Tribal Consent

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ARTICLE

TRIBAL CONSENT

Matthew L.M. Fletcher†

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series of articles on American Indian tribal consent and resistance theory and practice. See
Matthew L.M. Fletcher, Resisting Federal Courts on Tribal Jurisdiction, 81 U. COLO. L.
REV. 973 (2010); Matthew L.M. Fletcher, Resisting Congress: Free Speech and Tribal Law,
in THE INDIAN CIVIL RIGHTS ACT AT FORTY (Kristen A. Carpenter, Matthew L.M. Fletcher,
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States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.¹

American Indian law scholar Rick Collins first theorized the utility of consent theory in American Indian law and policy in his important essay, Indian Consent to American Government.² Professor Collins questioned whether Indian tribes ever “consented” to American government, and whether usual principles of consent theory “applied to Indians.”³ He noted that Indian treaties could have served as a proper vehicle for demonstrating consent, but so many of them involved “substantial coercion of the tribal party.”⁴ Collins concluded that while the United States often respected principles of consent with Indian tribes, violations of those consent principles have left some Indian tribes and individual Indians in “oppressive conditions.”⁵ Collins expressed dissatisfaction with strategies to eliminate these concerns about tribal consent such as the pursuit through the courts of true “tribal independence” due to the failures of such efforts in the past and poor likelihood of the success of those efforts in the future.⁶

Professor Collins’ paper was prescient in many ways, especially in his conclusion that “[m]uch more tribal independence can be achieved within the existing system, by doing the hard work of building up tribal governments and improving tribal economies.”⁷ But the ability of Indian tribes to engage in that developmental process, while succeeding in many ways,⁸ is significantly

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3. Id. at 371.
4. Id. at 373.
5. Id. at 386.
6. Id. at 386-87.
7. Id. at 387.
hampered by the continued lack of tribal consent in modern American Indian law and policy. Now is an excellent time to return to Professor Collins’ analysis—more than 20 years have passed since his prescription. I argue in this Article that the fundamental question of tribal consent continues to haunt Indian affairs, and will continue to do so unless it is rectified.

Consider the following hypotethicals that frame the outer limits of this discussion of consent theory and federal Indian law:

A federally recognized Indian tribe\(^9\) executes a treaty with the President of the United States, later ratified by the Senate, reserving a homeland for the tribe and its members for all time. The treaty requires the express consent of three-fourths of the adult males of the tribe to amend the treaty. The government seeks such consent at a later time for purposes of acquiring the tribal land base, procures the consent through arguably fraudulent means, and Congress enacts legislation effectuating the sale.\(^10\)

A non-Indian driving on a dirt road in the west crosses into Indian Country without even knowing it, although there is a sign posted at the reservation border that states: YOU ARE NOW ENTERING INDIAN COUNTRY AND CONSENT TO THE JURISDICTION OF THE TRIBE. The tribe in question has enacted an ordinance that holds any person who enters the reservation willingly has impliedly consented to tribal regulatory and adjudicatory authority.\(^11\)

Both fact patterns involve issues of consent. Did the tribe consent to the sale of the land in the first case? According to the Supreme Court in Lone Wolf v. Hitchcock,\(^12\) it doesn’t even matter because Congress has plenary authority as trustee of tribal property to sell Indian lands (even to itself) and remit the


\(11\). This hypothetical is based on the recommendation of Indian affairs observers in the 1970s that tribes enacted implied consent ordinances in order to authorize assertion of tribal authority over nonmembers. E.g., National American Indian Court Judges Association, Justice and the American Indian, Vol. 4: Examination of the Basis of Tribal Law and Order Authority 50-56 (1974).

\(12\). 187 U.S. 553 (1903).
proceeds to the tribe (or to itself as guardian or trustee). Consent is irrelevant. Did the nonmember consent to the tribe’s jurisdiction by entering the reservation? What if he had seen the sign and still crossed into the reservation anyway? According to the Supreme Court in cases such as Atkinson Trading Co., Inc. v. Shirley, consent to tribal jurisdiction must be express, and is limited to the narrow subject areas of the express consent. Otherwise the tribe has no jurisdiction. Literal, express consent is highly relevant.

Tribal consent to federal statutes, regulations, and cases that decide matters critical to American Indian people and tribes long has been lacking. The nineteenth and twentieth century Supreme Court cases are replete with efforts by Indians and tribes to avoid the dictates of many of these laws and regulations that directly injured tribal interests, almost always to no avail. Congress legislated, the Executive branch acted, and the Supreme Court either declined to act or upheld the law and its enforcement. As recently as 1955, the Supreme Court has held that the taking of tribal property by federal agencies was a non-compensable taking.

Federal Indian law—the law that governs federal-state-tribal relations—

13. See id. at 568 (“In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government.”). See also United States v. Dann, 470 U.S. 39, 44-45 (1985) (holding that a tribal claim to land is extinguished under the Indian Claims Commission Act “when [judgment] funds are placed by the United States into an account in the Treasury of the United States for the Tribe pursuant to 31 U.S.C. § 724a”).


15. See id. at 656 (quoting E. Ravencroft, The Canterbury Guests; Or, A Bargain Broken at v. 1.) (“A nonmember’s consensual relationship in one area thus does not trigger tribal civil authority in another—it is not ‘in for a penny, in for a Pound.’”)

16. There was a time when consent was readily recognized. An 1834 legislative report includes the following language: “As to those persons not required to reside in the Indian Country, who voluntarily go there to reside, they must be considered as voluntarily submitting themselves to the laws of the tribes.” H. R. Rep. No. 23-474, at 18 (1834), excerpted in Monroe E. Price, Native American Law Manual 465 (1970).


18. The Court’s invocation of aspects of the political question doctrine—as in, if the tribe loses, it can always petition Congress—is legion in Indian law cases. See Matthew L.M. Fletcher, The Original Understanding of the Political Status of Indian Tribes, 82 St. John’s L. Rev. 153, 178-79 n.131 (2008) (collecting dozens of cases).


has been dramatically altered in recent decades in part by the notion that non-Indians and non-tribal entities have not consented to assertions of tribal government authority over them. This lack of consent is meaningful because Indian tribes are not beholden to the dictates of the American Constitution (nor could they be), and so the nonmembers could be subject to governmental authority unfettered by individual constitutional rights. The problem has best been identified by Professor Alex Aleinikoff as a “democratic deficit,” wherein these nonmembers and nonmember-controlled entities have not participated in the tribal political process, and therefore should not be subject to tribal sovereign powers. On the Supreme Court, Justice Kennedy long has been a champion of consent theory in relation to tribal government power, dating back to his days on the Ninth Circuit.

All of this comes as the federal government slowly vacates many aspects of its on-the-ground governance, a process begun in the mid-1970s when Congress authorized Indian tribes to contract with the Bureau of Indian Affairs to administer on-reservation services. Indian tribes now are the primary government authorities in Indian Country, a political fact that should seem inevitable but has been a long, long time in coming. In an article describing an

23. However, Congress’s enactment of the Indian Civil Rights Act is an effort to apply many (but not all) of the major individual rights of the American Constitution to those under tribal jurisdiction. 25 U.S.C. §§ 1301-1303 (2006). See generally The Indian Civil Rights Act at Forty 133 (Kristen A. Carpenter, Matthew L.M. Fletcher, and Angela R. Riley eds., 2012).
25. Interestingly, in two recent cases that attracted a great deal of attention, nonmembers were eligible to sit on juries in tribal court cases where nonmembers were defendants. See Plains Commerce Bank, 554 U.S. at 316; Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005), cert. denied, 549 U.S. 952 (2006). At least some tribes are taking the “democratic deficit” seriously.
28. See John C. Mohawk, Indian Economic Development: An Evolving Concept of Sovereignty, 39 Buff. L. Rev. 495, 495-97 (1991). The Bureau of Indian Affairs, and occasionally state agencies, were the primary governmental units in Indian Country going
early version of the legislation that would become the Indian Self-Determination and Education Assistance Act,\textsuperscript{29} Bobo Dean wrote in the early 1970s that, for the first time, the “consent of the governed” would be a part of Indian affairs.\textsuperscript{30} Self-determination meant that Indian people would be governed by Indian people, a concept that the Supreme Court had recognized as a matter of federal common law in 1959,\textsuperscript{31} but had not quite reached Congress or the bureaucracy. So while tribal governments begin to develop and exercise their governance authority and competence, the nonmembers residing and working within Indian Country are largely free of tribal regulation.\textsuperscript{32}

Of course, observers who argue that it makes sense to decide federal common law cases with consent theory in mind (Professor Aleinikoff excepted\textsuperscript{33}) fail to note the incredible irony of importing consent theory into federal Indian law. The irony comes on two levels. First, consent theory is of course a pure fiction, in that no one person has ever “consented” to the American federal government’s authority except in symbolic or meaningless ways.\textsuperscript{34} Moreover, consent theory is not a favored part of modern American high political theory and has been subject to powerful and persuasive theoretical and practical attacks.\textsuperscript{35}

The second source of irony is perhaps even more fundamental and simple; Indian nations and Indian people literally have not consented to most of the vastly broad and deep assertions of federal and state government that modern policymakers and judges assume exists.\textsuperscript{36} Indian tribes were not invited to the

\begin{footnotesize}
\textsuperscript{31.} See Williams v. Lee, 358 U.S. 217, 220 (1959) (“Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”) (emphasis added).
\textsuperscript{32.} See N. Bruce Duthu, \textit{American Indians and the Law} 6-7 (2008) ( canvassing several cases involving torts of non-Indians against Indian people).
\textsuperscript{36.} Examples of federal legislation restricting tribal governance and expanding state regulation into Indian Country includes the Major Crimes Act of 1885, 18 U.S.C. § 1153
\end{footnotesize}
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constitutional convention, nor could they sign or ratify the Constitution.\textsuperscript{37} Indian people, with relatively few exceptions largely relating to land tenure,\textsuperscript{38} never consented to federal citizenship,\textsuperscript{39} and to this day could be the only persons the Fourteenth Amendment excludes from citizenship (the so-called “Indians not taxed”).\textsuperscript{40} Indians who asserted treaty rights, for example, typically had been considered “uncivilized” and therefore ineligible for citizenship.\textsuperscript{41} Indians who declined to “abandon their tribal relations,” for another example, were in the same category.\textsuperscript{42} It is further ironic that there is an established method for acquiring the factual consent of Indian tribes and individual Indians to government control through a treaty or other agreement,\textsuperscript{43} but the United

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\textsuperscript{37} The Supreme Court has often used this kind of phrasing in recent decades. \textit{See, e.g.}, \textit{Kiowa Tribe of Oklahoma v. Mfg. Tech., Inc.}, 523 U.S. 751, 756 (1998) (“tribes were not at the Constitutional Convention”); Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991) (noting that Indian tribes could not have surrendered sovereignty “in a [Constitutional] convention to which they were not even parties”). \textit{See also} Agua Caliente Band of Cahuilla Indians v. Superior Court, 40 Cal. 4th 239, 251 (2006) (quoting \textit{Kiowa Tribe}).


\textsuperscript{40} \textit{See} Elk v. Wilkins, 112 U.S. 94 (1884).

\textsuperscript{41} \textit{E.g.,} Matthew L. M. Fletcher, \textit{The Eagle Returns: The Legal History of the Grand Traverse Band of Ottawa and Chippewa Indians} 114-15 (2012) (describing how local officials refused to allow Grand Traverse Band members to vote in 1866 because they had treaty rights to hunt and fish).

\textsuperscript{42} \textit{But see} Elk v. Wilkins, 112 U.S. 94 (1884), where the petitioner argued he had “severed his tribal relation to the Indian tribes” and was still denied the right to vote in Nebraska. \textit{See id.} at 98, 109.

States often does not take the time or effort to acquire the needed consent. And yet Indian nations and individual Indians remain under the control and authority of federal and many state governments. Anyone with even a superficial knowledge of American political theory would have to shake their head at the irony of a group of people subject to the control of a government only through what could charitably be described as acquiescence, and less charitably as violent conquest. One key tenet of consent theory is that the lack of consent to government action in the context of conquest is mere tyranny. Tyrannical, totalitarian governance by the United States has been at the heart of American Indian affairs over the last two centuries.

To be sure, in numerous instances American Indian tribes have freely given their consent to American action, usually through some sort of treaty arrangement or federal-tribal agreement, typically codified in acts of Congress. But all too often, the federal government (along with the states)

44. It should be said, however, that tribal interests in recent decades have become formidable lobbyists and negotiators, and so lack of consent in much recent legislation is somewhat illusory. See DANIEL M. COBB, NATIVE ACTIVISM IN COLD WAR AMERICA: THE STRUGGLE FOR SOVEREIGNTY (2008); Andrew Ramonas, Akin Gump’s Tribal Campaigns: Firm’s Specialized Practice Group Aided by Many American Indian Lobbyists, NAT’L L. J., Aug. 15, 2011, at 1.


49. See generally WILLIAMS, supra note 36 (describing history of treaty relations through 1800); Collins, supra note 2, at 372-73 (describing Indian consent through treaties, sovereign-to-sovereign agreements, and federal statutes allowing tribes to opt-in); G. William Rice, 25 U.S.C. §§71: The End of Indian Sovereignty or a Self-Limitation of Contractual Ability?, 5 AM. INDIAN L. REV. 239 (1977) (arguing that the 1871 statute ending the treaty period of Indian affairs still allows for the United States and Indian tribes to enter into treaty-like agreements, and describing several such arrangements).
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disregarded the limits of that consent to government action.50 In recent decades, however, Congress and the Executive branch have dramatically improved their recognition and respect of the limits of tribal consent to federal government action (with some equally dramatic negative action as well).51 Moreover, the last few presidential administrations have ordered federal agencies to consult with tribal governments before making significant policy choices affecting tribal interests.52 And yet, the Supreme Court’s decisions in recent decades have replaced Congress and the federal bureaucracy as the leading federal policymaking entity in many aspects of Indian affairs.53 Many of the Court’s decisions have enabled and actively encouraged state governments to oppose tribal sovereignty, putting tribes and states in a prisoner’s dilemma game where states have all of the bargaining chips.54 In short, Justice Kennedy’s vision of


51. A prime example of how modern congressional statutes have incorporated tribal consent into Indian affairs are “opt-in” statutes, such as the Tribal Law and Order Act (TLOA), which allow tribes to exert greater law enforcement authority if they provide adequate constitutional safeguards. See 25 U.S.C. §§ 1302(7)(a)-(d) (2006). Tribes that choose to continue exercising criminal jurisdiction under the older version of the Indian Civil Rights Act, with its one-year limitation on sentencing authority per offense, may do so. E.g., Miranda v. Anchondo, 654 F.3d 911 (9th Cir. 2011) (upholding tribal court sentence for violent crimes under pre-TLOA version of Indian Civil Rights Act).


54. See generally Skibine, supra note 45, at 416-36. The best examples of granting wins to state governments that have intruded on tribal sovereignty because they can are Carcieri v. Salazar, 129 S. Ct. 1058 (2009) (holding that the Department of Interior cannot
consent in Indian affairs only works one way, and hearkens back to 19th
century and early 20th century Indian affairs policies of assimilation and
destruction of tribal governments and sovereignties.35

The first Part of this paper is a short history of the incorporation of Indian
tribes into the American polity, largely without the consent of Indian tribes and
Indian people. The second part moves beyond the discussion of the lack of
tribal consent to federal and state governance, and how that lack of consent
actually generated the legal and political justification for congressional (and
federal) plenary power over Indian affairs. The third Part describes how express
and literal consent has come to dominate federal common law on tribal
authority over nonmembers. This Part explores the irony of introducing
nonmembers in vast numbers into Indian Country without tribal consent, and
then forcing tribal governments to acquire literal consent from those
nonmembers in order to govern them. The lack of authority over nonconsenting
nonmembers has led to sometimes devastating consequences for Indian people.
The fourth, and last, Part argues for a theory of tribal consent. Unlike the vague
and even fictional consent espoused by thinkers such as Justice Kennedy, and
denigrated by critics who bemoan its limitations, tribal consent theory should
be explored and integrated in federal Indian law. In fact, the United Nations
Declaration of the Rights of Indigenous Peoples requires that states acquired
the free and informed consent of indigenous governments and people before
taking action detrimental to those peoples,56 giving rise to a kind of literal
consent theory and practice desperately needed in American Indian affairs.

55. See generally ECHO-HAWK, supra note 19, at 161-216 (describing two important
Supreme Court decisions from the 19th century that went a long way toward assimilating
Indian people and destroying tribal governments: Lone Wolf v. Hitchcock, 118 U.S. 556
(1903), and United States v. Sandoval, 231 U.S. 28 (1913)).

56. Six times the United Nations Declaration on the Rights of Indigenous Peoples
requires consent by indigenous peoples for state action. See United Nations Declaration on
the Rights of Indigenous Peoples, supra note 1, at arts. 10, 11, 19, 28, 29, 32.
I. TRIBAL CONSENT PRIOR TO THE MODERN ERA OF INDIAN AFFAIRS (1789-1959)

A. The Non-Consensual Incorporation of Indian Tribes into the American Polity

The Founders of the United States did not invite American Indian nations (or tribes) to the Constitutional Convention, nor did they ask Indian nations to ratify the Constitution. Indian nations likely would not have chosen to ratify the Constitution, as it does relatively little to recognize and preserve the sovereignty of Indian nations. Indian tribes originally had almost no part to play in the dual-sovereignty system of federal and state government established by the Constitution. The text of the Constitution expressly treats Indians and tribes as outsiders. They were outsiders, just like foreign nations, although most Indian tribes were considered domestic, not foreign, nations after the 1830s. And yet, like foreign nations, Indian tribes were parties to hundreds of Senate-ratified and President-proclaimed treaties with the United States, the same treaties that form the basis for modern American Indian law and policy. These treaties established a blurry dividing line between the American and tribal sovereignties, a line that persists in various forms in the 21st century.


59. At the time of the Founding, scholars agree that Indian tribes were the equivalent of foreign nations. E.g., Saikrishna Prakash, Against Tribal Fungibility, 89 CORNELL L. REV. 1069, 1082-86 (2004); Angela R. Riley, (Tribal) Sovereignty and Illiberalism, 95 CAL. L. REV. 799, 821-25 (2007).

60. There is no express constitutional safeguard for tribal government authority contained in the Constitution, nor is there an express limit on congressional authority in Indian affairs. See FRANK POMMERSHEIM, Braid of Feathers: American Indian Law and Contemporary Tribal Life 44 (1995).

61. See ALENIKOFF, supra note 24, at vii.

62. See U.S. CONST. art. 1, § 8, cl. 3 (Indian commerce clause); art. I, § 2, para. 3 (“Indians not taxed” clause); POMMERSHEIM, supra note 53, at 165.


