IMPLICIT DIVESTITURE OF TRIBAL POWERS: LOCATING LEGITIMATE SOURCES OF AUTHORITY IN INDIAN COUNTRY

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Introduction

The United States Supreme Court has been severely criticized by tribal leaders,[1] tribal advocates,[2] and scholars[3] for its treatment of tribal powers of self-government. The Court has been charged with straying too far from John Marshall's "original proposition" that tribes are "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States."[4] Put another way, the Court has substantially diluted the theory and substance of tribal sovereignty formulated in the early days of the republic.[5]

The modern Court readily admits that its conception of tribal sovereignty has not remained static over the years, but has evolved "in response to changed circumstances."[6] These circumstances have included dramatic shifts in

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1. *E.g.*, Robert Yazzie, Chief Justice of the Navajo Supreme Court, Remarks to the Association of American Law Schools, Section on American Indian Law (Jan. 7, 1994). Chief Justice Yazzie, in criticizing the confused state of jurisdictional law in Indian country, said, "We have lives to talk about." *Id.*

2. *E.g.*, Craig J. Dorsay, Address at New York University Colloquium on the Native American Struggle: Conquering the Rule of Law (Apr. 11, 1992) (urging tribal advocates to exercise extreme caution in litigating issues which may reach the Supreme Court). Dorsay represented Klamath tribal member Alfred Smith and argued his case, Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

3. *See, e.g.*, Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77 (1993); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219; Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

4. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832).

5. *See generally* Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1; Williams, *supra* note 3. Some of the strongest criticism has come from Justices on the Court. See especially Justice Blackmun's opinions partially concurring and partially dissenting in Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 448-68 (1989), and in County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269-78 (1992).

6. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 171 (1973).

congressional Indian policy and ideology, ranging from the assimilationist strategies of the late nineteenth and early twentieth centuries to the current policy of tribal self-determination (and some shifts in between). Treaty making, the hallmark of early Indian policy, abruptly ended in 1871, although extant treaties were preserved. Perhaps most notable, the federal government's allotment policy in the late nineteenth century precipitated wholesale changes in the demographic makeup of many Indian reservations by opening up former tribal lands to homesteading by non-Indians.[7] The resulting social, cultural and political disruption in Indian life mirrored the clashing ideologies on tribal sovereignty. Did tribal sovereignty survive? And if so, in what form and to what extent?

The answer to the first question universally is "Yes." Tribes continue to possess inherent powers of self-government.[8] The answer to the second question is, "It depends." It depends, in part, on whether a federal enactment addresses the issue. Where treaty, constitutional authority, or statutory authority exists, a court's interpretive role is fairly well circumscribed both by the language of the enactment and by rules or canons of treaty/statutory construction unique to the field of federal Indian law.[9]

Difficulties arise, however, when no positive law exists. Until 1978, courts generally applied a presumptive rule supporting retained tribal powers in the absence of contrary congressional expression.[10] However, in 1978, the Supreme Court declared that Indian tribes "are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status.'"[11] The atavistic reference to "status" recalls John Marshall's characterization of tribes as "domestic dependent nations."[12] The Court's "implicit divestiture" theory[13] has since

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7. For a detailed historical analysis of the vacillations in federal Indian policy, see FRANCIS P. PRUCHA, THE GREAT FATHER (abridged ed. 1984); *see also* FREDERICK HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984); D'ARCY MCNICKLE, NATIVE AMERICAN TRIBALISM: INDIAN SURVIVALS AND RENEWALS (1973).

8. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 231 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

9. Charles F. Wilkinson & John M. 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, 608-19 (1975). Wilkinson and Volkman identify three primary rules of construction: (1) ambiguous expressions must be resolved in the Indians' favor; (2) Indian treaties must be interpreted as the Indians themselves would have understood them; and (3) Indian treaties must be liberally construed in favor of the Indians. *Id. See generally* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986).

10. COHEN, *supra* note 8, at 231; *see also* Powers of Indian Tribes, 55 Interior Dec. 14, 22 (1934).

11. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

12. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). Marshall wrote,

> They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States

been applied, reworked, and expanded in several subsequent decisions. Significant areas of tribal jurisdictional authority have been affected, usually to the tribes' detriment; these areas include criminal jurisdiction over nonmember Indians,[14] hunting and fishing regulatory control throughout the reservation,[15] and zoning authority.[16] Ironically, this judicial reworking of the jurisdictional scheme in Indian country comes at a time of unparalleled congressional support for tribal self-determination.[17]

This article will explore the Supreme Court's creation and subsequent use of implicit divestiture as a theory delimiting tribal political authority. The article will explore this theory within the larger context of the Court's struggle to articulate principles applicable to the radically changed geopolitical and cultural landscape of today's Indian reservations. The article will also consider whether the Court correctly perceives its interpretive role in the absence of textual congressional direction.

This analysis will reveal that the Court's approach is fundamentally flawed. Implicit divestiture lacks coherent structure, a sense of limits, that give theories value and predictive worth. Additionally, it is overly burdened with historical and ethnocentric biases that run antithetically to the notion of retained tribal powers.

The article offers two alternative approaches to give courts better guidance in resolving questions about tribal authority. The first approach builds on recent scholarship in political philosophy that finds support for the maintenance of communities, including political communities, in classical liberal theory.[18]

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resembles that of a ward to his guardian.

Id. The Court's opinion in United States v. Wheeler, 435 U.S. 313 (1978), expressly held that implicit divestiture operates as a result of the tribe's "dependent status." *Id.* at 326.

13. *Wheeler*, 435 U.S. at 326.

14. Duro v. Reina, 495 U.S. 676 (1990).

15. Montana v. United States, 450 U.S. 544 (1981); South Dakota v. Bourland, 113 S. Ct. 2309 (1993).

16. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

17. Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1453 (1988); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450a-450n (1988 & Supp. V 1993); Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1988); American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1988); Tribally Controlled Community College Assistance Act, 25 U.S.C. §§ 1801-1852 (1988 & Supp. V 1993); Indian Mineral Development Act, 25 U.S.C. §§ 2101-2108 (1988); Indian Consolidation Act of 1983, 25 U.S.C. §§ 2201-2211 (1988 & Supp. V 1993); National Indian Forest Resources Management Act, 25 U.S.C. §§ 3101-3120 (Supp. V 1993); Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1988 & Supp. V 1993); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (Supp. V 1993); Indian Child Protection and Family Violence Act of 1990, 25 U.S.C. §§ 3201-3211 (Supp. V 1933); Indian Health Care Amendments of 1990, 25 U.S.C. §§ 1613-1682 (Supp. V 1993).

18. *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE (1989); Steven J. Heyman, *Foundations of the Duty to*

The work of Will Kymlicka and his defense of liberalism is particularly relevant in this setting because his paradigmatic group are the indigenous peoples of North America, particularly the First Nations of Canada.

The second approach actually relies on Congress and its preeminent role in Indian affairs.[19] It will explore avenues Congress can and should pursue to redirect the discourse on tribal-state-federal relations. It will reveal that while Congress has demonstrated concern for tribes' ability to function effectively in a range of political, cultural, and regulatory milieus, it has not articulated clear and principled guideposts to help courts and advocates steer through the "jurisdictional maze"[20] on today's reservations.

Part I will briefly outline relevant portions of the historical record to illuminate and provide context for the changing demographic profile of Indian country and the ideological shifts underlying federal-tribal political relations. Much of this field has been plowed thoroughly by others.[21] Nonetheless a brief overview is required to establish a foundation for subsequent commentary. Part II will develop the jurisprudential record in response to these significant changes and will devote particular attention to the Court's creation and continued use of implicit divestiture to delimit tribal authority. It will critique the theory's inherent value as a workable legal principle while questioning the institutional authority of the judicial branch that promulgated it. Part III will offer a theoretical paradigm that justifies and hopefully secures a greater measure of tribal political authority over property and persons within Indian country. This theory builds on Kymlicka's formulation of liberalism and ties it in more directly to the unique problems of reservations of mixed political and cultural communities. Finally, part IV will explore avenues that Congress should pursue to bring direction, predictability, and security in this complex area.

One last question before moving on: Why bother? Kymlicka notes that if this were purely an issue about the "special status" of tribes within the United

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Rescue, 47 VAND. L. REV. 673 (1994); Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992).

19. United States v. Wheeler, 435 U.S. 313, 323 (1978). This argument assumes but does not concede Congress's preeminent role in Indian affairs.. It accepts that as between the states and the federal government, the Constitution accords Congress the power to engage with the Indian tribes. U.S. CONST. art. I, § 8, cl. 3. It does *not* accept that Congress's power extends to the point of completely obliterating the political authority of tribes. *See generally* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984); *see also* Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57 (1991).

20. *See* Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).

21. The literature on American Indian-federal relations is too vast and multifaceted to attempt a listing here. However, a general overview is provided in PRUCHA, *supra*, note 7; COHEN, *supra* note 8, at 47-206; Dorris, *The Grass Still Grows, the Rivers Still Flow: Contemporary Native Americans*, 110 DAEDALUS 43 (1981).

States, ethnocentric tendencies alone might dissuade us from pursuing it.[22] He is probably right, but one hopes he is wrong. Recognizing individual and group differences, and according these differences value and protection under the law is fairly new work in North America. The issue is particularly acute for American Indians who, despite a long history of self-rule, are still quite vulnerable to the forces of assimilation and subjugation.[23]

The enterprise is useful, indeed necessary, because it puts the United States visibly out on the international stage in its treatment of indigenous people. This effort is appropriate when one considers that "[f]ar more of the world's minorities are in a similar position to American Indians (i.e., as a stable and geographically distinct historical community with separate language and culture rendered a minority by conquest or immigration or the redrawing of political boundaries)."[24] This realization has implications for United States foreign interventionism in the post-Cold War era when the federal government increasingly must justify — to Americans and to the international community — its incursions into foreign internecine struggles, many of which involve indigenous peoples.[25] This justification necessarily will have to include consideration of the United States' own record in protecting the self-governing rights of American Indian tribes.

I. A Brief Historical Sketch

The Constitution authorizes Congress to "regulate Commerce . . . with the Indian Tribes."[26] The Supreme Court has generally afforded Congress an extraordinarily wide berth to establish federal Indian policy.[27] That policy has vacillated between two poles. At various times, the government pursued policies aimed at the immediate or eventual assimilation of American Indians into the general American polity; at other times, it pursued policies aimed at maintaining a "measured separatism"[28] between Indian tribes and white

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22. KYMLICKA, *supra* note 18, at 257.

23. Leslie Chapman, a Laguna Pueblo, objected to the Indian Civil Rights Act's tendency to treat Indians and concepts of justice as monolithic. She said,

> Even within the Anglo system, you can see the Constitution and due process do not necessarily yield justice. If you are concerned with how people feel and what is the effective way, what is functional in terms of the people on the reservation, the recognition of difference is going to have to be made.

JOHN R. WUNDER, RETAINED BY THE PEOPLE: A HISTORY OF AMERICAN INDIANS & THE BILL OF RIGHTS 141 (1994).

24. KYMLICKA, *supra* note 18, at 257-58.

25. *See generally* S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 82 ARIZ. J. INT'L & COMP. L. 1 (1991).

26. U.S. CONST. art. I, § 8, cl. 3.

27. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.").

28. CHARLES WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 4 (1987).

settlements.[29] These ideological shifts in policy were usually accompanied by shifts in federal Indian land practices. A significant question to bear in mind as we proceed is whether the ideologies described above actually represent "competing" ideologies. In other words, did the ideological discourse manifested in shifting government policies allow for "cultural relativism," the notion that tribes were intended to maintain cultural, political, and territorial autonomy even while surrounded by an Americanized and otherwise "civilized" body politic?[30]

The earliest federal policy, falling on the side of "measured separatism," continued the colonial practices of accommodating Indian interests. Beyond maintaining the status quo in intergovernmental relations, including the colonial policy of making treaties with tribes, the policy was pragmatic. Large tribal confederations like the Iroquois Confederacy were extant and posed a continued threat to the nascent republic. In 1789, Henry Knox, the first Secretary of War, wrote to President Washington urging that the government pursue a "liberal system of justice" toward the tribes.[31] This system included protecting the tribes' territorial rights. Knox wrote,

> The Indians, being the prior occupants, possess the right of the soil. It cannot be taken from them unless by their consent, or by rights of conquest in case of just war. To dispossess them on any other principle would be a great violation of the fundamental laws of nature and of that distributive justice which is the glory of a nation.[32]

Secretary Knox and President Washington prevailed on Congress to pass legislation protecting Indian territorial claims and curtailing abuses by settlers on tribal lands.[33] In 1790, Congress passed the first in a series of nonintercourse acts restricting conveyances of Indian lands. The Act[34] prohibited private purchases of Indian lands unless made by public treaty with the United States.[35]

Two interpretations are possible here. In one view, statutory protection of tribal lands coupled with continued treaty making reflected some support for

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29. *Id.* at 13; *see also* PRUCHA, *supra* note 7, at 64.

30. *See* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 706 (1988).

31. MCNICKLE, *supra* note 7, at 52-53.

32. Frederick E. Hoxie, *The Curious Story of Reformers and the American Indians*, *in* INDIANS IN AMERICAN HISTORY 210 (Frederick E. Hoxie ed., 1988).

33. County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985).

34. 25 U.S.C. § 177 (1988).

35. PRUCHA, *supra* note 7, at 31. Tribal land claims premised on this act have been successful as recently as 1985. *See, e.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985); *see also* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

the notion of an autonomous tribal political state with a recognized and protected territorial base. A second, more cynical, view suggests that federal policy sought to imbue tribes with sufficient legal status to legitimize the transfers of vast amounts of land via treaty; the statutory enactments were instruments designed to protect the federal prerogative in these usurpations.[36] Clearly, only the former view would accord dignity to the concept of tribal sovereignty by treating tribes as legitimate political entities capable of entering and being bound by these bilateral agreements.[37]

Persistent encroachment by whites on Indian lands provoked consideration on the part of federal officials to reconsider this policy. As Prucha notes, "[T]here were dreams that the problems could be eliminated once and for all by inducing the eastern Indians to exchange their lands for territory west of the Mississippi, leaving the area between the Appalachians and the Father of the Waters free for white exploitations."[38] The Louisiana Purchase in 1803 enhanced the appeal of this idea, and Thomas Jefferson promoted the idea of an exchange.[39] Subsequent administrations also took up the proposal, but it was not until Jackson's presidency in the 1830s that the proposal became reality and led to the infamous "Trail of Tears."[40] The Cherokee Nation's

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36. Eric Cheyfitz, *Savage Law: The Plot Against American Indians in Johnson and Graham's Lessee v. M'Intosh and the Pioneers, in* CULTURES OF UNITED STATES IMPERIALISM 109 (Amy Kaplan & Donald E. Pease eds., 1993).

