prior to its adoption. Applying similar reasoning, the Court of Appeals for the Eighth Circuit held in Buster v. Wright that the Creek Nation possessed inherent authority to tax non-Indians trading within its borders. The court stated that the authority of the Creek Nation to enact the tax did not originate in a federal statute, treaty or agreement. Rather, the power derived from the "inherent and essential attributes of its original sovereignty."

Once the inherent sovereignty of a tribe is recognized, courts must determine whether tribal powers have been relinquished through treaties or removed by Congress through statutes. All powers not expressly taken

50. See also Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958) (constitutional limitations of the fourteenth amendment are inapplicable to the legislative actions of the Oglala Sioux Tribe because it is not a creature of state government). But see Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301 to 1341 (1976). The Act reads in pertinent part:

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500 or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C. § 1302 (1976). Although the Act makes most constitutional guarantees applicable to Indian governments, it is not coextensive with the Bill of Rights. See notes 126, 128 and accompanying text infra.

51. 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906).

52. 135 F. at 950.

53. In Buster v. Wright, the Eighth Circuit recognized that "every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by Act of Congress or by the contracts of the Creek tribe itself." 135 F. at 950. And in United States v. Quiver, 241 U.S. 602 (1916), the Supreme Court said that the power to regulate the domestic relations of tribal members is vested in the tribal government unless
away by Congress or given up by the tribe itself are retained under the principle of residual sovereignty. A cardinal principle in judicial interpretation of treaties and statutes under the principle of residual sovereignty is that ambiguities must be resolved in favor of the tribes. Thus, Indian sovereignty may be limited only upon a clear showing of Congressional intent to extinguish or tribal intent to relinquish tribal powers.

Applying this analytical framework of residual sovereignty, the courts have validated the tribal power to regulate the use and disposition of individual property among its members; to administer a criminal justice system; to tax non-Indians doing business within reservation boundaries; to determine the extent to which the right to vote will be exercised in tribal elections; and to exclude non-Indian trespassers from the reservation.

Moreover, courts have relied on the general principles of inherent and residual sovereignty to sanction Indian jurisdiction over non-Indians as well as Indians living or doing business within the reservation. In Buster v. Wright, the appellate court cited the general principle of international law that a sovereign nation's power extends to all the inhabitants of its territory. Additionally, in holding that the tribal court is the proper forum for adjudicating claims by non-Indians against Indians for nonpay-

Congress clearly directs otherwise. See also Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir. 1957), cert. denied, 356 U.S. 960 (1958).


55. See Menominee Tribe v. United States, 391 U.S. 404, 413 (1968)("the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress"); United States v. Santa Fe R.R., 314 U.S. 339 (1941). See generally Wilkinson & Volkman, supra note 17.


57. Tom v. Sutton, 533 F.2d 1101 (9th Cir. 1976); Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975).


60. Ortiz-Barraza v. United States, 512 F.2d 1176, 1179 (9th Cir. 1975). Indian sovereignty also has been recognized in other contexts. An Indian tribe possesses sufficient independent authority over its internal affairs to accord absolute privilege to its officers for acts committed within an area of tribal control. Davis v. Littell, 398 F.2d 83 (9th Cir. 1968). Provided the Indian Civil Rights Act, 25 U.S.C. §§ 1301 to 1341 (1976), is not violated, an Indian tribe may structure its government in any form, even if the power to interpret tribal laws is vested in a tribal council rather than a tribal court. Howlett v. Salish and Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976). As sovereign entities, Indian tribes enjoy immunity from suit. They may be sued only with their consent or the consent of Congress. Lomayaktewa v. Hathaway, 520 F.2d 1324 (9th Cir.), cert. denied, 425 U.S. 903 (1975).

61. See, e.g., Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).

62. 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906).
ment of goods, the Supreme Court in *Williams* suggested that the race of the parties is not a relevant consideration in Indian jurisdictional cases: "It is immaterial that Respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." Furthermore, the Court has rejected the argument that the exercise of tribal authority over non-Indians is inappropriate because non-Indians are not eligible to participate in tribal government.

The principle that the powers of Indian tribes exist independent of congressional grant or treaty recognition was most recently reaffirmed in *United States v. Mazurie*. Pursuant to legislation allowing Indian tribes to regulate the introduction of alcoholic beverages into Indian reservations, the Shoshone and Arapaho Tribes enacted an ordinance requiring a tribal license for all retail liquor outlets within the reservation. The Mazuries' application for a license was denied, but they continued to operate the bar, prompting the initiation of criminal proceedings. The district court entered judgments of conviction but the Court of Appeals for the Tenth Circuit reversed, invalidating the delegation of congressional authority and maintaining that Indian tribes are merely private voluntary organizations with no governmental authority. In a unanimous decision, the Supreme Court upheld the delegation of authority to Indian tribes to regulate the introduction of alcoholic beverages into Indian reservations. The Court reasoned that restrictions on congressional authority to delegate legislative power decreases when the entity exercising the delegated authority possesses independent authority over the subject matter. The Court upheld the delegation of authority in *Mazurie* because Indian tribes "possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life." The Court likewise reaffirmed that the authority of Indian tribes as "unique aggregations possessing attributes of sovereignty over both their members and their territory," may properly extend to non-Indians doing business within the reserva-

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66. 18 U.S.C. § 1161 (1976). The statute provided that 18 U.S.C. § 1154 (1976), which establishes criminal penalties for the introduction of alcoholic beverages into Indian reservations, would not apply when there had been compliance with tribal ordinances regulating alcoholic beverages.
68. 419 U.S. at 556-57 (citing United States v. Curtis-Wright Export Corp., 299 U.S. 304, 319-22 (1936)).
69. 419 U.S. at 557.
Mazurie, therefore, embodies the teachings of a long line of cases establishing the inherent authority of Indian governments as both territorial and personal in nature. Furthermore, it completes a series of cases affirming that tribal powers are retained until relinquished through treaties or removed by federal legislation.

II. OLIIPHANT: A BLOW TO INDIAN SOVEREIGNTY

Central to the Court's opinion in Oliphant v. Suquamish Indian Tribe is that the exercise of criminal jurisdiction over non-Indians by Indian tribes is inconsistent with their status as political entities completely under the sovereignty of the United States. The Court reached this conclusion by starting with the premise that Indian tribes submitted to United States sovereignty when their lands were incorporated into the territory of the United States. This premise is not only unsupported by precedent, but undermines the principle of Indian sovereignty.

The Court relied principally on United States v. Rogers for its proposition that all Indian reservations are part of the United States' territory. In Rogers, a non-Indian murdered another non-Indian in territory assigned the Cherokee Nation by the United States under a removal treaty. Under the force of certain removal treaties, one group of Cherokees relinquished the right to its ancestral homelands in what is now the southeastern United States in exchange for land of the United States west of the Mississippi River.

Finding that the federal court had jurisdiction over Rogers because he was a non-Indian, the Supreme Court, in an opinion by Justice Taney, stated that the Cherokee Territory was part of the territory of the United States, held by the Cherokees with the assent and under the authority of the United States. Justice Taney cited no rule of law or precedent in support of this statement; therefore, the basis of his statement only be-

70. Id.
72. 45 U.S. (4 How.) 567 (1846).
74. Rogers contended that the federal court had no jurisdiction to try him because he had been adopted by the Cherokees and, under a federal statute, currently codified at 18 U.S.C. § 1152 (1976), federal jurisdiction did not extend to crimes committed by Indians. The Court held that a non-Indian adopted by an Indian tribe does not thereby become an Indian for purposes of the statute. 45 U.S. (4 How.) at 573.
75. Id. 572.
comes clear in light of the unique acquisition of land by the Cherokee Tribe. Unlike other tribes living on reservations in which title to an aboriginal land area was recognized by treaty, the western territory of the Cherokees had been created by a conveyance of United States land. Therefore, Rogers is incorrectly cited for the proposition that all Indian reservations are part of the territory of the United States. Indian lands cannot acquire this status by simple unilateral declaration of the Supreme Court.

The next step in the Court's analysis, that Indian tribes submitted to the sovereignty of the United States when their lands became part of its territory, suffers from a similar infirmity. As authority, the Court cited the following statement from Johnson v. M'Intosh: "[T]heir rights of complete sovereignty, as independent nations, [are] necessarily diminished." This statement, quoted only partially and out of context, was made by Chief Justice John Marshall in a discussion of the limitations placed on Indian tribes by the doctrine of discovery.

Formulated to regulate the competing interests of European nations in acquiring land in the New World, the doctrine of discovery, as outlined in M'Intosh, gave the discovering nation a pre-emptive right to acquire title to the discovered lands from Indian owners. Based on Chief Justice Marshall's use of the word "title" to describe the pre-emptive right obtained by the discovering nation, the doctrine has been erroneously interpreted to mean that the United States, by succeeding to the rights of Great Britain, acquired absolute fee simple title to all lands discovered in the Americas. A close reading of M'Intosh however, suggests that the doctrine did not purport to convey fee title to the discovering nation. Rather

77. 21 U.S. (8 Wheat.) 543, 574 (1823), quoted in 435 U.S. at 209.
78. The full quotation reads as follows:
   The [original inhabitants] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it . . . ; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

Id. at 573.
79. Id. at 573.
80. For example, Marshall says at one point: "The principle was, that discovery gave title to the government by whose subjects . . . [discovery] was made . . . which title might be consummated by possession." Id.
than undermining the Indian nations' right to the lands they occupied,\textsuperscript{82} the doctrine merely gave the discovering nation the right to purchase land from the rightful owners, to the exclusion of all other European governments.\textsuperscript{83} Thus, \textit{M'Intosh} was not concerned with the complete submission of the tribes to United States sovereignty and the acquisition of Indian land by the United States as \textit{Oliphant} suggests, but rather with the limitation on the disposition of tribal land stemming from the doctrine of discovery.

Implicit in the Court's decision is the notion that the United States acquired sovereignty over Indian tribes through conquest.\textsuperscript{84} Such a theory, however, lacks historical support. Rather than claiming power over Indian land by virtue of conquest, the United States has uniformly followed a policy of extinguishing the title of the Indian tribes only with their consent.\textsuperscript{85} This policy has been expressed in a long course of treaty-making during which tribes relinquished large tracts of land in return for guarantees that their title to reserved areas would be respected.\textsuperscript{86}

Based on the premises that all Indian land is part of the United States' territory and that the United States has sovereignty over all Indian tribes, the Court concluded that the exercise of criminal jurisdiction over non-Indians by Indian tribes is inconsistent with their status as subjugated sovereigns. In reaching this conclusion, the Court relies solely on a separate opinion by Justice Johnson in \textit{Fletcher v. Peck}.\textsuperscript{87} Characterizing Johnson's opinion as a concurrence that summarized the "nature of the limitations

\textsuperscript{82} The Court stated: "[The original inhabitants] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it . . . ." 21 U.S. (8 Wheat.) at 574. Any misunderstanding about the meaning of the doctrine of discovery should have been cleared up by \textit{Worcester v. Georgia}, 31 U.S. (5 Pet.) 515, 546 (1832), in which Chief Justice Marshall stated: "these grants [in Royal Charters] asserted a title against Europeans only, and were considered as blank pieces of paper so far as the rights of the natives were concerned."

