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# Defense of Nonintercourse Act Claims: The Requirement of Tribal Existence

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# DEFENSE OF NONINTERCOURSE ACT CLAIMS: THE REQUIREMENT OF TRIBAL EXISTENCE

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## I. INTRODUCTION

On August 26, 1976, a group of persons claiming to be the "Mashpee Indian Tribe" commenced suit in the United States District Court for the District of Massachusetts[1] against 146 named defendants alleging, *inter alia,* these named defendants to be representative of a class of defendants asserting interests in and title to a tract of land comprising all but a small fraction of the Town of Mashpee, Massachusetts.[2] Specifically, the *Mashpee* plaintiff claimed that all persons asserting an interest in or title to the land in the Town of Mashpee obtained that interest or title in violation of section 12 of the Indian Trade and Intercourse Act of 1834 (the Nonintercourse Act).[3] The plaintiff sought threefold relief: immediate possession of virtually all the land in Mashpee,[4] the fair rental value of any portion

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1. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978).

2. The tract of land claimed by the alleged Mashpee tribe also included a small portion of the Town of Sandwich, Massachusetts, which borders the Town of Mashpee.

3. The term "Nonintercourse Act" as used herein refers only to that section of the various versions of the Indian Trade and Intercourse Acts restraining the alienation of land. Section 12 of the Indian Trade and Intercourse Act of 1834, now codified as 25 U.S.C. § 177 (1963), provides:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

The Nonintercourse Act was first adopted on July 22, 1790. Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137. It was subsequently reenacted by: Act of March 1, 1793, ch. 19, § 8, 1 Stat. 329; Act of May 19, 1796, ch. 30, § 12, 1 Stat. 469; Act of March 3, 1799, ch. 46, § 12, 1 Stat. 743; Act of March 30, 1802, ch. 13, § 12, 2 Stat. 139; Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729. *See generally* F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834 (1962).

4. The plaintiff's initial complaint sought immediate possession of all land in Mashpee except that land which constituted the "actual site of the principal place of residence of any individual . . . ." As to such occupied land, the plaintiff sought fair rental value *en futuro.* In its first Amended Complaint, the plaintiff eliminated from its prayer for relief restoration to possession and fair rental value all land owned by

of the land to which any defendant or member of the defendant class retained possession after entry of final judgment, and trespass damages from the defendants in the amount of $5,000,000.[5] After certification of a defendant class[6] and after denial of the town's motion to dismiss,[7] the representative defendants designated by the trial court filed an answer and counterclaim denying the plaintiff's allegations that it presently existed and had existed as an Indian tribe within the meaning of the Nonintercourse Act.[8] The trial court severed, and

its alleged members. The trial court noted, however, that the very basis of the plaintiff's claim rendered the attempted unilateral exclusions nugatory.

5. This action was one of several filed in the wake of the First Circuit Court of Appeals decision in Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), *aff'g* 388 F. Supp. 649 (D. Me. 1975). *See, e.g.*, Narragansett Tribe of Indians v. Southern R.I. Land Dev. Corp., 418 F. Supp. 798 (D.R.I. 1976) (opinion on preliminary motions); Schaghticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780 (D. Conn. 1976) (opinion on preliminary motions); Western Pequot Tribe v. Holdridge Enterprises, Inc., No. H-76-193 (D. Conn., filed 1976); Mohegan Tribe v. Connecticut, No. H-77-434 (D. Conn., filed 1977); and Epps v. Andrus, No. 77-3739-S (D. Mass., filed Dec. 5, 1977). Another suit was commenced prior to *Passamaquoddy*. Wampanoag Tribe of Gay Head v. Town of Gay Head, No. 74-5826-G (D. Mass., filed Dec. 26, 1974). Each of these "New England" Indian land claims was predicated upon alleged alienation of land in violation of the Nonintercourse Act.

In *Passamaquoddy*, the plaintiff Passamaquoddy Indians, claiming entitlement to much of the State of Maine under the Nonintercourse Act, commenced an action against the Secretary of the Interior and the Attorney General of the United States seeking a determination of whether the Nonintercourse Act established a trust relationship between the United States and the Passamaquoddy Indians, and whether the Secretary of the Interior properly declined to file suit in behalf of the Passamaquoddy Indians on the grounds that no trust relationship existed. The First Circuit Court of Appeals determined that a trust relationship existed between the Passamaquoddy Indians and the United States. In doing so, however, the court carefully limited its holding:

> When and if the specific transactions are litigated, new facts and legal and equitable considerations may well appear, and Maine should be free in any such future litigation to defend broadly, even to the extent of arguing positions and theories which overlap considerably those treated here.

528 F.2d at 376. *Passamaquoddy* did not resolve the issue of tribal status. Bottomly v. Passamaquoddy Tribe, 592 F.2d 1061 (1st Cir. 1979).

6. The defendants in *Mashpee*, believing certification of a defendant class to be the most expeditous means of resolution, did not oppose class certification.

7. Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D. Mass. 1977). This motion, made pursuant to FED. R. CIV. P. 12 (b)(6), (7), and 19, asserted that the plaintiff's complaint failed to state a claim upon which relief could be granted and that the plaintiff's failure to join the United States of America and the Commonwealth of Massachusetts as indispensable party plaintiffs. The specific ground of the motion to dismiss for failure to state a claim was the plaintiff's failure to plead federal recognition. Absent such recognition, the defendants claimed, the plaintiff could not proceed. The trial court relied upon *Passamaquoddy* in denying this portion of the defendants' motion. *Id.* at 903.

8. The affirmative defenses pleaded by the defendants included abandonment of tribal status; lack of standing; extinguishment of title by conquest; extinguishment of title by conquest and occupation; extinguishment by cession; abandonment of title; federal common law defense of laches; consent to the land conveyances in issue by the United States; ratification of the land conveyances in issue by the United States;

scheduled for trial first, the issue of whether the plaintiff existed as an Indian tribe within the meaning of the Nonintercourse Act in August, 1976 (the time the action was commenced) and on other relevant dates. The companion issues of whether the plaintiff or its predecessors (if any) had ever owned or occupied the disputed land, and whether there had been any violations of the Nonintercourse Act, were reserved for subsequent determination. Similarly deferred was adjudication of the issues raised by the affirmative defenses pleaded in the defendants' answer and counterclaim.

Trial commenced on October 17, 1977, and continued through January 6, 1978. At the conclusion of the trial, the trial court submitted a set of special interrogatories to the jury.[9] These interrogatories addressed only the issue of the plaintiff's claimed tribal existence. Specifically, the trial court requested that the jury determine whether the plaintiff had proven that it or its predecessors in interest, if any, constituted an Indian tribe within the meaning of the Nonintercourse Act on certain relevant dates;[10] whether the plaintiff was an Indian tribe within the meaning of the Nonintercourse Act on the date of the commencement of the action; and whether any Indian tribe in Mash-

termination of the trust relationship between the United States and the plaintiff; abandonment of the trust relationship between the United States and the plaintiff; delegation by the United States of its power to deal with the plaintiff to the Commonwealth of Massachusetts; federal common law defense of estoppel and assimilation of the plaintiff into the general populace. The defendants' counterclaim was predicated on the theory that, if the plaintiff were allowed the recovery it requested, it would be unjustly enriched.

Some of these representative defendants thereafter joined in the filing of third-party complaints against the United States of America and the Commonwealth of Massachusetts. Motions to dismiss those third-party complaints were allowed by the trial court.

9. These special interrogatories, and the jury's answers, are set forth in full in the Memorandum and Order for Judgment of the trial court. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940, 943 (D. Mass. 1978).