> The importance of [*Johnson*] is that it translated Indian notions of native peoples' relation to their lands into the language of Anglo-American property law — that language where "title" is the supreme term — not so that Indians could be empowered in that language, but so that ultimate power over their lands, the historical inalienability of which constituted their cultures, could be "legally" transferred to the federal government. In short, Johnson v. M'Intosh translates Indian lands into the terms of title so that title over these lands can be claimed by the government; and in doing this, it becomes the cornerstone of the establishment of federal Indian law.

Id. at 110. This fascinating article reads *Johnson* in relation to James Fenimore Cooper's novel, *The Pioneers*, also published in 1823.

37. In Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), the opinions of Marshall and Johnson employ differing interpretive strategies based on the same textual evidence. Marshall writes, "Tribes have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war. *Id.* at 16. Johnson, on the other hand, found the treaties employed "the language of sovereigns and conquerors, and not the address of equals to equals." *Id.* at 22-23.

Why the difference? We'll never truly know — and that's the point. Interpretive strategies call into play the interpreter's values which influence, to some degree, the decision-making process. Marshall's interpretation of the Cherokee treaties was obviously influenced by an interpretive strategy which considered morality and a palpable sense of sympathy for the Cherokee position. *See id.* at 15.

38. PRUCHA, *supra* note 7, at 65.

39. *Id.*

40. *See generally* CHEROKEE REMOVAL, BEFORE AND AFTER (William L. Anderson ed.,

unsuccessful efforts to resist removal are legendary and culminated in the famous Cherokee cases before the United States Supreme Court.[41] These foundational decisions are discussed in more depth in the next section.

This period of United States history is inordinately complex and has justifiably drawn the attention of numerous scholars. This brief historical account cannot and does not hold pretensions of capturing the full scope of historical, ideological, and political struggles that characterize this era. The summary suggests, however, that the removal policy reflected a fundamental shift in the government's attitude toward Indian lands, a shift away from the government's original willingness to preserve Indian lands amidst non-Indian demands for territorial expansion.[42] The removal policy did not, however, reflect a substantial ideological shift in the notion that tribes were distinct political entities entitled to a measure of political and geographical autonomy. Tribes would still be tribes in the political sense; they would just have to maintain that existence in another place.[43]

1991).

41. Historian Theda Perdue explores the complex issue of the Cherokee political system and class structure as a prelude to the Nation's signing a removal treaty. She finds evidence of a "rising middle class" in Cherokee society, a group

> envious of the wealth and power of the elite and disdainful of the desires of the masses, and who saw in the removal issue an opportunity to usurp political authority and to reap rewards and concessions from the United States. Members of this class, and not the "common Indians," are the ones who ultimately 'burst their bonds of slavery' by negotiating a removal treaty.

Theda Perdue, *The Conflict Within: Cherokees and Removal, in* CHEROKEE REMOVAL, BEFORE AND AFTER (William L. Anderson ed., 1991) at 55, 66-67. Historian Michael D. Green presents a similar but expanded historical treatment of Creek government and its response to removal in MICHAEL D. GREEN, THE POLITICS OF INDIAN REMOVAL: CREEK GOVERNMENT AND SOCIETY IN CRISIS (1982). Green describes the complexity of Creek political and social organization during this period. He reveals how an opportunistic group of Creek leaders, led by William McIntosh, essentially "sold out" the Nation by entering into a removal treaty without full authority of the Creek Council. McIntosh was ultimately executed by the Creek Nation in accordance with Creek law. *Id.* at 97. Green writes,

> While the Creeks had adopted certain Anglo-American legal concepts, they had welded them to their own assumptions of political independence and used them to serve decidedly Creek purposes. The execution of William McIntosh for the treason of the Treaty of Indian Springs was the pivotal moment in the history of Creek Council government.

Id.

42. PRUCHA, *supra* note 7, at 64-77.

43. One of the best political, historical, and legal accounts of this complex era as it relates specifically to the Indian questions is an article by historian Joseph C. Burke. Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969). On the point that tribal political existence was preserved during this tumultuous time, Burke writes,

> While Monroe and Adams had urged removal by every kind of inducement, officially they continued to treat the tribes as more or less sovereign nations and to respect their right to remain on the treaty lands. Whereas circumstances had permitted them to postpone decision on the Indian question, the intransigence of

United States Indian policy in the mid-nineteenth century was dominated by the creation of reservations.[44] This policy was animated by two concerns: (1) ensuring the safety of non-Indian settlers and pioneers traveling through Indian territories and (2) facilitating the ultimate civilization of Indian people.[45] The latter objective was accomplished, in large part, through the work of Christian missionaries contracted by the federal government to run schools on reservations.[46] By the 1880s, a confluence of several historical events and circumstances precipitated yet another shift in federal policy — this time directed at both the tribes' territorial land bases and their distinct political systems. Again, extended treatment of this complex historical period is best left to professional historians.[47] It can be noted, however, that desires for western expansion (particularly post-Civil War), construction of more efficient transportation systems,[48] lust for newly found reserves of gold (in the Black Hills of South Dakota and in California), and frustration at the "slow pace" of Indian acculturation were interrelated factors leading federal officials to reconsider the "Indian problem."

Congress, for its part, acted in 1871 to end the practice of treaty making with tribes.[49] While Congress continued to create reservations and enter into agreements with tribes,[50] the 1871 act signaled "a downgrading in the political status of tribes."[51]

Georgia and the Cherokees did not allow Jackson such a luxury.

Id. at 504. Burke notes that Andrew Jackson had indicated as early as 1817 that he opposed the practice of treating tribes as sovereign nations. According to Burke, Jackson "considered them subjects of the United States whose only right to the land was that of occupancy for hunting purposes." *Id.* at 504 n.19. Indeed, Jackson chose the occasion of his First Annual Message, Dec. 8, 1829, to urge passage of a removal bill, in part to effectuate the "humane and considerate attention" to tribal rights he promised in his inaugural address of Mar. 4, 1829, and in part, to satisfy Georgia's demands that no separate political entity be maintained within Georgia boundaries. *Id.* at 504 nn.19 & 21.

For a fascinating critique of Andrew Jackson's attitudes toward Indians, see Ronald N. Satz, *Rhetoric Versus Reality: The Indian Policy of Andrew Jackson, in* CHEROKEE REMOVAL, BEFORE AND AFTER 29-54 (William L. Anderson ed., 1991). Satz writes that the "historical evidence clearly indicates that both the so-called devil and the revisionist 'angel' interpretations are too one-dimensional and simplistic. Andrew Jackson did not admire the ways of Indian life, but his views on Indian policy were shaped not so much by any ill will toward Indians as by his overwhelming concern for the growth, unity, and security of white America." *Id.* at 35.

44. PRUCHA, *supra* note 7, at 211.

45. *Id.* at 182.

46. COHEN, *supra* note 8, at 139-40.

47. A leading study is FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984).

48. In the eyes of one senator, delaying construction of railroads because of treaty rights and past promises was "poppycock." *Id.* at 48.

49. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566. This legislation, however, specifically preserved the viability and enforceability of treaties entered into before 1871. *Id.*

50. *See* DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW, CASES AND MATERIALS 179 (3d ed. 1993).

51. CHARLES WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 19 (1987). Congress's

Other reform-minded individuals wanted Congress to do more. Prucha notes that the Christian reformers who arrived on the scene in the early 1880s had earlier supported the reservations as "protected enclaves in which the programs of civilization and Americanization could move forward."[52] Ultimately, these reformers also advocated the elimination of reservations because they "symbolized the great separation between the Indians and the rest of American society, a separation that precluded the absolute Americanization that was the ultimate goal of the reform organizations and their friends in the government."[53]

Massachusetts Senator Henry L. Dawes was among the reformers' government friends who also considered himself a friend of the Indians.[54] He introduced legislation, the General Allotment Act of 1887,[55] which effectively dismantled communal tribal lands and allotted lands to individual tribal members under a trust patent of limited duration. Surplus lands were purchased by the government and sold to non-Indian homesteaders.[56] The "Dawes Act" was the centerpiece of an assimilationist program that included boarding schools,[57] Indian police, and federal prohibitions of tribal cultural and religious expression.[58] Greed alone did not motivate this policy. On the contrary, Prucha notes that allotment was not pushed through Congress by Westerners "greedy for Indian lands, but by eastern humanitarians who deeply believed that communal landholding was an obstacle to the civilization they wanted the Indians to acquire and who were convinced that they had the history of human experience on their side."[59] Vesting Indians with private property would accelerate their civilization and break up the communal land masses. The policy certainly accomplished the latter. The tribal land mass deteriorated from 138 million acres in 1887 to 52 million acres in 1934.[60]

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reasons for passing this act are usually attributed to internecine squabbling in Congress, the result of some House members wanting a direct role in dealing with Indian tribes. The treaty process, per the Constitution, involves only the Senate and the executive. *See* GETCHES ET AL., *supra* note 50, at 179.

Historian John R. Wunder disputes this account. He maintains that Congress's turnaround was precipitated by the great Sioux leader Red Cloud's initial refusal to sign the Treaty of Fort Laramie. He signed only after extracting further governmental concessions. While Wunder's account is not clearly developed, his point appears to be that the United States lost faith (or patience) in the diplomatic process and turned instead to the unilateral process afforded by agreements. *See* WUNDER, *supra* note 23, at 30-31.

52. PRUCHA, *supra* note 7, at 211.

53. *Id.*; *see also* Hoxie, *supra* note 32, at 205-28.

54. *Id.* at 205-06.

55. 25 U.S.C. § 331 (1988).

56. PRUCHA, *supra* note 7, at 226.

57. VINE DELORIA & CLIFFORD LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 11 (1983).

58. WUNDER, *supra* note 23, at 34-36.

59. PRUCHA, *supra* note 7, at 227.

60. WILKINSON, *supra* note 28, at 20. The Supreme Court upheld the allotment process in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

Allotment was not repudiated as federal policy until 1934, when Congress passed the Indian Reorganization Act.[61] Regarding Indian lands, the IRA prohibited future allotments, extended trust periods and restrictions on Indian lands indefinitely, and created a mechanism to restore unallotted lands to the tribe. Most significant for our purposes, the IRA did not affect the land rights of non-Indians who were then permanent reservation residents. The IRA's other principal feature was provision for tribes to reconstitute themselves politically as governments following IRA requirements.[62] This provision confirmed the notion of inherent tribal powers.[63] Regarding ideology, the IRA reflected the biases of its architect, John Collier, who stressed "group self-determination and the preservation and restoration of Indian culture."[64] It is important to note that some traditional Indian leaders objected to the IRA's standardized procedures for organizing politically, viewing the procedures "as simply another means of imposing white institutions on the tribes."[65]

Two other major shifts in federal Indian policy have occurred since 1934: the "Termination and Relocation" policies of the 1950s and the policy of tribal self-determination ushered in during the early 1970s, the predominant federal policy today. These two policy eras merit fuller attention than can or should be devoted in this brief overview. For present purposes, this article will discuss the most pertinent aspects of each.

Termination described the result of the federal government's severing of its political relationship with and legal obligations to tribes. The ideological impulse driving this policy was very much in accord with that of the Allotment era — a humanitarian, emancipating ethic toward the Indians.[66] From this ideological vantage, United States Indian policy had taken an unnecessary detour with the IRA policies and was now on track with longer-standing federal policy. Collier's crusade, in Prucha's terms, was "looked upon by many as an aberration."[67] For those tribes that were in fact terminated, the results were devastating, particularly the erosion of land and natural resources.[68]

The Relocation program instituted by the Bureau of Indian Affairs in the early 1950s contributed to a demographic shift of the Indian population from rural/reservation lands to urban areas. Thornton estimates about 100,000 American Indians relocated to urban areas as a direct result of this program.[69]

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61. 25 U.S.C. § 461 (1988).

62. *See id.* § 476.

63. *Id.* § 476(e) ("In addition to all powers vested in any tribe or tribal council by *existing law* . . . ." (emphasis added)); *see* DELORIA & LYTLE, *supra* note 57, at 14.

64. PRUCHA, *supra* note 7, at 340.

65. DELORIA & LYTLE, *supra* note 57, at 15.

66. PRUCHA, *supra* note 7, at 340.

67. *Id.*

68. *Id.* at 348-51.

69. RUSSEL THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492, at 228-29 (1987).

His study also notes American Indians did not necessarily stay in the urban centers, and many returned to their reservations.[70]

The policy of self-determination represents the last — and, to date, final — significant ideological shift in federal Indian policy. It originated in the early days of the Kennedy administration.[71] This policy, like that of the IRA, supports the concept of tribal self-governance, seeks to restore and rehabilitate the devastated tribal land bases, provides stimulus to tribal economic development, and supports tribal efforts to strengthen and/or restore significant cultural elements (e.g., languages, religion).[72] Most importantly, and for the first time, tribes were involved in designing much of the legislation coming out of Washington. Since 1975, Congress has enacted a plethora of statutes supporting tribal self-determination.[73]

A few observations should be noted before we leave this section. First, anticipating the next section on jurisprudence, we can ask to what extent federal Indian law incorporates or captures the complex historical portrait developed above. How do courts reconcile contemporary legal issues that may, and usually do, originate from vastly different historical and legal periods? Vine Deloria, Jr., offers a fairly bleak assessment:

> Very few doctrines of present federal Indian law are capable of explaining what the United States did, whether or not it was legal in the sense that governments must bind themselves to certain principles of law, and what the Indians did or felt in response to

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70. The evidence suggests a wide range in return rates from 30% to 70%. *Id.* at 230. Thornton presents the results of studies on the characteristics of American Indians who remained in the city and those who returned. "Returnees" were likely to have less formal education, possess a relatively high quantum of Indian-blood and self-identify more strongly as American Indian when compared to Indians who remained in cities. *Id.* For interesting personal accounts of the relocation experience, see INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN 161-73 (Kenneth R. Philp ed., 1986).

A major figure in the design and implementation of the relocation program was Dillon S. Myer, former Commissioner of Indian Affairs in the Truman Administration. Myer had previously directed the government's relocation of Japanese-American citizens to internment camps, called "relocation centers." *Id.* at 164. Philleo Nash succeeded Myer as Commissioner and his criticism of the program included the following:

> We were bound by the great American liberal value of non-segregation. Relocated Indians were scattered throughout the cities so they could not form neighborhood cohorts. This made little sense. Every ethnic group that established itself in America did so by creating cohesive neighborhoods that generated their own support. But the Indian Bureau could not follow this practice. This would be practicing segregation.

Id. at 168. In context, it appears this policy was the product of internal departmental practice, not external legal constraints. *Cf.* Morton v. Mancari, 417 U.S. 535 (1974).