\textsuperscript{83} Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823).

\textsuperscript{84} The Supreme Court has at least once stated incorrectly that the United States claims ownership of and sovereignty over Indian lands under a theory of conquest. \textit{See} Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).


\textsuperscript{86} \textit{See, e.g.}, Treaty between the United States and the Delaware Tribe, August 18, 1804, 7 Stat. 81, in which the Delawares ceded a large area in exchange for United States recognition of the Delawares "as the rightful owners of all the country" specifically reserved. \textit{Id.} at Art. IV. \textit{See generally} C. Thomas, \textit{supra} note 85.

\textsuperscript{87} 10 U.S. (6 Cranch) 87, 143 (1810)(Johnson, J., dissenting).
inherently flowing from the overriding sovereignty of the United States," the Court quoted the following passage from *Fletcher*: “[T]he restrictions upon the right of soil in the Indians, amounts . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves.” The limitations referred to by Justice Johnson and cited by the *Oliphant* Court again concerned the effect of the doctrine of discovery on Indian tribes rather than United States’ sovereignty over them, as claimed by the majority in *Oliphant*. Significantly, Justice Johnson’s comments were made in dissent, not in concurrence, leaving the Court with a misinterpreted dissenting opinion as the only authority for its conclusion.

In addition to the manipulation of precedent, the Court relied heavily on what it termed legislative and judicial assumptions that Indian tribes have no inherent authority to exercise criminal jurisdiction over non-Indians. The Court justified this reliance by noting that treaties and statutes in Indian law “cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.” These assumptions were apparently viewed by the Court as expressions of general policy and attitudes illuminating the historical setting of the case. Although historical perspective is helpful, the use of assumptions as an analytical device in Indian law is particularly problematic because the federal government has seldom spoken with a consistent and uniform voice. Moreover, legislative materials are generally used to clarify statutory ambiguities. Unlike the Court’s use of assumptions in *Oliphant*, the cases cited by the Court in support of its approach correctly used congressional materials pertinent to statutes that controlled the case. The

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88. 435 U.S. at 209.
89. 10 U.S. (6 Cranch) at 147, quoted in 435 U.S. at 209.
90. At issue in *Fletcher* was the validity of a conveyance by the Georgia legislature of land to which Indian title had not been extinguished. Chief Justice Marshall, for the majority, held that “the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.” 10 U.S. (6 Cranch) at 142-43. In contrast, Justice Johnson would have held that Georgia could not possibly have a fee simple interest in Indian lands because the United States had acknowledged the tribes’ “right of soil, by purchasing from them and restraining all persons from encroaching upon their territory.” *Id.* at 147. The States’ interest in Indian lands was described by Justice Johnson as nothing more than a pre-emptive right to extinguish Indian title when the tribes consented to sell, acquired under the doctrine of discovery. *Id.*
91. 435 U.S. at 206.
Court's assumptions also lack support in legislative materials and judicial decisions.

Relying primarily on the Western Territory Bill, the 1854 amendments to the Trade and Intercourse Act, and a 1960 Senate Report, the Court maintained that Congress has always assumed that Indian tribes were without authority to exercise criminal jurisdiction over non-Indians. The Western Territory Bill, however, would have created a separate Indian territory governed by a confederation of Indian tribes. The Court focused on that part of the Bill applying United States law to United States officials, travelers, and United States citizens required by treaty stipulation to reside in the Indian territory. The Court ignored the fact that the primary objective of Congress was to create a territory in which an Indian government would have jurisdiction over all permanent residents, including non-Indians. The legislative materials accompanying the Bill reveal that Congress, in fact, believed that Indian tribes could properly exercise criminal jurisdiction over non-Indians. The House Committee that reported the Bill explained its overall scheme as securing the right of self-government to each tribe with jurisdiction over "all persons and property within its limits, subject to certain exceptions, founded on principles somewhat analogous to the international laws among civilized nations." Even if the Court correctly interpreted legislative intent, the Western Territory Bill is nonetheless an unreliable indicator of congressional policy because it was never enacted.

Additionally, the Court looked to a provision in the 1854 amendments to the Trade and Intercourse Act for support. The amendment prohibited the prosecution in federal court of an Indian who had previously been divested Montana of jurisdiction over offenses on the Crow Reservation not involving Indians.

96. 435 U.S. at 201-06.  
97. Id. at 202.  
98. Section nine clearly contemplated that the new Indian government would have jurisdiction over non-Indians:  
... in all cases when a person not a member of any tribe shall be convicted of an offense, the punishment whereof by the laws of the tribe shall be death, the judgment shall be forthwith reported to the Governor, who may for good reasons suspend the execution thereof until the pleasure of the President shall be known.  
The Court reasoned that the absence of a similar provision barring retrial of non-Indians indicated a Congressional belief that Indian tribes had no jurisdiction over non-Indians. To derive such intent from this omission is far reaching in light of the purpose of the amendment. Rather than devising a comprehensive scheme to meet a pervasive problem, Congress was reacting to an isolated incident in which an Indian already tried in tribal court, was prosecuted again in federal court. Likewise, the Court's reliance on a 1960 Senate Report claiming that tribal law is not enforceable against non-Indians is questionable. No authority is cited in the Report as support for that proposition and the Court gives no reason to justify regarding it as a correct statement of the law.

A more recent and explicit expression of legislative policy suggests, in contrast to Oliphant, that Congress supports criminal jurisdiction of Indian tribes over non-Indians. In enacting the Indian Civil Rights Act of 1968, Congress specifically extended the Act's constitutional guarantees to "any person," rather than limiting its application solely to Indians. An early version of the Act applicable only to Indians was later changed to include all persons. The purpose of this change, as expressed by the Senate Subcommittee on Constitutional Rights, was to extend the guarantees of the Act to "all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians." The majority in Oliphant dismisses this change as an expression of Congress' desire to extend the Act to non-Indians "if and where they come under a tribe's criminal or civil jurisdiction by either treaty provision or act of Congress." No evidence from the legislative history of the Act is offered to support this highly speculative reading of congressional intent. Moreover, it is most unlikely that Congress would define the scope of the Act's coverage in terms of the occurrence of some uncertain future event.

The Court's finding of a judicial assumption against tribal jurisdiction over non-Indians is as unreliable as its strained interpretation of legislative
materials. In *Ex parte Kenyon*, the only authority cited by the Court to support its conclusion, a non-Indian was convicted of larceny in a Cherokee tribal court. The United States District Court for the Western District of Arkansas found that the tribal court did not have subject matter jurisdiction because the offense was committed beyond the boundaries of the Cherokee territory. Although the issue of whether an Indian tribe may exercise criminal jurisdiction over non-Indians for acts committed within the territorial jurisdiction of the Indian court was not before the court, Judge Parker stated that an Indian court may assume criminal jurisdiction only when the offender is an Indian. By reading *Kenyon* to hold that Indian courts have jurisdiction in criminal cases only if the offender is an Indian, the *Oliphant* Court elevates the dictum in *Kenyon* to the rule of the case.

In addition to relying on unsupported assumptions, the Court misapplied the rules of construction to the provisions of the Point Elliot Treaty of 1855, which governs the legal relationship between the Suquamish Tribe and the United States. Article IX of the treaty acknowledges that the Suquamish Tribe is dependent upon the United States for protection from non-Indian intruders into their territory. The Court concluded that by this treaty provision, the Suquamish recognized that the federal courts would have exclusive jurisdiction over non-Indians. In reaching this conclusion, the Court refused to apply the longstanding rule that ambiguous provisions in treaties must be resolved as the Indians would have understood them. Dismissing evidence that the Suquamish would not have equated acceptance of United States' protection with relinquishing tribal jurisdiction over non-Indians, the Court purported to apply a dif-

107. 14 F. Cas. 353 (W.D. Ark. 1878).
108. *Id.* The *Oliphant* Court attempts to lend credence to Judge Parker's comments by noting that his conclusion was reaffirmed in a 1970 Opinion of the Solicitor of the Department of the Interior. 77 Interior Dec. 113 (1970). By the Court's own admission, however, that Opinion has since been withdrawn, rendering its validity questionable. Moreover, a 1934 Solicitor's Opinion reached the opposite conclusion. See 55 Interior Dec. 14, 57 (1934)(an Indian tribe "might punish aliens within its jurisdiction according to its own laws and customs").
110. 12 Stat. at 929.
111. 435 U.S. at 207. The Court's conclusion contradicts the principle of international law, applied to the relations between Indian nations and the United States in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61, that a nation accepting the protection of another nation surrenders no attributes of its sovereignty.
113. A draft treaty considered by the parties at the negotiations contained a provision specifically recognizing United States jurisdiction over non-Indians. See *Brief for Respon-
different rule: surrounding circumstances may be relied on to clarify treaty and statutory provisions. Yet, in the final analysis, the Court failed to apply its own rule of construction because it showed no circumstances surrounding the signing of the treaty to support its conclusion.

The second provision cited by the Court involved an agreement by the Suquamish to deliver to the United States non-Indians violating United States law and seeking refuge within the Suquamish Territory. From this provision the Court drew the inference that the Suquamish agreed not to try and punish non-Indians. Such an inference is clearly inappropriate because Oliphant involved criminal jurisdiction over non-Indians who violate tribal law rather than United States law. An agreement to turn over non-Indians violating United States law is not inconsistent with the exercise of criminal jurisdiction by the tribe over non-Indians violating tribal law because two different legal systems are involved. In addition to making no effort to ascertain the Suquamish's understanding of this provision as required by rules of treaty interpretation, the Court ignored the rather obvious interpretation that this provision is a simple extradition clause inserted to conform the relations between the United States and the Suquamish to the usual international practice.

The Oliphant opinion is also suspect because it largely ignores a well-established body of case law recognizing the inherent and residual sovereignty of Indian tribes. The Court departed from the principle of residual sovereignty by ruling that Indian tribes have no inherent authority to exercise criminal jurisdiction over non-Indians because such authority is inconsistent with their status as subjugated sovereigns. In holding that tribal

dents, app. at A-20, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). This provision was omitted from the final version, but no explanation of the reasons was recorded in the minutes of the treaty negotiations. Although there is no specific evidence on this point, the logical inference is that the Suquamish intended jurisdiction over non-Indians to remain in the tribe. The Court dismissed the draft treaty as irrelevant, claiming that "it seems probable that the [Treaty] Commission preferred to use the language that had been recommended by the Office of Indian Affairs." 435 U.S. at 206-07 n.16.


115. The Court's interpretation appears to be based on its own speculation. For example, the Court says that by acknowledging their dependence on the United States, the Suquamish were "in all probability" recognizing that jurisdiction over non-Indians would be exclusively in the United States. 435 U.S. at 207.