10. Mashpee was organized as a proprietorship in the seventeenth century. The members of the Mashpee proprietary held the land in common. In 1763, the General Court of the Province of Massachusetts Bay incorporated Mashpee as a district, a municipal organization similar in structure to a town. Acts and Resolves of Province of Massachusetts Bay, 1763-64, 1st Sess., ch. 3. In 1788, Mashpee's district status was terminated. Mass. Acts of 1788, ch. 38. In 1834, the District of Mashpee was recreated, Mass. Acts of 1834, ch. 166, and in 1842, most of the common land in Mashpee was allocated in severalty among its residents. Mass. Acts of 1842, ch. 72. However, alienation of the partitioned land remained restricted to transfers between residents. *Id.* In 1869, all state imposed restraints on alienation of the partitioned land were removed. Mass. Acts of 1869, ch. 463. In 1870, the Town of Mashpee was incorporated. Mass. Acts of 1870, ch. 293.

Given this historical background, the "relevant" historical dates chosen by the trial court were 1790, the year of the enactment of the first Nonintercourse Act; 1834, the year the District of Mashpee was incorporated; 1842, the year most of the common land in Mashpee was partitioned among its residents; 1869, the year all state imposed restraints on alienation of land in Mashpee were removed; and 1870, the year in which the Town of Mashpee was incorporated.

pee, if found to exist, continously existed as an Indian tribe through 1976.

After deliberation, the jury returned its verdicts, determining that the plaintiff had failed to carry its burden of proving that its predecessors were an Indian tribe in 1790, 1869, and 1870; that the plaintiff constituted an Indian tribe at the time suit was commenced; and that the plaintiff had continuously existed as an Indian tribe. On March 24, 1978, the trial court issued its memorandum and order for judgment.[11] Relying substantially upon the jury's determination that the plaintiff "was not a tribe for the purposes of the Nonintercourse Act,"[12] the trial court dismissed the plaintiff's action.[13]

On appeal to the First Circuit Court of Appeals,[14] the plaintiff claimed a variety of errors by the trial court[15] including certain aspects of the court's instructions on the definition of an Indian tribe as that term is used in the Nonintercourse Act.[16] On February 13, 1979, the First Circuit Court of Appeals rejected each of the plaintiff's assignments of error and affirmed the judgment of the trial court.[17]

## II. The Standards for Determination

The result in *Mashpee* graphically illustrates the importance of a threshold requirement that confronts plaintiffs who claim the benefit and protections of the Nonintercourse Act—pleading and proving tribal existence. As the First Circuit Court of Appeals unequivocally held in *Mashpee*:

> It is undisputed that if plaintiff was not a tribe [at the time suit was commenced] it lacked standing to bring this suit and that if not a tribe at the critical times in the nineteenth century it was not protected by the [Nonintercourse Act]. . . .
>
> Plaintiff must prove that it meets the definition of "tribe of Indians" as that phrase is used in the Nonintercourse Act both in order to establish any right to recovery and to establish any standing to bring this suit . . . .[18]

Significantly, the *Mashpee* court determined the tribal status requirement to be a double hurdle. First, a plaintiff must prove that it presently constitutes an Indian tribe within the meaning of the Non-

11. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom.* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979).

12. *Id.* at 950.

13. *Id.*

14. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979).

15. *Id.* at 580.

16. *Id.* Other assertions of error included the trial court's denial of the plaintiff's pre-trial motion for a continuance; the trial court's allocation of the burden of proof; the trial court's ruling that the jury's special verdicts were neither inconsistent nor ambiguous; and the trial court's investigation of an ex parte communication with a juror. *Id.*

17. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979).

18. *Id.* at 579, 581.

intercourse Act. This is the "standing" element of the tribal status requirement described by the *Mashpee* court.[19] Second, a plaintiff must prove that its predecessors in interest constituted an Indian tribe at critical historical times. Proof of this historical tribal existence is a prerequisite to establishing prior violations of the Nonintercourse Act which entitle a plaintiff to recovery.[20] Having failed to satisfy both prongs of this tribal existence standard, the *Mashpee* plaintiff was denied recovery.

A similar result was reached in the unreported case of *Epps v. Andrus*.[21] In *Epps*, plaintiffs, claiming to be the successors in interest of the Chappaquidick Indians, asserted title under the Nonintercourse Act to allegedly former Indian land. Because plaintiffs' complaint did not contain any allegations of present tribal status, defendants moved to dismiss for failure to allege present tribal existence. That motion was allowed and the plaintiffs' claims were dismissed.[22]

The results in *Mashpee* and *Epps* accord with applicable case law.[23] Each of the recently decided cases involving claims brought under the Nonintercourse Act has stated that the plaintiff must show that it is or represents an Indian "tribe" within the meaning of the Act; that the parcels of the disputed land are covered by the Act as tribal land; that the United States has never consented to the alienation of the tribal land; and that the trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abandoned.[24] This line of cases clearly established the principle that a plaintiff invoking the Nonintercourse Act has the burden of proving[25] that it constitutes an Indian tribe

19. *Id.* at 581. See text accompanying note 26 *infra*.

20. 592 F.2d at 581.

21. No. 77-3739-S (D. Mass., Dec. 18, 1978).

22. *Id.*

23. There is not an abundance of precedent:

> Because most groups of Indians involved in litigation in the federal courts have been federally recognized Indians on western reservations, the courts have been able to accept tribal status as a given on the basis of the doctrine going back at least to *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 756-57 (1867), that the courts will accord substantial weight to federal recognition of a tribe. [Citation omitted]. One consequence is that very little case law has developed on the meaning of "tribe."

Mashpee Tribe v. New Seabury Corp., 592 F.2d at 582 (1st Cir. 1979).

24. Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 537-38 (N.D.N.Y. 1977); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 902 (D. Mass. 1977); Western Pequot Tribe v. Holdridge Enterprises, Inc., No. H-76-193 (D. Conn., filed Mar. 27, 1977); Narragansett Tribe of Indians v. Southern R.I. Land Dev. Corp., 418 F. Supp. 803 (D.R.I. 1976) (citing Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 310 (1st Cir. 1975)).

25. The *Mashpee* plaintiff contended that 25 U.S.C. § 194 (1963) required that the burden of proof be placed on the defendants. That section allocates the burden of proof to "a white person" in disputes "about the right of property" between Indians and "white persons." Section 194, however, is not applicable to issues of tribal existence. By its own terms, § 194 applies only after the Indian claimant has "[made] out a

within the meaning of the Act.[26]

As a further element of its prima facie case, a plaintiff must prove that it has continuously constituted a tribe of Indians within the meaning of the Nonintercourse Act.[27] It has long been recognized that

presumption of title." 25 U.S.C. § 194 (1963). The showing necessary to establish this presumption or prima facie case under the Nonintercourse Act includes proof of a plaintiff's existence as an Indian tribe at all relevant times. See text accompanying note 21 *supra*. The shifting of the burden of proof under § 194 is contingent upon a plaintiff's first satisfying its burden of proof as to the issue of tribal existence. As stated by the First Circuit Court of Appeals in Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1979):

> There can be no presumption of title in plaintiff until plaintiff has proved it is an Indian tribe and was a tribe at each relevant date. As to these threshold questions, § 194 cannot aid the plaintiff.

Moreover, § 194 applies only to a trial "about the right of property," 25 U.S.C. § 194 (1963), and not to preliminary issues of tribal existence. This limitation on the applicability of § 194 is fully supported by the two decided cases citing that section. In each of those cases, the only issues to which § 194 was deemed applicable concerned property rights and interests. Omaha Indian Tribe v. Wilson, 575 F.2d 620, 622 (8th Cir. 1978), *vacated and remanded*, 99 S. Ct. 2529 (1979) (tribe's claim to title to land lost by movement of river); Felix v. Patrick, 36 F. 457, 461 (C.C.D. Neb. 1888), *aff'd*, 145 U.S. 317 (1892) (suit to cancel land transfers). Neither case involved adjudication of tribal status.