71. PRUCHA, *supra* note 7, at 357-58.

72. *Id.* at 357-80.

73. *See supra* note 17 (listing some of the major legislation).

> the government overtures. Indeed, what is missing in federal Indian law are the Indians.[74]

Second, were the ideologies manifested in the shifting government policies (i.e., the ideologies of assimilation and of separatism) actually competing ideologies? The question is relevant in helping to determine if the historical record actually supports an ideology of cultural relativism. Professor White, in his work on the Marshall Court, argues that the ideologies were not competing, but rather were two sides of the same coin. He explains:

> [T]hey both started with the assumption that Indians were different (primitive, childlike, savage) and that their differentness could not be tolerated. While the positions provoked sharp differences of policy and, . . . precipitated conflict in the Court's Indian cases, they functioned to exclude from discourse a third ideological point of view, that of cultural relativism. The idea that Indians in America should be allowed to perpetuate a radically different cultural heritage from that of white settlers, and at the same time be treated as human beings having natural rights to autonomy and respect, was not seriously entertained at the time of the Marshall Court. Only a diluted version of that idea was entertained, manifested in the theory that Indian tribes were wards of the federal government and should, because of their cultural differentness, be forcibly separated from white society. That theory was subsequently to provide the principal justification for the establishment of federal Indian reservations, which began in earnest in the 1860s.[75]

If Professor White is correct,[76] then we would proceed logically to some later historical period that manifested an ideology supportive of cultural relativism. The 1930s Indian Reorganization Act era and the current self-determination policy offer possibilities. But if contemporary tribal claims predate those eras, as many of them do, how should the modern Court resolve the claim? Which "policy period" should predominate? The answers to these questions bear directly on the Court's development and continued reliance on

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74. Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 205 (1989).

75. WHITE, *supra* note 30, at 706.

76. I assume arguendo that he is correct, although the historical evidence presented above, particularly the official administration positions of Presidents Monroe and Adams as discussed in Professor Burke's work, suggests he may be wrong. In addition, it is important to note that no matter what the federal government thought or expected would happen to Indians, Indian people viewed themselves as separate, distinct and enduring. The important work of historians like Michael Green, Theda Perdue, and others is helping to document — i.e., "prove" — what traditional tribal oral histories have been suggesting all along.

the implicit divestiture theory to help resolve present-day assertions of tribal authority. We turn now to consider that development.

II. Development and Critique of the Implicit Divestiture Theory

A. Oliphant v. Suquamish Indian Tribe

Until 1978, the prevailing legal formulation of inherent tribal powers was:

> An Indian tribe possesses, in the first instance, all the powers of any sovereign State . . . . These powers are subject to be qualified by treaties and by express legislation of Congress, but save as thus expressly qualified, full powers of internal sovereignty are vested in Indian tribes and in their duly constituted organs of government.[77]

This formulation is consistent with the historical record developed in part I. Treaty making was the hallmark of federal Indian policy until 1871. After that point, Congress legislated matters in Indian affairs but maintained bilateral relations with tribes through agreements. Tribal powers of self-governance could thus be restricted in only two ways: bilaterally (through treaties or agreements) or unilaterally (through the exercise of Congress's constitutional authority in Indian matters). The Supreme Court recognized in 1896 that tribal powers of self-governance were not limited by the federal Constitution.[78] Congress changed this in 1968 through the Indian Civil Rights Act, imposing most, but not all, of the Bill of Rights on tribes.[79]

In 1978, the Supreme Court decided *Oliphant v. Suquamish Indian Tribe*.[80] The question presented was whether the tribe retained inherent criminal authority to prosecute a non-Indian reservation resident for reservation-based crimes.[81] The Court, speaking through then-Associate Justice Rehnquist, held in the negative. While the Court devoted over sixteen pages to a review of treaties, statutes, attorney general opinions, and some case law (a review that has been sharply criticized by other scholars),[82] it could not find clear and

77. Powers of Indian Tribes, 55 Interior Dec. 14, 22 (1934).

78. Talton v. Mayes, 163 U.S. 376, 384 (1896).

79. 25 U.S.C. § 1302 (1988).

80. 435 U.S. 191 (1978).

81. Oliphant got into federal court through the habeas corpus provisions of the Indian Civil Rights Act, 25 U.S.C. §§ 1301, 1303 (1988).

82. *See* Russel Barsh & James Henderson, *The Betrayal*: Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 637 (1979) (describing the opinion as the "product of distortion, unreason, or sloppiness"); Richard B. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 528-29 (1979) (stating that the marshaling and use of precedents is "selective and at times inaccurate and misleading," but less critical overall of *Oliphant's* reasoning); Peter C. Maxfield, Oliphant v. Suquamish Tribe: *The Whole Is Greater Than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 396 (1993) (stating that the court's justification for its result is "reprehensible"). Maxfield is the harshest critic of the Oliphant court.

express congressional authority delimiting tribal criminal jurisdiction. In fact, a close reading of the treaties and statutes from the eighteenth century does suggest that tribal criminal jurisdiction over non-Indians, particularly those who intruded upon tribal lands, was widely exercised and recognized.[83] Indeed, Rehnquist conceded that "[b]y themselves, these treaty provisions would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction."[84] According to then-prevailing notions of tribal sovereignty, the inquiry should have ended there; retained tribal authority should have been presumed. Instead, Rehnquist proceeded to announce the following unprecedented rule:

> But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Ninth Circuit Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers "*inconsistent with their status.*"[85]

In his conclusion, he states,

> If a student in the classroom or a lawyer in court drew false inferences, misrepresented or distorted case holdings and other legal authorities, and generally argued based on unsubstantiated statements, what would be the appropriate response? Would our system, so resilient and yet so fragile, survive this practice on a widespread scale? What if the example for this practice is the United States Supreme Court?

Id. at 443.

83. *See, e.g.*, Barsh & Henderson, *supra* note 82, at 617-19. These authors point to Rehnquist's general characterization of Indian treaties as "typically" expressing the view that tribes lacked criminal jurisdiction over non-Indians. They write,

> It is readily apparent, however, that there is no "typical" arrangement for nontribal criminal jurisdiction. The quoted language, for example, appears in only one treaty . . . . If Justice Rehnquist meant to imply that tribes "typically" gave up jurisdiction over "injuries" committed by non-Indians, the implication is clearly false. Moreover, the language quoted, even if representative of most treaties, is just as consistent with concurrent tribal and federal criminal jurisdiction; it does not say United States citizens shall *only* be punished according to the laws of the United States.

Id.; *see also* Collins, *supra* note 82, at 506 ("[T]he tribes had no authority to punish non-Indians lawfully present in tribal territory under federal authority and protection, jurisdiction over non-Indian members of tribal societies was extensively exercised by Indian Territory tribes, and the status of intruders was uncertain except under a few treaties."). Finally, it should be noted that the Court's analysis throughout the opinion was almost entirely grounded on nineteenth century precedents. *See* Williams, *supra* note 3, at 273 n.202 ("One would be hard pressed to find a contemporary Supreme Court opinion which relies so exclusively on as many 19th century precedents as *Oliphant* does.").

84. *Oliphant*, 435 U.S. at 208.

85. *Id.*

The Ninth Circuit's opinion is the only authority Rehnquist cites for this proposition. Of course, the irony is that the Ninth Circuit found the Suquamish *retained* tribal criminal jurisdiction over Oliphant. That court treated Oliphant's case as an Indian Civil Rights Act (ICRA) case. Oliphant argued he could not get a fair trial in tribal court because non-Indians were excluded from jury service. The Court responded, "This issue is raised prematurely. Oliphant is entitled to a fair trial; if he should be denied one, appeal from a conviction or a petition for a writ of habeas corpus, would then be appropriate. Further discussion of this contention is unnecessary."[86]

It is worth examining exactly what the Ninth Circuit was talking about in the section cited by Rehnquist. The full paragraph states:

> Oliphant argues that the Suquamish have no jurisdiction over non-Indians because Congress never conferred such jurisdiction on them. This misstates the problem. The proper approach to the question of tribal criminal jurisdiction is to ask "first, what the original sovereign powers of the tribes were, and, then, how far and in what respects these powers have been limited." Powers of Indian Tribes, 1934, 55 I.D. 14, 57 . . . It must always be remembered that the various Indian tribes were once independent and sovereign nations . . . who, though conquered and dependent, retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress.[87]

The portions of *Worcester* and *Cherokee Nation* cited by the Ninth Circuit clearly reference international law principles that sanctioned the type of political arrangement existing between tribes and the United States and required that the international community respect that arrangement.[88] The nature of the

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86. Oliphant v. Schlie, 544 F.2d 1007, 1011-12 (9th Cir. 1976).

87. *Id.* at 1009 (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560-61 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831)).

88. In *Cherokee Nation*, the Court stated in relevant portion:

> [Indians] and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831). In a similar vein, the Court in *Worcester* stated:

> The very fact of repeated treaties with them recognizes, and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence — its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.

political arrangement between tribes and the federal government was such that tribes could no longer cede lands to foreign governments or otherwise transact as sovereign to sovereign — except, of course, with the United States government. Legal discourse across international channels was the prerogative of the "stronger power" of the United States. But nothing in these passages suggests that the tribal-federal political arrangement in itself provoked a diminution of inherent tribal powers. Indeed, *Worcester's* statement not only confirms these inherent powers but establishes the federal obligation to protect it.

After the citations to *Worcester* and *Cherokee Nation*, the Ninth Circuit continued:

> Surely the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is a *sine qua non* of the sovereignty that the Suquamish originally possessed. As the Eighth Circuit held seven decades ago when it upheld the right of the Creek Nation to tax non-Indian residents:
>
> > It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.
> >
> > . . . .
>
> We turn to the relevant treaties and Congressional acts to see whether any has withdrawn from Suquamish the power to punish Oliphant for a violation of the tribal law and order code. Our approach is influenced by the long-standing rule that "legislation affecting the Indians is to be construed in their interest."[89]

In summary, the Ninth Circuit's discussion manifests a strongly solicitous view of tribal powers that were not only confirmed by the United States but guaranteed by it. The Ninth Circuit makes clear that only Congress can diminish tribal powers either through bilateral arrangements with tribes or unilateral acts pursuant to its plenary authority. Finally, the court establishes that the tribal-federal political arrangement precipitated no "internal" diminution of tribal powers but only restrained tribes in "external" dealings with foreign nations.

Rehnquist extracts from the Ninth Circuit's opinion, and by extension, from the jurisprudence of John Marshall, a rule of law that tribal powers may be divested in three ways — by treaties, by express statutory acts, and now, by

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Worcester v. Georgia, 31 U.S. (6 Pet.) 560-61 (1832).

89. *Oliphant*, 544 F.2d at 1009-10 (quoting Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905)) (citations omitted).

virtue of tribal "status." The exegesis developed above suggests Rehnquist and his brethren in the majority were seriously mistaken.

Following the "inconsistent with their status" language, Rehnquist goes on to develop his argument, but in a substantially different direction. He writes:

> Indian reservations are "a part of the territory of the United States." Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority." Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. "[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished."[90]

Three observations are in order. First, Rehnquist in no place defines what he means by "upon incorporation." Professor Milner Ball has already subjected this concept to rigorous scrutiny and concluded that "[t]he phrase is a performative utterance. The only evidence of the incorporation of Indian nations known to me is located in those words. I can discover no incorporating event or series of events outside them."[91] Professor Ball also notes that the citation to *Johnson* is odd, because in that decision John Marshall "specifically allowed for the incorporation of non-Indians into the tribes and specifically rejected the notion that tribes had been or could be incorporated into the United States."[92]

Rehnquist may have relied on the specific concept of incorporation for another reason. Early Supreme Court case law recognized that full constitutional safeguards may not apply when Congress enacts laws to govern territories or other federal property.[93] However, when territories are "incorporated" as part of the United States, all constitutional restraints are applicable.[94] In light of the extraordinarily broad license the Court had

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90. *Oliphant*, 435 U.S. at 209 (quoting United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823)) (citations omitted).

91. Ball, *supra* note 5, at 37.

92. *Id.* at 38-39 n.171.

93. *See* Reid v. Covert, 354 U.S. 1, 13-14 (1957). Congressional authority over territories is provided in U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.").

94. Reid v. Covert, 354 U.S. 1, 13 n.26 (1957). The Court cites Rassmussen v. United States, 197 U.S. 516 (1905), for this proposition. A principal issue in *Rassmussen* was whether Congress was bound by the Sixth Amendment jury provisions in legislating for Alaska. That issue, the Court said, required it "to determine whether Alaska has been incorporated into the United States as a part thereof, or is simply held . . . under the sovereignty of the United States as a possession or dependency." *Id.* at 520-21.

afforded Congress in setting Indian policy,[95] the Court may have wanted to leave no doubt that congressional authority was restrained even in Indian affairs, at least in some circumstances. Invoking this jurisprudence of "incorporation" provided that assurance, even if the Court could point to no actual or historical incorporation of tribes within the United States.[96]

Second, the passage cited from *Johnson v. M'Intosh*,[97] read in context, discusses the legal fiction of the "discovery doctrine," which bestowed "exclusive" title to whichever European potentate landed first. It was a rule of "first thou" that gave "to the nation making the discovery the sole right of acquiring the soil from the natives . . . . [I]t was a right with which no Europeans could interfere."[98] Marshall's interpretation of the discovery doctrine at best supports a negative limitation on tribal powers. Tribes could not cede lands to another European power because of the necessary but fictitious constraints imposed by an external ordering system, a system that bound Europeans not to interfere with indigenous people once a fellow Western nation had claimed their land. Marshall in no place indicates that this limitation on tribal power stemmed from qualities or characteristics inherent to tribes. In fact, he could not have.

Finally, Rehnquist indicates that tribal powers are "constrained" so as not to conflict with the "interests" of the overriding sovereignty. He identifies two such overriding interests. One is the interest of the United States in protecting its territorial boundaries.[99] This interest is consistent with earlier pronouncements from the Marshall Court; tribes could not transgress into areas that were exclusively within the external sovereign prerogative. These prerogatives included federal land cessions and treaties with foreign countries. Recall, however, that such constraints on tribal powers resulted from the political arrangement between tribes and the federal government, not from any inherent limitations.

The other interest is individual liberty. Rehnquist notes that

> from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding

95. *See* United States v. Kagama, 118 U.S. 375 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

96. This line of reasoning was pursued by the court in Duro v. Reina, 495 U.S. 676 (1990), where the Court held that tribes were implicitly divested of criminal jurisdiction over nonmember Indians. *Id.* at 693-94.

97. 21 U.S. (8 Wheat.) 543 (1823).