117. 435 U.S. at 208. The Court reads this provision in conjunction with 18 U.S.C. § 1152 (1976) which extends federal enclave law to non-Indian offenses on Indian reservations.

118. The Court of Appeals for the Ninth Circuit has so construed a similar provision. Arizona ex. rel. Merrill v. Turtle, 413 F.2d 683, 686 (9th Cir. 1969).
powers may be limited by this judicially determined status, the Court directly contradicts the longstanding rule that tribal powers could be limited only by treaty stipulation or congressional enactment. The Court further departed from the principle of residual sovereignty by deciding the issue of criminal jurisdiction over non-Indians for all Indian tribes, despite the fact that the narrow issue before the Court was the criminal jurisdiction of the Suquamish Tribe over non-Indians. When the authority of an individual Indian tribe is at issue, the doctrine of residual sovereignty requires the status of that tribe to be determined separately, since particular treaties and statutes directly affect only certain tribes. Rather than focusing exclusively on the treaties and statutes that directly affect the powers of the Suquamish Tribe, the Court in Oliphant relied heavily on treaties with other tribes and broad statements of congressional and executive policy. By encompassing all Indian tribes in its decision, the Court failed to recognize the individualized nature of tribal powers and attempted to decide the issue for tribes who had no opportunity to present their case.

Thus, a close examination of the Court's analytical framework suggests that Oliphant is a result-oriented decision. Had the Court looked to policy considerations, it may have found some basis to support its decision. It is, therefore, surprising that the policy considerations guiding the Court were not more fully articulated. The Court merely implies that it would be unfair to subject non-Indians to an Indian system of justice that is based on

119. As authority for this departure from prior law the Court merely adopted a statement by the Ninth Circuit in the same case that Indian tribes "retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress." Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976). The Court's reliance on the Ninth Circuit's formulation of the residual sovereignty principle is misplaced for two reasons. First, the cases cited by the Ninth Circuit as authority furnish no support for the proposition that Indian tribes may not exercise any power inconsistent with their status. See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), notes 22-31 supra. Second, the Ninth Circuit did not apply its own formulation of the rule. Rather than analyzing the status of Indian tribes to determine whether the exercise of criminal jurisdiction over non-Indians is inconsistent with that status, it applied the traditional analysis of searching treaties and statutes for limitations on tribal powers and concluded that no treaty or statute limited the power of the Suquamish tribe to exercise criminal jurisdiction over non-Indians. 544 F.2d at 1010-12.

120. Compare Treaty with the Choctaws, Sept. 27, 1830, Art. IV, 7 Stat. 333 (1830) (the tribe's jurisdiction is limited to "the Choctaw Nation of red people and their descendants ") with the Treaty with the Delawares, Sept. 17, 1778, Art. IV, 7 Stat. 14 (1788) (provides some measure of criminal jurisdiction over non-Indians).

121. For example, the Court cites a Choctaw treaty, see note 120 supra, to support its conclusion that treaties evidence a presumption that Indian tribes had no inherent criminal jurisdiction over non-Indians. 435 U.S. at 197.

122. 435 U.S. at 211.
different customs and standards. Although a few tribal codes seek to incorporate distinctly Indian concepts of justice, most are patterned after Anglo-American legal codes,123 making the structures and procedures of Indian courts similar in many respects to non-Indian courts.124 Despite the growing similarity between Indian and non-Indian courts, however, significant differences remain. It can only be assumed that the Court in its brief statement was referring to these differences. For example, it is true that constitutional procedural protections available to defendants in Indian courts may be more limited than those available in state and federal courts.125 Although the Indian Civil Rights Act guarantees certain protections for non-Indian as well as Indian defendants,126 it does not provide all the protections contained in the Bill of Rights. One major difference is that the Act does not guarantee the assistance of counsel in criminal cases; rather, it allows defendants to obtain counsel at their own expense.127 Moreover, it is not clear whether Congress intended to apply to tribal governments the same substantive standards that the federal courts have developed in applying the Bill of Rights to state and federal governments.128 Although the procedural protections may not be identical, the Indian Civil Rights Act significantly reduced the danger that fundamental rights of non-Indians would be violated by Indian governments. Because Congress believed that Indian governments had jurisdiction over non-Indians,129 the Act should be understood as a congressional measure to ensure that the civil rights of non-Indians are not violated by tribal governments. The fact that the Act fails to detail an exhaustive list of procedural protections for defendants in Indian courts does not reduce its effectiveness; rather, it suggests that the development of specific protections should be left to the tribal courts. It cannot plausibly be argued that because the process is not complete Indian governments should be denied absolutely criminal jurisdiction over non-Indians.

Another possible objection to Indian criminal jurisdiction over non-Indians is that non-Indians are ineligible to participate in tribal government

123. See generally S. Brakel, American Indian Tribal Courts 17 (1978).
124. The Court in Oliphant expressly recognized this fact. 435 U.S. at 211-12.
129. See notes 50, 104-05 supra and accompanying text.
on many reservations. The Supreme Court, however, has expressly re-
jected the argument that the exercise of tribal authority over non-Indians
is inappropriate due to nonparticipation in tribal government.\textsuperscript{130} In so
holding, the Court implicitly recognized that the tribe’s interest in sover-
eignty outweighs the interest of non-Indians in being free from the juris-
diction of a government in which they may not participate. Finally, it has
been argued that because the quality of the administration of justice varies
greatly from reservation to reservation the exercise of criminal jurisdiction
over non-Indians is inequitable.\textsuperscript{131} This is not a valid objection because
the right to exercise sovereign authority does not depend on how well it is
exercised. Furthermore, tribal courts have improved their quality and ef-
fectiveness through training programs such as one provided by the Na-
tional American Indian Court Judges Association,\textsuperscript{132} and many tribes are
currently revising their constitutions and law and order codes.\textsuperscript{133}

To be evaluated properly, these potential objections to criminal jurisdic-
tion over non-Indians must be weighed against the strong policy consider-
ations favoring tribal jurisdiction. Primary among these is the fact that the
tribal government frequently is the only authority capable of governing the
reservation. \emph{Oliphant} dealt a blow, in a practical and legal sense, to the
efforts of Indian tribes to govern effectively the people living within the
reservation boundaries. Indian tribes now face the prospect of dealing
with large non-Indian populations immune from tribal criminal laws. In
denying the tribes criminal jurisdiction, the Court has enhanced the politi-
cal and economic power of non-Indians living and working on reserva-
tions and thereby has diminished the status of Indian tribes as the
legitimate governing authority on the reservation.

Moreover, frequently the tribal court is the only forum available in
which to prosecute non-Indians for minor offenses.\textsuperscript{134} Federal and county
prosecutors are often reluctant to institute proceedings for minor offenses
due to crowded dockets and the confusing jurisdictional division between
federal, tribal, and state governments. A Justice Department Task Force
found that because minor Indian cases are ill-suited to the federal court
system, federal prosecution is slow and uncertain.\textsuperscript{135} Thus, the exercise of

\begin{footnotes}
\item[132.] \textit{See Commission Report, supra note 1, at 165.}
\item[133.] \textit{Id.}
\item[134.] \textit{Oliphant} v. Schlie, 544 F.2d 1007, 1013-14 (9th Cir. 1976).
\item[135.] U.S. Dep’t of Justice, Report of the Task Force on Indian Matters 41
(1975) (cited in Chairman’s Ass’n Brief, \textit{supra} note 1, at 37). The Report found that United
\end{footnotes}
criminal jurisdiction over non-Indians by Indian tribes is essential to the preservation of law and order on the reservation. The Oliphant decision strikes a serious blow to this necessary judicial authority.

III. CONCLUSION

American courts have consistently recognized the inherent and residual sovereignty of Indian tribes over their people and territory. In Oliphant, the Court largely ignored this well-established body of case law and undermined traditional principles of judicial decisionmaking. The Court's conclusion, that the exercise of criminal jurisdiction over non-Indians by Indian tribes is inconsistent with their subjugated status, propounds questionable legal premises supported only by the weakest of precedent. Similarly, the Court ignored legislative materials inconsistent with its conclusion that Congress believed Indian tribes had no authority to exercise criminal jurisdiction over non-Indians, and failed to apply well-established rules of treaty interpretation.

Despite the adverse impact of the Court's decision on Indian governments, Indian tribes retain many important attributes of sovereignty. Oliphant does not preclude the exercise of sovereign power by Indian tribes over their own members and the exercise of civil jurisdiction over reservation territory. Indian tribes will continue to retain all sovereign powers not relinquished by treaty, taken away by Congress or found by courts to be inconsistent with their status. Nevertheless, the Court's holding that tribal powers may be lost by implication places a severe legal restriction on Indian sovereignty and raises the possibility of further judicial erosion of Indian rights. Thus, Oliphant must ultimately retard the efforts of Indian tribes to achieve greater governmental autonomy and to govern the reservation effectively.

Curtis G. Berkey

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States Attorneys declined to prosecute 75% of the Indian cases presented to them for the period studied. Id.

The provisions of the National Labor Relations Act,1 (NLRA or Act), reflect a policy that units of employees,2 through chosen representatives, should be able to deal with employers on an equal footing in determining the terms and conditions of their employment.3 In line with this policy, supervisory and managerial employees, typically aligned with the employer in the industrial setting, are excluded from the Act's coverage.4 Professional employees, however, are expressly covered by the Act unless their duties fall within the supervisory or managerial exclusions.5 Recent assertion of jurisdiction by the National Labor Relations Board (NLRB or Board) over private colleges and universities, accompanied by an increase in faculty organizing,6 has required the Board to determine whether uni-

1. 29 U.S.C. §§ 151 to 166 (1976). With the passage of the NLRA in 1935, Congress, in its first attempt to regulate labor relations, gave the National Labor Relations Board broad authority to regulate employer-employee relations.

2. Section 9(b) of the NLRA, 29 U.S.C. § 151 (1976), gives the Board responsibility for determining the appropriate collective bargaining unit. The Board need only determine an appropriate unit, not the most appropriate unit. See, e.g., *Wil-Kil Pest Control Co. v. NLRB*, 440 F.2d 371 (7th Cir. 1971). Unit determinations have been likened to the drawing of legislative election districts in that the composition of the unit ultimately determines the success of the union's attempt to gain bargaining representation status. See Comment, *The Appropriate Faculty Bargaining Unit in Private Colleges and Universities*, 59 VA. L. REV. 492, 494 (1973). See note 23 infra.


6. The Board assumed jurisdiction over private colleges and universities in *Cornell Univ.*, 183 N.L.R.B. 329 (1970). Substantial faculty organization had occurred prior to the *Cornell* ruling, but without federally protected labor rights, representatives had little power
versity faculty should be classified as professional employees within the Act's coverage or as supervisory/managerial employees, excluded from statutory protections. Due to the unique role of faculty in university governance, the application of industrial precedent has been difficult, and has led to inconsistent results. Nevertheless, the Board has consistently maintained the position that full-time faculty are neither supervisors nor managers under the Act, but are instead professional employees, functioning in the collegial system. Recently, in NLRB v. Yeshiva University, the Court of Appeals for the Second Circuit rejected the Board's position and held that full-time faculty are managerial employees and thus excluded from the Act's protection.