65. Charles Wilkinson coined the phrase, “measured separatism,” to describe the
Justice Kennedy recently suggested (though he was not the first\(^{66}\)) that Indian tribes are an “extraconstitutional” part of the American constitutional structure.\(^{67}\)

However, something amazing has happened in American constitutional law in the centuries that have followed. Indian tribes are a part of the American constitutional polity—they are the “Third Sovereign,” as Justice O’Connor famously noted after visiting two American Indian tribal courts in 1999.\(^{68}\) Somehow, Indian tribes have been at least partially incorporated into the American constitutional polity, playing a part alongside the states and the federal government.\(^{69}\) Tribes operate federal government programs and services,\(^{70}\) negotiate inter-governmental cooperative agreements with states and local governments,\(^{71}\) and exercise government authority over numerous classes of American citizens,\(^{72}\) including the authority to send people to prison.\(^{73}\) All of

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\(^{68}\) Sandra Day O’Connor, Lessons from the Third Sovereign: Indian Tribal Courts, 33 TULSA L. J. 1 (1997).


\(^{71}\) See Conference of Western Attorneys General, American Indian Law Deskbook 620-60 (4th ed. 2008); Getches, et al., supra note 20, at 634-35.


\(^{73}\) E.g., United States v. Wheeler, 435 U.S. 313 (1978); Talton v. Mayes, 163 U.S. 376 (1896); Miranda v. Anchondo, 654 F.3d 911 (9th Cir. 2011); Means v. District Court of Chinle Judicial District, 7 Navajo Rep. 383 (Navajo Nation Supreme Court 1999); Eastern
this authority derives from an inherent sovereign authority possessed by all Indian tribes, but still subject to limitation by Congress or the Supreme Court—a structure that presumes tribal incorporation to the American political structure, despite the complete lack of a Constitutional amendment that would codify such an arrangement.  74

How did this happen?

There is no easy answer to this question, but an understanding of the meandering and complicated route by which Indian tribes started out as purely outsiders but eventually found themselves a part of the American constitutional structure can be reached by a review of the history of American Indian affairs.  75

B. Exclusion of Indian Tribes

Early American politics established the outsider status of Indian tribes in what would become the American constitutional polity. The weakened nascent American state had reason to fear the Indian military presence on the borders of the Western lands.  76 Decades later, Chief Justice John Marshall would imply that the infant American Republic had every reason to fear a massive Indian military offensive that could push the United States into the Atlantic Ocean.  77 President Washington articulated a strong policy favoring purchasing Indian


76. “The Indians are not mentioned in the treaty of 1783, yet they were a very influential factor in the negotiations.” WALTER H. MOHR, FEDERAL INDIAN RELATIONS, 1774-1788, at 93 (1933).

77. Well, to be more accurate, the Indian tribes and the Americans were at a state of equipoise. Jack Blair, Demanding a Voice in Our Own Best Interest: A Call for a Delegate of the Cherokee Nation to the United States House of Representatives, 20 AM. INDIAN L. REV. 225, 227 (1995-1996). See also Worcester v. Georgia, 31 U.S. 515, 548 (1832) (noting the desire of Congress to avoid hostility); RICHARD C. BROWN, ILLUSTRIUS AMERICANS: JOHN MARSHALL 213 (1868) (“The Indians were a fierce and dangerous enemy whose love of war made them sometimes the aggressors, whose numbers and habits made them formidable, and whose cruel system of warfare seemed to justify every endeavor to remove them to a distance from civilized settlements.” (quoting Letter from Chief Justice Marshall to Justice Story (Oct. 29, 1828))); ROBERT KENNETH FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 54-55 (1968) (“Instead [Marshall] excused the displacement which had occurred by the most narrow argument possible: the Indians' war-like savagery made their physical proximity a mortal danger to the conquering settlers, and only to the extent of that danger might their lands be appropriated.” (emphasis added)); Robert J. Miller, American Indian Influence on the United States Constitution and Its Framers, 18 AM. INDIAN L. REV. 133, 138 (1993) (arguing that the weak post-Revolutionary United States was ill-equipped to deal with “Indian troubles”).
lands, and causing the "savage, as the wolf, to retire." The United States in its early years dealt with Indian tribes as it would any foreign nation—through treaties and diplomacy, and still occasionally war.

And so, during the short period after the Revolution but before the ratification of the Constitution—the Confederation period—the Americans continued to engage Indian tribes as foreign nations. They continued to enter into diplomacy and treaties, even as the tribes became weaker and weaker absent the economic and political buttressing of their British allies. During this period, some Americans suggested offering a political stake in Congress to the Cherokees and other tribes, even dangling statehood. The Articles of Confederation, in a famously contradictory provision, reserved Indian affairs to the federal government subject to state legislative prerogatives. Indian tribes remained complete outsiders in the American polity.

The text of the Constitution establishes that there would be little change in

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78. Letter from George Washington to James Duane (Sept. 7, 1783), as reprinted in Getches, et al., supra note 20, at 88.


84. See Articles of Confederation of 1781, art. IX, para. 4 ("The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated . . . ."); See also Worcester v. Georgia, 31 U.S. 515, 558 (1832) (arguing that the reservation of state authority "annul[led]" the federal power); Robert S. Pelcyger, Justices and Indians: Back to Basics, 62 Or. L. Rev. 29, 35-37 & n.38 (1983) (describing the need for, and proposals to ensure, federal control over Indian affairs).

the status of Indian tribes as political outsiders. The Constitution mentioned Indian tribes only once, in a provision reserving exclusive congressional authority to regulate commerce with foreign nations and Indian tribes, and among states. And so while tribes could therefore not be states or foreign nations under American constitutional law by virtue of the negative implication in the Commerce Clause, they were something. Chief Justice Marshall's opinions in the Cherokee Cases recognized as such, but waffled between labeling tribes "domestic dependent nations" and "distinct, independent political communities." Regardless, Indian tribes remained constitutional outsiders, as evidenced by the Cherokees eventual "removal" to western lands in the Trail of Tears.

The federal government cemented the outsider status of Indian tribes after the enactment of the Constitution by maintaining and expanding treaty relationships with tribes. In all, over 200 treaties with Indian tribes remain at least partially extant, and perhaps over 400 such treaties reached at least the stage where the parties executed them (although the Senate might not have ratified every one). There can be no greater expression of distance between the United States and another political entity than that of a treaty relationship under the Constitution. Despite Congress's decision to stop treating with

86. See generally Clinton, supra note 53.


88. See Cherokee Nation v. Georgia, 30 U.S. 1, 18 (1831) (Marshall, C.J.) ("In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them.").

89. Compare Cherokee Nation, 30 U.S. at 17 (Marshall, C.J.) ("domestic dependent nations"), with Worcester v. Georgia, 31 U.S. 515, 557 (1832) ("distinct political communities"); id. at 559 ("distinct, independent political communities").

90. In 1830, Congress passed the Indian Removal Act, 4 Stat. 411, establishing federal policy in support of "removing" Indians to the western lands, authorizing the President to execute treaties with Indians to that effect, and even authorizing the President to use force against Indians who refused to comply with a removal treaty. See generally Alfred A. Cave, Abuse of Power: Andrew Jackson and the Indian Removal Act of 1830, 65 HISTORIAN 1330, 1331-36 (2003) (examining the enactment of the Indian Removal Act).


93. See WILKINSON, supra note 65, at 8.

94. See Mike Townsend, Congressional Abrogation of Indian Treaties: Reevaluation and Reform, 98 YALE L. J. 793, 797-98 (1989).
Indian tribes in 1871.\textsuperscript{95} Indian treaties remain the cornerstone of the relationship of Indian tribes and the federal government.\textsuperscript{96} And, while many Indian tribes currently recognized as sovereigns by the United States do not have a treaty relationship (at least according to the United States),\textsuperscript{97} as a practical matter the federal government deals with them as independent political entities akin to treaty tribes.\textsuperscript{98}

The exclusion of Indian tribes from the American constitutional structure made good sense from the point of view of the Americans so long as "Indian Country" remained outside of the exterior boundaries of the United States.\textsuperscript{99} American Indian law and policy during the eighteenth and nineteenth centuries, and likely as late as the 1960s, almost always involved efforts to exterminate the political existence of Indian tribes, not to mention the cultures of Indian communities.\textsuperscript{100} But a difficult tension arose—and continues to exist—as Indian tribes became physically (but not legally) incorporated into the United States by virtue of refusing to disappear.\textsuperscript{101}

The Constitution's Framers spent little time debating how to handle Indian affairs.\textsuperscript{102} James Madison's \textit{Federalist No. 42} indicates that the Framers' main preoccupation was ensuring that the federal government would retain exclusive authority to deal in Indian affairs, keeping the states and American citizens at

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\item \textsuperscript{96} See Vine Deloria, Jr., \textit{Reserving to Themselves: Treaties and the Powers of Indian Tribes}, 38 ARIZ. L. REV. 963, 974-79 (1996).
\item \textsuperscript{101} E.g., Matthew L.M. Fletcher, \textit{Same-Sex Marriage, Indian Tribes, and the Constitution}, 61 U. MIAMI L. REV. 53, 83 (2006) (arguing that American policy debates on same-sex marriage excluding the import of Indian tribes may create unanticipated consequences on the constitutional status of Indian tribes); Alex Tallchief Skibine, \textit{Redefining the Status of Indian Tribes Within Our Federalism: Beyond the Dependency Paradigm}, 38 CONN. L. REV. 667, 669-77 (2006) (discussing different theories of incorporation of Indian tribes into the constitutional structure, and their difficulties).
\item \textsuperscript{102} See AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107-08 (2005); Albert S. Abel, \textit{The Commerce Clause in the Constitutional Convention and Contemporary Comment}, 25 MINN. L. REV. 423, 466 (1941).
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bay. As a policy matter, the early American Republic saw Indian affairs as involving primarily three questions: who would acquire Indian lands, who would regulate trade with remaining Indian people and tribes, and how to avoid Indian wars. Of the three, the most pressing by far involved Indian lands, and that fact alone demonstrates a major assumption of the Framers and the leaders of the early Republic—Indian tribes were unnecessary to the United States, and constituted a clear and direct competitor to the security of America. The second policy point, driven home most specifically by Thomas Jefferson’s efforts to regulate and develop trade with Indians, involved an effort to make the presence of Indian people (not tribes) more palatable (and valuable) to Americans. Jefferson and others fervently hoped that Indian people would abandon their tribal relations and become civilized as a result of this trade; and if not, to disappear along with the tribes. The third policy point, it goes without saying, again recognizes the serious threat that Indian tribes posed to the United States, a young and relatively poor government. In

103. See FEDERALIST No. 42 (James Madison) (“The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.”); see also Robert N. Clinton, State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine, 26 S.D. L. Rev. 434, 435-36 (1981) (collecting additional historical materials suggesting the Framers intended to make Indian affairs exclusively a federal question).

104. See generally Robert A. Williams, Jr., Jefferson, the Norman Yoke, and American Indian Lands, 29 Ariz. L. Rev. 165 (1987) (analyzing the history of Indian lands purchases from 1763 to the early American Republic).

105. See Abel, supra note 102, at 466; Clinton, supra note 103, at 435-36; Robert Laurence, The Indian Commerce Clause, 23 Ariz. L. Rev. 203, 223-27 (1981).

106. See Kades, supra note 99, at 1131-41.

107. See generally THOMAS PERKINS ABERNETHY, WESTERN LANDS AND THE AMERICAN REVOLUTION 162-361 (1937) (recounting American political maneuvers regarding Indian lands in the west after the Revolution and before the Constitutional Convention).

108. See FEDERALIST No. 24 (Alexander Hamilton) (“The savage tribes on our Western frontier ought to be regarded as our natural enemies, their [the British] natural allies, because they have most to fear from us, and most to hope from them.”).


sum, for the United States, Indian tribes, people, and lands constituted a national question, and potentially a vast revenue-generating endeavor.\textsuperscript{112}

Over the course of the next two centuries, American law and policy in Indian affairs wavered from passive-aggressive efforts to undermine Indian tribes, to overtly aggressive (even violent and viciously oppressive) attacks on tribal governance. While the experience of every Indian tribe is unique, the experience of tribal communities such as the Anishinaabek in the Great Lakes region\textsuperscript{113} and the Coast Salish communities of the Pacific Northwest\textsuperscript{114} provide excellent snapshots of the federal government’s efforts to hasten the political extinction of Indian tribes in the United States.\textsuperscript{115}

The story of the Anishinaabek (primarily Ojibwe, Odawa, and Bodewadmi)\textsuperscript{116} in the Great Lakes differ again, in that the tribes established a treaty relationship with the United States creating (but not necessarily) guaranteeing reservations.\textsuperscript{117} The key treaties involved the massive cessions of lands by the tribes to the United States, the largest perhaps being the cession of about one-third of what would become the State of Michigan in the 1836 Treaty of Washington.\textsuperscript{118} Hovering over these tribes during this period was the ever-present threat of removal to the west,\textsuperscript{119} though largely due to the short growing season in their northernmost portions of their territories, the federal government was successful in removing only a fraction of these tribal communities.\textsuperscript{120} These tribal communities remain in their home territories,

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\item[114.] E.g., Frank W. Porter, In Search of Recognition: Federal Indian Policy and the Landless Tribes of Western Washington, 14 AM. INDIAN Q. 113 (1990).
\item[119.] See United States v. Michigan, 471 F. Supp. at 207-11.
\item[120.] Compare, e.g., James M. McClurken, Ottawa Adaptive Strategies to Indian
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though in reservations much smaller than the original homelands. Coupled with aggressive cultural attacks such as boarding schools, and through immersion in large numbers of non-Indians, many of these tribal communities (mostly those in Michigan) were unable to avoid administrative termination for significant time periods. However, the revitalization of these tribes has been nothing short of remarkable in the last few decades. Starting in the late 1960s, numerous Indians from these communities in Michigan, Wisconsin, and Minnesota began exercising off-reservation treaty rights to hunt, fish, and gather. These efforts have proven largely successful in cases such as United States v. Michigan, Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, and Minnesota v. Mille Lacs Band of Chippewa Indians, the only case from the Great Lakes area to reach the Supreme Court.

Similarly, the Coast Salish tribal communities in the Pacific northwest executed land cession treaties agreed to move to smaller reservation areas (often crowding into small reservations with several other tribes), and then


122. See *The Tree That Never Dies: Oral History of the Michigan Indians* 52-54 (Pamela J. Dobson ed., 1978) (describing the Mount Pleasant Indian School, which was run like a military school where students received punishments so severe that scarring resulted from the beatings).


all but withered away\textsuperscript{130} until the 1960s when individual Indians began to assert off-reservation treaty rights.\textsuperscript{131} But in cases such as \textit{United States v. Washington}, \textsuperscript{132} \textit{Sohappy v. Smith}, \textsuperscript{133} and various water rights cases such as the Snake River general stream adjudication,\textsuperscript{134} Indian tribes in the region were able to re-establish the viability of their tribal governments.\textsuperscript{135} In recent decades, these tribes have been leaders in managing scarce fishing resources and preserving fisheries and wildlife habitats in the region.\textsuperscript{136}

The stories of these tribes and many others like them are indicative of the incredible survival of tribal governments through the entirety of American history. Despite a clear lineage of federal law and policy supporting the extermination of Indian tribes, many hundreds of have survived.

C. Living with (and Incorporating) Indian Tribes

Currently, there are 566 federally recognized Indian tribes,\textsuperscript{137} despite two centuries Indian law and policy geared toward destroying tribal governments and the cultures of Indian people.\textsuperscript{138} Starting in 1934, with the Indian
Reorganization Act,\textsuperscript{139} Congress legislated with an eye toward recognizing Indian tribes as viable, permanent entities.\textsuperscript{140} But Congress quickly deviated from that path,\textsuperscript{141} and it was not until probably the late 1960s and early 1970s that the federal government’s policymaking branches of government finally concluded through law and policy choices that Indian tribes were here to stay.\textsuperscript{142} Ironically, the Supreme Court acknowledged the permanent sovereignty of Indian tribes and the likelihood that they would be around years before, perhaps as early as 1959.\textsuperscript{143}

The presence of Indian tribes within the borders of the United States has

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\item\textsuperscript{139} Indian Reorganization (Wheeler-Howard) Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified at 25 U.S.C §§ 461-479 (2006)).

[i]n 1953, Congress undertook some major legislation in this area. It passed a bill giving state courts jurisdiction over civil and criminal matters involving Indians on reservations but it specified the states involved—and Arizona was not included The legislative history of the bill is most informative. In discussing the bill the House Committee stated: “As a practical matter, the enforcement of law and order among the Indians in the Indian Country has been left largely to the Indian groups themselves.” This would appear to be persuasive proof of Congress’ intent and understanding of the present state of the law.

Ball, supra, at 398 (quoting Bench Memorandum, 1958 Term, Williams v. Lee, No. 39, Certiorari to Supreme Court of Ariz. at 6-7 (on file with the Library of Congress, Washington, D.C., Earl Warren Papers, Manuscript Division, Box 188)). See also id. at 399 ("Importantly for the Navajo, Chief Justice Earl Warren and Justice William J. Brennan supported the presumption of inherent tribal sovereignty. Without the introduction of state legislation to confirm the actions of Congress, Warren said, "[t]he] 1953 Act gave jurisdiction conditionally—[A]rizona does not want to carry expense of that change.")." (quoting Conference, Williams v. Lee, No. 39 (Nov. 21, 1958) (on file with the Library of Congress, Washington, D.C., William O. Douglas Papers, Manuscript Divisions, Box 1201)). Justice Black expressed his support for tribal nations in the mid-1960s as well: “Justice Hugo Lafayette Black was generally supportive of Native American rights, as was Justice William O. Douglas. In a letter to Murray Lincoln, Chief Justice of the Navajo tribe, dated June 14 of 1965, Justice Hugo Black wrote, '[y]ou know, I am also sure, the great interest and sympathy I feel for the Tribes that seek to preserve their ways of life.'" Id.

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created a kind of constitutional conundrum. As noted earlier, the Framers appeared to assume that at some point, Indian tribes would phase out of existence. But here they are in the twenty-first century, many of them operating robust and large government bureaucracies,\textsuperscript{144} enforcing criminal laws,\textsuperscript{145} and managing million- and billion-dollar business concerns.\textsuperscript{146} Thousands, and perhaps hundreds of thousands, of non-Indian Americans rely upon Indian tribes for employment and business opportunities.\textsuperscript{147} Even if the federal government or anyone else desired to pursue the eradication of Indian tribes, it would not be politically or economically viable. But while Indian tribes are here to stay as political bodies, and as economic engines, it is not so clear how they are incorporated into the American constitutional polity, if at all.