98. *Id.* at 574.

99. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209-10 (1978).

> sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.[100]

Rehnquist's individual liberty analysis examines two nineteenth century judicial precedents, *Ex parte Crow Dog*[101] and *United States v. Kagama*,[102] and an eighteenth century statute, the 1790 Trade and Intercourse Act.[103] Since the individual liberty thesis may constitute the only legitimate legal point of contention in *Oliphant*, it is worth examining this argument and its underlying basis more closely.

The Nonintercourse Act is cited for the proposition that tribal criminal jurisdiction over non-Indians was somehow preempted. Professor Maxfield notes that the statute contains language similar to some of the early treaties that in fact recognized tribal criminal authority over non-Indians. At best, Maxfield argues, the cited statute militates a finding of concurrent, but not exclusive, federal jurisdiction.[104]

The case of *Ex parte Crow Dog* involved the murder of a Brule Sioux chief by a fellow tribal member within the reservation. The respective families met and resolved the matter according to tribal law.[105] Crow Dog was subsequently tried in United States territorial court, found guilty, and sentenced to hang. On appeal, the Supreme Court found exclusive jurisdiction in the tribe and reversed the conviction due in large part to the "nature and circumstances of the case."[106] The Court essentially found that it would be unfair to try Crow Dog according to external laws, "of which [he had] an imperfect conception" and a standard of morality, "which measures the red man's revenge by the maxims of the white man's morality."[107] For Rehnquist, Oliphant's

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100. *Id.* at 210 (quoting H.R. REP. NO. 474, 23d Cong., 1st Sess. 18 (1834)) (citation omitted).

101. 109 U.S. 556 (1883).

102. 118 U.S. 375 (1886).

103. Act of July 22, 1790, ch. 33, 1 Stat. 137.

104. Maxfield, *supra* note 82, at 418-19; *see also Oliphant*, 435 U.S. at 198 n.8.

105. The settlement required Kan-gi-shun-ca (Crow Dog) and/or his clan to pay $600 in cash, eight horses, and one blanket to the family of the decedent, Sin-ta-ga-le-Scka. SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW AND UNITED STATES LAW IN THE NINETEENTH CENTURY 1 (1994).

106. *Crow Dog*, 109 U.S. at 571.

107. *Id.* Rehnquist's quote from *Crow Dog* "sanitizes" the earlier opinion by removing its references to "savage life," "superiors of a different race," and "savage nature." *Compare Crow Dog*, 109 U.S. at 571 *with Oliphant*, 435 U.S. at 210-11.

situation presented "almost the inverse"[108] of Crow Dog's situation. Considerations of fairness precluded federal jurisdiction in *Crow Dog* and "speak equally strongly against" retained tribal authority in *Oliphant*.[109] The syllogism, of course, does not withstand close scrutiny.

First, Crow Dog's case involved a purely intratribal affair while Oliphant's case involved an Indian and non-Indian encounter. Second, it is disingenuous to suggest that Oliphant had "an imperfect conception" of laws against assaulting a police officer (*any* police officer) and resisting arrest. And third, that Rehnquist would almost equate the power the Suquamish held over Oliphant with the power the federal courts held over Crow Dog is a cause for mild celebration. In reality, the courts exercised vastly different powers. Crow Dog, after all, was sentenced to hang; Oliphant, at worst, would have gotten a cot in the tribal jail for a few days and/or a fine.[110]

United States v. Kagama, on facts nearly identical to Crow Dog's case, involved a challenge to the federal Major Crimes Act,[111] passed in June 1885, one and one-half years after Crow Dog's conviction was overturned.[112] The Act authorized federal prosecution of certain enumerated crimes, including murder, when committed by Indians within Indian lands. The Supreme Court upheld the law, not on grounds that the statute was authorized pursuant to Congress's Article I powers in Indian affairs,[113] but on the basis of Congress's presumed plenary power in Indian affairs. The Court did not, and indeed could not, cite textual authority from the Constitution to support this theory of congressional power in Indian affairs. Congress's authority to legislate a criminal code for tribes apparently stemmed from its role as tribal guardian. The *Kagama* Court opined:

> It seems to us that this is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe

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108. *Oliphant*, 435 U.S. at 210.

109. *Id.* at 211.

110. At the time of Oliphant's offense, the Indian Civil Rights Act prescribed maximum penalties of $500 fine or a term not greater than six months in prison. 25 U.S.C. § 1302(7) (1988).

111. 18 U.S.C. § 1153 (1988).

112. Harring demonstrates that the federal statute was not necessarily a visceral political reaction to the "public outcry" which followed Crow Dog's case. HARRING, *supra* note 105, at 134. In fact, the Bureau of Indian Affairs had been lobbying Congress for just such a statute since 1874. *Kagama*, the first legal challenge to the new statute, was decided less than a year after the Act's passage and a mere nine months before the Dawes Act of 1887. *Id.* at 142 n.3.

113. The Court refused to consider the imposition of a system of criminal laws for Indians to be encompassed within the clause authorizing Congress to "regulate Commerce . . . with the Indian Tribes." This represented a "very strained construction of this clause." United States v. Kagama, 118 U.S. 375, 378 (1886).

> no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.[114]

When viewed in context with prevailing federal Indian policy during the late-nineteenth century, it is clear that the Supreme Court in *Kagama* was reconciling, indeed, restructuring its jurisprudential view of tribal-federal political relations to resonate harmoniously with extant congressional policy. Professor Harring characterizes *Kagama* as "the judicial embodiment of Congress's policy of forcing the assimilation of the tribes, recognizing none of their sovereignty, none of their status as domestic nations."[115]

It is noteworthy that Rehnquist does not cite the passage in *Kagama* recognizing federal authority but instead cites the portion of *Kagama's* dicta that found only two "legitimate" sovereign powers operating within the American federalist structure. The modern Court, generally, has tried to distance itself from reliance on plenary power as a legitimating source of federal authority in Indian affairs,[116] though its efforts have not always been consistent or complete.[117] *Kagama* departs from Marshall's conceptualization of tribal sovereignty by offering a different vision, one that views tribal sovereignty existing as a gesture of federal grace, not legal entitlement. Classic republicanism (what Robert Clinton calls a form of "trust us" political

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114. *Id.* at 383-84.

115. HARRING, *supra* note 105, at 142. He adds,

> [B]oth the Major Crimes Act and the *Kagama* decision occurred directly in the midst of Congress' most sweeping debate on Indian policy, a policy that led to the Dawes Act of February 8, 1887, providing for the forced allotment of Indian lands as a deliberate means of destroying "communistic" tribal culture and forcing the Indians to assimilate as farmers and ranchers into the mainstream of U.S. life.

Id. at 143.

116. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." *Id.* at 172 n.7 (citing U.S. CONST. art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 2).

117. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). "When Congress acts with respect to the Indian tribes, it generally does so pursuant to its authority under the Indian Commerce Clause, or by virtue of its superior position over the tribes." *Id.* at 155 n.21.

constraint[118]) replaced legal mechanisms as the prime source of protection for tribal autonomy.

It should not be surprising that a judicial reformulation of tribal powers would have occurred during this time, considering Congress's overhaul of the tribal-federal relationship. What is surprising is that while Congress has since returned to a policy strongly supportive of inherent tribal power, *Kagama's* judicial conceptualization both of tribal powers and of virtually unlimited federal authority in Indian affairs has persisted. The competing views of tribal powers present serious challenges to contemporary jurists. Should a jurist accept Marshall's concept of tribes as nations or *Kagama's* concept of tribes "not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people"?[119] To give full force to the Marshall theory in present-day affairs would be, in effect, to recognize a species of political autonomy in tribes that takes no account of the dramatic intervening historical, social, and political forces that produced today's complex reservation communities. However, to give full force to the *Kagama* theory would effectively ignore the long-standing policies of tribal-federal bilateralism that preceded Allotment and the policies of self-determination that ultimately prevailed in the Allotment era.[120]

Mark Oliphant's challenge to the Suquamish Tribal Court's criminal authority required an intellectual "unpacking" of crates of historical, legal, political, and social materials. The crate marked *"Worcester v. Georgia,"* while it may have been wheeled into the examining room, evidently was not opened. Its absence in the *Oliphant* opinion is conspicuous and noteworthy. What explains this omission? The facts of *Oliphant* may provide the best clue.

The Suquamish occupy a reservation of over seven thousand acres in northwestern Washington state. The majority of this acreage is owned in fee simple by non-Indian residents who outnumber Suquamish residents by a ratio of nearly sixty to one.[121] Non-Indian reservation residents derived their title through policies that grew out of the Allotment Act.[122]

The specter of fifty reservation tribal members exercising criminal authority over nearly three thousand non-Indian reservation residents must have struck the Court as so profoundly discordant with fair processes that it justified the

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118. Robert N. Clinton, *Peyote and Judicial Political Activism, Neo-colonialism and the Supreme Court's New Indian Law Agenda*, 38 FED. BAR NEWS & J. 92, 93 (1991).

119. United States v. Kagama, 118 U.S. 375, 381 (1886).

120. *See* WILKINSON, *supra* note 28, at 25-31.

121. The Court notes that 63% of the 7000-plus acres is owned in fee simple by non-Indians while the other 37% is Indian-owned lands held in trust by the United States. Nearly 3000 non-Indians reside on the reservations while only 50 tribal members reside there. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 193 n.1 (1978).

122. The Suquamish did not consent to non-Indian homesteading of surplus lands. Non-Indians acquired title through sales of Indian allotments which were authorized by other Allotment Era provisions and implemented by the Secretary of the Interior. *Id.*

wholesale creation of a limiting theory of tribal jurisdiction. Treaties, statutes, and other positive expressions of law did not offer sufficient justification to do this, so the Court resorted to what we might term "legal imagism." Two visions were created, juxtaposed against each another and presented as irreconcilable, thereby necessitating the extinction of one vision. What were these two constructed images?

The first is an atavistic conceptualization of tribal authority, particularly over non-Indians. The Western genre and notions of frontier justice were revitalized in *Oliphant* to create an image of Indians and whites still battling over precious lands, where Indians' savage nature (Crow Dog) still awaits the tempering and benevolent influences of an understanding yet firm paternal white figure (Judge Isaac Parker) and where the Indian polity is already firmly dominated, if not completely superseded, by a superior power *(Kagama).* References to "increasingly sophisticated" tribal court systems are insufficient to eradicate the "dangers" awaiting non-Indians if brought before tribal forums.[123] *Oliphant's* vision of justice in tribal courts for non-Indians is the judicial analogue to the American literary genre of captivity narratives.[124]

This image necessarily entails privileging the historical record and the federal policies of another era. The last section raised this concern as one of the most significant juridical issues confronting today's courts. For tribal legal advocates, the important question lies in how best to present the full record of a matter and reduce the risk that a subsequent court will choose to effectuate the policies of another era to the tribe's detriment.[125]

The second image is that of an American political and legal apparatus that greatly values individual liberty and constrains government action that restricts individual liberty unless clearly warranted. Even then, government processes must accord "basic procedural rights" to the individual before liberty can be limited.[126] This image is incomplete. It furthers the impression that federal and state polities — the only two legitimate bodies within "the broad domain of sovereignty" — both extend "equally great solicitude" to citizens' liberty interests. As Professor Newton demonstrates, this view distorts a significant portion of American constitutional history. While the Fourteenth Amendment

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123. *Oliphant*, 435 U.S. at 211-12.

124. *See, e.g.*, COLIN G. CALLOWAY, NORTH COUNTRY CAPTIVES (1992). "Pioneers on the American frontier commonly viewed the prospect of being taken captive by Indians as a fate worse than death. The narratives recorded by redeemed captives represent one of the oldest genres of American literature, and they helped to establish enduring stereotypes of Indians as cruel and bloodthirsty." *Id.* at vii; *see also* JOHN TANNER, THE FALCON: A NARRATIVE OF THE CAPTIVITY AND ADVENTURES OF JOHN TANNER (Viking-Penguin 1994) (1830).

125. For a recent example of the Court effectuating the policies of the Allotment Era despite strong arguments that both the IRA and current policy mandated a contrary result, see County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992).

126. *Oliphant*, 435 U.S. at 212.

to the Constitution[127] imposed due process and equal protection restrictions upon states,[128] nearly one hundred years elapsed before "the Supreme Court determined that the concept of fundamental fairness of the Due Process Clause incorporated certain provisions of the Bill of Rights to the states."[129] In other words, the Supreme Court began to incorporate provisions of the Bill of Rights selectively, making them applicable to states via the Fourteenth Amendment at about the time Congress was doing the same thing vis-à-vis the Indian tribes through the mechanism of the Indian Civil Rights Act of 1968 (ICRA).[130]

As constructed by the Court, it is plain to see which vision had to yield. The Indians, as they say, "never stood a chance." This result is anomalous because it never addresses why non-Indians' liberty interests are privileged over those of Indians. All Indians were granted United States citizenship in 1924[131] and thus are entitled to the federal government's "great solicitude." The difference may be, though the Court never explored it, that tribal members participate directly in the formation of their government and thereby influence the quality of justice administered by their courts.

This analysis perhaps should prompt us to revisit the Ninth Circuit's opinion in *Oliphant*, if only to determine whether that court struggled with the difficult policy implications underlying the case. The Ninth Circuit apparently did confront these issues but pursued a path entirely different from that undertaken by the Supreme Court. Upon completing its analysis of legislative enactments, the Ninth Circuit turned to consider "whether the exercise of criminal jurisdiction by the Suquamish in cases such as this one would interfere with or frustrate the policies of the United States."[132] The court found no conflict with federal law. Indeed, it noted that the federal government "has been encouraging Indian tribes to adopt law and order codes, set up tribal courts, and exercise authority over reservation lands . . . . Tribal criminal jurisdiction over non-Indians, *as limited by the Indian Bill of Rights* [presumably, the ICRA], is a small but necessary part of this policy."[133]

Compared to the Supreme Court's approach, the Ninth Circuit's analysis defers more to congressional policy and seems to assume, though this is never stated, that the most recent manifestation of federal Indian policy should

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127. U.S. CONST. amend. XIV (ratified July 9, 1868).

128. Scholars have questioned whether the Fourteenth Amendment was constitutionally enacted given that representatives from southern states were excluded from that Congress. *See* Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 698 (1989).

129. Nell Jessup Newton, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109, 120 (1992).

130. 25 U.S.C. §§ 1301-1303 (1988); *see* Newton, *supra* note 129, at 121.

131. COHEN, *supra* note 8, at 642-45. Some Indians acquired citizenship earlier via treaties or statutes.

132. Oliphant v. Schlie, 544 F.2d 1007, 1012 (9th Cir. 1976).

133. *Id.* at 1012-13 (emphasis added).

govern. The only constraint the Ninth Circuit could find on the tribe's criminal power over non-Indians was the ICRA.