In 1974, the Yeshiva University Faculty Association filed a representation election petition seeking certification as the exclusive bargaining representative for a unit essentially composed of the full-time faculty. In to force universities to bargain collectively. Comment, supra note 2, at 492 n.6 (1973). As of 1968, only one of 1400 private colleges had adopted a collective bargaining agreement. See Ferguson, Collective Bargaining in Universities and Colleges, 19 LAB. L.J. 778, 803 (1968). Labor organizations currently administer faculty collective bargaining agreements at over 500 college campuses. NLRB v. Yeshiva Univ., 582 F.2d 686, 697 n.13 (2d Cir. 1978), cert. granted, 99 S. Ct. 1212 (1979).

7. In contrast to a typical industrial setting, the system of governance recognized in American higher education gives the faculty a significant role in recommendations on faculty appointments, promotion, tenure, and dismissal, as well as in matters of educational policy. See Finkin, The Supervisory Status of Professional Employees, 45 FORDHAM L. REV. 805, 817 (1977). Compare Kirp, Collective Bargaining in Education: Professionals as a Political Interest Group, 21 J. PUB. L. 323, 327 n.20 (1972) ("[F]aculty members have a role... that reaches far beyond even the wildest dream of the most radical unions") with Blackburn, Should Faculty Organize? in FACULTY POWER: COLLECTIVE BARGAINING ON CAMPUS 117, 123 (T. Tice ed. 1972) ("[F]aculty power is a myth. The notion is a smoke screen covering where the real power resides—in boards and administrations.").


10. NLRB v. Yeshiva Univ., 582 F.2d at 688.

11. When a petition has been filed, section 9(c)(1) of the NLRA, 29 U.S.C. § 159(c)(1), requires the Board to conduct an investigation to provide for a hearing and, upon a finding that a question concerning representation exists, to direct an election.

12. 582 F.2d at 688. The University is composed of 12 schools and colleges and has approximately 209 full-time and 150 part-time faculty members.
opposing the petition, Yeshiva University contended that its faculty members were supervisory or managerial personnel as a result of their participation in collegial decisionmaking. Relying on its rationale in past decisions, the Board rejected the supervisory/managerial argument and found the Yeshiva faculty to be professional employees entitled to the Act's coverage. Consequently, following an election the Board certified a bargaining unit composed of the full-time faculty.

The university, however, refused to bargain with the newly certified union, thereby committing an unfair labor practice in violation of the Act and forcing the Board to apply to the Court of Appeals for the Second Circuit to enforce its bargaining order. As an affirmative defense, the university restated its supervisory/managerial exclusion argument raised unsuccessfully in the representation proceeding. The Second Circuit, in the first court decision to determine the issue squarely, agreed

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14. In rejecting the supervisory/managerial argument, the Board takes the position that faculty members are professional employees under the Act; that their participation in collegial decisionmaking is on a collective rather than an individual basis; that their authority is exercised in the faculty's interest, rather than in the interest of the employer; and, that final authority rests with the university board of trustees. See cases cited in note 9 supra.

15. Alternatively, the university sought a unit consisting of all full-time and regular part-time faculty, excluding as supervisory and or managerial personnel: department chairpersons, members of the university's Committee on Academic Priorities and Resource Allocation, members of the Faculty Review Committee, assistant deans, principal investigators of research and training grants, and faculty to be terminated as of the date of the election. 221 N.L.R.B. at 1054. The union wanted to include all but the part-time faculty in the bargaining unit. The Board substantially agreed, and excluded as supervisors only the principal investigators from the unit of full-time faculty. NLRB v. Yeshiva Univ., 582 F.2d at 689 n.2.

16. Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1)(1976), makes it unlawful for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by the Act. Under section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5)(1976), it is unlawful for an employer to refuse to bargain collectively with employee representatives selected by a majority of an appropriate bargaining unit.


18. NLRB v. Yeshiva Univ., 582 F.2d at 689. A representation proceeding, e.g., a unit determination, cannot be judicially reviewed because it does not constitute a final order under the Act. Consequently, a unit determination is not reviewable until an employer refuses to bargain with a union which has won an election. See R. GORMAN, BASIC TEXT ON LABOR LAW: UNIFICATION AND COLLECTIVE BARGAINING 59-60 (1976).

19. The Court of Appeals for the First Circuit has twice addressed related issues of faculty status. In NLRB v. Wentworth Inst., 515 F.2d 550 (1st Cir. 1975), the Institute argued that all faculty at all institutions of higher learning were excluded from the Act. The court rejected this far-reaching argument and found that neither the Institute's faculty nor its committee exercised substantial management or supervisory authority, either individually or collectively. In Trustees of Boston Univ. v. NLRB, 575 F.2d 301 (1st Cir.) petition for cert. filed, 47 U.S.L.W. 3014 (U.S. July 11, 1978)(No. 78-67), the university argued that particular
with the university and denied enforcement of the Board’s order. Judge Mulligan, writing for the unanimous three-judge panel, reasoned that faculty members who are responsible for determining the central policies of the institution merited managerial status under the Act. Acknowledging that Board unit determinations were generally accorded great weight, the court nevertheless invalidated the Board’s finding, barring the faculty from the Act’s protection. In rejecting the Board’s inclusion of university faculty under the Act, the Second Circuit was critical particularly of the Board’s lack of explanation for its position. Although an examination of the Board’s decisions suggests that this criticism has merit, close scrutiny of Yeshiva indicates that the court similarly failed to base its position on the policies of the Act or the realities of the role of faculty in today’s universities.

I. THE NLRB ARRIVES ON CAMPUS

Initially, in determining the size, scope and composition of bargaining units, the NLRB excluded as supervisors or managers those individuals who lacked a community of interest with units of rank and file employ-

chairpersons and not the entire faculty were supervisors. The court rejected this argument, finding that the chairpersons’ recommendations were not effective nor made in the interest of the employer.

20. NLRB v. Yeshiva Univ., 585 F.2d at 698. Judge Mulligan was formerly dean of the law school at Fordham University where the university raised the supervisory/managerial argument in a similar faculty representation proceeding. See Nielsen, Yeshiva: An Outrageous Decision, THE AMERICAN TEACHER, Sept. 1978, at 4.

21. 582 F.2d at 702-03. A Board determination that an individual is an employee under the Act will stand if it has warrant in the record and a reasonable basis in the statute. NLRB v. Hearst Publications Inc., 322 U.S. 111, 131 (1944); cf. NLRB v. Mercy College, 536 F.2d 544, 550 (2d Cir. 1976)(Board’s unit determination receives more than the usual weight). But see Niagara Univ. v. NLRB, 558 F.2d 1116, 1118 (2d Cir. 1977) (closer scrutiny will result when the Board has acted inconsistently with prior rulings).

22. See 582 F.2d at 698 n.14 (Board’s position is without analysis or citation to pertinent administrative decisions, judicial precedents, or legislative history).

23. The Act provides no guidance as to unit determinations. Therefore, the Board relies on past rulings and looks at the circumstances of each case in light of Board policy. See Note, Collective Bargaining by University and College Faculties Under the National Labor Relations Act, 36 OHIO ST. L.J. 71, 77 (1975). Generally, employees who share a “community of interest” with respect to the terms and conditions of employment will comprise an employee unit. The Board considers the following factors: (1) the history of collective bargaining; (2) the extent of union organization; (3) the degree of functional integration of the production process; (4) the skills and duties of the employees; (5) common supervision; and (6) interchangeability and other contact among employees. F. BARTOSIC & R. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR, 82 (1977). When there is a question of professional status or craft cohesion, the employees’ wishes are considered. Moore, The Determination of Bargaining Units for College Faculties, 37 U. PITT. L. REV. 43, 46 (1976).
This policy did not foreclose coverage by the Act because the Board permitted some of these employees to form a separate bargaining unit. Prompted by dissatisfaction with a Board decision permitting foremen to form a separate bargaining unit, Congress excluded supervisors from the Act's coverage through the 1947 Taft-Hartley amendments. The amendments broadly define supervisors as “individuals” who possess authority to recommend or implement, “in the employer’s interest,” measures to control or direct other employees. The purpose of the exclusion was two-fold: to prevent loss of employer control through subjecting supervisors to union influence, and to protect the union from possible domination by agents of the employer. Even though the statutory amendments did not exclude managerial personnel, the Board continued to exclude managers who “formulate, determine and effectuate an employer’s policies” from the rank and file unit, but allowed some managerial personnel to form their own unit. Nevertheless, to conform with the statutory exclusion of supervisors, the Supreme Court in \textit{NLRB v. Bell Aerospace Co., Division of}\n


27. Section 2(11) of the NLRA, 29 U.S.C. § 152(11) (1976), defines a “supervisor” as: any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action if . . . the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment (emphasis added).

The requirements have been read disjunctively, so that possession of any one of the criteria will result in supervisory status. \textit{See}, \textit{e.g.}, NLRB v. Metropolitan Life Ins. Co., 405 F.2d 1169, 1173 (2d Cir. 1968).


29. \textit{See} Eastern Camera & Photo Corp., 140 N.L.R.B. 569, 571 (1963); Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946). The precision of the statute’s definition of supervisor has not been equaled in either judicial or Board verbal formulations of managerial status; this may explain why the Board has tended to blur the distinction between the two. \textit{See} Finkin, \textit{supra} note 8, at 614.

30. At one point the Board specifically held that managers were not entitled to any of the protections of the Act. Swift & Co., 115 N.L.R.B. 752 (1956)(Board refused to create a separate unit for managerial employees). The Board later reversed itself, finding that managerial employees were entitled to bargaining rights unless they shaped or implemented labor relations policies for their employer. North Ark. Elec. Coop., Inc., 185 N.L.R.B. 550, 551 (1970), \textit{enforcement denied}, 446 F.2d 602 (8th Cir. 1971). For an excellent discussion of the
Textron, Inc. recently held that all managerial employees were excluded from the Act's protection.\textsuperscript{31}

At the same time Congress excluded supervisors from the Act's coverage, it specifically included professional employees.\textsuperscript{32} Since work which is based on professional competence necessarily involves consistent exercise of discretion and judgment, the professional employee inclusion and the supervisory exclusion overlap. Congress, however, did not distinguish between the two groups, and Bell Aerospace likewise failed to instruct the Board and the courts in distinguishing between managerial and professional employees.\textsuperscript{33} Consequently, the Board faced the responsibility of resolving the tension between these overlapping provisions in its bargaining unit determinations.

The inherent difficulty in reconciling these conflicting employee classifications is enhanced in the context of the university setting. Because educational policymaking is diffuse and often vested in groups, it is difficult for the Board to determine exactly who is making supervisory or managerial decisions within the meaning of the Act.\textsuperscript{34} Thus, when the Board departed from two decades of tradition to assert jurisdiction over private colleges and universities in Cornell University,\textsuperscript{35} it invited consideration of faculty confused status of managerial personnel, see NLRB v. Bell Aerospace Co., Div. of Textron, Inc., 475 F.2d 485 (2d Cir. 1973), rev'd in part, 416 U.S. 267 (1974).