This last fact puts Indian tribes in a particular quandary. If they are not "under" the Constitution, then what are they? They certainly are not "foreign nations," and they even more certainly are not "States."\textsuperscript{148}

Despite all of the bad history of American Indian affairs, Indian tribal sovereignty is at its peak since long before the establishment of the United States.\textsuperscript{149} Indian tribes retain enormous authority over their own territories and members.\textsuperscript{150} They have immunity from suit in federal and state courts,\textsuperscript{151} except

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144. See Fletcher, supra note 72, chap. 13 (examining tribal administrative practices); Jonathan B. Taylor, Determinants of Development Success of Native Nations of the United States 4 (2008) available at http://nni.arizona.edu/resources/inpp/determinants_of_development_success_english.pdf ("The demands of self government require performing certain jobs well. Without the staffs to design the wildlife protection plan, maintain the land title records, or operate the police dispatch system, Native nations fail to achieve their own objectives").


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as against the United States. They prosecute Indian criminal offenders; they establish rules of contract, probate, domestic relations, and land use; and they even partially regulate the activities of people who are not Indians. Indian tribal courts have developed some of the most forward-thinking criminal diversion courts, including drug courts and the famous peacemaker courts at Navajo, in Alaska, and elsewhere.

Indian tribes are experts at administering federal programs and handling federal and private grant money. Congress has repeatedly recognized the tribal sovereignty of Indian tribes by listing them as sovereigns eligible to enforce the Clean Air Act and other federal environmental regimes.

Congress authorized tribal courts to enforce court orders and judgments under the Violence against Women Act and made federal and state courts grant full (criminal jurisdiction over nonmembers).

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383 (Navajo 1999) (criminal jurisdiction over nonmembers).


162. See 42 U.S.C. § 7601(d) (2006); Arizona Public Service Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000).


164. See 18 U.S.C. § 2265(a) (2006); Sarah Deer & Melissa L. Tatum, Tribal Efforts to Comply with VAWA’s Full Faith and Credit Requirements: A Response to Sandra
faith and credit to tribal court orders and judgments under the Indian Child Welfare Act. Congress forced states to negotiate with Indian tribes over casino-style gaming, despite the Supreme Court's efforts to preserve state sovereign immunity in this area. Even in areas where Congress hasn't spoken, state and federal courts and governments grant enormous deference to tribal law and court judgments, though certainly not all the time. For example, some federal and state courts will count tribal court criminal convictions and inmate time served in their own calculations in sentencing.

Of note, many states and local governments have entered into agreements with Indian tribes over taxation, law enforcement, jail space, land use and zoning, economic development, enforcement of foreign judgments, and more. 


170. E.g., United States v. Cavanaugh, 643 F.3d 592 (8th Cir. 2001); State v. Spotted Eagle, 71 P.3d 1239 (Mont. 2003).


172. E.g., State v. Manypenny, 682 N.W.2d 143 (Minn. 2004) (upholding county-tribe law enforcement cooperative agreement); Mutual Aid Act, N. M. STAT. ANN. §§ 29-8-1 to -3 (West 2011) (authorizing any local government to enter into a law enforcement cooperative agreement with an Indian tribe).


174. E.g., Intergovernmental Agreement on Cooperative Land Use and Planning
child welfare, and dozens of other subjects. Some states have even published guides on tribal-state relations. Hundreds, if not thousands, of these agreements exist and are in operation at this moment.

These factors point to a very real constitutional fact—Indian tribes have somehow been incorporated into the American dual-sovereignty structure of government without a constitutional amendment to define the incorporation. The Supreme Court’s decisions are the strongest legal authority establishing the incorporation of Indian tribes into the American constitutional polity, though its pronouncements are haphazard at best. The Court’s major holdings are: (1) that Indian tribes are not beholden at all to the Constitution; (2) Indian tribes are immune from suit and from state and local taxation and regulation; inherent tribal sovereignty allows tribes to make laws on tribal membership and other subjects that otherwise would be prohibited by state or federal law; (4) Indian tribes have the power to prosecute criminal offenders; and (5) Indian treaty rights are extant until Congress abrogates them. Congress and the Executive branch have largely acquiesced to these rulings, with rare agreements being reached. Among the more notable agreements are those between the Wampanoag Tribe of Gay Head (Aquinnah) and the Town of Aquinnah (2006), available at http://www.wampanoagtribe.net/Pages/Wampanoag_News/tribe%20approved%20MOU.pdf; Cooperative Agreement between the U.S. Department of Interior—Bureau of Land Management and the Agua Caliente Band of Cahuilla Indians for the Santa Rosa and San Jacinto Mountains (1999), available at http://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process/agua-caliente/tribal coop agreement_1999.pdf.


80. See POMMERSHEIM, supra note 53, at 139-43.


exceptions.\textsuperscript{186}

The Supreme Court only recognizes tribal sovereign rights in tribes that are federally recognized, however.\textsuperscript{187} Federal recognition of a tribe’s sovereignty grants a tribe the right to participate in the federal government’s programs and services provided to Indian people nationally, but it also amounts to a critical political lifeline from the federal government to Indian tribes, who otherwise would not be able to assert their sovereignty validly under federal law.\textsuperscript{188}

There are several ways Indian tribes can acquire the status of a federally recognized tribe. The clearest road to federal recognition is through the creation of a treaty relationship with the United States.\textsuperscript{189} A treaty relationship means that the United States negotiated with an Indian tribe over issues of fundamental sovereign interests, such as land and governmental authority and responsibilities.\textsuperscript{190} The Senate then executed agreement, followed by a Presidential declaration of the treaty’s effective date.\textsuperscript{191} All of this is conducted under the procedures established in Article II of the Constitution, rendering Indian treaties the supreme law of the land under Article VI (subject, of course, to congressional amendment and abrogation).\textsuperscript{192}

Other means by which Indian tribes can become recognized by the federal government are through Acts of Congress,\textsuperscript{193} certain legal actions or opinions of the Executive branch,\textsuperscript{194} and more recently through the Federal Acknowledgment Process administered by the Bureau of Acknowledgment and Research in the Bureau of Indian Affairs.\textsuperscript{195} Each of these requires some affirmative act by the relevant Indian tribe to pursue federal recognition, just like treaty tribes. It could be a lawsuit,\textsuperscript{196} a petition to the Bureau of Indian

\footnotesize{\textsuperscript{186} E.g., United States v. Lara, 541 U.S. 193, 199 (2004) (describing Congress’s efforts to overturn\textsuperscript{187} Duro v. Reina, 495 U.S. 676 (1990)).

\textsuperscript{187} \textit{Cf.} Carceri v. Salazar, 555 U.S. 379 (2009) (holding that Indian tribes not federally recognized in 1934 may not be eligible for certain federal services, including having their lands held in trust by the federal government).

\textsuperscript{188} See 25 C.F.R. \textsection 83.2 (2011); Samish Indian Nation v. United States, 419 F.3d 1355, 1358 (Fed. Cir. 2005); Roberto Iraola, \textit{The Administrative Tribal Recognition Process and the Courts}, 38 \textit{Akron L. Rev.} 867, 867-68 (2005).

\textsuperscript{189} \textit{E.g.}, Treaty with the Ottawas, Etc., supra note 118.

\textsuperscript{190} \textit{See, e.g.}, Treaty with the Ottawas, Etc., supra note 118, art. I (cession of Indian claims to land); art. II (establishment of reservations); art. XIII (right to hunt on ceded lands).

\textsuperscript{191} \textit{See} Treaty with the Ottawas, Etc., supra note 118.

\textsuperscript{192} \textit{See U.S. Const. art. II, \textsection 2, cl. 2 (treaty clause); art. VI, cl. 2 (supremacy clause).}


\textsuperscript{195} \textit{See id.} at 25-26 (listing tribes recognized under 25 C.F.R. \textsection 83).

\textsuperscript{196} \textit{E.g.}, Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).}
Affairs, or support of a congressional bill.

It is important next to consider what exactly Indian tribes are agreeing to when they acquire federal recognition. Treaty tribes—that is, signatories to the treaties executed and ratified between the earliest treaty (1778) and the last treaties (1868)—generally consented to what Chief Justice Marshall described in international law terms as “protection” under the federal government. Under international law, that meant basically that the tribe had agreed to turn over its external sovereign rights to form military and other alliances with nations other than the United States—and nothing more. Later treaties would provide for a greater intrusion in the internal sovereignty of Indian tribes, but not so much that they would lose their fundamental sovereign existence.

While tribal sovereignty for treaty tribes is reserved in the treaties, for Indian tribes that are not treaty tribes, sovereignty could be ambiguous. The solution to this problem comes from the means by which the Supreme Court has decided its Indian cases over the years, and through congressional enactments related to the Indian Reorganization Act. From the earliest Indian law cases, the Court has applied a sort of “least favored nation” analysis to treaty terms. In large part, the Court will interpret tribal sovereignty and,

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197. E.g., Petition of the Grand Traverse Band of Ottawa and Chippewa Indians to the Secretary of Interior for Acknowledgement of Recognition as an Indian Tribe (1978).
198. E.g., Michigan Indian Recognition, Hearing before the Subcommittee on Native American Affairs of the Committee on Natural Resources, House of Representatives, 103rd Cong. (1993).
201. See Worcester v. Georgia, 31 U.S. 515, 560-61 (“The very fact of repeated treaties with them recognizes it; 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. Examples of this kind are not wanting in Europe. ‘Tributary and feudatory states,’ says Vattel, ‘do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state.’ At the present day, more than one state may be considered as holding its right of self government under the guarantee and protection of one or more allies.”).
203. See Wiessner, supra note 202, at 577-80.
often, treaty language in accordance with the least favorable (to tribes) federal court precedents or with its own perceptions or knowledge of Indian affairs, despite the actual language of the treaty or the factual realities on the ground. In short, when the Court limits the tribal governmental authority of one tribe, all tribes suffer the same limitation whether they should be or not. Similarly, though more happily for tribal interests, Congress’s amendments to the Indian Reorganization Act allowed tribes to take advantage of most of the Act’s favorable tribal government provisions even if they voted not to reorganize under the Act (or were not allowed). In short, non-treaty tribes are looped in with treaty tribes for purposes of determining the contours of tribal sovereignty, for better or worse.

The reality of federal recognition is more complicated than mere eligibility to run federal programs and coordinate with state and local governments on community governance. Federal recognition comes with additional burdens, not the least of which is a federal plenary power over Indian affairs—including the internal affairs of Indian tribes—that has created an enormous mess in Indian Country. While some aspects of tribal sovereignty appear not to be within the federal grasp—such as tribal citizenship rules or internal


207. For example, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), which held the Suquamish Tribe could not exercise criminal jurisdiction over non-Indians, applies to all Indian tribes.


210. E.g., Cohen, supra note 48 (describing many aspects of federal plenary power over the day-to-day lives of American Indians in the early 1950s); Alex Talchiel Skibine, Integrating the Indian Trust Doctrine into the Constitution, 39 TULSA L. REV. 247, 256-58 (2003) (describing the power of Congress to interfere with tribal self-government); see also Clinton, supra note 53, at 235-252 (rejecting federal plenary power over internal Indian affairs).

211. See generally Riley, supra note 59, at 827-30; Skibine, supra note 53, at 1137-55.

212. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (membership); see also id. at 55-56 (“They have power to make their own substantive law in internal matters, see Roff v. Burney [168 U.S. 218 (1897)] (membership); Jones v. Meehan [175 U.S. 1, 29 (1899)] (inheritance rules); United States v. Quiver [241 U.S. 602 (1916)] (domestic relations), and to enforce that law in their own forums, see, e.g., Williams v. Lee [358 U.S.
governance disputes—virtually all aspects of tribal sovereignty even in the modern era are subject to the review and occasionally control of federal (and sometimes state) courts. The most egregious example of this review and control is over civil disputes in tribal courts where the defendant is a nonmember. No Indian tribe has ever consented to such federal court review, and no Act of Congress has ever authorized such review. And still, such review is pervasive in Indian Country, with federal courts all over the country confronted with complicated questions of tribal court jurisdiction, questions about which federal court judges admit to having no special expertise or even experience. Federal intrusion on tribal sovereignty without the express (or even implied) consent of those tribal nations is the core subject area of this Article.

We will return to a fundamental question—what exactly did Indian tribes consent to in order to acquire what we now call federal recognition?

II. THEORIES OF FEDERAL CONTROL OVER INDIAN AFFAIRS

Congress has plenary control over Indian affairs, to the exclusion of the States and other nations, according to the constitutional common law of the Supreme Court. As a part of the exercise of its plenary power, Congress has delegated enormous and general authority to deal in Indian affairs to the President and to the Secretary of Interior. With virtually no significant


215. See National Farmers Union, 471 U.S. at 854-55 (quoting Attorney General Cushing, 7 Op. Atty. Gen. 175, 179-81 (1855): “But there is no provision of treaty, and no statute, which takes away from the Choctaw jurisdiction of a case like this, a question of property strictly internal to the Choctaw nation; nor is there any written law which confers jurisdiction of such a case in any court of the United States. . . . The conclusion seems to me irresistible, not that such questions are justiciable nowhere, but that they remain subject to the local jurisdiction of the Choctaw. . . . Now, it is admitted on all hands . . . that Congress has ‘paramount right’ to legislate in regard to this question, in all its relations. It has legislated, in so far as it saw fit, by taking jurisdiction in criminal matters, and omitting to take jurisdiction in civil matters. . . . By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaw themselves of civil controversies arising strictly within the Choctaw Nation.”) (emphasis added).


exception, the Supreme Court has upheld every exercise of Congress’s legislative authority to deal in Indian affairs. And, only in rare circumstances, has the Court struck down an act of the Executive branch as lacking authorization.

The Constitution is all but silent as to Indian affairs, with the lone provision authorizing federal action being the so-called Indian Commerce Clause. Article I, Section 8, Clause 3 authorizes Congress to regulate commerce with Indian tribes, along with commerce with foreign nations and among the several States. Given the very broad definition of “commerce” that the Supreme Court has recognized through the Necessary and Proper Clause, Congress’s authority in Indian affairs is mighty.

Congress might not have the incredible—well-nigh absolute in some instances—authority that its plenary power confers over Indian affairs without the authority voluntarily relinquished to it in hundreds of Indian treaties. In fact, given the Supreme Court’s “least favored nation” canon of interpreting Indian treaties, the Court has significantly bolstered congressional power over Indian affairs by asserting that Congress has acquired additional authority to deal in Indian affairs via the treaty power. While other provisions of the Constitution, in particular the Property Clause and the Territory Clause, have been advanced as possible sources of congressional authority, it is the Indian Commerce Clause and the treaty power that have been the clearest sources of authority.
A. A Quick History of the Rise of Congressional Plenary Power over Indian Affairs

Congressional plenary power over Indian affairs has three components. The first is probably the easiest as a matter of law, and perhaps the most controversial as a matter of politics—the exclusion of states from Indian affairs. As noted above, Chief Justice Marshall wrote that state law has “no force” in Indian Country. The Indian Commerce Clause serves to exclude state governments from enacting their own major Indian affairs laws, certainly if they conflict with federal law or policy. Moreover, the various Indian treaties taken singly and together, at least since 1789 (the year the states ratified the Constitution), completely foreclose state input into Indian affairs. Generally, courts usually will not recognize significant state authority into Indian affairs without apparent consent (or at least clear acquiescence) from Congress. While a small group of law professors and state attorneys general debate whether this is the case, the law is clear in excluding states from Indian affairs absent congressional consent.

The second component is related, and is the congressional plenary power over what I term external Indian affairs; that is, the relationship between Indian tribes and the federal government and the states. Congressional plenary power over external Indian affairs dates back to earliest days of the American Revolution, when the Continental Congress first attempted to assert diplomatic and military authority over Indian affairs. The nascent United States was only doing what the British had been expressly doing since 1763, which was to preclude the colonies and Americans from engaging Indian tribes and Indian people in commerce, trade, and virtually all forms of “intercourse” without

236. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, supra note 9, § 6.01[1], at 499.
237. See generally MOHR, supra note 76, at 37-91.
national government consent and regulation. The national authority carried over into the Articles of Confederation period, though not without complexity, given the contradictory character of Article IX, which seemed to grant significant Indian-affairs power to both Congress and the states. James Madison’s proposed fix to the Articles reached its final form in the Indian Commerce Clause, preserving congressional authority over Indian commerce, and thereby, through the Necessary and Proper Clause, all Indian affairs.

Contrast this component with the third component—congressional plenary power over internal Indian affairs, including the authority of Indian tribes to govern themselves. There is little controversy at all about the plenary power of Congress over external Indian affairs, which tends to serve both the federal government and Indian tribes well. But internal tribal affairs are another matter.

Congress and the federal government generally did not want, or need, to control the inner workings of Indian tribes for many decades after the formation of the Union. From the Founding until as late as 1885, Congress largely refused to regulate Indian tribes themselves, instead focusing on forcing tribes to cede land and remove to the west. Under the Constitution, this made sense. The Constitution is written with an implied understanding that Indian tribes usually are—and will remain—outside of the constitutional governance structure and, outside of the geographic bounds of the United States.

But by 1885, when Congress enacted the Major Crimes Act that extended

238. See Mohr, supra note 76, at 1-36. Congress eventually codified its policy choices in the Trade and Intercourse Acts. See Amar, supra note 102, at 108 n.6 ("It also bears notice that the First Congress enacted a statute regulating noneconomic interactions and altercations—"intercourse"—with Indians; see An Act to regulate trade and intercourse with the Indian tribes, July 22, 1790, 1 Stat. 137. Section 5 of this act dealt with crimes—whether economic or not—committed by Americans on Indian lands."); Jack M. Balkin, Commerce, 109 Mich. L. Rev. 1, 24-26 (2010).