Finally, the *Wilson* court held that, "it is apparent that in adopting [§ 194] Congress had in mind only disputes arising in Indian Country, disputes that would not arise or involve any of the States." 99 S. Ct. at 2538 (1979). Section 1 of the 1834 Indian Trade and Intercourse Act defined Indian Country as being "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished . . . ." *Id.* The *Mashpee* dispute clearly arose outside of "Indian country." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 580, 589 (1832) (McLean, J., concurring). Accordingly, § 194 had no application in *Mashpee*.

For a thorough discussion of the meaning of the phrase "Indian country," see the following articles in this symposium: Clinton, *Judicial Enforcement of the Federal Restraint on Alienation of Indian Land: The Origins of the Eastern Land Claims;* Paterson and Roseman, *A Reexamination of Passamaquoddy v. Morton.*

26. The requirement that a plaintiff in an action brought pursuant to the Nonintercourse Act constitute a "tribe" of Indians should be compared with the Indian Claims Commission Act, 25 U.S.C. § 70a (1963), which permits the Commission to "hear and determine . . . claims against the United States on behalf of any Indian tribe, band *or other identifiable group of American Indians.*" (emphasis added). Thus, the Indian Claims Commission Act permits groups of Indians who have lost some, or all, of the indicia of tribal existence to recover against the United States. Conversely, the Nonintercouse Act does not permit recovery by non-tribal groups of Indians.

27. *Passamaquoddy* also contributed to an increasing number of petitions to the Bureau of Indian Affairs by groups seeking federal recognition as Indian tribes. 44 Fed. Reg. 116 (1979) (listing petitions filed prior to October 2, 1978). In response, the Department of the Interior promulgated regulations governing the determination of federal recognition of tribal existence. 43 Fed. Reg. 39361 (1978). Those regulations require continuous tribal existence. *Id.* ("These regulations are intended to apply to groups which can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present."). *Id.* at 1, 54.3(a). The regulations further define "continuously" as "extending from generation

the prohibitions and protections of the Nonintercourse Act, as well as all other acts of Congress regulating trade and commerce with the Indian "tribes," apply only as long as the "tribe" continues to exist as such.[28] Even though a plaintiff may have once existed as an Indian tribe, voluntary dissolution of its tribal organization by abandonment[29] or assimilation[30] terminates the trust responsibilities of the United States,[31] thereby rendering inapplicable the protections of the Nonintercourse Act.[32] The benefits and protections of the Act cannot be reinstated by a unilateral revival of tribal existence.[33]

Given the importance of tribal status as a prerequisite to the invocation of the Nonintercourse Act, the crucial inquiry which logically follows is: What are the standards for determining tribal existence for purposes of application of the Nonintercourse Act?[34] The definition

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to generation through the tribe's history essentially without interruption." *Id.* at 1, 54.1(m). *Accord,* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979) ("There must be a continuous leadership.").

28. *See* The Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1866); *accord,* McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 173 n.12 (1973).

29. *See, e.g.,* Confederated Salish and Kootenai Tribes v. Moe, 392 F. Supp. 1297, 1315 (D. Mont. 1975), *aff'd,* 425 U.S. 463, 476 (1976). *See also* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979).

30. See text accompanying notes 118-54 *infra.*

31. Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 902 (D. Mass. 1977); Western Pequot Tribe of Indians v. Holdridge Enterprises, Inc., No. H-76-193, slip op. at 3 n.3 (D. Conn. filed 1977); Narragansett Tribe of Indians v. Southern R.I. Land Dev. Corp., 418 F. Supp. 798, 803 (D.R.I. 1976).

32. Termination of the trust relationship eliminates the sole constitutional justification for the restraints on alienation embodied in the Nonintercourse Act. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 663 (D. Me. 1975). *Cf.* Sunderland v. United States, 266 U.S. 226, 233-34 (1924). Once the constitutional justification for the application of the Nonintercourse Act is removed, its prohibitions cease to have any further force and effect. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 594 (1831) (McLean, J. concurring). *See generally* M. PRICE, LAW AND THE AMERICAN INDIAN 44-46 (1973).

33. 43 Fed. Reg. 39,361, 39,362 (1978). In addition to requiring continuity of tribal existence, the recently promulgated regulations specifically provided that they are "not intended to apply to associations, organizations, corporations, or groups of any character formed in recent times." *Id. Accord, Guidelines For Preparing A Petition For Federal Acknowledgement As An Indian Tribe* 9 (United States Department of Interior, Dec. 1978) ("The petitioner should demonstrate that there exists now *and has existed throughout history* . . . .") (emphasis added).

The need for "continuity" of tribal existence is manifest. 43 Fed. Reg. 39,362 § 54.3 (1978). Absent such a requirement, a group of persons of admittedly common Indian heritage could organize and agree to submit to a common leadership or government. So organized, this newly constituted Indian tribe could assert a Nonintercourse Act claim to lands which had not been held by tribal Indians for centuries. Claims by such ancient tribes would appear without warning to the innocent purchasers of the land claimed and would totally upset the "justifiable expectations" of those persons. The "continuity" requirement avoids such an undesirable result.

34. The narrow issue here is only the definition of an Indian tribe within the Nonintercourse Act. The leading commentator has acknowledged that "an Indian tribe may 'exist' for certain purposes and not for others." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 272 (University of New Mexico Press ed. 1971). The *Mashpee* trial court

of an Indian tribe for purposes of the Act has been articulated as follows:[35] "[A tribe of Indians is] a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[36] Embodied in this deceptively simple formulation are a series of standards. Specifically, a Nonintercourse Act plaintiff must establish that its purported members are of the same or a similar race; are united under one political leadership or government; are a socially and culturally distinct community not assimilated into the general populace; and inhabit a particular area.[37] The second and third standards were of paramount importance in *Mashpee*.[38] It is, therefore, these standards which will be discussed here.

### A. *A Plaintiff Must Prove the Existence of a Separate and Distinct Indian Leadership or Government*

The requirement that a purported tribe possess an independent, distinct political existence is the most important criterion determinative of tribal status.[39] While it is no longer necessary that an Indian tribe possess the full panoply of sovereign functions in the most "absolute sense,"[40] it remains essential that the claimed tribe establish a legal, political, and governmental existence apart from the "general mass of the population."[41] Indeed, it is a constitutional requirement that an Indian tribe be more than a racial group consisting of Indians:

> [F]ederal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique

made a similar observation. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940, 950 n.7 (D. Mass. 1978).

35. A similar definition was suggested in a paper presented by a representative of the Department of Justice to a symposium of anthropologists:

> The terms "tribe" and "band" have given no difficulty. These are two of the historic terms by which Indian groups were commonly known and referred to by the whites in dealing with them. Both of these terms suggest continuity of collective or communal existence, common leadership, and the exercise of that sort of political authority characteristic of Indians generally living in the United States.

*Anthropology and Indian Claims Litigation*, 2 ETHNOHISTORY 318 (1955).

36. United States v. Candelaria, 271 U.S. 432, 442 (1926) (quoting from Montoya v. United States, 180 U.S. 261, 266 (1901)); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 n.8 (1st Cir. 1975).

37. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 582 (1st Cir. 1979).

38. *Id.*

39. This requirement arises from that portion of the United States v. Candelaria, 271 U.S. 432 (1926), definition requiring that the alleged "tribe" be united "under one leadership or government."

40. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 378 n.9 (1st Cir. 1975).