\textsuperscript{31} 416 U.S. 267 (1974). In Bell Aerospace, the Board certified a unit comprised of buyers in Bell's purchasing and procurement department, rejecting the employer's contention that they were managerial employees. A divided Supreme Court held that Congress implicitly excluded all managerial employees from the Act and that the Board was "not now free" to limit the exclusion to those employees whose union activity might present a conflict of interest. Id. at 289. The decision has been heavily criticized for its strained construction of the consequences that would attend unionization of managerial employees. See Barney, Bell Aerospace and the Status of Managerial Employees Under the NLRA, 1 IND. REL. L.J. 346 (1976).

\textsuperscript{32} Section 2(12) of the NLRA defines professional employees as:
any employee engaged in work (i) predominantly intellectual and varied in character . . . (ii) involving the consistent exercise of discretion and judgment . . . (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning . . . .

The Board's cases indicate that it reads these requirements conjunctively, usually demanding the presence of one or more of the four criteria. See Comment, supra note 2, at 497. Compare § 2(12) with § 2(11) supra note 27.

\textsuperscript{33} See Comment, supra note 24, at 113-14. See also Brief for the National Labor Relations Board at 19 n.10, NLRB v. Yeshiva Univ., 582 F.2d 686 (2d Cir. 1978), cert. granted, 99 S. Ct. 1212 (1979) [hereinafter cited as NLRB Brief].

\textsuperscript{34} See Comment, supra note 2, at 499-500.

\textsuperscript{35} 183 N.L.R.B. 329 (1970). The decision that colleges and universities fell outside the
status under the Act. Nonetheless, since Cornell involved bargaining units of primarily blue-collar and clerical workers, neither the parties nor the Board made reference to its implications for university faculty. As a result, the status of organizational rights of university faculty remained an open question after Cornell.

One year later, the Board addressed this question in C.W. Post Center of Long Island University. In 1970, the United Federation of College Board's jurisdiction was initially made in Trustees of Columbia Univ., 97 N.L.R.B. 424, 427 (1951) (Board jurisdiction not asserted over educational institutions when activities noncommercial and intimately connected with charitable and educational activities). See NLRA § 14(c)(1), 29 U.S.C. § 164(c)(1) (1976) (Board may decline jurisdiction where the effect of a labor dispute on commerce is not sufficiently substantial to warrant exercise of its jurisdiction). In 1970, however, the Board was troubled by the workability of this distinction since universities' operations had spiraled and were almost always commercial in character. 183 N.L.R.B. at 332. Additionally, the Board, influenced by the failure of states to enact labor relations legislation and increased federal involvement in higher education, reasoned that educational employees should be afforded the same protection as employees in the profit-making sector. See Note, supra note 23, at 74.

Interestingly, it was the university administration who urged the Board to assert jurisdiction in Cornell. This oddity is explained by the fact that a petition had been filed against the university with the state labor relations board. Since state law appeared to favor unions and the NLRA more evenly balanced employer-employee interests, the university sought jurisdiction under the federal Act. See Kahn, supra note 8, at 94. Cornell University's position was extremely unpopular with universities in states with no state act or labor relations board. Ferguson, Private Institutions and the NLRB in Faculty Power: Collective Bargaining on Campus 59, 60 (T. Tice ed. 1972).

Since jurisdiction was the major issue in the case, the Board's decision was primarily devoted to changing economic and sociological factors mandating assertion of jurisdiction. See Kahn, supra note 8, at 91 n.102. See note 35 supra.

In determining the appropriate nonfaculty bargaining unit, the Board indicated, in dicta, that it considered its industrial-oriented determination principles as reliable in the educational context as in the industrial. Cornell Univ., 183 N.L.R.B. 329, 336 (1970). Subsequently, the Board denied a petition filed by the American Association of University Professors requesting the Board to establish general rules for faculty collective bargaining. The Board feared that adoption of inflexible rules for units of teaching employees would prevent the Board from adapting its approach to a highly pluralistic set of conditions. See Note, supra note 23, at 78-79. The Board rarely proceeds by rulemaking and has been heavily criticized for not doing so in the faculty cases. See Menard & DiGiovanni, NLRB Jurisdiction Over Colleges and Universities: A Plea for Rulemaking, 16 WM. & MARY L. REV. 599 (1975); Kahn, supra note 8.

Also left unanswered by Cornell was the appropriate dollars-volume amount necessary to invoke Board jurisdiction. Six months later, pursuant to a rulemaking procedure, the Board announced it would assume jurisdiction over any private, nonprofit university with a gross annual income of at least $1 million. 29 C.F.R. § 103.1 (1977). The Board estimated that this standard would bring 80% of all private colleges and universities and 95% of all nonprofessional personnel within the reach of the Act. 35 Fed. Reg. 18371 (1970).
Teachers filed representation petitions seeking elections among the faculty at C.W. Post. Under university regulations, the full-time faculty had the power and responsibility to formulate and recommend student admissions and curriculum criteria as well as faculty matters such as promotion, tenure, and dismissal. Its recommendations on these matters were reviewable by university officials and finalized by the board of trustees. The university first argued that the Board's jurisdiction, if asserted over universities, should not include professional personnel. The Board rejected this argument, reasoning that the individuals involved "have the usual incidents of the employer-employee relationship." In the alternative, the university asserted that the unique status of faculty personnel required the application of principles different from those applied in unit determinations in industry. Finding that no practice of collective bargaining in the academic field mandated a modification of ordinary unit determination principles, the Board also rejected this contention and proceeded to consider the issue of unit determination.

In addressing this issue, the university argued only that the deans and department chairpersons should be barred from the unit under the supervisory exclusion. While agreeing that these faculty members exercised sufficient authority in hiring and personnel matters to qualify as supervisors, the Board also set forth its views on the supervisory status of faculty members in general under the Act. Acknowledging that it was entering into an uncharted area, the Board stated that the "policymaking and quasi-supervisory authority which adheres to full-time faculty status but is exercised by them only as a group does not make them supervisors within . . .

40. C.W. Post Center, 189 N.L.R.B. 904, 905 (1971).
41. Id. at 904. The consensus of opinion is that such an argument requiring a distinction between categories of professional employees is legally impermissible. In assuming jurisdiction over university employees in Cornell, the Board was required to assume jurisdiction over professional employees of higher education since section 14(c)(1) of the NLRA, 29 U.S.C. § 164(c)(1) (1976), speaks of jurisdiction over classes of employers and does not differentiate among types of employees. See Kahn, supra note 8, at 85 n.79, 91. This argument was later made in Fordham Univ., 198 N.L.R.B. 134 (1971), and summarily dismissed by the Board.
42. C.W. Post Center, 189 N.L.R.B. 904, 905 (1971). The Board reached this conclusion by examining faculty cases decided by state labor relations boards which had been cited by the university. Id. at 905 n.7. See NLRA § 2(2), 29 U.S.C. § 152(2) (1976)(Board does not have jurisdiction over political subdivisions of states).
43. The issue of whether all faculty were supervisory/managerial was raised at least tangentially. Finkin, supra note 8, at 612. Professor Finkin contends that the Board reached beyond the specific arguments put forth by the university and that its conclusion must be considered dictum. Id. at 613. But see Kahn, supra note 8, at 121: "Despite the holding in C.W. Post . . . "(emphasis added).
the Act, or managerial employees."44 Finding that full-time faculty members "qualified in every respect" as professional employees, the Board determined the appropriate faculty unit to include full-time and part-time faculty,45 but to exclude department chairpersons as supervisors.46 As the first Board decision on the issue, C.W. Post set the precedent that faculty as professional employees fall within the statutory umbrella and that their possession of quasi-supervisory authority on a collective basis is not grounds for their exclusion within the supervisory/managerial exclusions.

Nevertheless, university administrations in subsequent representation proceedings vigorously argued that entire faculties were composed of managerial or supervisory employees and thus devoid of collective bargaining rights.47 In Fordham University, for example, the university attempted to support this contention by compiling a detailed record showing faculty members' authority in hiring, promoting, adjusting grievances, and other

44. C.W. Post Center, 189 N.L.R.B. at 905 (emphasis added). See note 27 supra.
45. The Board's handling of part-time faculty has provided critics with a prime illustration of how its industry rules fail in a university setting. For 40 years, the Board has maintained a policy in the industrial sector of including part-time and full-time employees in the same unit. See Menard, supra note 4, at 938. Consequently, the Board included part-time faculty in the unit in C.W. Post and succeeding cases. See, e.g., University of New Haven, Inc., 190 N.L.R.B. 478 (1971). Due to problems encountered by the Board surrounding the part-time faculties at Catholic, Fairleigh Dickenson and New York Universities, the Board sought additional information through the rare procedure of consolidated oral argument. See Kahn, supra note 8, at 110. Ultimately, the Board reversed itself in New York Univ., 205 N.L.R.B. 4 (1973), finding differences in compensation, participation in university governance, tenure eligibility and working conditions too substantial to include part-time and full-time faculty in the same unit.
46. The status of department chairpersons is probably the most unique unit determination problem. Note, supra note 23, at 80. The Board included chairpersons in the faculty unit at Fordham, NYU, Detroit, Miami, and Northwestern. Chairpersons were excluded, however, at C.W. Post, Adelphi, Syracuse, Fairleigh Dickenson, and Point Park College. According to two commentators' analyses of these decisions, if the chairpersons are no more than first among equals, selected by colleagues to represent the faculty interests in negotiations with the administration, they are included in the unit. If they are appointed by the administration to supervise the department as the administration sees fit, then they are excluded. If they are neither, the Board balances their interests to determine whether they are closer to the university or the faculty. Pollitt & Thompson, Collective Bargaining on the Campus: A Survey Five Years After Cornell, 1 INDUS. REL. L.J. 191, 231 (1976).
47. Finkin, supra note 8, at 613 (citing New York Univ., 205 N.L.R.B. 4 (1973); Manhattan College, 195 N.L.R.B. 65 (1972); Fordham Univ., 193 N.L.R.B. 134 (1971)). Manhattan College spent over 60 pages in its brief arguing that its faculty should be excluded because faculty members individually exercised supervisory authority and/or constituted the management of the college. G. Bodner, The No Agent Vote at NYU: A Concise Legal History, at 11 (Academic Collective Bargaining Information Service Special Report No. 9, Aug. 1974) (available from ACBIS, 1818 R Street, N.W., Washington, D.C. 20009). Mr. Bodner is presently Labor Counsel for Yeshiva University.
areas of academic life. Although admitting their important and sometimes determinative role in academic matters, the faculty union argued that these were not areas of managerial or supervisory authority, but rather matters within the ambit of a professional group’s expertise. Stressing that the faculty exercised its role in policy determination only as a group, the Board relied upon C.W. Post and rejected the university’s supervisory argument. Alternatively, the university argued that all department chairpersons and faculty members on the policymaking committees were supervisors. Because committee members were elected by faculty to represent it as a whole, the Board again reasoned that faculty members were not “individual” supervisors within the meaning of the statute, since “no one faculty representative can make the policy decisions in question.” In addition, the Board distinguished department chairpersons at Fordham from those at C.W. Post. Finding that other faculty members at Fordham viewed chairpersons as representatives of the faculty, rather than of the administration, the Board refused to exclude them as supervisors. Thus, in Fordham, by including departmental chairpersons in the faculty unit, the Board seemed to focus on another supervisory requirement — that authority be exercised in the interest of the employer.