239. See Federalist No. 42 (James Madison); Clinton, supra note 103, at 435.

240. See Clinton, supra note 81, at 1064-1164 (detailing the history of the adoption of the Indian Commerce Clause).


federal criminal jurisdiction into Indian Country, the geographic reality was that the remaining Indian tribes were within the territorial boundaries of the United States.\footnote{245. See United States v. Kagama, 118 U.S. 375, 384-85 (1886) ("The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.") (emphasis added).}

Quickly following the Major Crimes Act, in 1887 Congress passed the Dawes Act, or the General Allotment Act,\footnote{246. Ch. 119 24 Stat. 388 (1887). See generally Wilcomb E. Washburn, The Assault on Tribalism: The General Allotment Law (Dawes Act) of 1887 (1975).} which instructed the Department of Interior to prepare to "allot" Indian reservations with the dual purpose of "civilizing" Indians and of breaking up the tribal land mass within the United States.\footnote{247. See Judith V. Royster, The Legacy of Allotment, 27 Ariz. St. L. J. 1, 7-14 (1995).}

Once again, Congress had legislated directly to interfere with internal tribal relations, this time to rewrite the rules of land ownership and possession inside of Indian Country.\footnote{248. See generally Kenneth H. Bobroff, Retelling Allotment: Indian Property Rights and the Myth of Common Ownership, 54 Vand. L. Rev. 1559 (2001).}

The Executive branch, typically without congressional authorization, had already been interfering with internal tribal affairs for years.\footnote{249. See American Indian Religious Freedom: Hearings before the United States Senate Select Committee on Indian Affairs, 95th Cong. (1978) (detailing federal interference with American Indian religions); Cohen, supra note 48 (federal interference with day-to-day lives of American Indians in the early 1950s).}

The Bureau of Indian Affairs enacted regulations creating Courts of Indian Offenses to enforce the similarly promulgated Law and Order Codes applied to Indian reservations.\footnote{250. See Vine Deloria, Jr., American Indians, American Justice 113-16 (1983); William T. Hagen, Indian Police and Judges 104-25 (1966); National American Indian Court Judges Assn., Indian Courts and the Future 7-13 (David H. Getches, ed. 1979); Gloria Valencia-Weber, Tribal Courts: Custom and Innovative Law, 24 N. M. L. Rev. 225, 235 (1994).}

The Bureau appointed Indian people to serve both as tribal judges and tribal police, giving the project the veneer of tribal sovereignty, but the reality was that these legal structures were entirely of the Bureau's concoction.\footnote{251. See Hagen, supra note 250, at 160-63; Kerr, supra note 243, at 321.}

The lower federal courts went along with the charade, rejecting the claims of Indians prosecuted under the codes and in tribal courts who alleged the court had no authority.\footnote{252. See United States v. Clapox, 35 F. 575 (D. Or. 1888).}

The most recent, significant, overt effort to interfere with tribal affairs came from the enactment of the 1968 Indian Civil Rights Act (ICRA)\footnote{253. Pub. L. 90-284, Title II, § 201, 82 Stat. 77 (1968) (codified at 25 U.S.C. § 1301 et seq.).} in which Congress instructed Indian tribal governments to comply with an altered
version of the Bill of Rights. Only in recent decades have Congress and the Bureau loosened the reins on tribal governments, still reserving for themselves significant apparent authority to direct interior tribal law and policy, especially at early stages in a tribal government’s formation and development.

The key Supreme Court cases that effectively ratified the authority of Congress and the Executive branch to interfere in internal tribal relations were United States v. Kagama and Lone Wolf v. Hitchcock. Kagama and Lone Wolf rejected direct challenges to the authority of Congress to enact the Major Crimes Act and to allot an Indian reservation, respectively. There are two key modes of jurisprudence that undergird congressional plenary power over internal tribal affairs, though they are closely related, and even a bit dependent on each other, but the next two Parts will parse them out separately for clarity’s sake.

B. “Protection” and the Guardian-Ward Relationship—The Common Law Authority for Congressional Plenary Power over Indian Affairs

The United States Supreme Court has supplied many common law decisions announcing various forms of the political relations between the United States and Indian tribes, articulating various forms of federal dominance. In the Marshall Trilogy, Chief Justice Marshall introduced into the American constitutional lexicon the notion that Indian tribes and Indian people were like the little brothers and sisters to the federal government by comparing federal-tribal relations to that of a guardian-ward relationship. The original source, generally speaking, of the notion that a national government could control the lives and governments of Indigenous people in such a manner is the Doctrine of Discovery, which presumes that Indian people are not legally (or spiritually) competent to control their own destinies. Robert A. Williams, Jr.’s critically important work, The American Indian in Western Legal Thought,


256. 118 U.S. 375 (1886).

257. 187 U.S. 553 (1903).


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is the most thorough legal history of the origins of the Doctrine of Discovery.\(^{260}\)

The British, and then the Americans, codified the major aspects of the Doctrine of Discovery in the 1763 Proclamation\(^{261}\) and in the Trade and Intercourse Acts, first enacted in 1790.\(^{262}\) These statutes forbade any person from engaging in trade (or intercourse) with Indians and Indian tribes without the consent of the national government.\(^{263}\) Of note, all land sales and transactions involving Indians or tribes were void, absent consent of the national sovereign.\(^{264}\) But, between the establishment of the United States and the first Trade and Intercourse Act (approximately 1775-1790), there was a gap, in which no valid statute controlled trade and land transactions with Indian nations.

Chief Justice Marshall constitutionalized the Doctrine of Discovery in Johnson v. M'Intosh,\(^{265}\) where the Supreme Court held that land transactions between Indians and non-Indians, during the period in which, arguably, there was no statutory prohibition, were still void as a matter of federal common law.\(^{266}\) Alternatively, Johnson stands for the proposition that Congress is authorized to codify the Doctrine of Discovery, and that the United States stands in the place of Britain in relation to any land transactions taking place under the 1763 Proclamation.\(^{267}\) The major take-away from Johnson is that Indian tribes and Indian people cannot own clear title to their own lands;\(^{268}\) that

\(^{260}\) See WILLIAMS, supra note 36. See also Williams, supra note 104; Kevin J. Worthern, Sword or Shield: The Past and Future Impact of Western Legal Thought on American Indian Sovereignty, 104 HARV. L. REV. 1372 (1991) (reviewing WILLIAMS, supra note 36); Robert A. Williams, Jr., The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought, 57 S. CAL. L. REV. 1 (1983).

\(^{261}\) See WILLIAMS, supra note 36, at 235-38.


\(^{264}\) E.g., Ewert v. Bluejacket, 259 U.S. 129, 138 (1922) ("The purchase by Ewert, being prohibited by the statute, was void.") (quoting Waskey v. Hammer, 223 U.S. 85, 94 (1911)).

\(^{265}\) 21 U.S. 543 (1823).

\(^{266}\) See id. at 604-05.

\(^{267}\) See id. at 598; see also id. at 592 ("This opinion conforms precisely to the principle which has been supposed to be recognised by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.").

\(^{268}\) See id. at 587 ("An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown [sic] to extinguish that right. This is incompatible with an absolute and complete
instead Indian tribes and people only have a “right of occupancy,” leaving superior title to the lands to the United States. Johnson expressly holds that Indian tribes and Indian people are inferior entities and people, justifying congressional intervention in Indian affairs, and the limit on Indian land titles.

A decade later in the *Cherokee Cases*, the Supreme Court firmly and expressly established the guardian-ward structure of federal Indian affairs.

Chief Justice Marshall’s lead opinion in *Cherokee Nation v. Georgia* held that Indian tribes were neither states nor foreign nations. The question presented in *Cherokee Nation* was whether an Indian tribe could invoke a provision in the Constitution that allows either a state or a foreign nation to sue in the Supreme Court under the Court’s original jurisdiction. Rather than merely conclude that the Cherokee Nation was neither, and ending his opinion there, Chief Justice Marshall added that he thought Indian tribes were better described as “domestic dependent nations.” The dissent relied upon concepts of international law to find that the Cherokee Nation, in agreeing to place itself

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269. See *id.* at 574 (“Indian right of occupancy”); *id.* at 583 (“right of occupancy”); *id.* at 585 (same).

270. See *id.* at 590 (“But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.”).

271. See *id.* (“What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.”).


273. See *Worcester*, 31 U.S. at 562 (“Will these powerful considerations avail the plaintiff in error? We think they will. He was seized, and forcibly carried away, while under guardianship of treaties guarantying the country in which he resided, and taking it under the protection of the United States.”); *Cherokee Nation*, 30 U.S. at 17 (“Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. 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 resembles that of a ward to his guardian.”).

274. See *Cherokee Nation*, 30 U.S. at 17.

275. See *id.* at 15-16.

276. *Id.* at 17.
under the “protection” of the United States in various treaties, had merely agreed to become a protectorate of the federal government, and retained all other aspects of sovereignty.277

Since only Justice M’Lean joined Chief Justice Marshall’s opinion, it took another case for the Court to parse out the status of Indian tribes under the Constitution: Worcester v. Georgia,278 decided the next year. In Worcester, Chief Justice Marshall held that Indian tribes were better understood to be “distinct, independent political communities,”279 and expressly adopted the Cherokee Nation dissenters’ theories on Indian tribes retaining significant internal sovereignty.280 Over a solitary dissent,281 the Worcester Court held that

277. See id. at 52-53 (Thompson, J., dissenting) (“The terms state and nation are used in the law of nations, as well as in common parlance, as importing the same thing; and imply a body of men, united together, to procure their mutual safety and advantage by means of their union. Such a society has its affairs and interests to manage; it deliberates, and takes resolutions in common, and thus becomes a moral person, having an understanding and a will peculiar to itself, and is susceptible of obligations and laws. Vattel, 1. Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, live together in the state of nature, nations or sovereign states; are to be considered as so many free persons, living together in a state of nature. Vattel 2, § 4. Every nation that governs itself, under what form soever, without any dependence on a foreign power, is a sovereign state. Its rights are naturally the same as those of any other state. Such are moral persons who live together in a natural society, under the law of nations. It is sufficient if it be really sovereign and independent: that is, it must govern itself by its own authority and laws. We ought, therefore, to reckon in the number of sovereigns those states that have bound themselves to another more powerful, although by an unequal alliance. The conditions of these unequal alliances may be infinitely varied; but whatever they are, provided the inferior ally reserves to itself the sovereignty or the right to govern its own body, it ought to be considered an independent state. Consequently, a weak state, that, in order to provide for its safety, places itself under the protection of a more powerful, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self government, and sovereign and independent authority is left in the administration of the state. Vattel, c. 1, pp. 16, 17.”).

278. 31 U.S. 515 (1832).

279. Id. at 559.

280. See id. at 560-61 (“The actual state of things at the time, and all history since, explain these charters; and the king of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties; extending to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self government. The very fact of repeated treaties with them recognizes it; 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. Examples of this kind are not wanting in Europe. ‘Tributary and feudatory states,’ says Vattel, ‘do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state.’ At the present day, more than one state may be considered as holding its right of self government under the guarantee and protection of one or more
the State of Georgia’s efforts to undermine Cherokee sovereignty were unenforceable, and that, as a general matter, state law had “no force” in Indian Country.\textsuperscript{282} This watershed opinion raised the Constitution’s Supremacy Clause on a pedestal, and upheld the supremacy of all federal law—even Indian treaties—over state law.\textsuperscript{283}

\textit{Worcester} is a prime example of analyzing the relationship between the federal government, the states, and Indian tribes by the utilization of simple consent theory. Chief Justice Marshall’s soundest legal authority underlying the relationship between the United States and the Cherokee Nation was the Cherokee treaties themselves in which the Cherokee people agreed to place themselves under the “protection” of the federal government.\textsuperscript{284} Marshall expressly adopted the international law definition of “protection,” especially the writings of Emer De Vattel,\textsuperscript{285} which were well known and accepted in the

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\item \textsuperscript{281} See \textit{id.} at 596 (reporting that Justice Baldwin dissented without opinion).
\item \textsuperscript{282} \textit{id.} at 561 (“The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.”).
\item \textsuperscript{283} See \textit{id.} at 559 (“The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term ‘nation,’ so generally applied to them, means ‘a people distinct from others.’ The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.”). See also Comment, Federal Plenary Power in Indian Affairs After Weeks and Sioux Nation, 131 U. Pa. L. Rev. 235, 243 n. 49 (1982) (“Worcester and Cherokee Nation both analyzed the specific terms of treaties with the Cherokee to decide questions of federal law, and applied the supremacy clause to bind the states as well as the federal government to the terms of the treaties.”).
\item \textsuperscript{284} See \textit{Worcester}, 31 U.S. at 552 (1832) (“The general law of European sovereigns, respecting their claims in America, limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things in time of peace. It was sometimes changed in war. The consequence was, that their supplies were derived chiefly from that nation, and their trade confined to it. Goods, indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without involving a surrender of their national character.” (emphasis added)).
\item \textsuperscript{285} See \textit{id.} at 561 (citing \textsc{Emer De Vattel, The Law of Nations} 16-17
United States. Simply put, the Cherokees had consented to the delegation of their external sovereignty—that is, the right to seek alliances with any other nation besides the United States and other foreign affairs powers—to the United States. This was likely subject to recapture by the Cherokee Nation at the termination of the treaties if that day ever came. The internal sovereignty of the Cherokee Nation was expressly protected.

Of course, the political reality of the day foreclosed a future in the American Southeast for the bulk of the Cherokee Nation, which the federal government, under President Jackson and others, forced to undergo the genocidal Trail of Tears. Moreover, Worcester’s application of the “protection” principle became a dead letter within years, perhaps as a partial result of the Trail of Tears and the general degradation of Indian tribes under the pressure and “tutelage” of the federal government.

Worcester established a kind of trust relationship between the United States and the Cherokee Nation, to borrow modern federal Indian law lingo. Instead of Indian tribes being little brother governments to the United States, and Indian people being literal wards (and rhetorical children) to the federal agents and officials charged with supervising Indian affairs as Marshall described in Johnson and Cherokee Nation, under a treaty or similar agreement the United States would deal with Indian tribes more like partners in an international arrangement.

But that understanding died almost immediately (and so did Chief Justice Marshall). While the Supreme Court did not have occasion to revisit Worcester for decades, it became clear by the end of the 19th century that the Court had retreated to the more familiar guardian-ward dichotomy in describing

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287. See PRUCHA, supra note 262, at 61 (noting that the 1785 Treaty of Hopewell provided that the Cherokees came under the protection of the Americans, and agreed not to align with any other sovereign).


290. See Fletcher, supra note 205, at 658-61.

291. See Mitchell, 34 U.S. 711 (1835).

292. The famed Chief Justice died in 1835. See 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 806 (rev. ed. 1926).
Indian affairs. In *Ex parte Crow Dog*, 293 *United States v. Kagama*, 294 *Cherokee Nation v. Hitchcock* 295 and most especially in *Lone Wolf v. Hitchcock*, 296 the Supreme Court recognized an all-but-absolute plenary power over both internal and external relations involving Indian tribes and Indian people 297—in large part deriving from its own descriptions of the guardian-ward relationship between the United States and Indian tribes and Indian people. 298

293. 109 U.S. 556 (1883).
294. 118 U.S. 375 (1886).
296. 187 U.S. 553 (1903).
297. See generally *ECHO-HAWK*, supra note 19, at 161-86 (describing the import of the *Lone Wolf* decision); *POMMERSHEIM, BROKEN LANDSCAPE*, supra note 53, at 125-51 (same); *ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 71-87 (2005) (describing the rise of plenary power).
298. E.g., *Lone Wolf*, 187 U.S. at 565 (“In one of the cited cases it was clearly pointed out that Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians.”); *Cherokee Nation*, 187 U.S. at 302 (“As we have said, the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians, and the question arises, What is the duty of the government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights.”) (internal quotation marks omitted); *Kagama*, 118 U.S. at 383-84 (“It will be seen at once that the nature of the offense (murder) is one which in most all cases of its commission is punishable by the laws of the states, and within the jurisdiction of their courts. The distinction is claimed to be that the offense under the statute is committed by an Indian, that it is committed on a reservation set apart within the state for residence of the tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other tribe. It does not interfere with the process of the state courts within the reservation, nor with the operation of state laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation. 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 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.”); *Crow Dog*, 109 U.S. at 568-69 (“The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all,—that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs. They were nevertheless to be subject to the laws of the United States, not in the sense of citizens, but, as
there was very sparse support in either the Constitution or Indian treaties for such incredible power, but that did almost nothing to dissuade the Court.

During the period following Worcester and leading up to Crow Dog, the fortunes of Indian tribes nationally completely fell apart. The federal government succeeded in forcing nearly all tribal communities in the American southeast and the Ohio River Valley to remove to the west of the Mississippi, leaving only scattered remnants of tribal communities in the swamps and the mountains, as well as some Indian communities in the Old Northwest that resided in areas that could not support mass agriculture. Indian people in California suffered incredible, almost unbelievable, torment following the Gold Rush of 1849, including numerous massacres and mass murders, disease, slavery, and cultural oppression. The Great Sioux Nation that fought the United States military to a standstill by 1868 began almost immediately to collapse as their hunting-dependent livelihoods disappeared with the near-extinction of the buffalo herds, and the federal government illegally conducted a taking of their sacred Black Hills in favor of American gold miners and land speculators. Congressionally-approved “agreements” between the Sioux leaders and the United States were negotiated under a cloud of incredible duress, including threats of mass starvation, in the decades that they had always been, as wards, subject to a guardian; not as individuals, constituted members of the political community of the United States, with a voice in the selection of representatives and the framing of the laws, but as a dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor, and by education, it was hoped might become a self-supporting and self-governed society.

299. See Kagama, 118 U.S. at 378-79.


302. See generally Grant Foreman, The Last Trek of the Indians (1946).

303. E.g., Alanson Skinner, Notes on the Florida Seminole, 15 AM. ANTHROPOLOGIST (n.s) 63 (1913).


305. E.g., Fletcher, supra note 41, at 1-55.

306. See Exterminate Them! Written Accounts of the Murder, Rape, and Enslavement of Native Americans During the California Gold Rush (Clifford E. Trafzer & Joel R. Hyer, eds. 1999); C. Hart Merriam, The Indian Population of California, 7 AM. ANTHROPOLOGIST 594, 599-606 (1905).


followed.\footnote{309}

As the affairs of Indian tribes declined, the aggressiveness of Congress and the Executive branch in undermining tribal communities increased. By the 1850s, the Executive branch had adopted as a matter of policy a method of breaking up Indian land holdings by introducing the allotment of Indian lands in various treaties involving the Anishinaabe communities of the Old Northwest.\footnote{310} In 1887, Congress adopted allotment as its official Indian affairs policy goal, with the intent of breaking up the tribal land mass.\footnote{311} Congress and the Executive branch targeted tribes that had negotiated the right not to be allotted or otherwise give up their land ownership in strong treaty language for allotment.\footnote{312}

The first two Supreme Court cases establishing a federal common law justification of federal plenary power over Indian affairs arose tangentially out of these disputes. \textit{Ex parte Crow Dog} \footnote{313} arose out of the murder by Crow Dog of Spotted Tail, a competing leader of the Lower Brule Sioux community.\footnote{314} After Crow Dog’s conviction in federal court, the Supreme Court granted a writ of habeas corpus, declaring that the federal government had no authority to prosecute Indian-on-Indian crime within Indian Country.\footnote{315} The \textit{Crow Dog} Court relied upon the 1868 Treaty of Fort Laramie, which included a “bad men” clause that clearly established tribal authority to prosecute their own members, and excluded federal authority.\footnote{316} Of note, the Court added that someone of Crow Dog’s barbaric and uncivilized character could not possibly hope to comprehend relatively sophisticated federal laws and political norms, and could not have participated in the political process that established such laws and norms.\footnote{317} Here, the guardian-ward dichotomy rears its visible and ugly head in the overt racism of the Supreme Court.\footnote{318}

The Bureau began a campaign promising lawlessness in Indian Country if

\footnote{309. See Nell Jessup Newton, \textit{Indian Claims in the Courts of the Conqueror}, 41 AM. U. L. REV. 753, 821 n.411 (1992). ("The Government attached the 'sell-or-starve' rider to the treaty during the winter when the Government prevented the tribe from hunting, moved most of the members into stockades, and threatened to withhold rations if they did not agree to the treaty.").