The Ninth Circuit's inquiry into federal policies echoes that portion of the Supreme Court's language in *Oliphant* stating tribal powers were constrained so as not "to conflict with the interests of this overriding sovereignty."[134] Earlier, this author suggested that this inquiry requires a fundamentally different approach than the Supreme Court's other formulation diminishing tribal powers, i.e., the "inconsistent with their status" language. What is the difference?

Inquiry into "overriding federal interests" focuses the Court's attention on prevailing federal enactments or expressions of federal policy to determine the scope of extant tribal powers. Under this approach, courts logically should take the most recent articulation of federal Indian policy as governing unless they find clear evidence to the contrary. From this perspective, treaties and treaty-substitutes[135] serve a constitutive function to provide order and structure to the intergovernmental relationship. Professor Frickey argues for this view, noting that treaties (and their equivalents) are the

> constitutive document[s] providing the undergirding and framework for an ongoing (tribal) government-(federal) government relationship. [They are] . . . the joinder of two sets of "We the People," and . . . therefore [resonate] with *Marbury's* notion that constitutional authority flows from the people themselves. The treaty was a sovereign act of law rather than of sheer power — that is, of conquest.[136]

Inquiry into "overriding federal interests" also represents the more legitimate interpretive role for the judiciary. Professor Martha A. Field, in arguing for a broader judicial power to create federal common law, recognizes a significant limitation: "[T]he court must point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule."[137] This is particularly true for the federal judiciary owing to considerations of federalism, separation of powers, and the nature of the federal system as a government of limited powers.[138] Thus,

> federal judges' jurisdiction is limited to what Congress has granted, and Congress can grant only what the Constitution permits. . . . Federal judges . . . (or state judges faced with a federal common

134. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978).

135. This is Wilkinson's term. *See* WILKINSON, *supra* note 28, at 103.

136. Phillip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 409-10 (1993).

137. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 887 (1986).

138. *Id.* at 899.

> law problem) can fill in a gap only if some enactment permits them to do so; otherwise the area is not one for federal rule at all, but is left to the states.[139]

The Ninth Circuit's approach in *Oliphant* appears to fall within the parameters delineated here. It is less clear whether the Supreme Court's approach accords with this view.

John Marshall appreciated the conception of treaties as constitutive texts. Far from ruling that tribal powers could be divested because of some inherent quality, Marshall made clear that any limitation on tribal powers was a function of the political arrangement — the constitutive alignment — with a politically superior power. To the extent that Rehnquist's opinion in *Oliphant* requires inquiry into "overriding federal interests," it appears consistent with Marshall's theory.[140]

Inquiry into "inconsistent with their status," on the other hand, focuses the Court's attention on the individual tribal legacy of self-rule. In itself, this is not an irrelevant inquiry. Tribes evolve like all other communities; they merge, they confederate, and they disband. Thus, the inquiry ensures that a tribal body politic is extant with the potentiality of exercising inherent powers of self-rule. There are dangers, however. First, the interpretive lens may selectively incorporate an image or impression of tribalism at a given moment in time and give that image undue prominence. *Oliphant* slips dangerously close to this point when it relies on an 1834 House Report's characterization of tribes as wanting "of fixed laws [and] of competent tribunals of justice."[141] The opinion never fully disavows itself of this image, and its influence is palpable.[142]

Second, a focus on "tribal status" permits ethnocentric speculation about the nature of legitimate political institutional systems. *Oliphant* references an 1834 statement from the Commissioner of Indian Affairs who noted that with few exceptions, "the Indian tribes are without laws, and the chiefs without much

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139. *Id.*

140. Perry Dane notes that "[s]overeigns do intervene in each other's affairs, but it is the intervention of strangers. Its source is not the simple calculus of governance, but the complicated ethics of encounter." Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 971 (1991). "[W]hen done right," he says, it is "like one person on the street stopping another from beating her child." *Id.* The "dark" side is that the encounter can detach itself from any sense of order or principle and take on the form of hate and warfare. "At its worst," he says, "it is not like to protecting a stranger's child, but more like accosting the stranger with her child." *Id.*

141. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

142. One thinks of Edward Curtis and his manipulation of light, setting, costuming, and subject posing to achieve a certain image of "real Indianness." *See, e.g.*, BARRY PRITZKER, EDWARD S. CURTIS (1993). "[H]e believed that the supposed quality of 'Indianness' could be enhanced in a photograph, in part by maximizing a wild setting." *Id.* at 99.

authority to exercise any restraint."[143] As the historical section demonstrates, evidence to the contrary exists. Moreover, this early statement reflects a frequently encountered ethnocentric bias toward tribal political organizations denying the legitimacy of political systems that relied on consensus, not coercion, to regulate social relations.

Finally, a focus on "tribal status" viewed in context with the Anglo-American legal system's reliance on precedent creates obstacles to tribes attempting to tell their stories. Tribes frequently must deconstruct recorded historical materials both to add their voices to the narrative and to provide context for the recorded events. Precedent compounds this problem by imbuing past legal discourse with the cloak of authority. This phenomenon "allows legal authority to appear as though it were timeless. The example from the past is merged with a new example from the present: Linearity is redefined as simultaneity. The past is always present in the form of the authoritative example."[144]

Rehnquist's opinion in *Oliphant* demonstrates how easily precedent can be decontextualized and applied presently so as to appear timeless and hence authoritative. The 1790 NonIntercourse statute, in relevant part, provided for federal jurisdiction over non-Indians for offenses committed in Indian country. Rehnquist notes that Congress "was careful to extend to the non-Indian offender the basic criminal rights that would attach in non-Indian related cases. Under respondents' theory, however, Indian tribes would have been free to try the same non-Indians without these careful proceedings unless Congress affirmatively legislated to the contrary."[145] The "denuded" operative principle (borrowing the term from Torres and Milun) was that Indian tribes lacked criminal jurisdiction over non-Indians. The principle applied in 1790 continues to apply today because it has been established a priori as authoritative. Context seems irrelevant.

There is also a strong moral objection to relying on tribal status. Given the history of colonialism and federal policies aimed directly at destroying the tribal communitarian fabric, it appears disingenuous and immoral to posit that tribal powers no longer exist because they succumbed to debilitating and nihilistic forces.

In summary, the reasoning in *Oliphant* is revealed to be fundamentally flawed. There is no legal basis from which the Court can argue that tribal powers are implicitly divested by virtue of their "status." The Supreme Court's reliance on the lower court for this proposition is misguided, since the Ninth Circuit found in favor of retained tribal power and used "status" in the international law sense of the term, not as a free-standing theory to delimit

143. *Oliphant*, 435 U.S. at 197.

144. Gerald Torres & Kathryn Milun, *Translating* Yonnondio *by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 642.

145. *Oliphant*, 435 U.S. at 211.

tribal powers. As used by Marshall and the Ninth Circuit, tribal status is an inherently relational concept referring to the tribes' political relationship with the federal government. Limitations on tribal powers resulted from that political relationship but only to the extent the tribal activity infringed on a matter within the federal government's sovereign domain. Until *Oliphant*, these limitations consisted of transactions with foreign nations and cessions of public lands.

Oliphant's "overriding federal interests" language might be consonant with these earlier precedents, but the result of that inquiry would hardly produce an "implicit" divestiture of tribal powers since evidence of overriding federal interests would have to originate from Congress, and not be fabricated by the Court. *Oliphant's* obvious concern for the protection of individual liberty rights fails to consider that Congress may have taken that matter into account when it passed the Indian Civil Rights Act. From this perspective, the Court's interpretive function involved reconsidering legislative intent and reordering the resulting political dynamic — a function outside the traditional role of the judiciary.

The next section will examine *Oliphant*'s legacy and the adjudicative role of implicit divestiture.

B. Oliphant and Implicit Divestiture: The Aftermath

The *Oliphant* decision created jurisprudential problems in the field of federal Indian law and practical problems for Indian tribes. From a jurisprudential aspect, the decision upset precedent nearly one hundred and fifty years old by prescribing a novel means to divest or diminish tribal powers.[146] The power to do so, if it existed at all, rested with Congress, not the courts. *Oliphant* and its theory of implicit divestiture put the Court in a position to exercise judicial plenary power. The theory lacks both precise definition and any perceptible limits and can thus be asserted in a variety of contexts. This situation contrasts markedly with the quality and quantum of proof required of Congress to show it has acted to diminish tribal authority or rights. For example, the Court has typically required explicit or clear evidence of congressional intent to deprive tribes of treaty rights[147] or to diminish tribal land bases.[148]

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146. *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 451 (1989) (Blackmun, J., dissenting) (1989).

147. *See* Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968) (stating that statutes are not construed so as to abrogate treaty rights in "a backhanded way," and absent explicit statement, Congress's intent to abrogate or modify a treaty will not be "lightly imputed"). For a subsequent *Oliphant* decision in accord with *Menominee*, see United States v. Dion, 476 U.S. 734 (1986). The *Dion* Court stated, "What is essential is *clear evidence that Congress actually considered the conflict* between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 739-40 (emphasis added).

148. *See* DeCoteau v. District County Court, 420 U.S. 425 (1975) (requiring that

Practically, *Oliphant* unleashed an assault on the existence of tribal power, mainly from non-Indian reservation residents, non-Indian business entities, or the state.[149] It also helped generate a healthy flow of Indian law cases into the federal courts, a particularly ironic result given Chief Justice Rehnquist's active campaign to reduce the burden on the federal judiciary.[150]

The jurisprudential review that follows traces the Court's implicit divestiture theory since *Oliphant.* The immediate purpose is to assess whether the Court has modified the theory since 1978 and, if so, in what circumstances. The broader purpose is to expose the Court's underlying concerns with tribal authority over all persons and property within reservation boundaries. *Oliphant's* concern for individual liberties caused the Court to gloss over principles of legalism and historicism to achieve the desired result. As previously argued, the Court relied instead on legal imagism, a contrived but clear vision of the respective interests at stake. Time-honored individual liberties and inherent tribal sovereignty were set as oppositional forces to each other. In choosing to promote and protect the individual liberty interests of non-Indian reservation residents, at the expense of tribal self-government, the Court sacrificed even larger principles of judicial integrity and restraint.

Supreme Court decisions after *Oliphant* continue to cite its implicit divestiture theory but conflict over which "test" should govern its application.

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congressional determination to terminate reservation lands "be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history"). For a subsequent *Oliphant* decision in accord with *DeCoteau*, see Solem v. Bartlett, 465 U.S. 463 (1984). The *Solem* Court stated, "Diminishment . . . will not be lightly inferred. Our analysis of surplus land acts requires that Congress clearly evince an 'intent to change boundaries' before diminishment will be found." *Id.* at 470.

149. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Montana v. United States, 450 U.S. 544 (1981); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989); South Dakota v. Bourland, 113 S. Ct. 2309 (1993); Burlington N.R.R. v. Crow Tribal Council, 940 F.2d 1239 (9th Cir. 1991); Burlington N.R.R. v. Blackfeet Tribe, 924 F.2d 899 (9th Cir. 1991); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990).

An ongoing battle on the Cheyenne River Sioux Reservation between the tribe and a non-Indian liquor store owner indicates the continuing hostility and battles over jurisdiction. In City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2741 (1994), the tribe imposed a $100 liquor license fee on operators of liquor stores on the reservation. A non-Indian store owner refused to pay and challenged the tribe's authority beginning in tribal court. After exhausting tribal appeals, he filed suit in federal district court and ultimately got a ruling from the Eighth Circuit Court of Appeals that the tribe had been delegated authority by Congress to regulate liquor trade. *Id.* at 556. The store owner therefore owed the $100. An appeal was recently denied by the U.S. Supreme Court. The store owner may even mortgage other properties to pay legal expenses, all because he rejects tribal authority and refuses to pay the $100 fee. The author thanks Professor Frank Pommersheim for the background details on this case.

150. William Rehnquist, *National Conference on State-Federal Judicial Relationships: Welcoming Remarks*, 78 VA. L. REV. 1657 (1992).

For instance, in *United States v. Wheeler*,[151] the Court stated that tribes "possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a *necessary result of their dependent status. See Oliphant v. Suquamish Indian Tribe.*"[152] In *Washington v. Confederated Tribes of the Colville Indian Reservation*,[153] the Court flatly contradicted both *Wheeler* and itself in the same opinion. In construing tribal power to tax, the Court first said tribes retained such authority "unless divested of it by federal law or necessary implication of their dependent status."[154] The Court then relied on the "other" *Oliphant* test in stating:

> Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protection of the Bill of Rights.[155]

The *Wheeler* Court determined that the Navajo Nation had not been implicitly divested of its authority to prosecute a tribal member since tribal self-government included "the power to prescribe and enforce *internal* criminal laws."[156] Non-Indians were not involved in *Wheeler*, but in dictum, the Court explained that implicit divestiture had occurred in areas "involving the relations between an Indian tribe and nonmembers of the tribe."[157] The statement was gratuitous (only a tribal member was involved), overly broad (*Oliphant* referred to non-Indians that *Wheeler* expanded to nonmembers), and apocryphal (tribal authority over non-Indians was explicitly recognized in *Williams v. Lee*).[158]

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151. 435 U.S. 313 (1978).

152. *Id.* at 323 (emphasis added).

153. 447 U.S. 134 (1980).

154. *Id.* at 152.

155. *Id.* at 153-54 (citing *Oliphant*, 435 U.S. at 210; *Wheeler*, 435 U.S. at 326).

156. *Wheeler*, 435 U.S. at 326 (emphasis added). Defendant Wheeler was indicted for rape by a federal grand jury. One year earlier he pled guilty in tribal court to misdemeanor charges stemming from the same event. He interposed the Fifth Amendment's double jeopardy provision to the federal prosecution, arguing that the tribe's authority flowed from the federal government's and therefore represented a second prosecution by the same sovereign for the same offense. The court disagreed. *Id.* at 330.

157. *Id.* at 326.

158. *See* Williams v. Lee, 358 U.S. 217 (1959). The Court had occasion to consider whether tribes retained criminal jurisdiction over nonmember Indians. In Duro v. Reina, 495 U.S. 676 (1990), the Court held that tribes had also been implicitly divested of this authority. The decision relied heavily on the individual liberty arguments discussed in *Oliphant* and a dubious theory that tribal authority rests on consent of the governed. Given the nonmember Indians' membership in a larger political group — the United States — and their inability to participate in tribal affairs,

Despite the Court's conflicting statements in *Colville*, there is no doubt which "test" was applied in its holding; the Court found "no overriding federal interest that would necessarily be frustrated by tribal taxation. And even if the State's interests were implicated by the tribal taxes . . . it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States."[159] This analysis accords with Marshall's theory that viewed tribal powers in relation to overriding federal political authority. In the absence of any conflicting federal policies, tribal authority should be presumed.