41. United States v. Joseph, 94 U.S. 614, 617 (1876). See text accompanying notes 120-29 *infra*.

> status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a "'racial' group consisting of 'Indians' . . . ."[42]

The requirement that a claimed tribe exhibit a separate and distinct political leadership or government arises from the judicial characterization of Indian tribes as semi-sovereign nations. This characterization was first adopted by Chief Justice Marshall in the seminal case of *Worcester v. Georgia.*[43] *Worcester* involved a claim by the State of Georgia, a former colony, that it had the power to enforce its laws on the Cherokee Indian Reservation. The plaintiff, a minister from Vermont, had been condemned to hard labor for four years in a Georgia penitentiary for residing within the limits of the Cherokee Reservation without having obtained a license to do so from Georgia. The plaintiff-minister contended that the state law under which he was sentenced[44] was an invalid infringement upon the federal government's plenary power over Indian tribes by the State of Georgia.[45]

Chief Justice Marshall "set out to fully examine the rightfulness of a former colony's assertion of jurisdiction over an Indian Tribe within its borders."[46] After meticulously reviewing the history of colonial-Indian relations, the Chief Justice addressed the issue of the appropriate allocation of the power to regulate intercourse with the Indian tribes between the individual states and the federal government.[47] He first noted that, prior to the Revolutionary War, "this power . . . was admitted to reside in the crown."[48] After the Revolutionary War, the Articles of Confederation gave the United States Congress the exclusive power of "regulating the trade and managing all affairs with the Indians, not members of any of the States; provided that the legislative power of any State within its own limits be not infringed or violated."[49] This language, the Chief Justice noted, gave rise to competing assertions of jurisdictional authority by indi-

42. United States v. Antelope, 430 U.S. 641, 646 (1977) (quoting from Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974)); *accord,* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979); *see* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 304 n.42 (1978).

43. 31 U.S. (6 Pet.) 515, 556 (1832).

44. The laws challenged in *Worcester* purported to nullify all governmental powers of the Cherokees; to make it a criminal offense for any Cherokees to assemble for purposes of legislating; and to require all "white persons" within the limits of the Cherokee Reservation to obtain a license. *Id.* at 577-78 (McLean, J. concurring).

45. Section 8 of Article 1 of the United States Constitution gives Congress the power "to regulate Commerce . . . with the Indian tribes." The terms "trade" and "intercourse" have been interpreted to be coextensive with the term "commerce." United States v. Holliday, 70 U.S. (3 Wall.) 407, 417-20 (1866).

46. O'Toole & Tureen, *State Power and the Passamaquoddy Tribe,* 23 MAINE L. REV. 1, 33 (1971).

47. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 558 (1832).

48. *Id.*

49. *Id.* at 558-59.

vidual states and the United States.[50]

The Chief Justice found that all ambiguities as to allocation of power over the Indian tribes had been resolved by adoption of the Constitution. That instrument granted to the United States the exclusive power to regulate the Indian tribes.[51] Consequently, the purported exercise of jurisdiction by the State of Georgia over acts occurring on the Cherokee Indian Reservation was repugnant to the Constitution.[52]

In so holding, the Chief Justice specifically described those Indian tribes subject to the power of the United States and within the coverage of the Trade and Intercourse Acts "as distinct political communities, having territorial boundaries, within which their authority is exclusive."[53] He then went on to state that the "Indian nations [have] always been considered as distinct, independent political communities, retaining their original natural rights . . . . The very term 'nation,' so generally applied to them, means 'a people distinct from others.' "[54]

Justice McLean authored a concurring opinion in *Worcester* in which he carefully compared the politically independent and distinct Cherokee Tribe with those "remnants of tribes" over which a state, such as Georgia, could properly exercise jurisdiction. Justice McLean first recounted the long history of sovereign-to-sovereign dealings between the Cherokee Tribe and the United States.[55] He then compared the politically independent Indian tribes such as the Cherokees[56] with the remnants of tribes who had lost their status as a "separate and distinct people":[57]

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50. *Id.* at 559.

51. "The shackles imposed on this power, in the confederation, are discarded." *Id.*

52. *Id.* at 562.

53. *Id.* at 557.

54. *Id.* at 559. The terms "tribe" and "nation" were virtually synonomous during this period.

> Although many anthropologists have now become wary of the word *tribe*, it has steadily gained popularity in common speech and writing. But curiously, it did not become a general term of reference to American Indian society until the nineteenth century. Previously, the words commonly used for Indian populations were *nation* and *people*. Indeed, even when the word *tribe* was used in the early nineteenth century, it was often coupled with the word *nation*, as in "tribe or nation."

Friedman, *The Myth of Tribe*, NATURAL HISTORY 41 (April 1975). *But see* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979) (citing Montoya v. United States, 180 U.S. 261, 265 (1901)).

55. 31 U.S. (6 Pet.) at 582-83.

56. "In the executive, legislative and judicial branches of our government, we have admitted, by the most solemn sanctions, the existence of the Indians as as separate and distinct people, and as being vested with rights which constitute them a state, or a separate community . . . ." *Id.* at 583.

57. *Id.*

> In some of the old states, Massachusetts, Connecticut, Rhode Island, and others where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, had lost the power of self-government, the laws of the state have been extended over them, for the protection of their persons and property.[58]

These remnants, Justice McLean noted, lay beyond the federal government's constitutional power to regulate intercourse with the Indian tribes and therefore beyond the coverage of the various Trade and Intercourse Acts.[59] Chief Justice Marshall's characterization of Indian "tribes" was not without substantial support. Indeed, just four years earlier, United States Attorney General William Wirt had provided a detailed summary of the sovereign nature of Indian "tribes":

> Like all other independent nations, [the tribes] are governed solely by their own laws. Like all other independent nations, they have absolute powers of war and peace. Like all other nations, their territory is inviolable by any other sovereignty . . . . As a nation they are still free and independent. They are entirely self-governed . . . self-directed. They treat, or refuse to treat, at their pleasure; and there is no human power which can rightfully control them in the

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58. *Id.* at 580.

59. Justice McLean specifically noted that § 19 of the 1802 Trade and Intercourse Act, see note 3 *supra*, excepted "fragments of tribes" from coverage of the Act. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 589 (1832); *accord*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 73 (1831) (Thompson, J. dissenting); United States v. Cisna, 25 F. Cas. 422 (No. 14,795) (C.C.D. Ohio 1835). Section 19, *in pari materia*, excepted from the Trade and Intercourse Act's coverage "any trade or intercourse with Indians living on land surrounded by settlements of the citizens of the United States and being within the ordinary jurisdiction of any of the individual states. . . ." Act of March 30, 1802, ch. 13, § 19, 2 Stat. 139, 145 (hereinafter "the 1802 Act"). When the Nonintercourse Act was re-enacted in 1834, Act of June 30, 1834, ch. 161, 4 Stat. 729 (hereinafter "the 1834 Act"), this "non-Indian settlement exception" was specifically omitted and the 1802 Act was repealed. Section 29 of the 1834 Act, however, provided that this repeal "[s]hall not . . . *impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi.*" Act of 1834, ch. 161, § 29, 4 Stat. 729, 734 (emphasis added).

The *Mashpee* defendant moved for a directed verdict contending that, as enacted, the 1834 Act did not totally abrogate the non-Indian settlement exception which had been included in the 1802 Act. Rather, the defendants argued, the non-Indian settlement exception remained valid as to those states east of the Mississippi until the enactment of the Revised Statutes and excepted lands in Mashpee from the coverage of the Nonintercourse Act. This argument was rejected by the trial court, which held that the exception embodied in § 19 of the 1802 Act did not apply to tribal land, but rather applied only to land of individual, non-tribal Indians. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940, 950 (D. Mass. 1978); *accord*, Narragansett Tribe of Indians v. Southern R.I. Land Dev. Corp., 418 F. Supp. 798, 803-09 (D.R.I. 1976). The *Mashpee* defendants' appealed the denial of their motion for a diected verdict to the First Circuit Court of Appeals. The First Circuit Court of Appeals, having held for the defendants by rejecting all the plaintiff's assignments of error, declined to render an "advisory opinion" on this issue. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979).