Without departing from its position in C.W. Post and Fordham, the Board, for the first time, in Adelphi University, admitted its difficulty with applying rules governing industrial employees to the university setting.

49. Kahn, supra note 8, at 121.
51. Id. at 138. Additionally, the Board noted that: (1) tenure, promotion, and appointment decisions were not made by chairpersons alone but by the faculty of the department as a group; (2) chairpersons views reflected their superior knowledge and experience and not the possession of authority as contemplated by the statute; (3) salary recommendations were subject to review at three levels of authority; and, finally, (4) that chairpersons views were not conclusive. Id. Member Kennedy dissented in part, finding the chairpersons’ situation at Fordham “substantially akin to that at C.W. Post.” Id. at 140. See note 46 supra.
52. See note 27 supra. Accord, University of Miami, 213 N.L.R.B. 634 (1974)(faculty not supervisors under Act because collegial decisionmaking not exercised in the interest of employer). This rationale has been severely criticized since many believe that faculty and university interests are one and the same. See Kahn, supra note 8, at 68, quoted in NLRB v. Yeshiva Univ., 582 F.2d at 700-01. Since much faculty authority is directed toward improving educational and institutional excellence to attract better students and faculty, it is argued that improved academic status benefits both the scholar and the administration. But see Northeastern Univ., 218 N.L.R.B. 247, 257 n.26 (1975) (faculty and institutional interests may not always be synonymous, particularly where financial limitations curtail academic programs).
53. Adelphi Univ., 195 N.L.R.B. 639, 648 (1972). The Board for the first time also applied its 50% rule to determine if the department chairpersons were supervisors. This rule, which originated in an industrial context, states that a supervisor of nonunit employees will
Rather than arguing that the entire faculty fell within the supervisory exclusion, the Adelphi administration limited its challenge to members of the personnel committee which decided matters of tenure, promotion, sabbaticals, and removal, as well as members of the committee responsible for investigating faculty grievances. Recommendations of both committees went to the board of trustees who almost always accepted them.\(^5\) Although acknowledging that these committees had "considerable and effective authority with respect to a wide range of actions affecting the status of the university's professional personnel," the Board refused to categorize faculty committee members as supervisors.\(^5\) Stopping short of declaring the unique role of faculty in university governance and the Act's professional and supervisory provisions irreconcilable, the Board conceded that the concept of collegiality does not "square with the traditional authority structures with which this Act was designed to cope" and that a "genuine system of collegiality would tend to confound us."\(^5\) The Board, nevertheless, justified its use of industrial principles by distinguishing the faculty units in Adelphi and Post from a genuine system of collegiality in which ultimate authority rests with the peer group and not with the board of trustees.\(^5\)

Such frankness on the part of the Board in Adelphi encouraged university administrations to believe that the Board might reconsider its newly established precedents. This belief, however, proved to be unfounded. In New York University,\(^5\) the Board rejected an argument that the faculty's participation on committees and in the faculty senate attested to their supervisory authority. Reasserting that the supervisory issue was governed by its decision in Post, the Board noted that any implication to the contrary in Adelphi was unwarranted.\(^5\) The Board reached this conclusion by excluding from the Act's coverage only if the supervisory functions account for more than 50% of the employee's time. See Menard, supra note 4, at 951. See generally Great W. Sugar Co., 137 N.L.R.B. 551 (1962).

\(^5\) 195 N.L.R.B. at 647, 648.

\(^5\) Id. at 648.

\(^5\) In an important and controversial footnote, the Board noted that the delegation of such functions to elected groups which, in the industrial setting, separated managerial and employee interests, could jeopardize their existence under the Act. The Board, however, refused to decide this issue in the context of a representation proceeding. Id., at 648 n.31.

\(^5\) Member Kennedy forcefully opposed the majority's failure to distinguish between the faculty role in C.W. Post and Adelphi. He noted that the Adelphi personnel committee consisted of 11 members, whereas the entire 600 member faculty at C.W. Post shared personnel authority. See Note, supra note 23, at 84.


\(^\) Id. at 5. Alternatively, NYU argued that because it lacked control over the manner in which the faculty carried out their primary educational responsibilities, the faculty fell within the Act's independent contractor exclusion. See N.L.R.A. § 2(3), 29 U.S.C. § 152(3)
despite the fact that the university sought to distinguish itself as a "mature university" rather than a mere teaching institution. This distinction is grounded upon the notion that mature, academically superior institutions, usually private four-year liberal arts colleges in which the faculty share authority with the administration, are particularly ill-suited to the management-employee dichotomy. \(^6\) Unable to detect any critical distinction between the faculty role at New York University and that of the faculties in the earlier cases, the Board refused to deviate from precedent. \(^6\)

The "mature university" distinction was again rejected by the Board in *Northeastern University*, despite the university's attempt to demonstrate that its faculty role was different and more extensive than those previously examined by the Board. \(^6\) In a discussion of faculty managerial/supervisory status unequaled in any Board opinion, Member Kennedy, concurring and dissenting in part, distinguished professional authority from bureaucratic authority, finding that only the latter connoted managerial status. Reasoning that basic policy decisions are made by those with bureaucratic authority, he noted that professional authority is necessarily exercised by experts in a particular field. He concluded that Northeastern and many other universities have parallel authority structures: bureaucratic authority exercised by the administration and board of trustees, and the professional authority exercised by the faculty. \(^6\)

Thus, despite repeated attempts by universities to argue the inapplicability of industrial precedents and to remove their faculties from the Act's protections, the Board continued to reject the supervisory/managerial argument. Instead, it relied upon the evolving legal principles of the prior cases — that the faculty are professional employees within the Act; that their possession of quasi-supervisory authority on a collective basis does not make them "individual" supervisors; that their authority is exercised in

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(1976). Noting that educational courses were subject to certain university restrictions, the Board found that the faculty members lacked independent freedom required for the exclusion. *See* G. Bodner, *supra* note 47, at 12.

\(^6\) See *Kahn*, *supra* note 8, at 69-74.


\(^6\) Northeastern Univ., 218 N.L.R.B. 247 (1975). Northeastern also attempted to halt the faculty's petition for certification under the "contract bar" doctrine by alleging that a collective bargaining contract already existed on campus. The university argued that the faculty senate was the elected bargaining representative and the faculty handbook the equivalent to a collective bargaining agreement. The Board rejected this argument because the faculty senate functioned in an advisory capacity and made recommendations totally different from demands advanced by a union. *Id.* at 248. *See generally* Pollitt & Thompson, *supra* note 46, at 220 n.194.

\(^6\) 218 N.L.R.B. at 257. This distinction was originally made in J. BAlDRIDGE, POWER AND CONFLICT IN THE UNIVERSITY 114 (1971).
their own interest, not in the interest of the employer; and that final authority rests with the board of trustees. The Board has consistently relied upon these four legal principles in faculty unit determinations, and to date has never found them to confer managerial or supervisory status on the faculty as a whole.

Six months after Northeastern, the identical language and case law was cited in Yeshiva University in response to the managerial/supervisory argument. Unlike previous Board cases defining the status of faculty under the Act, however, the Yeshiva decision was overturned on appeal.

II. NLRB v. Yeshiva University: A Questionable Interpretation

The decision in NLRB v. Yeshiva University came as a surprise to members of the academic community. The managerial/supervisory argument was presumed settled since the Board had refused to reconsider its position and its conduct had received tacit approval in the court of appeals. Additionally, Board unit determinations are rarely disturbed on appeal. Nevertheless, the Second Circuit made no effort to conceal its displeasure with the Board's rigid application of industrial principles and demanded that the Board's reasoning withstand "closer scrutiny." After examining the four legal premises dictated by precedent and applied in Yeshiva, the court found the decision unsupported by the record and lacking in analysis.

First, the court assailed the Board's premise that full-time faculty are professional employees as conclusory. Although acknowledging that the

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64. Yeshiva Univ., 221 N.L.R.B. at 1054 n.5.
66. See note 19 supra.
67. See note 21 supra. Particularly during the past 15 years, courts of appeals have rarely overturned Board determinations regarding nonmanagerial status. See Barney, supra note 31, at 378. Cf. NLRB v. Mercy College, 536 F.2d 544, 550 (2d Cir. 1976)(Board's unit determination receives more than usual weight).
68. 582 F.2d at 702 n.21, 703. The Second Circuit first announced this "closer scrutiny" test in Niagara Univ. v. NLRB, 558 F.2d 1116, 1118 (2d Cir. 1977), which involved the exclusion of religious faculty from a bargaining unit.
69. The court reasoned that the Board had never found professional status per se to preclude managerial status. 582 F.2d at 697. Although the court's point is technically correct, the Board cases cited to support this position are distinguishable because they involved
faculty's discretion over their courses and teaching put them squarely within the professional inclusion, the court found that the faculty's extensive control over curriculum, admissions, tuition, rank, salary and tenure matters also excluded them as supervisory/managerial personnel. Noting the tension between the professional inclusion and the supervisory exclusion, the court refused to accept the Board's rationale that while the activities at Yeshiva might suggest supervisory/managerial status in other contexts, they did not in an educational institution. Finding the legal justification for such a distinction unclear, the court concluded that in addition to exercising professional expertise, the faculty were "substantially and pervasively operating the enterprise." 