312. \textit{E.g., Lone Wolf v. Hitchcock}, 187 U.S. 553 (1903); \textit{Echo-Hawk}, \textit{supra} note 19, at 161-86 (describing the import of the \textit{Lone Wolf} decision); \textit{Pommersheim}, \textit{Broken Landscape}, \textit{supra} note 53, at 125-51 (same).

313. 109 U.S. 556 (1883).


316. See \textit{id.} at 563.

317. See \textit{id.} at 571-72.

318. See \textit{Williams}, \textit{supra} note 297, at 75-79.
no federal prosecutor had authority in Indian Country, prompting Congress to enact the Major Crimes Act in 1885.\textsuperscript{319} The first challenge to a federal prosecution under the Major Crimes Act reached the Supreme Court the very next year in \textit{United States v. Kagama},\textsuperscript{320} a case arising on the Hoopa Valley Reservation, which had been established by an Executive Order of President Grant.\textsuperscript{321}

Defending the Major Crimes Act in \textit{Kagama} presented the government with a slight problem—the Supreme Court had changed dramatically since the Marshall Court,\textsuperscript{322} and was beginning to embark on a long campaign to undermine congressional authority.\textsuperscript{323} The first holding of the \textit{Kagama} Court was to state that the Indian Commerce Clause simply did not authorize the Major Crimes Act.\textsuperscript{324} Despite the original understanding of the First Congress, which had established a kind of general criminal law for Indian Country as applied to Americans,\textsuperscript{325} the Court casually held that the Commerce Clause simply had nothing in it authorizing the assertion of federal criminal jurisdiction in Indian Country.\textsuperscript{326} Moreover, since the Senate had never ratified the 1850s treaty with the Hoopa Valley Tribe,\textsuperscript{327} there could be no congressional authority arising from the consent of the Tribe itself.\textsuperscript{328}

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\item \textsuperscript{319} See Harring, supra note 314, at 134-40 (discussing the legislative history of the Major Crimes Act); Helen L. Peterson, \textit{American Indian Political Participation}, 311 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 118 (1957).
\item \textsuperscript{320} 118 U.S. 375 (1886).
\item \textsuperscript{321} See Karuk Tribe v. Ammon, 209 F.3d 1366, 1370 (Fed. Cir. 2000), cert. denied, 532 U.S. 941 (2001); Parravano v. Babbitt, 70 F.3d 539, 542 (9th Cir. 1995).
\item \textsuperscript{322} See generally David P. Currie, \textit{The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910}, 52 U. CHI. L. REV. 324, 324-25 (1985). Professor Currie criticizes the \textit{Kagama} Court for not relying on the Commerce Clause. See id. at 337-38.
\item \textsuperscript{324} See Kagama, 118 U.S. at 378-79 ("The mention of Indians in the constitution which has received most attention is that found in the clause which gives congress 'power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.").
\item \textsuperscript{325} See Act of July 22, 1790, 1 Stat. 37.
\item \textsuperscript{326} See Kagama, 118 U.S. at 378-79.
\item \textsuperscript{327} See Robert F. Heizer, \textit{The Eighteen Unratified Treaties of 1851-1852 between the California Indians and the United States Government}, unpublished manuscript at 1 (1972); see also id. at 91-95 (excerpting treaty).
\item \textsuperscript{328} See, e.g., Worcester v. Georgia, 31 U.S. 515, 549-55 (1831) (establishing history of treaties with Indian tribes prior to 1831 and links to congressional powers deriving
\end{itemize}
So what was left?

The Court upheld the Major Crimes Act not because of express authority contained in the Constitution or a treaty, but because of a combination of the geographic location of the Hoopa Valley Tribe within the territory of the United States and the deeply degraded condition of Indian tribes and Indian people everywhere. If the Major Crimes Act came to the Supreme Court where a petitioner had challenged congressional authority to enact it in the modern era of Commerce Clause jurisprudence, as it sometimes does in the lower federal courts, it is not so clear that the Supreme Court would uphold congressional authority under the Indian Commerce Clause alone. But the 1886 Court refused to do so.

The Court’s reasoning, if not its conclusion, if remarkable. It held that while no Constitution or treaty provision authorized the Major Crimes Act, a combination of the mere geographic placement of the Hoopa reservation within the exterior boundaries of the United States and the poor condition of Indian people generally forced the Court to recognize congressional authority to enact the statute. Now the guardian-ward served for Congress as a source legislative authority.

Congress’s authority to interfere in the interior affairs of Indian Country reached its peak in a series of cases following Kagama that involved the authority of Congress to control tribal property. The Supreme Court’s review of congressional acts in this area reached a new level of deference, when it finally held in Lone Wolf v. Hitchcock that challenges to congressional authority to regulate Indian affairs were foreclosed by what is now referred to therefrom); cf. Missouri v. Holland, 252 U.S. 416 (1920) (holding that the Treaty Power can be used to expand federal authority).

329. See Kagama, 118 U.S. at 383-84 (“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 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.”).


331. As Professor Currie suggested, this was probably an easy commerce clause case. See Currie, supra note 322, at 337-38.


333. 187 U.S. 553 (1903).
as the political question doctrine.\textsuperscript{334}

\textit{Lone Wolf}, a case that arose out a direct challenge to the authority of Congress to force the allotment of Indian reservations,\textsuperscript{335} came down after a failed challenge by the Cherokee Nation to the Executive branch’s administration of tribal trust property, \textit{Cherokee Nation v. Hitchcock}.\textsuperscript{336} In \textit{Cherokee Nation}, the Supreme Court held that a long line of cases involving the Cherokees had established congressional and Executive branch plenary power over tribal property.\textsuperscript{337} The Court focused on \textit{Stephens v. Cherokee Nation},\textsuperscript{338} for the proposition that “the United States practically assumed the full control over the Cherokees as well as the other nations constituting the five civilized tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property.”\textsuperscript{339}

In \textit{Lone Wolf},\textsuperscript{340} members of the Kiowa and Comanche communities that had executed the Medicine Lodge Treaty of 1867 challenged Congress’s authority to enact legislation that would allot the tribes’ reservation lands, arguing the allotment act at issue was a taking under the Fifth Amendment.\textsuperscript{341} In \textit{Lone Wolf}, the Court built upon cases involving the Cherokee Nation and

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\item \textsuperscript{334} The \textit{Lone Wolf} Court wrote: Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations ..., the legislative power might pass laws in conflict with treaties made with the Indians. *** The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians. Id. at 565-66 (citations omitted).
\item \textsuperscript{335} See id. at 564-65. See generally Ann Laquer Estin, \textit{Lone Wolf v. Hitchcock: The Long Shadow, in THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880s at 215, 216-34 (Sandra L. Cadwalader & Vine Deloria, Jr., eds. 1984).}
\item \textsuperscript{336} 187 U.S. 294 (1902).
\item \textsuperscript{337} See id. at 306-07.
\item \textsuperscript{338} 174 U.S. 445 (1899).
\item \textsuperscript{339} \textit{Cherokee Nation}, 187 U.S. at 306. Ironically, the \textit{Stephens} Court merely “assum[ed]” that Congress possessed plenary power at the time. \textit{Stephens}, 174 U.S. at 478. Moreover, the Cherokee Nation long had succumbed to federal intervention as a result of their “adoption” of the Shawnees and the Delawares, not to mention their controversies with the Cherokee Freedmen. See \textit{CIRCE STURM, BLOOD POLITICS: RACE, CULTURE, AND IDENTITY IN THE CHEROKEE NATION OF OKLAHOMA} (2002).
\item \textsuperscript{340} 187 U.S. 375 (1903).
\item \textsuperscript{341} See id. at 564.
\end{itemize}
\end{footnotesize}
held that Congress’s power is “undoubted,” and that Congress could delegate authority to administer Indian property as it saw fit. The Supreme Court’s dictum in Lone Wolf that the sale of tribal lands was nothing more than “a mere change in the form of investment” recognized incredible federal authority to control Indian property.

Then, the Court also held that Congress is presumed to act in the best interests of Indian tribes (as it would in a guardian-ward relationship). A challenge to a decision by Congress (and by extension the Executive branch, as the delegate of congressional power) in Indian affairs was not reviewable. The Lone Wolf announcement that Congress possessed plenary power over Indian affairs and internal tribal relations was no announcement at all, but instead was a declaration that the relationship between Congress and Indian tribes was a political relationship within the exclusive discretion of Congress.

Congressional plenary power over Indian affairs between the federal government, states, and Indian tribes has not been seriously questioned since Lone Wolf, and really since Worcester, although the “absolute” character of plenary power is no longer recognized by the courts. But the Lone Wolf Court brought the guardian-ward relationship to the forefront of American Indian law, and forcefully ratified congressional action in interfering with the internal affairs of Indian tribes and tribal property. However, after Lone Wolf, rarely would the Supreme Court so directly rely upon the common law rule that Congress and the federal government are the guardians of Indian tribes and Indian people in a warship relationship. Instead, the Court would refocus its jurisprudence on congressional Indian affairs power on the Constitution.

342. Cherokee Nation, 187 U.S. at 306 (noting that “[t]he plenary power of control by Congress over the Indian tribes and its undoubted power to legislate, as it had done through the act of 1898, directly for the protection of the tribal property”).

343. Lone Wolf, 187 U.S. at 568.


345. See Lone Wolf, 187 U.S. at 567-68 (“In view of the legislative power possessed by Congress over treaties with the Indians and Indian tribal property, we may not specially consider the contentions pressed upon our notice that the signing by the Indians of the agreement of October 6, 1892, was obtained by fraudulent misrepresentations, and concealment, that the requisite three fourths of adult male Indians had not signed, as required by the twelfth article of the treaty of 1867, and that the treaty as signed had been amended by Congress without submitting such amendments to the action of the Indians since all these matters, in any event, were solely within the domain of the legislative authority, and its action is conclusive upon the courts.”) (emphasis added).


C. The Indian Commerce Clause and the Treaty Power—The Constitutional Authority for Congressional Plenary Power over Internal Indian Affairs

Challenges to congressional power over the internal workings of Indian affairs have been made off and on throughout the twentieth century, but since Congress largely has stayed away from interfering from internal tribal affairs in recent decades, there has been little to challenge. Scholars, however, have established compelling research and argumentation suggesting that no such congressional authority exists, but the Supreme Court has not decided a recent case involving such a direct challenge under these theories. Instead, the Supreme Court has continued to recognize congressional plenary power in the modern era without theorizing the justifications of such authority in great detail, and without delving into whether congressional authority extends into the internal affairs of Indian tribes.

The first significant discussion of congressional plenary power over Indian affairs came in a challenge to the so-called Duro fix, in which Congress attempted to override *Duro v. Reina* via statute. The Supreme Court in *Duro* held that Indian tribes had been implicitly divested of their sovereign authority to prosecute all persons who were not members. In the Duro fix, Congress sought to restore tribal authority to prosecute the limited class of


persons known as nonmember Indians through an amendment to the Indian
Civil Rights Act. Congress had two options in enacting the Duro fix. It could
deploy federal authority to prosecute such persons, or recognize inherent
tribal authority to prosecute. Congress chose the second option, and reaffirmed
inherent tribal authority, something it had never done in the face of a Supreme
Court holding that the inherent tribal authority had not existed for decades (or
ever).

The Duro fix percolated in the lower federal courts for over a decade
before a circuit split arose in United States v. Lara over whether Congress had
authority to override the Supreme Court’s decision. Finally, after Lara
reached the Court, a 7-2 majority affirmed Billy Jo Lara’s conviction. The
majority opinion, authored by Justice Breyer, reiterated the congressional
plenary power doctrine, but this time some Justices pressed the Court on the
real sources of congressional power. As noted in the previous subsection, the
majority noted several possible sources of constitutional authority for the Duro
fix. But the real authority that supported congressional plenary power was
the long line of Supreme Court cases that had assumed without significant
discussion that Congress had such power, and of course Congress’s assertion of
that power in dozens, if not hundreds, of Acts.

356. The relevant provision is 25 U.S.C. § 1301(2), which now reads (Duro fix
language in italics):

"powers of self-government" means and includes all governmental powers
possessed by an Indian tribe, executive, legislative, and judicial, and all offices,
body, and tribunals by and through which they are executed, including courts of
Indian offenses; and means the inherent power of Indian tribes, hereby recognized
and affirmed, to exercise criminal jurisdiction over all Indians....

357. The Supreme Court confirmed congressional authority to delegate federal power
to Indian tribes in United States v. Mazurie, 419 U.S. 544 (1975). See also Bugenig v. Hoopa
Valley Tribe, 266 F.3d 1201 (9th Cir. 2001) (en banc) (holding that Congress delegated
federal power to regulate nonmembers to the tribe in the Hoopa-Yurok Settlement Act).

358. See, e.g., Nevada v. Hicks, 533 U.S. 353 (2001) (holding that tribal courts have no
inherent authority to adjudicate civil rights actions against state officials); Oliphant v.
Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that Indian tribes had no inherent
authority to prosecute non-Indians).

359. E.g., United States v. Lara, 324 F.3d 635 (8th Cir. 2003) (en banc) (striking down
Duro fix); United States v. Long, 324 F.3d 475 (7th Cir.), cert. denied, 540 U.S. 822 (2003)
(affirming Duro fix); United States v. Enas, 255 F.3d 662 (9th Cir. 2001) (en banc)
(affirming Duro fix), cert. denied, 534 U.S. 115 (2002); United States v. Weaselhead, 156
F.3d 818 (8th Cir. 1998) (striking down Duro fix), vacated by an equally divided court, 165
F.3d 1209 (8th Cir. 1999) (en banc); Means v. Northern Cheyenne Tribal Court, 154 F.3d
941 (9th Cir. 1998) (interpreting the Duro fix as a delegation of congressional power);

361. See id. at 200.
362. See id. at 211 (Kennedy, J., concurring in judgment) (“difficult question”); id. at
215 (Thomas, J., concurring in judgment) (“doubtful”).
363. See id. at 200-02.
364. See id. at 202-07.
Justices Souter, joined by Justice Scalia, dissented through reliance on the Supreme Court's institutional authority to decide matters of inherent tribal authority and Justice Kennedy concurred only in the judgment on procedural grounds. But the real dissent came from Justice Thomas, who suggested that the Supreme Court review its precedents on congressional plenary power in light of recent precedents on the Interstate Commerce Clause. Justice Thomas concurred for largely the same procedural reasons as Justice Kennedy, but proposed that Congress had no authority whatsoever to grant Indian tribes the authority to prosecute anyone. He further proposed that Indian tribal sovereignty had been effectively extinguished in 1871 when Congress (as a policy matter) chose to cease entering into treaties with Indian tribes.

Regardless of the merits of the preconstitutional source of authority or Justice Thomas's disregard of a century of precedent, congressional plenary power is alive and well. Congressional plenary power over the inner workings of Indian tribes may also be alive and well, though not the subject of recent, direct challenge. We now move to an important pivot point in this Article; namely, a review of Supreme Court cases that have generated enormous consternation by federal Indian law observers, first from the vantage point of

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365. See id. at 227 (Souter, J., dissenting) ("Our precedent, then, is that any tribal exercise of criminal jurisdiction over nonmembers necessarily rests on a 'delegation' of federal power and is not akin to a State's congressionally permitted exercise of some authority that would otherwise be barred by the dormant Commerce Clause... ").

366. See id. at 211 (Kennedy, J., concurring in judgment).


368. See id. at 215 (Thomas, J., concurring in judgment).

369. See id. ("I cannot agree with the Court, for instance, that the Constitution grants to Congress plenary power to calibrate the 'metes and bounds of tribal sovereignty.' Ante, at 1635; see also ante, at 1639 (holding that 'the Constitution authorizes Congress to regulate tribal sovereignty'). Unlike the Court, ante, at 1633, I cannot locate such congressional authority in the Treaty Clause, U.S. Const., Art. II, § 2, cl. 2, or the Indian Commerce Clause, Art. I, § 8, cl. 3. ").

370. See id. ("Additionally, I would ascribe much more significance to legislation such as the Act of Mar. 3, 1871, Rev. Stat. § 2079, 16 Stat. 566, codified at 25 U.S.C. § 71, that purports to terminate the practice of dealing with Indian tribes by treaty. The making of treaties, after all, is the one mechanism that the Constitution clearly provides for the Federal Government to interact with sovereigns other than the States. Yet, if I accept that Congress does have this authority, I believe that the result in Wheeler is questionable."; see also id. at 218 ("Further, federal policy itself could be thought to be inconsistent with this residual-sovereignty theory. In 1871, Congress enacted a statute that purported to prohibit entering into treaties with the "Indian nation[s] or tribe[s]." 16 Stat. 566, codified at 25 U.S.C. § 71. Although this Act is constitutionally suspect (the Constitution vests in the President both the power to make treaties, Art. II, § 2, cl. 2, and to recognize foreign governments, Art. II, § 3; see, e.g., United States v. Pink, 315 U.S. 203, 228-230, 62 S.Ct. 552, 86 L.Ed. 796 (1942)), it nevertheless reflects the view of the political branches that the tribes had become a purely domestic matter.").

371. E.g., John P. LaVelle, Implicit Divestiture Reconsidered: Outtakes from the
tribal consent, and the moving in Part III to the vantage point of nonmember consent.