In the next term, the Court decided *Montana v. United States*.[160] In applying the implicit divestiture theory, the Court not only reverted to "dependent status" terminology, but reworked the entire jurisdictional framework. The issue was whether the Crow Tribe could enforce its hunting and fishing regulations throughout the reservation, including over fee lands held by non-Indians. Recognizing that *Oliphant* concerned inherent tribal authority in criminal matters, the Court said "the principles on which [*Oliphant*] relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[161] The "principles" referred to were summarized by the Court as follows: "But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[162]

Though *Montana* purports to restate the law regarding implicit divestiture, in truth, the opinion actually redefines and broadens it. *Wheeler's* dictum, that implicit divestiture applies in areas involving relations between tribes and nonmembers, becomes a "general principle" with the force of law. The phrase, "necessary to protect tribal self-government" as a basis for delimiting tribal authority is neither defined nor suggested by the cases cited in support.[163]

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the Court treated the nonmember Indians as non-Indians and ruled that inherent tribal criminal authority was divested. *Id.* at 692-93. *Duro* was legislatively reversed in 1991 by act of Congress. For comprehensive treatment of the *Duro* reversal legislation, see Newton, *supra* note 129.

159. *Colville*, 447 U.S. at 154.

160. 450 U.S. 544 (1981).

161. *Id.* at 565.

162. *Id.* at 564. *Wheeler* is cited just prior to this passage to clarify that "internal" matters refers to relations among members of the tribe; "external" matters refers to relations with nonmembers of the tribe. Tribal authority over the latter, according to the Court, has been implicitly divested and requires congressionally delegated authority. Four cases are cited immediately after this passage, three of which deal with questions of state authority in or arising from Indian country. They are thus inapposite for the proposition stated. The fourth, *Kagama*, was extensively reviewed earlier and much of that analysis applies here. It bears restating that *Kagama's* reasoning coincided with prevailing congressional efforts to eradicate tribalism. *See supra* notes 111-20 and accompanying text.

163. As a sop to retained tribal jurisdiction, the Court recognizes two instances where tribal

It is unclear why a case involving tribal hunting and fishing regulation would inspire the Court not only to perpetuate the *Oliphant* theory but actually to expand it. The Court fails to explain exactly why "tribal status" necessarily entails a divestment of tribal regulatory authority. It was sufficient that the tribe attempted to regulate the conduct of nonmembers on their fee lands, and, absent consensual arrangements with them or proof that their conduct impacted negatively on the tribal community, this authority would have to come from Congress.[164]

It is significant that only ten months later, *Montana* was not cited at all in a case questioning tribal authority to tax non-Indian commercial interests on reservations. In *Merrion v. Jicarilla Apache Tribe*,[165] the Court upheld tribal authority to tax non-Indians as part of its "inherent power necessary to tribal self-government and territorial management."[166] This power exists notwithstanding the fact that fee title to lands is held by non-Indians. The Court stated,

> [N]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual

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civil authority over non-Indians may still apply, even on fee lands: (1) where the nonmember has entered into "consensual relationships" with the tribe, or (2) where the nonmember's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66. The Court's opinion in *Colville* is cited as an example of the former. *Id.* at 566. The latter prong finds an interesting parallel in a federalism case decided the same term. In Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981), the Court found that the Tenth Amendment protected state sovereignty when federal laws "directly impair [states'] ability to structure integral operations in areas of traditional functions." *Id.* at 274 (quoting National League of Cities v. Usery, 426 U.S. 833, 852 (1976)). *National League* was overruled by Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985). *Garcia* found the political processes inherent in the structure of the federal government afforded the best protection to states. The Court could not "single out particular features of a State's internal governance that are deemed to be intrinsic parts of state sovereignty." *Id.* at 548. *Montana*'s "tests" for when tribal authority may be exerted over non-Indians on fee lands are as nebulous as the standards ultimately rejected in *Garcia*. Further, unlike states, tribes lack political protection inherent in the federal structure. Their authority therefore remains vulnerable to the vicissitudinous rulemaking of the Court. *See* Ball, *supra* note 5, at 93-94 n.454.

164. The history of the Allotment Act was key to the Court's analysis that Crow treaty rights had been abrogated. The Court forthrightly acknowledged that congressional policy was geared toward dissolving reservations and tribal governments. From this perspective, the Court found it incomprehensible that Congress would expect or desire that tribes exert any governmental authority over non-Indian landowners within the reservations. The expectations of landowners also weighed in the Court's consideration. The point is that the Court's discussion of inherent tribal authority — separate from the asserted treaty right — was strongly influenced by this historical legacy. As with *Oliphant* itself, the *Montana* opinion privileges a particular period of federal Indian policy and accords it determinative weight, despite subsequent congressional repudiation of the earlier policy.

165. 455 U.S. 130 (1982).

166. *Id.* at 141.

> powers of municipalities, *nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners.*[167]

The Court continued to struggle with implicit divestiture in a case challenging the tribe's authority to zone lands owned in fee by non-Indians within the reservation. In the badly fractured decision in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,[168] a plurality held that the tribe had been implicitly divested of its authority to zone fee lands held by non-Indians in reservation areas where the predominant landowners are non-Indians. Tribal zoning authority over fee lands owned by non-Indians was retained in reservation areas predominantly held under trust by the federal government. Justice White's opinion, which found implicit divestiture to have occurred at least in part of the reservation, recited the "dependent status" language but clearly based the finding of divestiture on the fact that the tribe attempted to regulate nonmembers: "[R]egulation of 'the relations between an Indian tribe and nonmembers of the tribe' is necessarily inconsistent with a tribe's dependent status, and therefore tribal sovereignty over such matters of 'external relations' is divested."[169] Justice White also indicated that the "list" of areas where tribal powers have been found implicitly divested "is by no means exclusive."[170]

Justice Blackmun's opinion, which disagreed that tribal powers had been divested at all, is notable for several reasons. First, it recalls Marshall's view that the only tribal powers lost by virtue of "dependent status" were those "inherently inconsistent with the paramount authority of the United States."[171] Second, it refutes *Montana's* "general principle" that presumptively denies tribal authority over nonmembers absent congressional delegation. Indeed, Blackmun says, one hundred and fifty years of jurisprudence involving Indians establishes a very different "'general principle' governing inherent tribal sovereignty — a principle according to which tribes retain their sovereign powers over non-Indians on reservation lands unless the exercise of that sovereignty would be 'inconsistent with the overriding interests of the National Government.'"[172] Third, he notes the critical role zoning plays in local governments' ability to "engage in the systematic and coordinated utilization of land that is the very essence of zoning authority."[173] For Blackmun, upholding tribal authority in

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167. *Id.* at 143.
168. 492 U.S. 408 (1989).
169. *Id.* at 427.
170. *Id.* at 426.
171. *Id.* at 451.
172. *Id.* at 450.
173. *Id.* at 458 (citing NORMAN WILLIAMS, AMERICAN LAND PLANNING LAW § 1.08 (1988)). The result in *Brendale* leads precisely to the sort of "checkerboard" jurisdiction which the Court had earlier declared anathema to effective reservation management. *See* Seymour v.

this context would fulfill congressional policy supporting tribal self-sufficiency and economic development.[174]

These cases indicate that the theory of implicit divestiture has played an integral role in the Court's narrowing of tribal powers.[175] The Court invoked the theory in *Oliphant* to protect non-Indians' individual liberty interests and has since expanded it to divest tribes of authority to regulate natural resources and zone lands throughout the reservation.

There are several problems with this development. First, the theory, when applied, has a totalizing effect upon tribal jurisdiction. In other words, divestiture works to deprive the tribe of total authority in a given subject area. It is by nature exclusionary, not accommodating. *Montana's* "two-prong exceptions" do not alter this view since the presumption is against tribal authority and the burden is on the tribe to overcome it; if it fails, tribal authority is completely divested. Second, the theory lacks coherent structure, definition, or limitations. As demonstrated, the Court has been unable to arrive at a consistent formulation of implicit divestiture as a theory and the circumstances wherein it might apply. In fact, as Justice White noted in *Brendale*, the "list" is still developing and may include more areas.

Third, the use of implicit divestiture interposes the Court into an Indian policy-making position that the Constitution assigns to Congress. This author has suggested that a significantly different inquiry proceeds depending on whether the theory is formulated as "inconsistent with dependent tribal status" or as "inconsistent with overriding federal interests." The latter necessitates consideration of a legislatively determined set of policy objectives that the Court must then consider and evaluate. This inquiry, by nature, is more constrained and gives proper deference to Congress's role in setting Indian policy. It reduces the uncontrolled judicial speculation inherent in the former inquiry.

There is no question that Congress's fluctuating Indian policy has produced significant jurisprudential problems for the modern Court. Changed circumstances in reservation demographics, land tenure, and notions of tribal sovereignty all contribute to complicating the picture. There is also no question that the modern Court should consider historical circumstances in resolving contemporary disputes. The problem is that the Court has produced no clear philosophy or paradigm that indicates *when* particular historical circumstances will be given authoritative weight and when they will not. As applied, implicit

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Superintendent of Washington State Penitentiary, 368 U.S. 351, 358 (1962).

174. *Id.* at 467. In South Dakota v. Bourland, 113 S. Ct. 2309 (1993), the Court applied the *Montana* formulation of implicit divestiture without any material change. The case is noted to indicate that no departure or retrenchment from the *Montana* position is imminent.

175. *See generally* Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993).

divestiture operates in an ad hoc fashion and confuses, rather than clarifies, the status of tribal authority. As we have seen, it is not at all clear exactly why tribal governments retain the power to tax non-Indian commercial entities — regardless of land tenure on the reservation — but presumptively lack zoning and other regulatory authority over the fee lands of non-Indians.

The next section will examine a different theoretical approach toward clarifying tribal authority within Indian lands, one that would allow the Court to consider history and the vast demographic and social changes that have occurred within reservations but would also be more consonant with the prevailing congressional policy of tribal self-determination. This approach utilizes the discourse of liberal theory. For purposes of the argument, it will approach the problem in *Oliphant* — the progenitor of implicit divestiture — as fundamentally a conflict between individual rights of non-Indians and the communitarian interests of the tribe in tribal self-government. Some immediate questions arise: Why bother with liberal theory at all, given its anticommunitarian reputation? Why utilize a Euro-American philosophical approach to resolve a problem involving unique non-Western governmental polities? Will this theory inevitably be subsumed by overarching political considerations? These are some of the questions considered in the next section.

III. Toward a Coherent Theory of Retained Tribal Powers

According to the Supreme Court, "unwarranted intrusions on [an individual's] personal liberty"[176] proved antipathetic to a tribal claim for retained criminal authority over non-Indians.[177] The result is consistent with classical liberalism's concern for individual rights and freedom from unnecessary government action, but it bodes ominously for tribal governments, particularly their ability to withstand future threats to retained governmental

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176. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

177. The Court never defines "unwarranted intrusion" but it presumably means criminal proceedings that do not accord full constitutional protections to defendants. In *Oliphant*, the Court specifically noted that non-Indians were excluded from tribal court juries. *Id.* at 194. In *Duro*, the case divesting tribes of criminal authority over nonmember Indians, the Court was concerned that indigent defendants had no right under the Indian Civil Rights Act to appointed counsel. Duro v. Reina, 495 U.S. 676, 693 (1990). In both circumstances, of course, the Court's remedy — via the implicit divestiture theory — was to strip tribes of inherent criminal authority. It is worth recalling that neither Mark Oliphant nor Albert Duro actually faced trial in tribal court; habeas petitions were successful in both cases. In effect, the Court presumed that the tribal apparatus would be unfair to defendants and would thus represent an "unwarranted intrusion" on their individual liberty interests. Contrast this response to speculative abuse of individual rights in tribal courts with the response to actual abuse of individual rights occurring in state courts. The tendency there is to reform the system, not to dismantle it piecemeal. *See* Mark Curriden, *Bar Seeks Indigent Defense Money*, A.B.A. J. Oct. 1993, at 44-45; *see also* State v. Peart, 621 So. 2d 780 (La. 1993) (establishing a rebuttable presumption that defendants in Orleans Parish criminal court were receiving ineffective assistance of counsel, given an indigent defender's heavy caseload, low pay, and little administrative assistance).

authority. The result raises questions of whether liberal concerns for individual rights will lead to further erosion of tribal powers. A broader question is whether liberalism and notions of tribal governmental powers are inherently antithetical concepts.

At least part of the answer is subsumed by consideration of whether liberalism is at all sympathetic to communitarian interests. Recent scholarly writings in political philosophy argue generally that liberalism is indeed more sympathetic to communitarian concerns than is commonly thought.[178] But these accounts are rarely situated in the context of a culturally pluralistic environment; instead, they proceed largely from a "simplified model of the nation-state, where the political community is co-terminous with one and only one cultural community."[179] These accounts therefore do not adequately consider the claims of tribal governments when assertions of tribal authority conflict with fundamental individual rights.

But this is precisely the area where coherent theoretical work must be done. As *Oliphant* demonstrates powerfully, these conflicts are the inevitable and present consequence of a domestic political apparatus that purports to recognize inherent tribal authority over persons and property within reservation boundaries while also according significant individual protections emanating from United States citizenship. *Oliphant* and its progeny suggest that the balance tips decidedly in favor of protecting individual rights, indicating that liberalism's influences in federal Indian law cannot be ignored. Yet there is no clear theoretical basis for determining why this should be so. Theory, as so often happens, lags behind the "actual state of things."[180]

This state of things requires a closer look at the recent work of political philosopher Will Kymlicka. In *Liberalism, Community and Culture*, published in 1989, Kymlicka sets out to defend liberalism against charges that it is anticommunitarian. More pertinent to this analysis, he confronts directly the response of liberalism to a culturally plural country. His thesis, broadly construed, is that liberalism supports and even requires consideration of cultural membership, thus providing justification for political strategies that differentiate along cultural and racial lines. The paradigmatic case for this thesis is the special status of North America's indigenous peoples, particularly Canadian Indian and Inuit people, although American Indian communities are considered throughout as well.

Kymlicka initially sets out his operative definition of liberalism. He is concerned with "liberalism as a normative political philosophy, a set of moral

178. *See, e.g.*, Heyman, *supra* note 18; McClain, *supra* note 18.

179. KYMLICKA, *supra* note 18, at 177 (critiquing the work of modern liberal philosophers John Rawls and Ronald Dworkin).