> exercise of their discretion in this respect . . . . In their treaties, all their contracts with regard to their property, they are free, sovereign and independent as any other nation.[60]

Subsequently, in *Blue Jacket v. Board of Commissioners,*[61] the Supreme Court placed substantial reliance on the sovereign nature of Indian "tribes" in holding that the lands of the Shawnee Tribe of Indians were not subject to state taxation. In so ruling, the Court expanded upon Chief Justice Marshall's characterization of an Indian "tribe" by specifically describing some of the powers of tribal self-government:

> [T]heir tribal organization has remained as it was before. They have elective chiefs and an elective council; meeting at stated periods; keeping a record of their proceedings; with powers regulated by custom; by which they punish offenses, adjust differences, and exercise a general oversight over the affairs of the nation. This people have their own customs and laws by which they are governed . . . . [They] are . . . a distinct people with a perfect tribal organization.[62]

Eighteen years later, the Supreme Court, in *Elk v. Wilkins,*[63] again contrasted the *Worcester* and *Blue Jacket* semi-sovereign tribes with those Indians who had lost their independent political existence. In *Elk,* the plaintiff brought suit in federal court against the voting registrar of one of the wards of the City of Omaha, Nebraska.[64] That registrar had refused to register the plaintiff as a qualified voter because he was an Indian.[65] Although the plaintiff acknowledged his birth as a member of an Indian tribe,[66] he claimed to have severed his tribal relations and to have surrended himself to the jurisdiction of the United States.[67] He further contended that he was a citizen of the United States by virtue of the fourteenth amendment of the United States Constitution and was entitled to all the voting rights and privileges accorded citizens.[68]

In holding that an Indian who is a member of a "tribe" cannot unilaterally sever his tribal relationships and establish himself as a citizen of the United States without formal naturalization,[69] the Supreme Court carefully distinguished members of "tribes" of Indians, who are subject to exclusive federal jurisdiction, from those Indians who are members of "remnants of tribes" which had lost their powers

60. 2 OP. ATT'Y GEN. 110, 132-35 (1828).
61. 72 U.S. (5 Wall.) 737 (1866).
62. *Id.* at 756.
63. 112 U.S. 94 (1884).
64. *Id.* at 94.
65. *Id.* at 96.
66. *Id.* at 98.
67. *Id.*
68. *Id.*
69. *Id.* at 109.

of self-government.[70] The latter, the Court stated, had lost their tribal status and therefore were subject to the jurisdiction of and regulation by the individual states.[71]

Recognition of the semi-sovereign status of Indian "tribes" flows directly from the substantial governmental powers historically vested in those groups of Indians properly characterized as "tribes."[72] Such powers are not delegated by Congress to the various Indian "tribes" but rather are inherent in the concept of tribal sovereignty.[73] Among those inherent powers long judicially acknowledged as existing in many Indian "tribes" are: the power to create and administer a criminal justice system for tribal members;[74] the power to exercise civil jurisdiction in suits against Indians arising from matters or transactions occurring on Indian land;[75] the power to enact laws for the governance of its own people and to establish tribal courts to enforce those laws;[76] the right to determine, as to nonmembers, who may enter tribal lands, to define the conditions upon which nonmembers may enter those lands and to prescribe rules governing their conduct while there, to expel those who enter the lands without proper authority, to expel those who violate tribal, state, or federal laws, to refer to state or federal officials those who violate state or federal laws, and to designate officials responsible for effectuating the foregoing;[77] the power to regulate use and disposition of the indi-

70. *Id.* at 107-08 (citing Justice McLean's opinion in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 580 (1832)).

71. *See* Danzell v. Webquish, 108 Mass. 133, 134 (1871). *See also* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS 542 (W. Lourie & M. St. Clair eds. 1832); *Report to the Secretary of War on Indian Affairs* 68-71 (New Haven 1822).

72. Chief Justice Marshall's characterization of Indian "tribes" as adopted by the *Kansas Indian* Court has been reiterated and reaffirmed on innumerable occasions. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978); United States v. Antelope, 430 U.S. 641 (1977); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172-73 (1973); United States v. Kagama, 118 U.S. 375, 381-82 (1886); Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231, 1234-35 (4th Cir. 1974); Maryland Casualty Co. v. Citizens National Bank, 361 F.2d 517, 520 nn.8-9 (5th Cir. 1966) (collecting cases) *cert. denied*, 385 U.S. 918 (1966).

73. United States v. Jacobs, 113 F. Supp. 203, 205 (E.D. Wis. 1953), *appeal dismissed*, 346 U.S. 892 (1953); *see* Talton v. Mayes, 163 U.S. 376, 382-83 (1896). *See generally* Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1348 (1969).

74. *See, e.g.*, United States v. Quiver, 241 U.S. 602 (1916); Ex Parte Crow Dog, 109 U.S. 556 (1883); Tom v. Sutton, 533 F.2d 1101, 1103 (9th Cir. 1976).

75. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Williams v. Lee, 358 U.S. 217 (1959); Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, 321 F.2d 767 (10th Cir. 1963).

76. *See, e.g.*, Williams v. Lee, 358 U.S. 217 (1959), Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965); Spotted Eagle v. Blackfeet Tribe of the Blackfeet Indian Reservation, 301 F. Supp. 85, 88 (D. Mont. 1969).

77. *See, e.g.*, Quechan Tribe of Indians v. Rowe, 531 F.2d 403, 410-11 (9th Cir. 1976).

vidual real and personal property of its members;[78] the power to determine the custody of orphaned Indians and to govern the care of its young in general;[79] the power to dictate the requirements for voting in tribal elections and for holding office;[80] and the power to levy a tax on its members and on nonmembers using its property.[81]

It is powers such as these, when evidenced,[82] which distinguish an Indian tribe from a voluntary association, club, or other social organization.[83]

The recent decision of the Supreme Court in *United States v. Mazurie*[84] is especially instructive in discerning the existence of a sovereign tribe. The defendants in *Mazurie* were non-Indians who operated a bar on a tract of non-Indian land held within the boundaries of the Wind River Indian Tribe's reservation.[85] They were convicted of operating their bar in violation of an ordinance enacted by the Wind River Tribe pursuant to federal local-option legislation.[86] That legislation allowed the various Indian "tribes" to regulate the use of liquor on their lands. The Tenth Circuit Court of Appeals reversed the defendants' convictions,[87] holding that Congress did not have the authority to delegate the power to regulate use of alcoholic beverages to "a private, voluntary organization."[88]

78. *See, e.g.*, Crowe v. Eastern Band of Cherokee Indians, Inc., 506 F.2d 1231, 1235 (4th Cir. 1974).

79. *See, e.g.*, Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 730 (W.D. Mich. 1973).

80. *See, e.g.*, Howlett v. Salish and Kootenai Tribes, 529 F.2d 233 (9th Cir. 1976).

81. *See, e.g.*, Barta v. Oglala Sioux Tribe, 259 F.2d 533, 556 (8th Cir. 1958) (quoting Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 99 (8th Cir. 1956)).