D. Implicit Divestiture and the Assertion of Federal Judicial Authority over Indian Affairs

The end of the political question doctrine in Indian law in Delaware Tribal Business Committee v. Weeks and United States v. Sioux Nation had an interesting and undertheorized subplot—the rise of judicial authority over Indian affairs, or what Frank Pommersheim has called "judicial plenary power." Beginning in 1978, the Supreme Court began to utilize a tool now known as "implicit divestiture" to manipulate the contours of tribal sovereignty absent a statement from Congress on the question. The Court apparently took its authority to do so from Marshall Trilogy-era cases, which held that Indian tribes do not have authority to alienate Indian lands absent the consent of Congress, amongst other things. The judicial power to craft federal Indian common law decisions in such striking ways had not been seriously considered by many observers of federal Indian law—until the Court simply took action in Oliphant. Prior to Oliphant, the doctrine of reserved tribal authority, or


374. See _United States v. Wheeler_, 435 U.S. 313, 326 (1978) ("Moreover, the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. Oneida Indian Nation v. County of Oneida_, 414 U.S. 661, 667-668, 94 S.Ct. 772, 777, 39 L.Ed.2d 73; _Johnson v. M’Intosh_, 8 Wheat. 543, 574, 5 L.Ed. 681. They cannot enter into direct commercial or governmental relations with foreign nations. _Worcester v. Georgia_, 6 Pet. 515, 559, 8 L.Ed. 483; _Cherokee Nation v. Georgia_, 5 Pet., at 17-18; _Fletcher v. Peck_, 6 Cranch 87, 147, 3 L.Ed. 162 (Johnson, J., concurring). And, as we have recently held, they cannot try nonmembers in tribal courts. _Oliphant v. Suquamish Indian Tribe_, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209.").


inherent authority, as articulated in the original *Handbook of Federal Indian Law*, was the law, and only Congress or an Indian tribe via treaty or other sovereign-to-sovereign agreement could abrogate tribal governmental powers.378

The Supreme Court’s invocation of implicit divestiture has been the most considerable source of interference in the internal workings of Indian tribes since the Termination Era in the 1950s, during which Congress unilaterally terminated the relationship between more than 100 tribes and the federal government.379 It is noteworthy that the subject areas of tribal sovereignty with which the Court has interfered—tribal criminal jurisdiction, taxation, regulatory, and adjudicatory jurisdiction over nonmembers— are areas of sovereignty in which Congress has largely been silent or supportive of tribal governance.384

The best argument for an Article III court asserting jurisdiction over an internal tribal matter such as criminal jurisdiction, in my view, comes from the Marshall Trilogy385 and *Kagama*.386 In *Johnson* and in *Worcester* especially, Chief Justice Marshall expressed the view that Indian tribes have generally accepted federal governance over them through the notion of “protection,” an accepted international law doctrine with significant limits over the

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377. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1941).
379. See generally Wilkinson & Biggs, supra note 50.
384. In the area of tribal criminal authority, Congress has acted to ratchet up tribal sovereignty, most recently in the Tribal Law and Order Act of 2010. See 25 U.S.C. §§ 1302(7)(a)-(d). In the area of tribal regulatory jurisdiction, Congress has allowed the Environmental Protection Agency to treat tribes as states for many purposes. See Ann E. Tweedy, *Using Plenary Power as a Sword: Tribal Civil Regulatory Jurisdiction under the Clean Water Act* after *United States v. Lara*, 35 ENVTL. L. 471 (2005); Jessica Owley, *Tribal Sovereignty over Water Quality*, 20 J. LAND USE 61 (2004). In the area of tribal court civil jurisdiction, Congress has frequently supported the development of tribal courts. See Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 147-50 (2006). Congress largely has been silent about Indian taxation issues, but it strongly supports tribal economic development, which runs counter to the Supreme Court’s views on state taxation in Indian Country. See *id.* at 144-47.
“protector’s” authority to control the inner workings of the “protected’s” governance.\textsuperscript{387} Kagama expanded that dramatically by incorporating a much broader definition of “protection” based on subjective factors such as “depend[ence]” and “weakness.”\textsuperscript{388} But in either case, it is at least questionable whether an Article III court can bootstrap its authority onto the power of Congress. Moreover, the Supreme Court in cases like Oliphant is asserting broad authority to determine the metes and bounds of tribal power, regardless of tribal consent, and regardless of congressional direction.\textsuperscript{389} The Court’s broad pronouncements of law are lacking in humility in the Court’s power,\textsuperscript{390} sympathy for the people potentially endangered by the Court’s decisions,\textsuperscript{391} or deference to either Congress or Indian tribes.\textsuperscript{392} These cases appear to be nothing more than lawmaking by fiat, despite their grounding in federal common law.

1. Tribal Criminal Jurisdiction

Congress had not legislated on the criminal jurisdiction of Indian tribes at all until it enacted the Indian Civil Rights Act in 1968,\textsuperscript{393} which purported to extend major portions of the Bill of Rights into Indian Country,\textsuperscript{394} attempting to regulate tribal prosecutions and even obliquely recognizing tribal authority to do so regardless of the membership status of the defendant. ICRA limited tribal government discretion by applying this “Indian Bill of Rights” to tribes, and did so without defining which persons could be subject to tribal governance.\textsuperscript{395} In short, Congress left the question open by keeping silent about whether

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\item \textsuperscript{387} See Worcester, 31 U.S. at 560-61; Johnson, 21 U.S. at 592-93.
\item \textsuperscript{388} Kagama, 118 U.S. at 383-84.
\item \textsuperscript{389} See Oliphant, 435 U.S. at 206 (articulating the “commonly shared presumption” of the federal government’s three branches without reference to prior Supreme Court precedent or Act of Congress); \textit{id.} (noting that the Treaty of Point Elliott is “silent” on the question).
\item \textsuperscript{392} See Skibine, \textit{supra} note 45, at 397-436.
\item \textsuperscript{394} See 25 U.S.C. § 1302.
\item \textsuperscript{395} The original version of 25 U.S.C. § 1301(2) read: “‘powers of self-government’ means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed . . . .” Section 1302 still begins: “No Indian tribe in exercising powers of self-government shall . . . .”, without reference to the persons under tribal government control.
\end{itemize}
nonmembers could be subject to tribal criminal prosecutions. Many tribes acted to modernize tribal justice systems as a result of the enactment of ICRA, and within a decade, a few dozen tribes enacted laws purporting to extend criminal jurisdiction authority over nonmembers.396

Throughout the history of American Indian law and policy, federal courts only rarely addressed questions of tribal criminal jurisdiction, and there are only three published federal court cases directly addressing the subject. Several other cases address the question indirectly, though in important ways. The first decision, Ex parte Kenyon,397 from the latter half of the 19th century, is a federal district court case that reached federal court (apparently) on a habeas petition. It’s not clear how the court could assert jurisdiction absent an act of Congress or an authorizing Constitutional provision, and so that court’s decision (which went against tribal criminal jurisdiction over non-Indians) is somewhat questionable given the jurisdictional gray area in which the case rests.398 The second case, Oliphant,399 relied in part on Kenyon,400 and many other legal authorities (but obviously no precedential cases), in reaching the same conclusion.401 In that case, Congress had expressly extended the federal habeas right to criminal defendants in tribal court in 1968’s Indian Civil Rights Act,402 though even there the jurisdictional requisite—detention403—was not

396. See Oliphant, 435 U.S. at 196 ("The Suquamish Indian Tribe does not stand alone today in its assumption of criminal jurisdiction over non-Indians. Of the 127 reservation court systems that currently exercise criminal jurisdiction in the United States, 33 purport to extend that jurisdiction to non-Indians. Twelve other Indian tribes have enacted ordinances which would permit the assumption of criminal jurisdiction over non-Indians.").

397. 14 F. Cas. 353 (W.D. Ark. 1878) (No. 7720).

398. Compare Armistead M. Dobie, Habeas Corpus in the Federal Courts, 13 VA. L. REV. 433, 450, 452 (1926) (citing Kenyon and noting that federal judges could issue habeas writs for persons within their territorial jurisdiction), with Talton v. Mayes, 163 U.S. 376 (1896) (holding the United States Constitution does not apply to Indian tribes), and Ex parte Crow Dog, 119 U.S. 575 (1883) (holding federal prosecutors had no authority over Indian-on-Indian crime within Indian Country).

399. 435 U.S. 191.

400. See id. at 200.


402. See 25 U.S.C. § 1303 ("The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.").

403. Neither defendant in the case had been convicted, nor was either defendant detained pending trial. See Oliphant, 435 U.S. at 194: Petitioner Mark David Oliphant was arrested by tribal authorities during the Suquamish’s annual Chief Seattle Days celebration and charged with assaulting a tribal officer and resisting arrest. After arraignment before the tribal court, Oliphant was released on his own recognizance. Petitioner Daniel B. Belgarde was arrested by tribal authorities after an alleged
satisfied. The third case reaching the same conclusion, *Duro v. Reina*, involved nonmember Indians. *Duro* reached the Court in the same extra-textual manner as *Oliphant*, prior to an actual conviction and resulting detention. In all three cases, the courts held that the tribal court could not exercise criminal jurisdiction over the defendants, all of whom were nonmembers. In the all three cases, federal court jurisdiction was doubtful, especially in the two modern cases; again demonstrating the Court’s willingness to go beyond Congress’s mandate in Indian affairs. Importantly, Congress overrode the Court’s judgment (as discussed above) in *Duro*, but not yet in *Oliphant*.

In other cases, the Supreme Court has affirmed tribal criminal jurisdiction over tribal members, most importantly in *United States v. Wheeler*, which was a double jeopardy challenge to a federal prosecution following a tribal high-speed race along the Reservation highways that only ended when Belgarde collided with a tribal police vehicle. Belgarde posted bail and was released. Six days later he was arraigned and charged under the tribal Code with “recklessly endangering another person” and injuring tribal property. Tribal court proceedings against both petitioners have been stayed pending a decision in this case.

*Id.* (emphasis added).

405. See *id.* at 679.
406. See *id.* at 682:

Petitioner then was placed in the custody of Pima-Maricopa officers, and he was taken to stand trial in the Pima-Maricopa Indian Community Court. The tribal court’s powers are regulated by a federal statute, which at that time limited tribal criminal penalties to six months’ imprisonment and a $500 fine. 25 U.S.C. § 1302(7) (1982 ed.). The tribal criminal code is therefore confined to misdemeanors. Petitioner was charged with the illegal firing of a weapon on the reservation. After the tribal court denied petitioner’s motion to dismiss the prosecution for lack of jurisdiction, he filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona, naming the tribal chief judge and police chief as respondents.

*Id.* (emphasis added).

408. See *supra* note 352.

prosecution for the same crime. In the nineteenth century, the Supreme Court decided *Ex parte Crow Dog*, where the Court held that the federal government had no criminal jurisdiction over Indian-on-Indian crime in Indian Country, indirectly recognizing the inherent authority of Indian tribes to prosecute their own for criminal law violations. Another nineteenth century case, *Talton v. Mayes*, noted that tribal criminal prosecutions are not subject to the dictates of the United States Constitution, a legal fact that Congress attempted to partially remedy in enacting the Indian Civil Rights Act. The most recent, *United States v. Lara*, was primarily an exercise in addressing whether Congress had authority to reinstate inherent tribal powers, and did not involve a habeas action arising out of tribal court.

It is important to separate out the cases that arise out of federal common law from the ones that arise out of the habeas provision of the Indian Civil Rights Act (ICRA). No case arises from ICRA, except in the extra-textual manner used in *Oliphant* and *Duro*. Because these cases arose out of pure federal common law—meaning that an Article III court created the cause of action and the individual right to be vindicated in the action—no Indian tribe could ever be said to consent to such an outside intervention. Conversely, in cases arising from ICRA, where tribal lobbying failed to prevent its enactment, but still contributed important limitations on the reach of the statute, at least some form of plausible implied tribal consent exists.

In sum, the Supreme Court directs federal policy on tribal criminal jurisdiction, with some Justices conveying open hostility to congressional preferences. The Court’s exercise of jurisdiction outside of the limited scope of the Indian Civil Rights Act further undermines congressional preferences, and directly implicates the lack of tribal consent to the Court’s jurisdiction. A conflict may be brewing in coming years after Congress passed the Tribal Law and Order Act and slightly expanded tribal criminal jurisdiction authority. Congress may also consider revising the Supreme Court’s holding in *Oliphant* to allow for tribal jurisdiction over nonmember domestic violence offenders.

411. *See id.* at 314.
412. 109 U.S. 556 (1883).
413. *See id.* at 571.
414. 163 U.S. 376 (1896).
415. *See id.* at 382-85.
418. *See id.* at 196.
2. Tribal Taxing, Regulatory, and Adjudicatory Authority

The Supreme Court also directs much of federal policy on tribal civil jurisdiction, starting with *Montana v. United States*, 423 decided in 1981. There, the Court articulated a common law general rule with two exceptions, 424 which on their face were broad and vague. The general rule was that Indian tribes do not possess civil regulatory jurisdiction over nonmembers on non-Indian-owned land. 425 The two exceptions, known as *Montana 1* 426 and *Montana 2*, 427 involved consensual commercial agreements and nonmember actions that had a dramatic impact on tribal governance, respectively. While the Court articulated the general rule in 1981, it wasn’t until the early 1990s that it became clear that the *Montana* rule had largely won out over competing Supreme Court decisions from the 1980s. 428 And it was not clear until 1997, when Justice Ginburg’s majority opinion in *Strate v. A-I Contracting* 429 labeled *Montana* with one of her trademarks (“pathmarking”) that *Montana* applied also to tribal court jurisdiction. 430

The standard identified by the Court in *Oliphant* that would justify the judicial divestiture of tribal authority was any power “inconsistent with [the tribe’s] dependent status.” 431 This is hardly much of a standard at all, and

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424. See id. at 565-66.
425. See id. at 565 (“Stressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns, the [*Oliphant*] Court quoted Justice Johnson’s words in his concurrence in *Fletcher v. Peck*, 6 Cranch 87, 147, 3 L.Ed. 162—the first Indian case to reach this Court—that the Indian tribes have lost any ‘right of governing every person within their limits except themselves.’”) (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978)).
426. See id. (“To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”).
427. See id. at 566 (“A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”).
430. See id. at 445.
431. *Oliphant*, 435 U.S. at 208 (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)). At one point after *Oliphant* but before *Montana*, the Court noted in dicta that a tribe might be implicitly divested of authority if it is in conflict with some sort of “overriding interest of the National Government,” *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 130, 154 (1980), a much different standard than “dependent status.” The Court does not appear to have returned to this standard.
renders predictability about future cases almost impossible. And lack of predictability in federal common law cases of course generates additional need for Supreme Court review in future cases, which in turn generates additional Supreme Court discretion and power. Oliphant was a bright-line rule and has not generated many later cases on its contours, but Montana's test and exceptions, along with Oliphant's standard, have generated enormous unpredictability in the lower courts and even in the Supreme Court (at least in terms of the cases it chooses to review). The federal common law questions on implicit divestiture have increased the Court's importance dramatically in American Indian law and policy, so much so that even Congress depends on the Court's pronouncements, a very far cry from the nearly two centuries of federal Indian law and policy that preceded the late Burger and Rehnquist Courts' decisions in which the Court adopted a virtual political question bar to tribal claims against Congress.

Congress had not legislated broadly on the question of tribal civil jurisdiction over nonmembers, leaving the door open to Supreme Court interpretation via federal common law. The first tribal civil authority cases following Montana upheld tribal authority to tax (Merrion v. Jicarilla Apache Tribe), to exclude undesirables from tribal lands (Merrion), and tribal authority to regulate nonmember activity on tribal trust lands (New Mexico v. Mescalero Apache Tribe), a decision guided in part by federal regulatory actions that supplied necessary federal Indian preemption authority to preclude state authority over nonmembers on tribal lands. These cases relied on a smattering of older cases and federal government opinions that upheld tribal taxing authority in decades past, as well as treaty rights to protect reservation boundaries and lands. It is important also that all of these cases arose on tribal trust lands.

In 1985, however, the Supreme Court took an enormous step in arrogating to itself judicial review over aspects of tribal court jurisdiction over nonmembers, even on tribal trust lands. In National Farmers Union v. Crow Tribe of Indians, the Court identified a federal right (for nonmembers only,

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432. See generally Krakoff, supra note 216.
436. 455 U.S. 130 (1982).
437. See id. at 141.
439. See id. at 348-51.
presumably) to be free of tribal court civil jurisdiction, and a federal common law cause of action to vindicate this right. National Farmers Union flew directly in the face of Santa Clara Pueblo v. Martinez, the case that denied individuals a federal cause of action to sue Indian tribes under the Indian Civil Rights Act (ICRA). Martinez held that Congress had legislated in the field of tribal civil rights completely, and Congress decided that the only federal cause of action to vindicate an ICRA right was the federal habeas provision available only to those that had been convicted of a crime in tribal court. National Farmers Union ignored Martinez by identifying a federal right outside of the scope of ICRA, and further ignored Martinez in identifying

441. See id. at 852 (“This Court has frequently been required to decide questions concerning the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians. . . . In this case the petitioners contend that the Tribal Court has no power to enter a judgment against them. Assuming that the power to resolve disputes arising within the territory governed by the Tribe was once an attribute of inherent tribal sovereignty, the petitioners, in essence, contend that the Tribe has to some extent been divested of this aspect of sovereignty. More particularly, when they invoke the jurisdiction of a federal court under § 1331, they must contend that federal law has curtailed the powers of the Tribe, and thus afforded them the basis for the relief they seek in a federal forum.”). Cf. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 468 U.S. 1315, 1318 (1984) (“But if because only the National and State Governments exercise true sovereignty, and are therefore subject to the commands of the Fourteenth Amendment, I cannot believe that Indian tribal courts are nonetheless free to exercise their jurisdiction in a manner prohibited by the decisions of this Court, and that a litigant who is the subject of such an exercise of jurisdiction has nowhere at all to turn for relief from a conceded excess.”).

442. See Nat’l Farmers Unions, 471 U.S at 852-53 (“The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a ‘federal question’ under § 1331. Because petitioners contend that federal law has divested the Tribe of this aspect of sovereignty, it is federal law on which they rely as a basis for the asserted right of freedom from Tribal Court interference. They have, therefore, filed an action ‘arising under’ federal law within the meaning of § 1331. The District Court correctly concluded that a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction.”).


444. See id. at 72 (“Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of §1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.”).

445. See id. at 70-71 (“Given this history, it is highly unlikely that Congress would have intended a private cause of action for injunctive and declaratory relief to be available in the federal courts to secure enforcement of § 1302. [The legislative history] indicates that the ICRA was generally understood to authorize federal judicial review of tribal actions only through the habeas corpus provisions of § 1303. These factors, together with Congress’ rejection of proposals that clearly would have authorized causes of action other than habeas corpus, persuade us that Congress, aware of the intrusive effect of federal judicial review upon tribal self-government, intended to create only a limited mechanism for such review, namely, that provided for expressly in § 1303.”).
a federal common law cause of action to vindicate that right. The Court additionally held that nonmembers must first exhaust tribal remedies before bringing the federal claim against the tribal court, a holding it buttressed a few years later in *Iowa Mutual v. LaPlante.*

In *Iowa Mutual,* the Court suggested that tribal court jurisdiction over nonmembers for cases arising on tribal lands was “presumptive.” *National Farmers Union* supported this notion by limiting federal court review of tribal court decisions to the question of jurisdiction, rather than a *de novo* review. Neither case ever reached the Court on the merits. And so no guidance on tribal court jurisdiction is available from them, just procedure.

Tribal court jurisdiction and tribal taxing authority over nonmembers seemed to heading in a different path than that of tribal regulatory authority, which the Supreme Court held was controlled by *Montana.* In the late 1980s, the Court divided sharply in *Brendale v. Confederated Yakima Tribes* over what test to apply in cases involving tribal regulation of nonmember conduct. *Brendale* was a case that frankly was a poor vehicle for deciding the question,

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446. See *Nat’l Farmers Union,* 471 U.S. at 856-57 (“We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of ‘procedural nightmare’ that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.”).


448. Id. at 18 (“Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. ‘Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.’”) (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149, n.14 (1982)).

449. See *Nat’l Farmers Union,* 471 U.S at 853 (holding that “a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction”); see also id. at 855 (suggesting that the federal court’s jurisdiction is limited to “whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians”).