180. This is John Marshall's phrase in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543 (1832).

arguments about the justification of political action and institutions."[181] In response to charges that liberalism is excessively individualistic or atomistic, Kymlicka purports to show what liberals *can* say, not what they have said in the past.[182] He focuses on modern liberalism, including writers like Rawls and Dworkin. With refreshing candor, he acknowledges that the "developments initiated by the 'new liberals' [might be] an abandonment of what was definitive of classical liberalism."[183] His concern "is to defend their political morality, whatever the proper label."[184] That morality begins with identifying essential interests. For Kymlicka, that means leading a life that is good. He identifies two preconditions for fulfilling that interest: (1) being able to lead one's life "from the inside, in accordance with our beliefs about what gives value to life;" and (2) being "free to question those beliefs, to examine them in the light of whatever information and examples and arguments our culture can provide."[185]

The former precondition requires having resources and liberties sufficient to lead a life from the inside — hence, "the traditional liberal concern for civil and personal liberties."[186] The latter precondition requires having the "cultural conditions conducive to acquiring an awareness of different views about the good life, and to acquiring an ability to intelligently examine and re-examine these views" — hence, "the equally traditional liberal concern for education, freedom of expression, freedom of the press, artistic freedom, etc., . . . liberties [which enable us to explore] different aspects of our collective cultural heritage."[187] From this statement of essential interests proceed "political theories which work from an 'abstract egalitarian plateau,' according to which 'the interests of the members of the community matter, and matter equally.'"[188]

Kymlicka describes two distinct kinds of community: a political community and a cultural one. Within the political community, "individuals exercise the rights and responsibilities entailed by the framework of liberal justice." Within the cultural community, "individuals form and revise their aims and ambitions . . . [and] share a culture, a language and history which defines their cultural membership."[189] These communities may be co-terminous with each other, where fellow citizens also share the same culture. This simple model of "nation-state," argues Kymlicka, underlies most of contemporary political theory.[190] More complex problems arise when these communities are not

181. KYMLICKA, *supra* note 18, at 9.
182. *Id.* at 10.
183. *Id.*
184. *Id.*
185. *Id.* at 12-13.
186. *Id.* at 13.
187. *Id.*
188. *Id.* (citing Ronald Dworkin, *In Defense of Equality*, 1 SOC. PHIL. & POL., 24 (1983)).
189. *Id.* at 135.
190. *Id.*

coextensive, as in the situation of culturally plural states which form "the vast majority of the world's states."[191] The genuine conflict, according to Kymlicka, is not stated simply as a struggle between individual and collective rights, but rather as a conflict in the considerations for showing respect for persons: "People are owed respect as citizens *and* as members of cultural communities."[192]

In culturally plural societies, "differential citizenship rights may be needed to protect a cultural community from unwanted disintegration. If so, then the demands of citizenship and cultural membership pull in different directions. Both matter, and neither seems reducible to the other."[193] In the case of American Indians, if one assumes arguendo that the reservation system operated in part to protect tribal cultures, then Kymlicka's point becomes clearer. Differential citizenship rights did operate to restrict coercively the "mobility, residence, and political rights of both Indians and non-Indians."[194]

At this juncture, Kymlicka suggests that proponents of minority rights, seeing the writing on the wall, will dismiss liberalism as either "incomplete" or "entirely inapplicable" and will proceed to find some other moral theory to support cultural membership and legitimate minority rights.[195] He rejects that response in favor of one which attempts to reconcile minority rights and liberal equality. The first response, according to Kymlicka, is not strong politically:

> [It does] not confront liberal fears about minority rights . . . [nor] explain why minority rights aren't the first step on the road to apartheid, or what serves to prevent massive violations of individual rights in the name of the group. Opponents of liberalism may find [the first response] convincing, but they may not be the ones who need convincing on this point. For better or worse, it is predominantly non-aboriginal judges and politicians who have the ultimate power to protect and enforce aboriginal rights, and so it is important to find a justification of them that such people can recognize and understand. Aboriginal people have their own understanding of self-government, drawn from their own experience, and that is important. But it is also important, politically, to know how non-aboriginal[s] — Supreme Court Justices, for example — will understand aboriginal rights and relate them to their own experiences and traditions. And, . . . on the standard interpretation of liberalism, aboriginal rights are viewed as matters of discrimination and/or privilege, not of

191. *Id.*

192. *Id.* at 151 (emphasis added).

193. *Id.* at 151-52.

194. *Id.* at 146. Recall from part I the federal restraints in dealing with Indian lands were imposed on both Indians and non-Indians. *See supra* notes 31-41 and accompanying text.

195. *Id.* at 153.

> equality. They will always, therefore, be viewed with the kind of suspicion that [lead] liberals . . . to advocate their abolition. *Aboriginal rights, at least in their robust form, will only be secure when they are viewed, not as competing with liberalism, but as an essential component of liberal political practice.*[196]

Kymlicka's second response, which aims to reconcile minority rights and liberal equality, situates cultural membership squarely within the domain of liberalism. Cultural structures should be protected, "not because they have some moral status of their own, but because it's only through having a rich and secure cultural structure that people can become aware, in a vivid way, of the options available to them, and intelligently examine their value."[197] Cultural structures, in other words, provide individuals with a "context of choice" that allows "meaningful individual choice."[198]

Protecting an individual's context of choice gives rise to a distinct source of political rights. Government policies that go beyond providing equal rights and resources — which accord special status to aboriginal peoples — are defensible but only if they work to correct the unequal circumstances that minority communities may face. According to Kymlicka, aboriginal cultural communities are vulnerable to the decisions of dominant cultures in matters affecting resources (he cites land or means of production that affect minority communities) or significant policy decisions (including public works programs that may impact — pro or con — minority communities).[199] These groups may incur costs merely to secure their cultural communities before pursuing their particular goals. Since members of the dominant cultures enjoy a relatively secure "context of choice," their resources may be expended immediately on the pursuit of their chosen goals. Special political protection is, thus, necessary to correct this imbalance before either community pursues their differential choice selection. As Kymlicka states, "[R]ectification of this inequality is the basis for a liberal defence of aboriginal rights, and of minority rights in general."[200]

If this synopsis is essentially correct, then we can proceed to consider whether Kymlicka's liberal approach offers guidance to the particular problem posed by *Oliphant* and progeny — the problem of administering law and justice within the mixed communities occupying reservations within the shadow of dominant United States political institutions.

Kymlicka provides us a useful analytical starting point by differentiating between political and cultural communities. His argument's primary aim is to secure the latter communities from domination by the former. This interpretive

196. *Id.* at 153-54 (emphasis added).
197. *Id.* at 165.
198. *Id.* at 169.
199. *Id.* at 183.
200. *Id.* at 189.

construct explicitly acknowledges and confronts the complex dynamics of a culturally pluralistic state. However, it does not recognize the reality of *politically plural* states. This is the situation of American Indian tribes who are recognized by the federal government as "'distinct, independent political communities, retaining their original natural rights' in matters of local self-government."[201] As we have seen, tribes are not constrained by the Federal Constitution, but their course of bilateral dealings with the federal government has brought them under federal protection and political dominance.[202]

When Kymlicka speaks about coercively restricting the rights of both Indians and non-Indians as a means of securing minority cultural communities, he assumes, for the most part, that these restrictions emanate from the dominant political authority. After all, it is the political morality of the dominant institution that occupies his attention. The political morality of tribal governmental structures within the larger political institutional framework is not considered. This perspective is imperative in this context since tribal political aspirations are to assert authority over all persons (Indian and non-Indian) and land (trust or fee lands) within reservation borders. Is this omission fatal to application of Kymlicka's analysis to American Indian tribal communities? Perhaps. A more important question is whether his work moves us toward clarification of how courts and legislators should resolve questions of tribal governmental powers and individual rights in a *politically plural and culturally plural* society. It provides for a direction toward a more coherent theory of contemporary tribal authority.

An important step in this direction is to recognize, with Professor Frickey, that the early treaties and agreements between tribes and the federal government should be conceptualized as constitutive texts, the "structural framework" that undergirds the sovereign-to-sovereign political relationship between the two polities.[203] This approach accords with Marshall's theory on tribal-federal political arrangements and does seem to underlie modern congressional Indian policy. The treaties and agreements, like the Constitution, incorporate a certain political morality that can provide the basis not just for distinct tribal political rights but for a coherent theory of tribal political authority. That political morality encompasses the promise of tribal community persistence and tribal territorial integrity. This is not to suggest that either of these promises leads to an absolute right to tribal sovereignty.[204] But it does suggest that persistence of tribal political and cultural communities is not only contemplated but is guaranteed. The fact that the federal government has not consistently honored those promises over time does not detract from the force

201. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978).
202. KYMLICKA, *supra* note 18, at 56.
203. Frickey, *supra* note 136, at 385.
204. *See* Newton, *supra* note 19, at 267.

of these early documents as constitutive texts or their underlying political morality.

Now consider the complex reservation geopolitical landscape shaped by more than two centuries of dealings between tribes and the federal government. Two particularly important historical developments influence this consideration. First, Indians acquired United States citizenship, most prior to the 1924 act that unilaterally conferred citizenship on native-born Indians.[205] Second, as described in part I, non-Indian citizens became residents in significant numbers on some reservations following the 1887 General Allotment Act. These events, coupled with federal recognition of tribal political autonomy, created the circumstances for the politically plural and culturally plural communities extant on many reservations today. Indeed, allotted reservations have created the thorniest jurisdictional problems for the Supreme Court, as shown by *Oliphant* and *Montana.*

In the midst of these profound geopolitical changes, tribes have occasionally succeeded at redirecting the federal government's attention to the political morality underlying the constitutive texts — the treaties and agreements. This redirected attention contributed in large measure to the prevailing modern federal policy of tribal self-determination. As a statement of federal policy, tribal "self-determination" is often used interchangeably with "tribal sovereignty," though the two are conceptually distinct. Professor Allen Buchanan, in exploring these distinctions, suggests that no group is truly capable of directing its own course, impervious to the influences of global forces such as environmental crises and world economic markets.[206] He conceives of self-determination as a value or an interest having high moral significance that may be served by various degrees or forms of political autonomy. The value, in its ideal form, is essentially "a kind of negative freedom, a group's freedom from domination by other agents of change, not the group's power to shape its world without external constraints."[207] Failing to distinguish between self-determination and political autonomy may lead us to assume wrongly "that the value of self-determination cannot be adequately served unless the group has the highest degree of political autonomy, namely sovereignty."[208] This conceptual mistake, Buchanan rightly points out, can have serious practical consequences.[209] He therefore urges a conception of

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205. Citizenship prior to 1924 was acquired by treaty or statute. *See* COHEN, *supra* note 8, at 644.

206. Allen E. Buchanan, *The Right to Self-Determination: Analytical and Moral Foundations*, 8 ARIZ. J. INT. & COMP. L. 41, 47 (1991).

207. *Id.* at 47-48.

208. *Id.* at 47.

209. *Id.* Tribal leaders have often demanded or asserted this highest form of political autonomy. *See, e.g.*, INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN 15-25 (Kenneth R. Philip, ed., 1986). *But see id.* at 290 (statement of R. David Edmunds (Cherokee)). Edmunds stated:

self-determination that accommodates and adjusts to differing situations and conditions.

An accommodative concept of self-determination is thus imperative to developing a theory of tribal political authority. The search for principles governing tribal authority is most acute in allotted reservations, where non-Indian residents may only contemplate state or federal authority over their affairs, while Indian leaders insist on tribal authority.

Differentiating along lines developed by Kymlicka, it should be clear that allotted reservations contain two distinct political communities and two or more distinct cultural communities. If "citizen" denotes a member of a political community, then allotted reservations contain citizens who are members of the broader political community, the United States. This political community would include virtually the entire reservation population — Indian and non-Indian.[210] The reservations also contain citizens who are members of a narrower political body — the particular tribe.[211] This political community would usually encompass tribal members only, most of whom are Indian.

Allotted reservations also contain at least two distinct cultural communities, broadly construed as Indian and non-Indian. Further differentiation is possible within both categories,[212] but these two general categories suffice for the

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> There are many definitions of the word sovereignty in Indian America. It seems to me that the majority of Indians mean "the maximum amount of self-control for the Indian people under the existing system" when they use this term. I doubt whether there will ever be complete tribal sovereignty in the United States.

Id.; *see id.* at 245 (statement of Oren Lyons (Onondaga)). Lyons stated:

> I have been called again and again an unrealistic fellow because of my contention that our people really believe that they are an independent and separate nation. I sit in a council that has been continuous for hundreds of years. We do not have the Bureau of Indian Affairs in our nation. We do not have a federal agent. We do not have anything but Indians. And, in our unrealistic manner, we do not have federal programs.

Id.; *see id.* at 291 (statement of Robert Burnette (deceased Rosebud Sioux)). Burnette stated:

> We are part of the United States of America. We are within its jurisdiction and subject to the plenary powers of Congress. So we are not, in a sense, sovereign, except that we do have treaties and the United States has usually tried to honor those treaties. The notion of tribal sovereignty is wishful thinking on the part of most modern day tribal leaders.

Id.

210. The exception may be resident aliens.

211. A further complexity was added by federal policies that occasionally created joint-use reservations to be occupied by two or more formerly distinct tribes or bands. *See* SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 183-84 (1989) (describing the formation of the Umatilla and Yakima Reservations); ROBERT H. WHITE, TRIBAL ASSETS 189-91 (1990) (describing the formation of the Warm Springs Confederation of Tribes). For purposes of federal policy, membership is tied to enrollment with the confederated tribe. The author's use of "citizen" also refers to membership in the political unit created by confederation.

212. The confederated tribal situation described above, in my view, leads to the creation of one political community — the confederated tribal community — and possibly several extant

analysis that follows.

In proceeding toward a coherent theory of tribal political authority, the focus should be directed on the tribal political community. It is here that the imposition of tribal laws may intersect with or possibly conflict with federal interests, including liberty interests that are the concern of classical liberal theory.

Tribal political action that uses law to resolve, mediate, or enforce tribal cultural communitarian interests should be accorded the highest form of respect. Tribal values and needs are directly implicated here. Issues may relate to such defining concerns as group membership, custody and control of children, forms of political authority and leadership, the assignment and use of tribal lands, etc. These expressions of tribal self-determination should be accorded a high degree of political autonomy. Federal policy may support tribal efforts to secure cultural communitarian interests but such support should not convert tribal interests into federal interests subject to federal controls. The federal role, properly conceived, should be limited to securing the conditions under which the tribe may pursue its cultural communitarian objectives. External constraints should thus rarely, if ever, be applied to check this form of tribal political action.