82. The listed powers, while indicative of tribal status, are not conditions precedent to the establishment of tribal existence. *See* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 584 (1st Cir. 1979). Historically, Indian tribes have evidenced even more substantial powers of self-government. For example, for many years the United States recognized the capacity of Indian tribes to make war and peace. *See* Fleming v. McCurtain, 215 U.S. 56, 60 (1909). *See generally* F. COHEN, *supra* note 34, at 39 n.76. At one time, passports were required for citizens or inhabitants of the United States wishing to enter the domain of an Indian "tribe." *Id.* at 40. The United States also has recognized the capacity of Indian "tribes" to enter into treaties of extradition. *Id.*

83. *See* United States v. Mazurie, 419 U.S. 544, 557 (1975); Oklahoma Tax Comm'n v. United States, 319 U.S. 598 (1943).

84. 419 U.S. 544 (1975).

85. *Id.* at 546-47.

86. *Id.* at 548-49.

87. United States v. Mazurie, 487 F.2d 14 (10th Cir. 1973).

88. *Id.* at 19. The court of appeals reasoned that:

> The tribal members are citizens of the United States. It is difficult to see how such an association of citizens could exercise any degree of governmental authority or sovereignty over other citizens who do not belong, and who cannot participate in any way in the tribal organization. The situation is in no way comparable to a city, county or special district under state laws. . . .
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> . . . .
>
> . . . Congress cannot delegate its authority to a private, voluntary organization, which is obviously not a governmental agency. . . .

*Id.* at 19.

In reversing the Court of Appeals, Justice Rehnquist, writing for a unanimous Supreme Court, carefully distinguished Indian "tribes" from those voluntary organizations which possess no autonomous legal existence:

> [I]t is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester v. Georgia*, 6 Pet. 515, 557, 8 L.Ed. 483 (1832); they are a "separate people" possessing "the power of regulating their internal and social relations . . .," *United States v. Kagama*, 118 U.S. 375, 381-383, 30 L.Ed. 2d 228, 6 S. Ct. 1109 (1886); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173, 36 L.Ed. 2d 129, 93 S. Ct. 1257 (1973).
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> Cases such as *Worcester, supra*, and *Kagama, supra*, surely establish the proposition that Indian tribes . . . are a good deal more than "private, voluntary organizations," and they thus undermine the rationale of the Court of Appeals' decision. These same cases, in addition, made clear that when Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life.[89]

Taken together, these decisions[90] clearly delineate a requirement that an alleged tribe demonstrate possession of those significant powers of self-government which characterize an Indian "tribe" as defined by Chief Justice Marshall in *Worcester*,[91] and by subsequent Supreme Court decisions.[92] It is not sufficient to prove that a group of Indians have joined in a voluntary social association or organization.[93] Rather, the collective group must establish that its leadership possesses sufficient binding authority over its members to distinguish

89. United States v. Mazurie, 419 U.S. 544, 557 (1975); *accord*, United States v. Wheeler, 435 U.S. 313, 323 (1978); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979).

In *Wheeler*, the question presented was whether the Navajo Tribe and the United States were separate sovereigns for purposes of application of the double jeopardy clause of the fifth amendment. In holding that the Navajo Tribe and the United States are separate sovereigns, the Supreme Court stated:

> [O]ur cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . . [T]hey are a good deal more than 'private, voluntary organizations.'" United States v. Mazurie, 419 U.S. 544, 557; *see also* Turner v. United States, 248 U.S. 354, 354-55.

435 U.S. at 323.

90. The regulations concerning tribal recognition recently promulgated by the Department of the Interior require that the claimed tribe establish that it "has maintained tribal political influence or other authority over its members as an autonomous entity" without interruption since aboriginal times. 43 Fed. Reg. 39,361, 39,363 (1978).

91. See note 21 *supra*.

92. See note 72 *supra*.

93. United States v. Mazurie, 419 U.S. 544, 557 (1975).

them from the general mass of the population.[94] Without proof of an independent and distinct political existence, a plaintiff cannot establish the requisite tribal existence for the purposes of the Nonintercourse Act.[95]

The *Mashpee* court declined the opportunity to define the parameters of the "leadership or government" element of tribal existence.[96] As one of its assignments of error, the *Mashpee* plaintiff challenged the trial court's instructions on tribal leadership.[97] Rather than determine the substantive validity of these instructions, Chief Judge Coffin, writing for the court, confined the court's determination to the issue of "whether [the instructions] conform to the objecting party's view of the law" without deciding "whether those portions are correct as a matter of law."[98]

To this end, Chief Judge Coffin first set forth all of the trial court's instructions on tribal leadership.[99] Against these instructions, he reviewed and rejected the plaintiff's claims that the trial court had erroneously required proof of binding authority;[100] that the trial court had erroneously required a formal system of succession;[101] and that the trial court had erroneously failed to instruct that a tribe "ought to be able to choose its leader in any way it sees fit and for whatever purposes are necessary."[102] Finding that the trial court's instructions on tribal leadership conformed to the plaintiff's interpretation of applicable law, the court rejected the plaintiff's challenge to those instructions.[103]

Chief Judge Coffin concluded that a narrow inquiry and holding was necessary in order that "the definition of 'tribe' [can] remain broad enough and flexible enough to continue to reflect the inevitable changes in the meaning and importance of tribal relations for the tribal members and the wide variations among tribal groups living in different parts of the country under different conditions."[104] The result was a decision which, by its own terms, provided limited guidance on the issue of "leadership and government."

Aware that the narrowness of the majority's holding might diminish its precedential value, Judge Bownes added a concurring opinion to emphasize that the trial "court's instructions were correct as a matter of law" and that the instructions comported with the applicable *Montoya* standards.[105] He went on to state:

94. United States v. Joseph, 94 U.S. 614, 617 (1876).
95. See text accompanying notes 40-90 *supra*.
96. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979).
97. *Id.* at 582.
98. *Id.* at 587.
99. *Id.* at 582-84.
100. *Id.* at 584.
101. *Id.* at 584-85.
102. *Id.* at 585.
103. *Id.*
104. *Id.* at 588.
105. *Id.* at 594.

> [W]e have a duty to find the instructions legally correct or incorrect and not merely whether they harmonized with one party's view of the appropriate legal standards. Both the district court's delineation of what constitutes "tribe" as well as this court's extensive explication should, in my opinion, serve as a firm foundation for future cases dealing with this sensitive and difficult issue. I would not shy away from reliance on these instructions and our comments thereon in future cases.[106]

The extent of the "firm foundation" described by Judge Bownes for future cases involving the issue of tribal leadership is limited.[107] The majority opinion cites only *Montoya* and is limited to a narrow review of the plaintiff's challenges to the trial court's instructions. No examination is made of the substantive correctness of the trial court's instructions on this issue. The limited nature of the court's holding is best evidenced by its observation that the trial court's charge on the issue of tribal leadership was "more favorable" to the plaintiff than "the every day usage of the terms in the *Montoya* definition would be."[108] Thus, there may have been error in the trial court's instructions which benefited the plaintiff. Consequently, *Mashpee* supplies limited assistance for future cases on the specific issue of tribal leadership.

### B. *A Plaintiff Tribe Must Prove That Its Alleged Members Have Not Become Assimilated Into The General Populace*

Under the *Mashpee* formulation, in addition to an independent political existence, a group of persons claiming tribal status must also establish their separate and distinct socio-cultural existence.[109] Thus, a plaintiff must establish itself to be a "tribe" historically, ethnologically, sociologically, and anthropologically.[110] Among the relevant considerations in making this determination are whether, and to what extent, any Indian language is spoken by members of the group;[111] whether the group has unique customs, traditions, rituals, and ceremonies;[112] whether the group exercises collective rights in

106. *Id.* at 595.

107. Compare text accompanying note 143 *infra*.

108. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979).

109. This requirement of an independent, separate, and distinct social and cultural existence is embodied in the definition of the phrase "united in a community." United States v. Candelaria, 271 U.S. 432, 442 (1926). *See generally* F. COHEN, *supra* note 34, at 271 (ethnological and historical considerations entitled to great weight in determining tribal status). *See also* 43 Fed. Reg. 39,361, 39,362 (1978).

110. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978) (describing an Indian tribe "as a culturally and politically distinct entity").

111. Sturtevant and Stanley, *Indian Communities in the Eastern States*, 1 THE INDIAN HISTORIAN, No. 3 at 15, 17 (1968) ("[T]he proportion of [a] community which speaks an Indian language . . . is a good rough guide to the degree of acculturation or cultural distinctness."). *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 54 n.5 (1978).

112. *See, e.g.*, United States v. Joseph, 94 U.S. 614, 616 (1876). *See also* Sturtevant

"tribal" lands, funds, or property;[113] whether the group engages in any tribal or communal economic activity;[114] whether the group's claimed members share a common and uniquely Indian cultural heritage;[115] whether non-Indians participate, and if so to what extent, in allegedly tribal activities;[116] and whether the group historically has been recognized and treated as a "tribe" or "band" by Indian tribes and other sovereigns.[117]

Proof that plaintiffs once possessed a distinct cultural and sociological tribal existence alone is insufficient.[118] Although a group of Indians may have historically constituted a "tribe" of Indians, it is possible that its members have become "so sophisticated or assimilated as to be other than those entitled to protection [of the] Nonintercourse Act."[119] It follows that a group of persons who have been socially and culturally integrated into the general community are not only beyond the coverage of the Nonintercourse Act but are beyond the legitimate exercise of the constitutional power to regulate Indian tribes.

The possibility that a group of Indians may become so assimilated into and acculturated to the general population that they shed the protections of the Nonintercourse Act was first suggested in *United*

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and Stanley, *supra* note 111, at 15.

113. F. COHEN, *supra* note 34, at 271.

114. *Id.*

115. Sturtevant and Stanley, *supra* note 111, at 17.

116. F. COHEN, *supra* note 34, at 271.

117. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975); Tully v. United States, 32 Ct. Cl. 1, 7-8 (1896). *See generally* F. COHEN, *supra* note 34, at 271. Conversely, "long standing" assumption of jurisdiction by a state without recognition of the existence of an Indian tribe is a factor indicating the absence of an Indian tribe. *See* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 603-05 (1977).

Recently promulgated regulations concerning federal recognition of Indian tribes enumerate the following types of evidence of tribal identification to be considered by the Bureau of Indian Affairs in reviewing petitions for federal recognition: repeated identification by federal authorities; longstanding relationships with state governments based on identification of the group as Indian; repeated dealings with a county, parish, or other local government in a relationship based on the group's Indian identity; identification as an Indian entity by records in courthouses, churches, or schools; identification as an Indian entity by anthropologists, historians, or other scholars; repeated identification as an Indian entity in newspapers and books; and repeated identification and dealings as an Indian entity with recognized Indian tribes or national Indian organizations. 43 Fed. Reg. 39,361, 39,363 (1978).

118. It is not enough that the ethnographic history of the . . . groups shows them in the past to have been distinct and well-recognized tribes . . . . A particular tribe . . . may well pass out of existence as such in the course of time . . . . There must be a currently existing group distinct and functioning as a group . . . .

F. COHEN, *supra* note 34, at 271-72 (quoting from Memo. Sol. I.D., December 13, 1938).

119. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 378 (1st Cir. 1975) (dictum); *accord,* The Kansas Indians, 72 U.S. (5 Wall.) 737, 755-57 (1867).

*States v. Joseph.*[120] In *Joseph*, the United States brought suit under the Trade and Intercourse Act of 1834[121] seeking the imposition of a fine for the defendant's alleged unauthorized settlement on land belonging to a particular Pueblo "tribe" of Indians.[122] The territorial court sustained the defendant's demurrer, placing substantial reliance upon its finding that the Pueblo Indians had obtained such a degree of civilization that they could no longer be considered a "tribe" within the meaning of the Nonintercourse Act.[123]

On appeal, the Supreme Court directly addressed the issue of whether "the people who constitute the *pueblo* or village of Taos [are] an Indian Tribe within the meaning of the [Nonintercourse Act]?"[124] Relying exclusively upon the factual recitation made by the territorial court trial judge in sustaining the defendant's demurrer, the Court held that the Pueblos were beyond the scope of the Nonintercourse Act:

> The degree of civilization which they had attained centuries before, their willing submission to all the laws of the Mexican government, the full recognition by that government of all their civil rights, including that of voting and holding office, and their absorption into the general mass of the population (except that they held their lands in common), all forbid the idea that they should be classed with the Indian tribes for whom the [Non]intercourse [Act was] made . . . .[125]

Several years later, the Supreme Court reached a contrary result, holding the same Pueblo Indians to be a "tribe" of Indians as that term is used in the Nonintercourse Act in *United States v. Candelaria.*[126] *Candelaria*, however, overruled only the result of *United States v. Joseph*, rather than the principal holding. It left intact the assimilation standard suggested in *Joseph.*[127]

The contrary decision reached by the *Candelaria* Court can be explained in part by the fact that the *Joseph* holding was "evidently based upon statements in the opinion of the territorial [trial judge] . . . which [were] at variance with other recognized sources of information [subsequently] available."[128] This new factual information

120. 94 U.S. 614 (1877).

121. Act of June 30, 1834, ch. 161, 4 Stat. 729. See note 3 *supra.*

122. United States v. Joseph, 94 U.S. 614, 615 (1876).

123. *Id.*

124. *Id.*

125. *Id.* at 617; *see* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 378 n.10 (1st Cir. 1975).

126. 271 U.S. 432 (1926). In *Candelaria*, the United States brought suit on behalf of the Pueblo Indians to quiet title to certain lands. 271 U.S. at 437.

127. Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 905 (D. Mass. 1977); *see* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 378 (1st Cir. 1975).

128. United States v. Candelaria, 271 U.S. 432, 440 (1926) (quoting from United States v. Sandoval, 231 U.S. 28, 48 (1913)).

demonstrated that "[a]lthough sedentary, industrious and disposed to peace, [the Pueblos] *are Indians in race, customs and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races.*"[129]

Thus, though facially inconsistent with *Joseph, Candelaria* merely applied the principle suggested in *Joseph.* The Court in *Candelaria* determined on new evidence that the Pueblo Indians were in fact the unassimilated, culturally distinct people which *Joseph* had held to be within the scope of the Nonintercourse Act. *Candelaria* thus did nothing more than apply the *Joseph* standards of tribal status.

Assimilation also served as the basis for a finding of lack of tribal existence in *United States v. Cisna.*[130] In *Cisna,* an indictment founded upon the fourth section of the Trade and Intercourse Act of 1802 had issued against the defendant for stealing a horse within the reservation of the Wyandott Indians.[131] The first issue before the court was whether the Wyandott Indians constituted a "tribe" of Indians within the meaning of the Trade and Intercourse Act.[132] In an opinion written by Justice McLean while he was a circuit judge, the court held the Wyandotts to have obtained such a degree of civilization and assimilation as to be removed from the scope of the Trade and Intercourse Act:

> The Wyandotts have made rapid advances in the arts of civilization. Many of them are very intelligent; their farms are well improved, and they generally live in good houses. They own property of almost every kind, and enjoy the comforts of life in as high a degree as many of their white neighbors.
>
> On a community of Indians situated in so limited a territory, and mixed up with and surrounded by a white population, which carries on with them almost every kind of commerce incident to their condition, can the acts which regulate intercourse with the Indians operate?[133]

In answering his own question in the negative, Justice McLean's conclusion accorded with the assimilation principles set forth in *Joseph.*[134]

The plaintiff in *Mashpee* argued that there is no currently valid decisional law supporting the inclusion of an assimilation standard

129. 271 U.S. at 441-42 (emphasis added).