450. The *Nat’l Farmers Union* Court importantly rejected an argument from the nonmembers that the bright-line rule against tribal criminal jurisdiction over non-Indians should be applied in the civil context as well. See id. at 853-57. Interestingly, part of the legal authority against such a ruling suggested that tribes generally do have civil jurisdiction over those within their territories. See *Nat’l Farmers Union,* 471 U.S. at 854-55 (quoting Attorney General Cushing, 7 Op. ATTY. GEN. 175, 179-81 (1855)).

given the enormously complex landownership pattern on the highly-checkerboarded reservation.\textsuperscript{452} In 1993, the Court (with a different fact pattern) decided \textit{South Dakota v. Bourland},\textsuperscript{453} holding that the \textit{Montana} test applied to tribal regulation of nonmember activity on nonmember land within the reservation borders.\textsuperscript{454} The Court's analysis strongly suggested that, despite the vague wording and textual broadness of the exceptions, it would be much harder for a tribal government to meet the exceptions than previously assumed, perhaps even by the \textit{Montana} Court.\textsuperscript{455}

The tribal lands/nonmember lands dichotomy, which at least generated a semblance of doctrinal coherence, suffered serious blows in \textit{Strate v. A-1 Contractors} \textsuperscript{456} and \textit{Nevada v. Hicks}.\textsuperscript{457} \textit{Strate} involved a routine car wreck on tribal trust lands and a resulting personal injury suit in tribal court.\textsuperscript{458} Tribal courts had begin hearing more and more tort claims, likely as a result of the tribal court exhaustion doctrine.\textsuperscript{459} The plaintiff and defendant in \textit{Strate} were nonmembers, though the plaintiff owned property on the reservation, was married to a tribal member, and had tribal member children.\textsuperscript{460} The highway on which the accident occurred was located on a highway upon which the State of North Dakota had an easement, and which it patrolled and maintained.\textsuperscript{461} However, the land was still trust land, even with the easement, and the plaintiff refused to exhaust tribal court remedies in accordance with \textit{National Farmers Union}.\textsuperscript{462} The \textit{Strate} Court agreed with lower courts in holding that the tribal court did not have jurisdiction,\textsuperscript{463} that \textit{Montana} was the correct standard to apply,\textsuperscript{464} and then most interestingly held that the state-maintained highway on tribal trust lands was not Indian Country.\textsuperscript{465} Moreover, the Court held that tribal

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\item \textsuperscript{452} See id. at 415 (describing the land ownership pattern of what is now known as the Yakama Indian Reservation).
\item \textsuperscript{453} 508 U.S. 679 (1993).
\item \textsuperscript{454} See id. at 694-97.
\item \textsuperscript{455} See id. at 695-96.
\item \textsuperscript{456} 520 U.S. 438 (1997).
\item \textsuperscript{457} 533 U.S. 353 (2001).
\item \textsuperscript{458} See \textit{Strate}, 520 U.S. at 442-44.
\item \textsuperscript{461} See \textit{Strate}, 520 U.S. at 455.
\item \textsuperscript{462} See id. at 444.
\item \textsuperscript{463} See id. at 442; A-1 Contractors v. \textit{Strate}, 76 F.3d 930 (8th Cir. 1996) (en banc).
\item \textsuperscript{465} See id. at 454-56.
\end{itemize}
court exhaustion was not required because to force exhaustion in a minor tort action involving nonmembers on non-Indian land would be futile.\textsuperscript{466} First, the Court noted that there was no difference between tribal civil regulatory and adjudicatory authority,\textsuperscript{467} an issue that had remained open “[f]or a long time.”\textsuperscript{468} Then, in strong language, the majority noted that it would be well-nigh impossible for a tribe to meet the \textit{Montana} test once it applies.\textsuperscript{469} \textit{Strate} obfuscated what is Indian land, and what is not. \textit{Strate} further undercut the plain language of \textit{Montana}, which also stated, “[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.”\textsuperscript{470}

A few years later, the Court added additional confusion in \textit{Nevada v. Hicks},\textsuperscript{471} where it held that an individual tribal member could not maintain a civil rights action under § 1983 against state law enforcement officers in tribal court,\textsuperscript{472} even where the incident arose on tribal trust lands and where (arguably) the state had only been on tribal lands with the permission of the tribal court.\textsuperscript{473} Once again, the Court applied \textit{Montana}, but now for the first time it applied \textit{Montana} on tribal lands.\textsuperscript{474} On first glance, \textit{Hicks} seems like a dramatic incursion on tribal lands through the application of the \textit{Montana} test. Justice Ginsburg filed a short concurrence where she argued that \textit{Strate} remains the controlling law and \textit{Hicks} should be limited to key procedural fact, which was that the defendant was the State of Nevada.\textsuperscript{475} Justice O’Connor wrote a

\textsuperscript{466} See \textit{id.} at 459 n. 14 (holding, in a footnote, that exhaustion of tribal court remedies in this case would only serve to “delay” the outcome).

\textsuperscript{467} See \textit{id.} at 453 (“As to nonmembers, we hold, a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction.”).


\textsuperscript{469} See \textit{id.} at 457 (“Although A-1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a ‘consensual relationship’ with the Tribes, ‘Gisela Fredericks was not a party to the subcontract, and the [T]ribes were strangers to the accident.’”) (quoting \textit{A-1 Contractors}, 76 F.3d at 940); \textit{id.} at 457-58 (“Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if \textit{Montana}’s second exception requires no more, the exception would severely shrink the rule.”).

\textsuperscript{470} \textit{Montana}, 450 U.S. at 565.

\textsuperscript{471} 533 U.S. 353 (2001).

\textsuperscript{472} See \textit{id.} at 376.

\textsuperscript{473} See \textit{id.} at 356.

\textsuperscript{474} See \textit{id.} at 360 (“The ownership status of land, in other words, is only one factor to consider in determining whether regulation of the activities of nonmembers is ‘necessary to protect tribal self-government or to control internal relations.’ It may sometimes be a dispositive factor. Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction . . . .”) (quoting \textit{Montana}, 450 U.S. at 565).

\textsuperscript{475} See \textit{id.} at 386 (Ginsburg, J. concurring) (“As the Court plainly states, and as Justice Souter recognizes, the ‘holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law.’ \textit{Ante}, at 2309, n. 2 (opinion of the
lengthy concurrence reading much like a dissent where she argued the case really was not a Montana case at all, but involved the question of whether Congress had waived the immunity of states in tribal courts by enacting Section 1983. Even Justice Scalia’s majority opinion notes that the “presumption” of tribal court jurisdiction over nonmembers noted in the dicta in Iowa Mutual remains, although suggested that after Strate, whether the presumption remains is an open question.

Since Hicks, the Court has decided only one more tribal civil jurisdiction case, Plains Commerce Bank v. Long Family Land and Cattle Co., which involved nonmember actions on nonmember lands within the reservation. Despite four votes for the proposition that the tribe met the Montana test for the action complained about (which involved race discrimination by a nonmember bank against tribal member debtors), the Court reaffirmed prior holdings that it is exceptionally difficult for a tribe to meet the Montana test on nonmember land. The Court, importantly, did not go so far as to hold that a tribe could never meet that test.

What is clear after Strate, Hicks, and Plains Commerce is that tribal civil jurisdiction over nonmembers on nonmember land is subject to the Montana general rule and exceptions, and that those exceptions are exceptionally difficult for a tribe to meet. On tribal lands, however, the “presumption” of tribal jurisdiction likely remains, with cases such as Merrion, Mescalero,
and Brendale\textsuperscript{486} supporting tribal taxing, regulatory, and adjudicatory authority over nonmembers on Indian lands. Does \textit{Montana} apply on Indian lands? Well, Hicks suggests yes, but that holding was unnecessary to decide Hicks, and Justice Scalia’s footnote on \textit{Iowa Mutual’s} dicta conflicts with that holding. Surely, it is an open question.\textsuperscript{487}

Lower courts, trying to predict what the Court might do in a future tribal jurisdiction case on tribal lands, have applied \textit{Montana}, usually to dispositive effect against tribal jurisdiction.\textsuperscript{488} However, in a few recent cases, the lower courts have been confronted with several compelling fact patterns strongly favoring tribal jurisdiction.\textsuperscript{489} They continue to discuss \textit{Montana}, but in a manner that suspiciously looks like what a test applying the \textit{Iowa Mutual} “presumption” might look like. Most recently, the Ninth Circuit held that tribal civil jurisdiction over nonmembers for claims arising on tribal lands may arise from authority “independent from the power recognized in \textit{Montana}.”\textsuperscript{490} But once such a case reaches the Court, no one can predict with any certainty what test the Court will apply.

Since Congress hasn’t legislated in the area, and Indian treaties are largely silent on these questions, the Supreme Court is acting without much guidance. Various Justices over the years have acted suspicious of tribal court procedures and tribal laws in general,\textsuperscript{491} suggesting that nonmembers would be falling into

\textsuperscript{486} 492 U.S. 408 (1989).

\textsuperscript{487} See LaVelle, supra note 371, at 762. See also Grant Christensen, \textit{Creating Bright-Line Rules for Tribal Court Jurisdiction over Non-Indians: The Case of Trespass to Real Property}, 35 \textit{Am. Indian L. Rev.} 527, 568 (2010-2011) (discussing Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842 (9th Cir. 2009), \textit{cert. denied}, 130 S. Ct. 624 (2009)).

\textsuperscript{488} E.g., Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc., 569 F.3d 932 (9th Cir. 2009); Nord v. Kelly, 520 F.3d 848 (8th Cir. 2008); MacAuthur v. San Juan County, 497 F.3d 1057 (10th Cir. 2007), \textit{cert. denied}, 552 U.S. 1181 (2008); Big Horn County Elec. Co-op., Inc. v. Adams, 219 F.3d 944 (9th Cir. 2000); Burlington Northern R. Co. v. Red Wolf, 196 F.3d 1059 (9th Cir. 1999), \textit{cert. denied}, 529 U.S. 1110 (2000); Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998); Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), \textit{cert. denied}, 523 U.S. 1074 (1998).

\textsuperscript{489} E.g., Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802 (9th Cir. 2011) (nonmember business that refuses tribal orders to leave reservation after land lease expires); Attorney’s Process and Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa, 609 F.3d 927 (8th Cir. 2010) (nonmember business that committed torts while involved in tribal government dispute), \textit{cert. denied}, 131 S. Ct. 1003 (2011); Smith v. Salish Kootenai College, 434 F.3d 1127 (9th Cir. 2006) (en banc) (nonmember Indian involved in an automobile wreck who initially sued others for tort in tribal court, then denied tribal court jurisdiction over him in counterclaim against him), \textit{cert. denied}, 547 U.S. 1209 (2006).

\textsuperscript{490} Water Wheel, 642 F.3d at 805.

\textsuperscript{491} Justice Souter’s concurrence in \textit{Nevada v. Hicks} is the most damning opinion of tribal court jurisdiction over tribal members. See 533 U.S. 353, 375, 383-85 (2001) (Souter, J., concurring): The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given “[t]he special nature of [Indian]
some form of trap by going to tribal court. The Court usually acts without knowledge about tribal governments, or on-the-ground realities. In one occasion, *Strate*, some Justices appeared to be concerned by the allegations of one amicus that a tribal court not a party to the underlying Supreme Court case had played dirty pool with the amicus. The Court’s most recent concern is a general concern that the Constitution does not apply to tribal governments, giving little weight to the presence of the Indian Civil Rights Act, and no

Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern tribal courts “mirror American courts” and “are guided by written codes, rules, procedures, and guidelines,” tribal law is still frequently unwritten, being based instead “on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,” and is often “handed down orally or by example from one generation to another.” Melton, *Indigenous Justice Systems and Tribal Society*.

Id.

492. See Conference Transcript: The New Realism: The Next Generation of Scholarship in Federal Indian Law, 32 AM. INDIAN L. REV. 1, 4 (2007-2008) (“[T]he Court has been engaging in an agonizing—I would say infuriating—case-by-case common law model of trying to micromanage doctrine in this area, based on judicial hunches about what is actually going on in Indian Country.”) (Statement of Philip P. Frickey). See also id. at 6 (“Consider, probably not so hypothetically, Justice Souter in *Hicks*. Presumably, he asked his law clerk to research tribal courts and to give him things to read. The clerk sought help from some of the best research librarians in the world, those who work at the Supreme Court Library. They, in turn, in frustration, call upon their compatriots in the Library of Congress.”) (Statement of Philip P. Frickey).


weight whatsoever to tribal civil rights protections. Chief Justice Roberts' majority opinion explicitly tied tribal civil jurisdiction over nonmembers to consent:

Tribal sovereignty, it should be remembered, is "a sovereignty outside the basic structure of the Constitution." ... The Bill of Rights does not apply to Indian tribes. ... Indian courts "differ from traditional American courts in a number of significant respects." ... And nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory.

Once again, the Supreme Court is the leading policymaker, making federal common law decisions, articulating vague standards requiring additional pronouncements, and increasing its political might in this field, almost always at the expense of Indian tribes, entities that attract significant skepticism from the Court, which bases its skepticism on unreliable sources. Ultimately, Indian tribes still have not consented to an Article III court's jurisdiction.

In sum, this Part is intended to demonstrate that tribal consent is, for the Supreme Court, of little import in cases involving federal and state authority in Indian affairs. Conversely, when tribal jurisdiction over nonmembers is at issue, nonmember consent becomes the most important factor. Strangely, the lack of tribal consent is consistent with a view propounded by the Supreme Court more than fifty years ago in Tee-Hit-Ton Indians v. United States—that Indians were conquered, and so tribal consent to outside government authority is irrelevant. The concluding portions of this Article will show that such a position is incorrect, and unnecessary to the adequate functioning of Indian Country governance.

III. CONSENT AND NONMEMBERS

Consent theory has a different meaning and practical application in federal Indian law when it comes to tribal assertions of governmental authority over nonmembers. When the Supreme Court speaks about consent of nonmembers to tribal governance, the Court robustly demands that the tribal government produce literal, express consent by nonmembers to tribal authority. This

498. See id. at 289 ("Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.").
requirement stands in great contrast to the implied, often illusory, consent that the Court finds important in the context of federal assertions of authority over Indian affairs, both internal and external.500

This Part will not be arguing, as I have argued elsewhere,501 that nonmember consent is irrelevant or somehow an improper means of analyzing tribal authority over nonmembers. While the previous subsection suggested there are numerous weaknesses in the Court’s decisions in the various subject areas of tribal authority over nonmembers, I will not argue for an overhaul of the Court’s federal Indian common law decisions. I will instead argue in the second subsection below that tribal governments have learned lessons from these cases, and slowly are adapting their laws to conform to the Supreme Court’s preferred regime. I propose that the Court should borrow from the consent theory espoused in the nonmember cases and apply it elsewhere in Indian law in a consistent fashion that does not assume tribal consent.

A. Cases Involving Nonmember Consent Questions

1. Montana I Consent Theory

In Montana v. United States,502 the Supreme Court held that Indian tribes do not have civil regulatory authority over nonmembers as a general rule, with two exceptions. The first exception detains us here. That exception reads: “A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”503 The Court in later cases, notably Atkinson Trading Co., Inc. v. Shirley,504 narrowed the exception to mean express consent and a “nexus” between the consent arrangement and the commercial activity to be adjudicated, taxed, or regulated by the tribe.505 We know from Strate cases that nonmembers are not subject to tribal court jurisdiction because they have been in an accident on nonmember land unrelated to the business purposes for being on the reservation,506 we

503. See id. at 565 (citations omitted) (emphasis added). Citations are omitted for a reason. In a later case, the Supreme Court rejected the notion that the citations to this language have much meaning, although the Court often will discuss these cited cases at some length.
505. Id. at 656.
know from Atkinson Trading that nonmembers on nonmember land are not subject to tribal taxation even if they accept public safety and other government services from the local tribes;\footnote{507} we know from Plains Commerce Bank that a nonmember is not subject to tribal court jurisdiction in a case arising on nonmember land merely because the nonmember defendant has previously filed more than twenty civil suits in the local tribe's court system.\footnote{508} All of these cases, frankly, involve nonmembers who are outliers in Indian Country, as will see in the next subpart.

First, we will discuss the so-called Montana I cases. The earliest Montana I case is, of course, Montana.\footnote{509} Prior to Montana, many Indian tribes operated on a theory of implied consent to tribal jurisdiction.\footnote{510} The theory seemed sound, in that anyone entering Michigan from Wisconsin impliedly consented to Michigan's authority over them, for example.\footnote{511} But the Montana Court rejected that claim out of hand, and imposed the general rule instead.\footnote{512} The reservation of the Crow Nation, which was the tribe involved in the Montana litigation, was perhaps a poor place to defend the implied consent theory in that the reservation had been allotted by Congress,\footnote{513} giving rise to a powerful argument that Congress had granted consent to the nonmembers living on formerly Crow lands to be there, obviating any need for tribal consent.

Montana largely involved treaty rights and federal interest claims on the Crow Reservation against the State of Montana, but the final portion of the opinion involved tribal regulatory authority over nonconsenting nonmembers on non-Indian owned land.\footnote{514} There, the State of Montana and non-Indian property owners objected to tribal authority on private property.\footnote{515} The nonmembers were not a part of the government decision-making that established the regulations, though their actions (on their own property) had wide impacts on the reservation.\footnote{516}

Montana I consent cases that followed have all demanded that Indian

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  \item \footnote{507} See Atkinson Trading, 532 U.S. at 656-57.
  \item \footnote{508} See Plains Commerce Bank, 554 U.S. at 341-42; see also Brief for Amicus Curiae Cheyenne River Sioux Tribe in Support of Respondents 29-31 & n. 30, Plains Commerce Bank, 554 U.S. 316 (2008) (No. 07-411) (cataloguing tribal court cases in which the Bank appeared without questioning jurisdiction).
  \item \footnote{509} 450 U.S. 544 (1981).
  \item \footnote{510} See NAT'L AM. INDIAN COURT JUDGES ASS'N, supra note 11, at 50-56.
  \item \footnote{511} See Fletcher, supra note 501, at 40.
  \item \footnote{512} See Montana, 450 U.S. at 564-65 ("Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize the Crow Tribe to adopt Resolution No. 74-05.").
  \item \footnote{513} See id. at 559 n. 9 (discussing Crow Nation allotment acts).
  \item \footnote{514} See id. at 564-66.
  \item \footnote{515} Cf. id. at 548-50 (noting the non-Indian activities on the river at stake).
  \item \footnote{516} Cf. id. at 558 & n. 6 (noting that the tribal interests had a treaty interest in fishing but did not allege as such in the complaint).
\end{itemize}
tribes produce evidence of some form of literal or express consent from nonmembers before the Court will acknowledge tribal authority. The best example is *Merrion v. Jicarilla Apache Tribe*, in which a nonmember business agreed via a lease agreement to pay royalties. While the majority in *Merrion* did not discuss *Montana*, the express consent acquired by the tribe now takes on greater significance than it did even in the original case. The classic case on the other side is *Atkinson Trading Co. v. Shirley*, where the Navajo Nation's efforts to enforce a hotel tax against a nonmember owned business on a postage stamp of non-Indian land failed for lack of express consent.