Tribal political action that uses law to resolve, mediate, or enforce political interests that are also fundamental concerns of the broader United States political community may be constrained by federal power, but only to the extent necessary to accord respect to these overriding federal interests. A proper respect for tribal self-determination requires that tribal courts be accorded primacy in resolving any potential conflict between the tribal and federal political interests. This federal constraint necessarily limits tribal action but only to the extent that substantive rules or procedural safeguards may be required to comport with the demands of the dominant federalist structure. There is consistency between this position and the view articulated by John Marshall regarding the tribes' political arrangement with the federal government. It acknowledges that tribes operate within, not beyond, the parameters of an overarching federal sovereignty. But importantly, it preserves a substantial governmental and political role for the tribe and thereby still serves the interest of tribal self-determination.[213]

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cultural communities — the formerly distinct tribe or band of a particular member. It is beyond the scope of this article to survey confederated tribal communities where disparate cultural traditions (e.g., language, religion, etc.) may persist and may be integrated into the political life of the community. Among non-Indian reservation residents, of course, it is entirely possible for groups to have retained cognizable boundaries which differentiate along ethnic, religious or racial lines.

213. Critics may argue that this approach institutionalizes a form of "legal auto-genocide" where the primary tool of federal hegemony is not overt federal control but rather tribal self-restraint. *See, e.g.*, Williams, *supra* note 3, at 274. Implicit in such criticism is profound skepticism about Congress's assumed plenary power in Indian affairs. At the outset, this article

This suggested approach does two things. First, it restores tribal political primacy in reservation government. It does not posit an absolutist conception of tribal authority; it does not argue, for example, that tribal self-determination can only be served by according tribes the highest form of political autonomy — sovereignty. That may well be the case in some circumstances, but not all. Some tribes neither desire to nor have the present capacity to exercise the degree of political autonomy that other tribes have or need. These political arrangements should be the subject of clearly delineated, bilaterally developed (usually federal and tribal) prospective plans for orderly government administration, not the result of ad hoc, retrospective judicial rulemaking. In the absence of such plans, the suggested approach secures some measure of tribal rulemaking authority, contingent on later revision with the tribe's participation and consent.

Second, this approach identifies and isolates the only legitimate constraint on inherent tribal authority — tribal action that may conflict with overriding federal interests. This interest-based inquiry requires a reviewing court to focus on positive expressions of federal policy to limit tribal authority. Inquiries that proceed from an evaluation of tribal powers "consistent with their status" are vulnerable to manipulation and interjection of stereotype, hyperbole, bias, or even blissful ignorance. This is not to suggest that the inquiry into tribal authority is solely a function of the political branches, outside the purview of judicial review. It is to suggest that there are some limits on the judicial inquiry that should restrain a court's zeal to "adjust the picture."

Two cases serve to illustrate how this suggested approach may apply. First, consider the *Oliphant* case. A non-Indian reservation resident is hailed into tribal court on misdemeanor criminal charges. The reservation's geopolitical landscape shows a preponderance of non-Indian residents who own the majority of reservation lands in fee simple. A focus on the tribal political community reveals that this particular expression of political action implicates interests that are also an overriding concern of the broader federal community — an individual's liberty interest. The tribe's interest in maintaining law and order, coupled with federal recognition of its governmental status, requires that the tribe retain primacy in resolving the matter, but it must proceed in light of federally imposed substantive and procedural constraints.[214]

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assumed arguendo that Congress possessed superior legal authority over tribes but it did not accept that proposition for all purposes. This author accepts that there is some value in challenging congressional intrusion into tribal affairs (compared to Congress's dealings "with" tribes, the latter involving legislation affecting the government-to-government relationship, the former involving legislation directly for tribes), if only to insist on some principled grounds for such intrusion. The suggested approach to resolving the complex jurisdictional problems on today's reservations is aimed primarily at restoring tribal political primacy in reservation government. It assumes that Congress, despite its current supportive posture, will not soon voluntarily abandon its plenary power position nor curtail the extraordinarily broad license afforded it by Supreme Court decisions.

214. The Indian Civil Rights Act requires tribes to accord, inter alia, due process and equal

Contrast this with the case of *Santa Clara Pueblo v. Martinez*.[215] A tribal member, a woman married to a non-tribal member, raises an equal protection challenge to a tribal membership ordinance that grants membership to children of mixed marriages if the father is a tribal member but denies it if the father is a non-tribal member. Focusing on the tribal political community reveals that this expression of political action implicates cultural communitarian interests, specifically, determinations of group membership. While federal policy supports the tribal member's interest in equal protection of tribal laws, such support should not readily convert cultural communitarian interests into federal interests subject to federal control. Tribal authority in this matter should be accorded the highest degree of political autonomy.[216]

The suggested approach to resolving questions of tribal authority in mixed reservation communities is certainly not free from its own complications. For example, problems may arise in identifying "overriding federal interests." What particular expressions of federal interests should be accorded weight? Should state concerns be assigned a separate value and be factored into the balance? Are states truly separate political communities as described above? These questions have no ready answers, though one would be inclined to answer the last two questions in the negative. While states regularly challenge assertions of tribal authority or defend their own incursions into Indian country, they still must identify some federal authority or policy to support their position. Federal plenary power constrains state authority as well. It is therefore appropriate to view state concerns as contingent on overriding federal interests.

Following this analysis, it appears the Supreme Court in *Oliphant* missed the mark in a couple of ways. First, the Court conjured a relatively static image of tribes and their political relationship with the federal government.

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protection rights. A defendant not accorded these rights is entitled to seek relief via habeas corpus petition in federal court. 25 U.S.C. § 1302 (1988). A related form of federal review in civil cases was created by the Supreme Court in National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985). This case allows federal court review of tribal court assertions of civil jurisdiction over non-Indians but only after the challenger has exhausted tribal remedies. The case law following *National Farmers* suggests that virtually no tribal court decisions have been reviewed by the federal courts, indicating that the exhaustion requirement provides some measure of security for tribal judicial processes. *See* GETCHES ET AL., *supra* note 50, at 521. At least two problems remain, however. First, the federal court review apparently is a "non-Indians-only" remedy. Second, it exposes tribes to continued challenges on the *existence* as well as the exercise of their governmental authority. Under my suggested approach, a *National Farmer* type of remedy could be allowed but only if it were available to any challenger and only upon proof that a demonstrated overriding federal interest was implicated. Exhaustion of tribal remedies would, of course, still be required.

215. 436 U.S. 49 (1978).

216. For a contrary perspective, at least regarding *Martinez*, see Robert Laurence, Martinez, Oliphant *and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 10 CAMPBELL L. REV. 411 (1988) and Robert Laurence, *A Quincentennial Essay on* Martinez v. Santa Clara Pueblo, 28 IDAHO L. REV. 307 (1991-92).

Despite references to contemporary developments, the opinion is firmly grounded in the historicism of nineteenth-century frontier America. The Court's nineteenth-century focus effectively subdued the dynamic nature of the tribal-federal political relationship, making it difficult, if not impossible, to recapture the underlying political morality of treaty promises that guaranteed tribal political authority and territorial integrity. Second, the Court may have construed the tribe's asserted authority over a non-Indian criminal defendant as a demand for recognition of the highest form of political autonomy, i.e., sovereignty. This level of autonomy would effectively place citizens outside the reach of protective federal laws. The conceptual mistake, of course, was failing to recognize that tribal self-determination could be served with less extreme forms of political autonomy. And, as Professor Buchanan noted, serious practical consequences can result from such conceptual mistakes.[217] In *Oliphant*, the Court's response was to accord no form of political autonomy at all in matters of criminal jurisdiction over non-Indians. The approach suggested above was developed precisely to help avoid these serious conceptual mistakes, with their attendant negative consequences for tribal governments.

IV. Congressional Alternatives

The theoretical argument developed in part III is essentially directed at the Supreme Court, urging it to repudiate its implicit divestiture theory and to pursue instead the suggested approach to resolve questions of tribal authority on mixed reservations. This possibility rests on slim hopes, since the present Court does not seem at all inclined to reconsider its theory delimiting tribal authority.[218] Thus, this final section offers two brief alternatives that Congress may pursue in the exercise of its authority in Indian affairs.

Reservations that have been allotted pose the most complex jurisdictional problems, given the multitude of communities residing on one reservation. Congress can clarify the geopolitical scene by enacting another series of removal acts. The acts would target non-Indians and non-member Indians who own land in fee simple within reservation boundaries. Since these individuals have vested property interests, Congress would have to pay just compensation for all individuals and families removed. The statutes could provide a specific period of time, say five years, for relocatees to decide whether to accept just compensation and remove or remain on the reservation. Those remaining would become subject to tribal criminal and civil jurisdiction. No state law (criminal, civil, or regulatory) could apply within reservations. Amendments

217. Buchanan, *supra* note 206, at 47.

218. In *Brendale*, former Justice White, in outlining the circumstances wherein implicit divestiture has been found, specifically noted that "[t]his list is by no means exclusive." Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 426 (1989). This suggests the Court contemplates other areas that may be beyond tribal authority — though these areas remain unknown.

may be made to the Indian Civil Rights Act to accord a fuller complement of procedural safeguards with concomitant increases in appropriations to tribes to help guarantee those safeguards.[219]

Of course, this is not a bona fide suggestion, but rather a device to illustrate that, notwithstanding its recently improved record in tribal affairs, Congress will only go so far to further the policy of tribal self-determination. Intuitively, we know that Congress would never pursue such a policy, at least with regard to non-Indians. But why?

Recall that while Congress repudiated the policy of allotment in 1934, it left intact the rights of non-Indians whose very presence on reservations, in part, was to facilitate the assimilation of Indians into American society. The land interests of resident non-Indians were thus effectively secured. Paradoxically, Indian interests in maintaining a connection to their traditional lands have been less secure. The voluntary relocation programs of the 1950s put considerable distance between many Indians and their traditional homelands. The more recent forced relocation of several thousand Navajo and several hundred Hopi tribal members also illustrates the vulnerability of tribal land interests.[220] In short, despite Congress's rhetoric, its practice has resulted in non-Indians enjoying more secure land interests than tribal members.

The second, and more bona fide, suggestion for Congress to consider is passage of legislation that explicitly recognizes that inherent tribal powers of self-government may only be diminished pursuant to congressional act or by agreement (i.e., a voluntary tribal relinquishment). While this action may arrest further use of implicit divestiture as a theory delimiting tribal powers, it does not clarify or resolve the problem of tribal authority already divested by this theory. In other words, it does not solve the problems created by *Oliphant*.[221] Legislation that attempts to reverse the results (as opposed to the methodology) in *Oliphant* and its progeny creates another set of problems beyond the scope of this article.[222] The present treatment will settle for a modest congressional

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219. This is to avert a constitutional challenge pursuant to Reid v. Covert, 354 U.S. 1 (1957).

220. *See generally* Hollis A. Whitson, *A Policy Review of the Federal Government's Relocation of Navajo Indians Under P.L. 93-531 and P.L. 96-305*, 27 ARIZ. L. REV. 371 (1985). Whitson notes that the forced relocation of over 10,000 Navajo members represents the largest forced relocation of any racial group in America since the Japanese relocation and internment policies of World War II. *Id.* at 372-73.

221. The only precedent here is Congress's legislative overrule of Duro v. Reina, 495 U.S. 676 (1990). The congressional overrule was effected by amending the Indian Civil Rights Act, 25 U.S.C. § 1301(2) (1988). *See* Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646. In theory, at least, since *Oliphant* (and progeny) was decided on the basis of federal common law, Congress is free to correct the ruling. *See* Philip S. Deloria & Nell J. Newton, *The Criminal Jurisdiction of Tribal Courts over Non-member Indians*, FED. B. NEWS & J., Mar. 1991, at 71.

222. Some of the problems, broadly speaking, would focus on whether such legislation creates delegated authority or affirms inherent authority. If the former takes place, is the rule of Reid v. Covert, 354 U.S. 1 (1957) violated? If the latter occurs, will amendments have to be made to the Indian Civil Rights Act to accord fuller procedural protections, such as paid

corrective measure: ending the reign of implicit divestiture as a theory delimiting tribal authority.

Conclusion

Tribal self-determination, for many tribes, has only recently moved from theory to reality. The business of overcoming centuries of dislocation, disruption, and damage is slow, but deliberate and persistent. It is unfortunate and paradoxical that at a time when Congress seems committed to helping rectify the problems it helped to create, the Supreme Court persists in employing a theory of tribal authority that necessarily moves us back in time, not forward. This article has attempted to address this phenomenon. Concern for individual liberties, misconceptions about the nature of tribal sovereignty, and a palpable distrust for "alien" governmental processes were all factors contributing to the Court's creation and use of implicit divestiture as a theory delimiting tribal authority. This article has suggested how many of those same concerns might be reconceptualized into an approach that addresses the problem of administering law and justice on reservations — without doing violence to the concept of inherent tribal authority. Indeed, the suggested approach affirms a role of primacy for tribal governments.

In setting out these arguments, the author found it was easy to become self-absorbed with the nuances of theory and detached from the realities of life on reservations. Images of tribes "under siege" by a dominant "evil empire" are quite easy to erect. This is not to overlook the tremendous poverty, unemployment, and serious health concerns facing today's tribal communities. It may, however, overlook the strength and tenacity of tribal cultures.[223] Writers often speak about the "resurgence" or "revitalization" of tribalism, as if it were an event that began at some identifiable moment in time. Policymakers may point to the 1960s civil rights movement or federal efforts in the early 1970s as the genesis for modern tribal self-determination efforts.

This focus overlooks the deliberate but less public work individual tribal communities have been doing all along to preserve their cultures, their

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attorneys?

223. An episode on the Navajo Reservation reminded the author of this important perspective. Fred Hoxie describes how outsiders got involved in the Navajo-Hopi relocation dispute after most of the tribal members had already been relocated. National defense groups were formed and an Oscar-winning documentary film was produced. Hoxie wrote,

> In the midst of this rising tide of concern, the Navajos' tribal newspaper published an editorial. Rather than express appreciation for the support they were receiving from non-Indian reformers across the country, the editors of the Navajo Times wrote that the activists should "find another whale to save and move on." They argued that reformers were polarizing the situation on the reservation and preventing the Indians from reaching a peaceful resolution of the land dispute.

Fred Hoxie, *The Curious Story of Reformers and the American Indians, in* INDIANS IN AMERICAN HISTORY 227 (Fred Hoxie ed., 1988).

traditions, and their governments. If the modern era represents anything useful for tribes, it may indicate that the federal bureaucracy will move off the backs of tribal governments and allow them to function in more assertive, self-defining ways. This release facilitates tribal self-determination; it does not attempt to fabricate it. The Court's use of implicit divestiture is at odds with this development because it leaves a void in the administration of law and justice on reservations that must be filled by state or federal authority. It is time for the Court to harmonize its theory with the real work being done by tribes and by the political branches to locate the legitimate sources of authority in Indian country.