130. 25 F. Cas. 422 (No. 14,795) (C.C.D. Ohio 1835).

131. *Id.*

132. *Id.* at 423.

133. *Id.* at 424.

134. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171 (1973) ("[T]he doctrine [of Indian sovereignty] has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community."); Dillon v. State of Montana, 451 F. Supp. 168, 176 (D. Mont. 1978) ("An Indian['s] . . . wardship status [may be] terminated . . . by his own actions in leaving the reservation to embrace a different culture . . . .").

in the determination of tribal status. In support of this proposition, the *Mashpee* plaintiff relied upon *Confederated Salish and Kootenai Tribes v. Moe.*[135] *Moe,* however, indicates precisely the contrary. Acknowledging that "[t]he courts have recognized that different rules may apply 'where Indians have left the reservation and become assimilated into the general community,' "[136] the district court in *Moe* held solely on the facts before it that the "[p]laintiff Tribes have not abandoned their tribal organization."[137] In so ruling, the court relied upon its findings which clearly indicated continued tribal existence:

> Plaintiff Tribes provide law and order, including a court system. They also provide other community services, including health care, special assistance (burials, fire, welfare), employment assistance, housing, tribal projects (support of Indian community events) and administration of programs unique to tribal government.[138]

The *Moe* court reaffirmed the principles of acculturation and assimilation.[139] It held only that the facts before it did not justify a finding of loss of tribal status.[140]

The *Mashpee* court rejected the plaintiff's contention that a "tribe" cannot become assimilated into the general community and thereby lose its tribal existence.[141] In so holding, the court provided an "extensive explication" which will provide a "firm foundation for future cases involving the issue of assimilation."[142] After setting forth the trial court's charge on the issues of abandonment and assimila-

135. 392 F. Supp. 1297 (D. Mont. 1975), *aff'd,* 425 U.S. 463 (1976).

136. *Id.* at 1312 n.22 (quoting from McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 171 (1973)).

137. *Id.* at 1315.

138. *Id.* at 1314 n.10.

139. A similar result was reached in United States v. John, 437 U.S. 634, 652 n.23 (1978), where the court found that no "evidence of the assimilation" had been adduced.

140. The *Mashpee* plaintiff further argued that most federally recognized tribes could not satisfy a definition of tribe which included an assimilation standard. At trial, however, Leslie Gay, Chief of the Branch of Tribal Relations of the Bureau of Indian Affairs, testified that federal recognition of a group of persons is a political process not necessarily related to any definable standards. It may be dependent upon nothing more than an historical relationship between the United States and the tribe. Mr. Gay further testified that an Indian tribe, once recognized by the federal government as such, remains a tribe without regard to the degree of acculturation, assimilation, political autonomy or social distinctiveness of the group. The federally recognized Indian tribe is, Mr. Gay testified, "locked in" as a tribe. These federally recognized Indian tribes consequently provide an inadequate source of comparison for a case where no historical federal relationship is extant and are an inappropriate standard by which to measure the judicial definition of an Indian "tribe" within the meaning of the Nonintercourse Act.

141. The *Mashpee* plaintiff had contended that a tribe's existence could only be terminated by congressional action or complete, voluntary abandonment. A finding of assimilation, the *Mashpee* plaintiff asserted, would be contrary to established law. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 585 (1st Cir. 1979).

142. See text accompanying note 106 *supra.*

tion,[143] the court held that a "tribe, even if it is federally recognized . . . can choose to terminate tribal existence."[144] If the choice was voluntarily made to "give up being a distinct community and instead to merge with the rest of society in all significant respects,"[145] then tribal status would be terminated.[146] This concept of "voluntary assimilation," the court held, comported with applicable law.[147]

In affirming the concept of termination of tribal existence by assimilation, Chief Judge Coffin was confronted with the court's holding in *Joint Tribal Council of Passamaquoddy Tribe v. Morton*[148] that the Nonintercourse Act established a trust relationship between Congress and the Indian tribes[149] and that Congress "alone has the right to determine when its guardianship shall cease."[150] The establishment of a trust relationship with tribes generally, the court now held, did not "guarantee the perpetual existence of any particular tribe."[151] Although Congress alone can terminate the guardianship relation created by the Nonintercourse Act, a particular tribe, by its own unilateral action, can remove itself from the protections of that Act.[152]

The *Mashpee* court thus defined a voluntary-involuntary assimilation dichotomy, the former branch of which can result in termination of tribal status while the latter cannot. In making this distinction Chief Judge Coffin merged the concepts of abandonment and assimilation.[153] Whatever the label, he held, a voluntary decision to merge with the general community and to abandon a distinct status terminated tribal existence.

The importation of the abandonment voluntariness requirement into the concept of assimilation is open to question. Neither *Joseph* nor *Cisna* indicated that assimilation must be the result of a voluntary, knowing, and willing decision. Rather, these decisions established that assimilation could be a long process of social and cultural evolution rather than the result of a single decision. To the extent that the concept of "voluntariness" includes the voluntary process of gradual social and cultural evolution, *Mashpee* is in accord with *Joseph* and *Cisna*. Conversely, to the extent that the concept of "voluntariness" requires proof of a single, readily identifiable deci-

143. 592 F.2d at 586.

144. *Id.* at 587 (citing Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171 (1973); United States v. Joseph, 94 U.S. 614, 617 (1876); The Kansas Indians, 72 U.S. (5 Wall.) 737, 759 (1867); and United States v. Wright, 53 F.2d 300 (4th Cir. 1931)).

145. 592 F.2d at 587.

146. *Id.*

147. *Id.*

148. 528 F.2d 370 (1st Cir. 1975).

149. *Id.* at 379.

150. *Id.* at 380.

151. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 586 n.6 (1st Cir. 1979).

152. *Id.*

153. *Id.* at 587 n.7 (rejecting a property law abandonment standard).

sion to terminate tribal existence, its inclusion in the assimilation standard is unnecessary and unjustified. So long as involuntary assimilation by imposition of conditions is held not to terminate tribal existence,[154] no "voluntariness" requirement is needed.

## III. CONCLUSION

The requirements of proof of a separate, distinct, and independent political, cultural, and social existence are of particular importance in the post-*Passamaquoddy* New England Indian land claims. Unlike the aboriginal tribal Indians of the western United States,[155] many Indians in New England have lived in relatively populated areas for more than three centuries[156] and presently have "no special legal status."[157] Many, if not all, have been socially, culturally, and politically integrated and assimilated into the general population.[158] Only the asserted common Indian heritage of a plaintiff's claimed members will distinguish them from other members of the general community. It is clear, however, that such a racial distinction alone[159] does not satisfy the requirement of tribal existence for Nonintercourse Act purposes. Nonintercourse Act claims by fully assimilated groups consequently may founder on the threshold requirement of tribal status.

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154. *Id.* at 587.

155. *See, e.g.*, United States v. Joseph, 94 U.S. 614 (1876) (Pueblo Indians); United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (aboriginal pre-treaty Indians of Pacific Northwest).

156. *See, e.g.*, Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940, 943-47 (D. Mass. 1978) (recitation of the history of the Indians in Mashpee).

157. Sturtevant and Stanley, *supra* note 111, at 15.

158. In the *Mashpee* litigation, one of the plaintiff's own expert witnesses, after extensive field research, had found that "there is no longer any pretense that the community of Mashpee is in any sense separable from the socio-economic and political context of American life." J.E. Ludtke, Mashpee Wampanoags: A Case of Ethnic Resurrection (February, 1974) (unpublished Master of Arts thesis submitted to the Graduate School of the University of Massachusetts).

159. See text accompanying note 42 *supra*.