2. Duro Consent Theory

The second critical case involving nonmember consent came in 1990—*Duro v. Reina*. The case involved tribal criminal jurisdiction over nonmember Indians, or Indians who are not members of the tribe attempting to prosecute them. Tribal members, who can chose to be tribal members of federally recognized Indian tribes, have effectively consented to tribal jurisdiction. Nonmembers, who have not—and cannot—consent, according to *Duro*, therefore, are not subject to tribal jurisdiction. The notion of consent theory propounded in *Duro* differs from the notion of consent theory propounded in the *Montana I* exception in that Justice Kennedy appears to assume that nonmembers are not and cannot ever become members because of the race and ancestry requirements of tribal membership.

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517. 455 U.S. 130 (1982).
518. See id. at 133 (noting the nonmember business had signed a lease, but challenged the tribal tax).
519. See id. at 171-72 (Stevens, J., dissenting) (discussing *Montana*).
521. See id. at 647-48.
523. See id. at 679.
524. See id. at 693 (“The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe’s additional authority comes from the consent of its members, so in the criminal sphere, membership marks the bounds of tribal authority.”).
525. See id. (“The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate. While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often ‘subordinate to the political branches of tribal governments,’ and their legal methods may depend on ‘unspoken practices and norms.’ . . . It is significant that the Bill of Rights does not apply to Indian tribal governments.”) (citing Talton v. Mayes, 163 U.S. 376 (1896)).
526. Cf. id. at 694 (“With respect to such internal laws and usages, the tribes are left with broad freedom not enjoyed by any other governmental authority in this country. . . . This is all the more reason to reject an extension of tribal authority over those who have not
Justice Kennedy's majority opinion harkened back to his dissent as a Ninth Circuit Judge when he sat on the Oliphant case in the 1970s. The Duro majority opinion evidences Judge Kennedy's view that tribal jurisdiction depends heavily, if not exclusively on congressional authorization, was incorrect by noting, through Justice Kennedy, that tribal sovereignty is retained unless abrogated.

The Duro consent theory is both narrower and broader than the Montana I consent theory. The Duro theory allows tribal jurisdiction broadly over tribal members, with literal or express consent unnecessary. The Duro analysis implies skepticism about whether nonmembers even have the legal capacity to consent to tribal criminal jurisdiction, and perhaps even whether Congress has constitutional authority to consent on behalf of nonmembers to criminal jurisdiction over nonmembers. Congress did exercise its Indian affairs authority to reverse Duro and recognize and reaffirm tribal criminal jurisdiction over nonmember Indians, leading to the Supreme Court's decision in United

527. See Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976), rev'd, 435 U.S. 191 (1978). As one commentator noted about then-Circuit Judge Kennedy's Schlie dissent: "Judge Kennedy then reached the following conclusions about tribal sovereignty: the tribal sovereignty notion grew out of cases dealing with state encroachment and simply are not applicable to the subject of tribal jurisdiction over an individual." Carol A. Mitchell, Note, Oliphant v. Schlie: Tribal Criminal Jurisdiction of Non-Indians, 38 MONT. L. REV. 339, 349 (1977) (citing Schlie, 544 F.2d at 1015) (Kennedy, C.J., dissenting). That commentator then argued that the "dissent's position on tribal sovereignty ignores a well settled rule of Indian law which implicitly recognizes the original sovereignty of tribes, as well as the survival of the remnants of that sovereignty." Id. at 350.:

528. See Duro, 495 U.S. at 684.

529. See id. at 694 ("Tribal authority over members, who are also citizens, is not subject to these objections. Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent.").

530. See id. at 689 ("Cases challenging the jurisdiction of modern tribal courts are few, perhaps because 'most parties acquiesce to tribal jurisdiction' where it is asserted. . . . We have no occasion in this case to address the effect of a formal acquiescence to tribal jurisdiction that might be made, for example, in return for a tribe's agreement not to exercise its power to exclude an offender from tribal lands") (quoting NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, supra note 250, at 48).

531. See id. at 693 ("It is significant that the Bill of Rights does not apply to Indian tribal governments, . . . The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts. There is, for example, no right under the Act to appointed counsel for those unable to afford a lawyer." (citing 25 U.S.C. § 1302(6))).
States v. Lara.\textsuperscript{532}

B. Applications of Nonmember Consent

Modern and sophisticated Indian tribes are working within the Supreme Court’s variations of consent theory. They seek express nonmember consent for civil jurisdiction purposes, and they exercise increasingly advanced governmental authority consistent with the implied consent over tribal members the Supreme Court recognizes.

It is likely that the Supreme Court remains unaware how often nonmembers engage in consensual arrangements with Indian tribes, but the number of nonmembers who work for Indian tribes is staggering,\textsuperscript{533} and very well might be a large majority of all nonmembers who reside or otherwise spend significant time in Indian Country. Indian tribes with highly successful gaming enterprises such as the Mashantucket Pequot Nation, Mohegan Tribe, Pokagon Band of Potawatomi Indians, Agua Caliente Band of Mission Indians, and other tribes in the same category each employees more than a thousand nonmembers, and possibly several thousand.\textsuperscript{534} Indian tribes with diversified and successful non-gaming business operations, such as the Southern Ute Tribe, Cherokee Nation of Oklahoma, Winnebago Tribe of Nebraska, and the Mississippi Band of Choctaw Indians likely employ thousands of members and nonmembers.\textsuperscript{535} And dozens upon dozens of other tribes with perhaps modest economies but are located in rural areas often are the biggest (or one of the biggest) local employers in whole regions, just because of the size of their tribal government bureaucracies.\textsuperscript{536} The Sault Ste. Marie Tribe of Chippewa Indians,

\textsuperscript{532} 541 U.S. 193 (2004).

\textsuperscript{533} E.g., Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian Country, Hearing Before the S. Comm. on Indian Affairs, 111th Cong., 2d Sess. 67 (Jan. 10, 2010) (statement of Conrad Edwards) (“The facts are that our average tribal workforce is 50 percent to 70 percent non-Indian and our unemployment rates are still 50 percent to 80 percent, depending on what reservation you are on and what time of the year it is.”).


\textsuperscript{535} For example, the Umatilla Tribe and the Southern Ute Tribes are the biggest employers in their regions. See Indian Tribal Good Governance Practices as They Relate to Economic Development, Hearing Before the S. Comm. on Indian Affairs, 107th Cong., 1st Sess. 3 (July 18, 2011) (statement of Neal A. McCaleb) (Umatilla); id. at 5 (Statement of Sen. Campbell) (Southern Ute).

\textsuperscript{536} See N. Idaho Tribe Emerges as Top Regional Employer, NAT. AM. TIMES, Sept. 21, 2011, available at http://www.nativetimes.com/news/tribal/3399-n-idaho-tribe-emerges-
for example, is the single largest employer in Chippewa County in the Upper Peninsula of Michigan.\textsuperscript{537}

Thousands upon thousands (no one knows exactly how many, or can really estimate) of nonmembers work for Indian tribes. They have all engaged in some consensual relationship with an Indian tribe, usually work on tribal lands (often for tribal businesses), and are paid for their work. Under a reasonable interpretation of \textit{Montana I},\textsuperscript{538} all of these nonmembers are subject to tribal regulation, taxation, and adjudication for events arising on tribal lands or anywhere within reservation boundaries or Indian Country.

Many more thousands of nonmembers live in tribal housing, which is usually located on tribal trust lands and land owned in fee by the tribe, because of intermarriage and other relationships. Under federal and tribal law, each of these individuals must be accounted for in a lease, rental, or ownership document and receive the consent of the tribe to live in tribal housing. All of them have signed legal documents in which they expressly consent to tribal regulation as a product of the housing agreement. Additional thousands of nonmembers are eligible to receive tribal government services because they may be the parent or guardian of tribal member children, elders, and others.

All of these thousands of nonmembers have consented in some manner expressly to tribal regulation. Maybe under the \textit{Montana I} line of cases a tribe could not regulate the employment of a nonmember on nonmember land who has merely signed a housing rental lease with the tribe, but there is significant overlap in employment, housing, and tribal government services in that most aspects of nonmember activity—\textit{even on nonmember land}—meet the \textit{Montana I} prescription. The nonmembers to whom Indian tribes likely cannot exercise jurisdiction are outliers. There are fewer and fewer of them every day, and since they are not engaging in consensual relations with Indian tribes, their activities are becoming more inconsistent with tribal preferences. It bears noting that the last few Supreme Court cases regarding tribal jurisdiction over nonmembers involve nonmember tortfeasors,\textsuperscript{539} not merely nonmembers who refuse to comply with tribal regulations or taxes. This trend is evident in lower


\textsuperscript{538} See \textit{Plains Commerce Bank v. Long Family Land and Cattle Co.}, 554 U.S. 316, 320 (2008) ("Following the sale, an Indian couple, customers of the bank who had defaulted on their loans, claimed the bank discriminated against them by offering the land to non-Indians on terms more favorable than those the bank offered to them."); \textit{Strate v. A-1 Contractors}, 520 U.S. 438, 443 (1997) ("The accident occurred when Fredericks' automobile collided with a gravel truck driven by Stockert and owned by respondent A-1 Contractors, Stockert's employer.").
Finally, all of this has begun to happen in earnest since the mid-1970s, after Congress agreed to start turning over the primary responsibility for providing government services to reservation residents to Indian tribes. Likely, the number of nonmembers consenting to tribal jurisdiction in some way grows every day. We will leave for another day all those nonmembers who consent after the fact to tribal jurisdiction in civil offense and other cases, though that number grows perhaps even faster than the number of expressly consenting nonmembers.

Consent theory, for all its vagaries and even confusion, has utility for Indian affairs, as I will demonstrate in the next Part. In fact, the United Nations Declaration for the Rights of Indigenous Peoples requires consent to be a critical aspect of governmental affairs involving indigenous peoples. And most importantly, it is a viable and realistic theory.

CONCLUSION: TOWARD A THEORY OF TRIBAL CONSENT IN MODERN INDIAN AFFAIRS

Indian tribes have either ownership or direct control over many millions of acres throughout the United States, though mostly in the western half of the continent. Hundreds of thousands of people live and work on that territory, including tribal members, nonmember Indians, and non-Indians. With the exception tribes located in the few states subject to Public Law 280, an Act of Congress that extended aspects of state jurisdiction into Indian Country, Indian tribes have significant control over tribal territories and those living and working on those lands. But as this Article shows, that control is subject to significant and artificial limitations and uncertainties relating to the relationship between Indian tribes and nonmembers, as well as the interests of state governments in on-reservation business activities.

Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples could force a paradigm shift if its public policy is applied as intended.

540. E.g., Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842, 844 (9th Cir. 2009) (involving a claim that nonmember defendant started on-reservation forest fire that "burned more than 400,000 acres of land and caused millions of dollars in damage"), cert. denied, 130 S. Ct. 624 (2009). See also cases discussed in note 489 (listing cases involving nonmember tortfeasors).

541. See generally Wilkins & Stark, supra note 147, at 131-32.


543. See Getches et al., supra note 20, at 12.

544. Interview with Wenona T. Singel, Assistant Professor of Law, Michigan State University College of Law, in East Lansing, MI (Aug. 1, 2011).


But for Indian tribes, Article 19 consent is complicated by its own terms. It reads:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.547

As is noted by the Supreme Court, Congress has never legislated in a comprehensive fashion on tribal authority to regulate the on-reservation activities of nonmembers.548 As a result, the general question is one of federal common law, ultimately decided by the United States Supreme Court. The Supreme Court’s jurisdiction, as a matter of federal law, is self-created under Article III of the Constitution. Of course, no American Indian tribe has effectuated “free, prior, and informed consent”549 to Supreme Court jurisdiction over internal tribal affairs. Unfortunately, Article 19 neglects to mention judicial decisions, possibly because judicial review in most countries is less robust than it is here in the United States.550 So is Article 19 consent even relevant to American Indian tribes in federal common law cases decided by the federal judiciary?

In my view, yes, in that the Supreme Court should defer more to Congress’s silence on the question of tribal authority over nonmembers. Congress has the institutional authority and capabilities to declare national public policy in Indian affairs.551 Congressional silence indicates at least one important factor: the lack of a pressing national interest in a question, so much so that Congress does not feel the need to act. If Congress makes no effort to comprehensively legislate in the area of tribal authority over nonmembers, then there would appear to be no national interest in the issue. Interestingly, the Court, once articulated a rule closely approximating this view in dicta. In Washington v. Colville Confederated Tribes,552 the Court noted that tribal inherent authority is divested when the exercise of that authority is inconsistent with the “overriding interests of the National Government.”553 Congressional action to comprehensively regulate tribal authority over nonmembers, after Article 19, would require the “free, prior, and informed consent” of the American Indian nations. Supreme Court decisions in the field should defer to

551. See Fletcher, supra note 384, at 130-54.
553. Id. at 153.
congressional silence in this area. Douglas Sanderson’s outstanding theory on institutional corrective justice provides a helpful theoretical framework for contextualizing Supreme Court deference under Article 19. Sanderson, writing about Canadian First Nations and the Canadian justice system, notes that there are three views of remedying historic wrongs against Indigenous peoples: (1) “land transfer,” (2) “subsistence,” (3) and “institutional.” In the United States, it is fair to say that “land transfer,” except as provided for by Congress in a series of land claims settlements, is anathema, especially to the federal judiciary. “Subsistence” remedies, defined by Sanderson as a remedy that allows “Indigenous peoples to live the same kinds of lives as they once did with respect to harvesting of resources traditionally relied upon,” has been welcomed several times by the federal judiciary in treaty rights cases. Sanderson’s recommendation, “institutional” remedies, which he defines as recognition of Indigenous “ability to develop and maintain political, social, and cultural institutions,” has been roundly approved by Congress and the Executive branch. But the Supreme Court, in its skepticism of tribal authority over nonmembers, repeatedly declines to defer in this area. The Court’s common law decisions stunt tribal institutional development. Yet while it shouldn’t take much to ask the Court to step aside, it is clear the Court will not.

Effective implementation of what I call tribal consent theory—the notion that tribal authority remains extant absent consensual abrogation of that authority—is a tough nut. The Supreme Court retains final veto over any governmental action by an Indian tribe in relation to nonmembers. But as a practical matter, the Court cannot and will not review every case, and the Court even declines to review some of the tougher cases. And that’s where Indian tribes can engage in the critical act of exercising de facto sovereignty. Tribes

555. See id. at 19-20.
558. Sanderson, supra note 554, at 27.
560. Sanderson, supra note 554, at 32.
561. See generally Fletcher, 384, at 151-54.
can make their own consent regime. All it takes is one case.

Tribal consent theory, as I see it, would fundamentally—but gradually—change the framework for analyzing the scope of tribal governance on tribal lands. As noted earlier, more and more nonmembers are expressly consenting to some form of tribal authority. More and more nonmembers depend economically and politically on Indian tribes. Fewer and fewer nonmembers on tribal lands have no consensual relationship with the local tribe. Even on reservation lands owned by nonmembers, the nonmember population numbers are declining.

Critically, the “open question” identified in Justice Scalia’s majority opinion—whether tribes have presumed civil jurisdiction over nonmembers on tribal lands—should be an easy one once it reaches the Supreme Court. There are two ways the Supreme Court can analyze the question when it arises. The first is to apply the presumption, a decision that could require the Supreme Court to articulate circumstances where tribal jurisdiction is unacceptable. When would tribal jurisdiction be fundamentally unfair or abusive toward nonmembers, for example? Common law courts are not at their best when trying to articulate exceptions to general rules, and so the exercise might be confounding to the Court. That said, nonmembers living and doing business on tribal lands very frequently have consented to being there, and there is solid legal support dating back to the nineteenth century that nonmembers voluntarily entering Indian lands are subject to tribal law.

More likely than not, the Court will apply a form of the Montana general rule and exceptions, even on tribal lands. The Justices are already familiar with Montana and have labeled it “pathmarking.” This would be a troubling, but not unexpected, outcome. There is some very speculative evidence that the Court tends to be interested only in cases where a nonmember plausibly claims some form of abusive or irrational exercise tribal jurisdiction, and as a result is extremely unlikely to ever grant certiorari in a case where a nonmember prevailed over a tribal interest below. Moreover, instances involving consensual relationships between Indian tribes and nonmembers are unlikely to be litigated at all.

563. See Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) (“Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.”).
568. See Fletcher, supra note 433, at 935-36.
The Supreme Court’s certiorari practices, and propensity for aligning with the *Montana* general rule, put tribal interests in a tough spot. Any Supreme Court decision involving a nonmember on tribal trust or reservation lands that applies *Montana* to the detriment of tribal interests would complicate tribal governance considerably. Nonmembers who remain outliers in reservation communities and areas would be all but free from governance, unless state governments dramatically expand their activities in Indian Country. Frankly, no state will do this, even if the legal complexities of such action were removed.

While it is plausible that the Supreme Court would hold in favor of tribal interests in a case where a nonmember challenges tribal jurisdiction, the Court’s historic skepticism of tribal governance, coupled with its disregard of the practical consequences of its decisions, is likely too heavy a mountain to move. Tribal interests might not win such a case.

In my view, however, the Supreme Court’s ad hoc decision-making on tribal jurisdiction over nonmembers is increasingly irrelevant. Even the most recent case, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, decided almost nothing. There, the bank still had to face the rest of the jury verdict because it challenged the court’s jurisdiction over only one cause of action against it. The nonmembers challenging tribal jurisdiction are increasingly behaving in unusual ways, and the impacts of their actions will shrink over time as tribes acquire more and more express consents. The short-term question is whether the Supreme Court will continue to side with those nonmembers in Indian Country who are increasingly becoming undesirable outliers.

Eventually, and that time may be years or decades away, Indian tribes will have solved the problem of the nonconsenting nonmember. Enterprising tribes will even find a way to incorporate non-Indians into the governance of the reservation—with their consent.

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571. *E.g.*, *Duro v. Reina*, 495 U.S. 676, 698 (1990) (“If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs.”).


More than 20 years ago, Professor Collins theorized that Indian nations would move toward independence from the federal government as perhaps the only conceivable means of achieving significant advances in strong and fair—and consensual—Indian Country governance. Independence is a lofty goal, one many tribes probably don’t want. But that is no reason not to pursue tribal consent theory. Indian tribes are in the best position in centuries to reestablish important governance authority over all of the people and entities within Indian Country and thoughtful tribal sovereigns have already begun to light the way.

Miigwetch.

575. See Collins, supra note 2, at 386-87.