The Second Circuit was even more critical of the Board's position that the collective authority of full-time faculty precluded a finding of supervisory/managerial status. It was noted that in Adelphi, the Board had conceded that its position arose not from precedent, but from "its puzzlement in attempting to apply to the unique university governance structure terms which were designed to cope in the typical organizations of the commercial world." Acknowledging that a literal reading of the "individual" language in the supervisory exclusion would not encompass the collective control exercised by the faculty either in concert or through committees, the court nonetheless was troubled by the Board's failure to explain its rationale. The court noted that although collective supervision was not considered by Congress, group action frequently is encountered in modern corporate decisionmaking. Consequently, it reasoned that excluding individuals exercising collective authority as supervisors is an equally realistic construction of the Act. The court, however, chose not to resolve this point, there being no "individual" requirement in the concept of manage-
cial employees.\textsuperscript{77}

The court also evaluated the Board's criterion that full-time faculty act on their own behalf rather than in the interest of the employer. In an attempt to expose the differences in university-faculty interests, the Board, in its brief, focused on the distinction between professional and bureaucratic authority.\textsuperscript{78} The Board emphasized that faculty members cooperate for their mutual benefit in exercising their professional discretion collectively; that the weight and respect accorded the faculty's views in their areas of expertise are independent of their position in university governance; and that any input in the areas of personnel and budget similarly arises from their professional concern with the academic quality of the institution.\textsuperscript{79} The court, however, was unconvinced by the Board's efforts to show that collegial action by peers in regard to their own conditions of employment was a circumstance peculiar to institutions of higher learning and not action in the interest of the university employer.\textsuperscript{80} Instead, the court offered one commentator's assessment of the way in which universities such as Yeshiva function, positing that there is no bright line between the interests of administrators and faculty whose common goal is to better the institution as a place of learning.\textsuperscript{81} Even assuming that the faculty's determinations on personnel, curriculum, admissions and other policy issues were motivated by their own best interests, the court concluded that the fact that the board of trustees rarely interfered in faculty decisions indicated that the interests of the faculty and the university were almost always coextensive.\textsuperscript{82}

Finally, the court summarily dismissed the Board's rationale that faculty are not supervisory/managerial employees because final authority rests in the board of trustees. The court reasoned that in industry, control by a

\textsuperscript{77} 582 F.2d at 699. Although disapproving the Board's statutory interpretation of "employee" status for a group not contemplated by the Act, the \textit{Yeshiva} court did not hesitate to adapt the statute to a similarly unanticipated group—modern corporate decision-makers.

\textsuperscript{78} NLRB Brief, \textit{supra} note 33, at 23. See text accompanying note 63 \textit{supra}. The Board again highlighted this distinction in its petition for certiorari. See NLRB Petition for Certiorari at 20-21, NLRB v. Yeshiva Univ., 582 F.2d 686 (2d Cir. 1978), \textit{cert. granted}, 99 S. Ct. 1212 (1979) (although playing an important role in devising curriculum and standards and selecting its own members, faculty do not generally advocate management's interests nor are they advised that they are management's representatives in making their decisions) [hereinafter cited as NLRB Petition].

\textsuperscript{79} NLRB Brief, \textit{supra} note 33, at 23.

\textsuperscript{80} 582 F.2d at 700.

\textsuperscript{81} 582 F.2d at 700-01 (quoting Kahn, \textit{supra} note 8, at 68). See note 52 \textit{supra}.

\textsuperscript{82} 582 F.2d at 700. \textit{But see} NLRB Petition, \textit{supra} note 78, at 24 (faculty-administration agreement is the result of a continuous process of discussion, negotiation and compromise; thus, faculty persuasiveness is no ground for concluding that it acts as management's representative).
board of directors never precluded the Board from finding supervisory/managerial employees. Furthermore, the court noted that this rationale conflicted with statutory language of the supervisory exclusion which, by reference to those who have power “effectively to recommend,” envisioned review by some higher authority.

Thus, intently critical of the Board’s dogmatic reliance upon industrial legal principles, the court invalidated them, one by one, and found the full-time Yeshiva faculty to be managerial employees excluded from the Act’s protection. From a strictly mechanistic perspective, the Second Circuit’s decision is arguably correct, given the overlap between the duties of professional, supervisory, and managerial employees, as well as the unique role of faculty in university governance. Nonetheless, the supervisory/managerial criteria are meaningless unless they are examined in light of the realities of the employee’s work environment and the policies of the Act. In reviewing the Board’s interpretation of faculty status under the Act, the court failed to evaluate these important considerations.

The outcome in Yeshiva and other university cases is influenced by whether or not the decisionmaker perceives faculty collective bargaining as a tool to strengthen university governance or as a weapon which will ultimately destroy it. There are widely divergent views on this issue. Some believe that collective bargaining and concepts of shared authority unique to university governance can co-exist, that the Board can accommodate its labor principles to the academic’s unique status, and that existing governance mechanisms can be improved through collective bargaining. Others believe that collective bargaining creates an adversary relationship, antithetical to notions that common educational interests supercede divisions between faculty and administration in a university community. Concomitantly, the latter view assumes that no adversarial relationship presently exists.

In its decision, which closely parallels both the legal and policy analysis of an amici brief submitted by several private universities and which

83. 582 F.2d at 701.
84. Id. at 702. See, e.g., NLRB v. Metropolitan Life Ins. Co., 405 F.2d 1169, 1177 (2d Cir. 1968) (power to recommend promotion is not actually power to promote, thus promotion recommendations will always be subject to review).
85. See, e.g., Finkin, supra note 8, at 610-12.
86. See, e.g., Kahn, supra note 8, at 68.
cites extensively to one commentator, Kenneth Kahn, the court appears to adopt the latter view. This position that collective bargaining and university governance are irreconcilable is grounded upon the Act's exclusivity principle. The Act provides that a representative chosen by the majority of the employees in an appropriate bargaining unit shall be the "exclusive representative" and obligates the employer to bargain solely with that representative. Critics of faculty collective bargaining fear the requirement of exclusivity will impair the ability of faculty members to work through existing internal structures to consult with the administration over institutional policies. Furthermore, they predict that the threat of an unfair labor practice charge would constrain administrations from dealing with faculty senates and committees over anything resembling a term or condition of employment.

Such a position, however, fails to take into account the enormous flexibility of the bargaining process itself and ignores a body of literature supporting the opposite conclusion. While there is seemingly a conflict between a group of people sharing governance with the administration and bargaining with it, evidence suggests that the conflict may be more theoretical than factual. To date most collective bargaining agreements negotiated by faculty unions have expressly retained the collegial decision-making machinery in effect prior to the contract. One critic suggests that the goal of faculty organizing is not to replace existing mechanisms, as the Yeshiva court perceives it, but to establish a more meaningful role in the existing governance structures. Thus, the court's assumption that faculties will bargain away faculty governance or that there is a necessary conflict between bargaining and governance is only arguably correct.

Further, the court's premise that bargaining is inappropriate in a university setting due to the autonomous position of university professors and the common goals of faculty and administrator is likewise subject to challenge.

88. 582 F.2d at 697 n.13, 698, 699, 701, 702, 703 & n.23.
90. See Kahn, supra note 8, at 158. See also Duquesne Univ., 198 N.L.R.B. 891 (1972).
93. See Nielsen, supra note 20, at 10.
94. See Amicus Brief of the American Association of University Professors at 30, NLRB v. Yeshiva Univ., 582 F.2d 686 (2d Cir. 1978), cert. granted, 99 S. Ct. 1212 (1979) [hereinafter cited as AAUP Brief].
Emphasizing the degree of independence enjoyed by faculty members "entirely unknown among the professionals in private industry," the court quoted a 1925 decision that noted, "by practice and tradition the members of the faculty are masters and not servants." The court, however, neglected to ascertain whether this were true in 1925 and if so, whether it continues to be true in 1978.

Examination of university faculty's current role suggests that this idealized concept of shared authority, originating in the Middle Ages is inappropriate today. By the early 1970's, faculties had encountered an accelerating reversal in their circumstances akin to the experience of workers during the Depression. With declining financial contributions to American colleges and universities, faculty salaries have decreased both in terms of real income and in comparison with workers in general. Since the 1973-74 academic year, academic salaries have continued to be outstripped by the consumer price index, and the gap widens each year. Additionally, the current surplus of doctoral holders as well as a steady no-growth rate of employment in higher education are projected to continue into the 1990's. These projections have resulted in the adoption of measures to modify tenure, release tenured faculty, and cut back curricula, all of which exacerbate faculty-administration relations. Adopting the university's version of shared authority, the court ignored facts in the present case which pointed to this opposite trend. Recently, the Yeshiva faculty has experienced an increased teaching load, diminished sabbaticals, a lower retirement age, postponed tenure decisions, more part-time

95. 582 F.2d at 700.
96. Id. at 698 (citing Hamburger v. Cornell Univ., 240 N.Y. 328, 336-37, 148 N.E. 539, 541 (1925). The quotation was taken out of context since in its entirety it stated that "members of the faculty are masters, and not servants, in the conduct of the classroom." 240 N.Y. at 336-37, 148 N.E. at 541 (emphasis added).
97. 582 F.2d at 701. The court failed to mention that shared authority based on the European model historically has never been practiced in American colleges and universities. Founding groups organized colleges in America from the top down by establishing boards of managers to hire and fire teachers, appoint and dismiss presidents, and basically run the enterprise. See Nielsen, supra note 20, at 4. Furthermore, the academic's demands for freedom, tenure, and a role in decisionmaking were at first strongly opposed by university presidents and trustees. See AAUP Brief, supra note 94, at 5.
98. AAUP Brief, supra note 94, at 8.
100. AAUP Brief, supra note 94, at 8.
102. Section 3(a) of the 1978 Amendments to the Age Discrimination in Employment Act permits mandatory retirement of tenured faculty members between the ages of 65 and 69. 29 U.S.C.A. § 631(d) (West Supp. 1978). While the Act raised the mandatory retirement
personnel, the closing of a graduate school, and the cancelling of courses considered cost-inefficient.\textsuperscript{103}

Accompanying its failure to consider economic realities, the court also ignored the policies underlying both the Act and its exclusions. In formulating the exclusions, Congress and the Court attempted to protect management's right to have supervisors and managers solely accountable to it without divided loyalty to a union. Furthermore, Congress hoped to avoid possible domination of the union by an employer's agents.\textsuperscript{104} Although the Board also failed to explicitly discuss these policies as a foundation for rejecting the supervisory/managerial argument, its position is more compatible with legislative intent.

The Board, for the first time, in its petition for certiorari argues that the "loyalty" rationale for the exclusions is anomalous in a faculty case.\textsuperscript{105} Since faculty members are expected to exercise independent professional judgment in academic and personnel matters, the dangers of divided loyalty that Congress sought to avoid through exclusion are minimized.\textsuperscript{106} Similarly, the unique structure of faculty governance eliminates the issue of union domination. Unlike industry, where power is held by few, all faculty share authority in a university setting. The court's labeling of this shared authority as managerial transforms the entire rank and file bargaining unit into a large class of faculty managers. This classification thus distinguishes the employee bargaining unit whose members would be subject to potential domination.\textsuperscript{107}

In contradistinction to the Second Circuit, the Board's position carefully balances the Act's professional inclusion and the managerial exclusion. Since the Supreme Court's decision in \textit{Bell Aerospace} eliminated the Board's option of putting managerial employees in a separate bargaining unit, the Board has construed the managerial standard narrowly.\textsuperscript{108} After \textit{Bell Aerospace}, if the Board did not reduce its findings of managerial status, numerous employees, particularly professionals explicitly covered by

age in private industry to 70 and eliminated the retirement age for government employees, it provided for early retirement of tenured faculty to alleviate the financial burden on educational institutions. S. REP. NO. 493, 95TH CONG., 1ST SESS. 8-9 (1917), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 983-84.

\textsuperscript{103} \textit{See} Connolly, \textit{Faculty Members: Hired Hands or Managers?} \textit{Chronicle of Higher Education}, Sept. 25, 1978, at 38.

