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Foreword

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FOREWORD

This Issue is dedicated to the memory of Thurgood Marshall. What a difficult thing for those of us a generation removed from his lionized years. We are indebted to the vivid essay provided by Pace Jefferson McConkie, Assistant General Counsel for the NAACP. Justice Marshall, we are reminded, accomplished much in the area now called civil rights. So much perhaps that current law students are offered specialized courses in the matter as if civil rights were a severable discipline from corporate law, for example. Of course, in practice, Marshall's legacy and the tax code are both so great that rarely could a single attorney understand both closely. But we, a generation removed, may be guilty of categorizing Marshall's role on the Court too quickly. We lack the cultural experience of vast sweeping change as Marshall's cohort incited in education, voting, housing, employment, transportation, public accommodation, etc. We sometimes accept the boundaries others place on civil rights.

Justice Marshall hardly lacked vision beyond the change he helped accomplish in the 1950s and 1960s. While he is most often associated with school desegregation, affirmative action, and rights of the accused, a review of his decisions arising from the Tenth Circuit reveal a rarely examined concern with Native American Rights. In his first review of a Tenth Circuit decision, Marshall displayed characteristic concern with criminal procedure. *Barber v. Page*,[1] a 1968 decision, declared that before the transcript of a co-perpetrator's preliminary hearing testimony can be used against the defendant, the right of confrontation requires that prosecutorial authorities make a good faith effort to obtain the presence of the witness at trial.

During the 1970s and 1980s, however, Marshall handed down a series of important decisions as to the sovereignty of tribal affairs. In *Santa Clara Pueblo v. Martinez*,[2] the Court rejected an attempt to expand federal review of tribal court decisions beyond the limited availability of writs of habeas corpus, preserving the authority of tribal courts to resolve issues based on tribal tradition and custom. In *Merrion v. Jicarilla Apache Tribe*,[3] the Court upheld the Tribe's power to assess a severance tax on oil and gas production on reservation land as an essential attribute of Native American sovereignty, and a necessary instrument of self-government and territorial management. In *New Mexico v. Mescalero Apache Tribe*,[4] state hunting and fishing regulations of non-tribal members on reservation land conflicted with tribal ordinances regulating both members and nonmembers. The Court concluded that New Mexico's regulations

1. 390 U.S. 719 (1968).
2. 436 U.S. 49 (1978).
3. 455 U.S. 130 (1981).
4. 462 U.S. 324 (1983).

were preempted by both the Tribe's authority to regulate the use of its resources and the federal objective of encouraging tribal self-government and economic development.[5]

These decisions reveal a broader view of Justice Marshall's activism, or rather, his wise restraint. Many of us now in law school have never lived without Justice Marshall's influence on the Supreme Court, much less understand the breadth of knowledge exerted in his twenty-four years of service there. We may see his generation as serving an agenda unrelated from our economic doubts in the 1990s. But if Thurgood Marshall was, as Pace McConkie's Dedication persuades, a man of simple justice, his work did not stop with single causes. His memory, in epitome, holds every relevance for young lawyers today.

About This Issue

With the emergence of several looseleaf services focused on Tenth Circuit decisions, the broad ranging attempt to report on every decision that has characterized previous Tenth Circuit Survey Issues of the *University of Denver Law Review* has become less useful. Returning to its origins, the current Issue focuses on analysis of Tenth Circuit opinion in a narrow group of federal topics. When the *Review* began its Survey Issues nearly 20 years ago, our objectives were to critically comment on significant court of appeals decisions and to inform federal practitioners in a limited number of areas. Now Senior Judge McWilliams wrote in a 1977 Foreword: "Of course at the heart of any successful survey of this type is the scholarship and objectivity of the reviewer. As might be well imagined, the members of the Tenth Circuit look forward to the annual survey with great interest, and perhaps a slight degree of trepidation!"[6] The following thirteen Surveys take an admirable first step toward restoring this spirit.

The Issue begins with a student-written piece on the Colorado Supreme Court decision in *Martin Marietta v. Lorenz.* With the court's unusual formulation of public policy protection for at-will employees, the Comment should easily be considered a definitive resource for attorneys preparing for employment litigation in this area. The *Review* plans to continue its narrower analysis in future Tenth Circuit Survey Issues, hopefully to the advantage of federal practitioners and to the benefit of the court of appeals. We extend our special thanks to Survey authors and members of the *Review* who endured the additional burden of a campaigning Issue editor.

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5. *Id.* at 338-40.
6. Judge Robert H. McWilliams, *Foreword*, 54 DENV. U.L. REV. 1-2 (1977).