\textsuperscript{104} \textit{See} Moore, \textit{supra} note 23, at 49. \textit{See also} text accompanying notes 23-28 \textit{supra}.

\textsuperscript{105} \textit{See} NLRB Petition, \textit{supra} note 78, at 22.

\textsuperscript{106} NLRB Petition, \textit{supra} note 78, at 22.

\textsuperscript{107} \textit{See} Comment, \textit{supra} note 2, at 504.

\textsuperscript{108} \textit{See} NLRB v. \textit{Bell Aerospace Co.}, Div. of Textron, Inc. 416 U.S. 267 (1974); Comment, \textit{supra} note 24, at 116 (the term "managerial" has been restricted to high level executives who also qualify as supervisors); notes 29-31 and accompanying text \textit{supra}.
the Act, would have been excluded from the Act's protection. Thus, the Board's position in the university unit determination cases may reflect an attempt, in light of Bell Aerospace, to ensure that professionals, both in university and industry settings, are not unduly divested of the Act's protection. Such a construction is especially critical, lest the employee who is deemed supervisory/managerial be denied rights which the Act was designed to protect.

Additionally, the Board's C.W. Post position reflects its implicit adherence to national labor policy: to eliminate labor relations instability "by encouraging the practice and procedure of collective bargaining." Since a contrary decision in C.W. Post would have been tantamount to sounding the death knell for faculty collective bargaining, the Board may have concluded that absent controlling statutory provisions excluding faculty, a national labor policy of promoting collective bargaining should control. Although the Board's failure to adequately offer these policy considerations to support its decisions on faculty status no doubt invited judicial review of its mechanical application of traditional rules, its position, un-

109. See generally Barney, supra note 31, at 376.
110. The Board elaborated on this point in a post-Bell Aerospace case which it cited throughout its brief in Yeshiva. See General Dynamics Corp., 213 N.L.R.B. 851, 857-58 (1974), cited in NLRB Brief, supra note 33, at 17, 20, 23, 25, 27 (conferring managerial status on professional employees whose independent job responsibilities did not make them true representatives of management would eviscerate the traditional distinction between labor and management).
111. See Westinghouse Elec. Corp. v. NLRB, 424 F.2d 1151, 1158 (7th Cir.), cert. denied, 400 U.S. 831 (1970) (Board has duty to employees not to construe supervisory status too broadly since employee who is deemed supervisory is denied statutory protection).
114. Despite the lack of clarity on the Board's part, it is highly questionable whether the court was justified in invoking "closer scrutiny." The Board's inclusion of faculty within the Act's coverage arguably is a reasonable interpretation of the statute and should have been upheld. See notes 21 and 67 supra. It is clear that the issue of faculty status was not contemplated when the statute was enacted. It, however, is the Board's role to interpret and apply the statute to new factual situations and its factual findings as to employee status are entitled to great weight. See Stop & Shop Co. v. NLRB, 548 F.2d 17, 18 (1st Cir. 1977). Even Kahn acknowledged that the Board "probably did not exceed its discretion" in its determination that faculty are neither supervisory nor managerial employees. See Kahn, supra note 8, at 180. In its decision, the court indicated that it not only disagreed with the Board's position but also with its administrative procedure. The court suggested that rulemaking rather than adjudication would be the appropriate method to explore the "special problems" created by the Board's assumption of jurisdiction. 582 F.2d at 703. But see NLRB v. Bell Aerospace Co., Div. of Textron, Inc., 416 U.S. 267 (1974) (it is the Board's decision whether or not to proceed by rulemaking or adjudication). See also note 38 supra.
like the court's, is consistent with the underlying policies of the exclusions and the Act.

Finally, the court's position can be criticized for creating inequitable results. *Yeshiva* suggests that the Board must distinguish between degrees of shared authority at the nation's universities in order to draw a line to delineate faculty supervisory/managerial status. In addition to decreasing predictability, resulting in time consuming and costly litigation, such a distinction would also create a paradoxical situation wherein the powerless faculty would be able to seek an influential role through collective bargaining while the more influential faculty, who had already secured a role through institutional concessions, would be denied the means to protect that role from erosion. Furthermore, the decision not only unduly distinguishes between gradations of faculty authority, it also impermissibly distinguishes between classes of employees vis-a-vis their employer. Of all university employees, including professional employees, only the full-time faculty as a class is denied collective bargaining rights. In view of decreasing economic resources for educational institutions, any concessions won by blue and white collar groups through collective bargaining may disadvantage the faculty for whom no countervailing bargaining right would exist.

An open question after *Yeshiva* is the breadth of the court's holding and its effect on existing and future faculty collective bargaining. While the Second Circuit took pains to emphasize the narrowness of its holding, the decision lends itself to a broader interpretation and provides ammunition for university administrations that oppose union organization. The *Yeshiva* court based its holding on the fact that in many instances the full-time faculty effectively recommended the hiring, promotion, and tenure of other faculty; it adopted the grading, graduation, curriculum, and admissions requirements of their respective schools; and in particular cases, it


116. See AAUP Brief, *supra* note 94, at 20-22. Additionally, the position of part-time faculty members with rights under the Act would be enhanced. See NLRB Petition, *supra* note 78, at 26 n.22.

117. See note 41 *supra*.

118. AAUP Brief, *supra* note 94, at 22-23.

119. The court described in detail the practices of each of the academic schools at Yeshiva and stressed that its decision was strictly limited to the facts as revealed by the evidence: "[o]ur function is not to examine *in vacuo* the governance procedures of all four-year private institutions of higher learning described in the briefs of the *amicus* universities as 'mature' institutions of higher education." 582 F.2d at 696 (emphasis in original). Yet, the court immediately noted that many institutions have adopted governance procedures in which the faculty play a decisive role in developing institutional policy.
controlled the hiring of deans, the physical location of a school, the teaching loads, and even the tuition to be charged. Although the amici universities stressed that an insignificant number of currently represented faculty would be affected by a decision labeling faculty at "mature" universities as supervisory or managerial, in reality the faculty in the prior Board cases held similarly significant positions in developing both educational and institutional policy. Accordingly, in its recently filed petition for a writ of certiorari, the Board asserted that the elements of faculty responsibility upon which the court determined managerial and/or supervisory status are essentially the same as those found in other universities. This suggests that Yeshiva not only undermines prior Board decisions, but may also pose a threat to current collective bargaining on the nation’s campuses.

III. Conclusion

In its struggle to promote collective bargaining rights for a group of employees whose functions refuse to fit neatly within the industrial framework, the National Labor Relations Board has performed less than satisfactorily. Principally, the Board has failed to elucidate reasons underlying its conclusion that the faculty are within the Act's protection. At the same time, the Board's admissions concerning its difficulty in reconciling the Act's provisions with the system of university governance have aggravated its vulnerable position. As a result, the Second Circuit in Yeshiva, influenced by critical commentary and its own assumptions regarding the

120. Brief for the Amici Universities, supra note 87, at 6 n.5. See cases cited in note 9 supra. Cf. NLRB v. Wentworth Inst., 515 F.2d 550, 557 (1st Cir. 1975) (court cited the NYU, Adelphi, Fordham, and C.W. Post cases as instances in which the faculties had a substantial role in personnel and educational policy matters).
121. NLRB Petition, supra note 78, at 26 n.22.
122. See NLRB Petition, supra note 78, at 27 (Yeshiva decision, if left standing, will create uncertainty as to whether faculty bargaining units at other educational institutions are entitled to the Act's protection and may jeopardize the stability of numerous established bargaining relationships.) See also Nielsen, supra note 20, at 4 (if the Yeshiva arguments are legitimized in the private sector, the same ones will be raised by every public institution in the country.) Relying on Yeshiva, university administrators could refuse to negotiate new contracts when existing ones expired. Such action by universities may lead to an increase in faculty strikes and possible congressional action. Should Congress choose to clarify the ambiguity concerning faculty status, it could amend the supervisory exclusion to ensure that faculty are protected under the Act. A recently enacted California public employee law could serve as a model. CAL. GOV'T CODE § 3562(m) (West Supp. 1979) provides in pertinent part: "[n]o employee or group of employees shall be deemed to be managerial employees solely because [they] participate in decisions with respect to courses, curriculum, personnel and other matters of educational policy." In order to provide similar protection against faculty managerial status, Congress would first need to amend the NLRA to incorporate case law managerial concepts.
relationship between faculty and administrators, discarded the Board's legal precedent and removed the full-time Yeshiva faculty from the Act's coverage under the managerial exception.

The Supreme Court could sustain the ruling in favor of Yeshiva on the basis of the Second Circuit's findings, that the university's structure actually embraces the total full-time faculty as managers or supervisors. On the other hand, the Court could choose to look beyond the Yeshiva faculty and address the broader question of faculty status in a university setting. In either situation, the Court would be ill-advised to uphold the Second Circuit's reasoning since it undermines the rationale for excluding employees from the Act's protection and ignores the realities of university life today.

If the Yeshiva holding is to be undone, the Board must make a concerted effort before the Supreme Court to highlight the consistency of its position with the basic policies underlying the Act and its exclusions. Additionally, the Board must avail itself of economic data to support its position that university and faculty interests are often divergent and disguised by an aura of "shared authority." If the Board fails to reveal the weaknesses in the court's approach, the result may be an increasing disenfranchisement of university faculty employees.

Felice Busto*

* Faculty collective bargaining is of particular interest to the author and other law students of Catholic University. On August 17, 1977, subsequent to a Board-conducted election, the Law Faculty Bargaining Committee was certified as the exclusive bargaining representative of a unit composed of the full-time law faculty at Catholic University. As in Yeshiva, the university administration refused to bargain with the union, thereby committing an unfair labor practice in violation of the Act and forcing the Board to apply to the U.S. Court of Appeals for the District of Columbia to enforce its bargaining order. Catholic Univ., 236 N.L.R.B. No. 122, (June 20, 1978) application for enforcement pending, NLRB v. Catholic Univ., No. 78-2297 (D.C. Cir. Dec. 19, 1978).

While characterizing the Committee as a "hybrid of management functions," the university's principal contention in defending its refusal to bargain is that a separate unit of law school faculty, rather than the entire university faculty, is inappropriate. In an industrial setting, if either a separate or overall unit would be appropriate, the Board has adopted a general policy against fragmenting employees into multiple bargaining groups. See Note, supra note 23, at 85. In the university context, however, the Board has held a bargaining unit limited to law school faculty appropriate since allegiance to a particular discipline could transcend the "community of interest" shared with other university faculty. See Syracuse Univ., 204 N.L.R.B.641, 643 (1973). Accord Fordham Univ., 193 N.L.R.B. 134 (1971); University of San Francisco, 207 N.L.R.B. 12 (1973); cf. University of Vermont, 223 N.L.R.B. 423 (1976)(medical school faculty excluded from university-wide bargaining unit). Universities opposing a separate unit composed of professional school faculty thus find themselves in the incongruous position of asking the Board to apply its industrial principles without accounting for the unique attributes of faculty members.