2004

Petitioner's Brief - Reargument of Oliphant v. Suquamish Indian Tribe

John P. LaVelle
University of New Mexico - School of Law

2002 TRIBAL LAW & GOVERNANCE CONFERENCE
CASE RECONSIDERATION

BEFORE THE SUPREME COURT OF
THE AMERICAN INDIAN NATIONS

Suquamish Indian Tribe,
Petitioner
v.
Oliphant et al.,
Respondents.

2002 Term

Case No. 02-1

First Decided by the
Supreme Court of the United States of America
on March 6, 1978
435 U.S. 191 (1978)

To be reargued and re-decided by the
Supreme Court of the American Indian Nations
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PETITIONER'S BRIEF

JOHN P. LaVELLE*
University of New Mexico School of Law
1117 Stanford Drive, N.E.
Albuquerque, NM 87131
(505) 277-0951

ATTORNEY FOR PETITIONER

QUESTION PRESENTED

Does the Suquamish Indian Tribe possess inherent sovereign power to exercise criminal jurisdiction over non-Indians alleged to have committed misdemeanor crimes within the boundaries of the tribe's own reservation in violation of the Suquamish Law and Order Code?

STATEMENT OF THE CASE

This case addresses the inherent sovereign power of an Indian tribe to exercise criminal jurisdiction over non-Indians accused of committing crimes within the boundaries of the tribe's own reservation. Respondent Mark David Oliphant, a non-Indian, was arrested by law enforcement officers of the Suquamish Indian Tribe for allegedly physically assaulting a tribal police officer and resisting arrest during Chief Seattle Days, a tribal festival conducted on the tribe's reservation, the Port Madison Reservation. Respondent Daniel B. Belgarde, also a non-Indian, was arrested by Suquamish tribal law enforcement officers after allegedly engaging in criminally reckless and dangerous conduct by participating in a high-speed race along a reservation highway that ended when Belgarde crashed his vehicle into a tribal police vehicle. In separate proceedings the United States District Court for the Western District of Washington denied both Respondents' habeas corpus petitions. Subsequently, the United States Court of Appeals for the Ninth Circuit Court affirmed the denial of habeas in Respondent Oliphant's case, holding that the Suquamish Tribe retained inherent sovereign power to exercise criminal jurisdiction over non-Indians because no treaty or statute deprived the Tribe of such jurisdiction and because the exercise of such authority was not in conflict with — and indeed was supported by — policies of the United States.[1] Respondent Belgarde's appeal from the district court's denial of habeas was pending before the Ninth Circuit Court of Appeals when the United States Supreme Court granted writs of certiorari in both cases.[2]

The United States Supreme Court reversed the dismissals of Oliphant's and Belgarde's habeas petitions, holding that Indian tribes lack the inherent sovereign power to try and to punish non-Indians who allegedly commit crimes within the boundaries of the tribes' own reservations.[3] The Court based its ruling on judicial assessment of tribes' "status" under United States law as informed by the Court's own discernment of a historic "assumption," purportedly shared by all three branches of the federal government, that Indian tribes lack inherent sovereign power to exercise governing authority over on-reservation crimes committed by non-Indians.[4] The Court intimated further that its denial of the inherent sovereign authority of Indian tribes to try and to punish non-Indians for on-reservation criminal activity was driven in part by

the Court's belief that such governing authority conflicted with an overriding federal interest in protecting United States citizens "from unwarranted intrusions on their personal liberty."[5]

The Suquamish Indian Tribe filed this timely request for review by the Supreme Court of the American Indian Nations. The Supreme Court of the American Indian Nations granted the Tribe's petition for review. The Tribe seeks this Court's reversal of the United States Supreme Court's denial of the inherent sovereign power of Indian tribes to exercise criminal jurisdiction over non-Indians within the boundaries of the tribes' own respective reservations.

SUMMARY OF ARGUMENT

The Suquamish Indian Tribe has never relinquished its inherent sovereign authority to exercise criminal jurisdiction over all persons within the boundaries of the Port Madison Reservation, including non-Indians such as Respondents Oliphant and Belgarde. Because there is no clear and unambiguous evidence that the Suquamish Indian Tribe has been prohibited by treaty provision or congressional statute from exercising its inherent sovereign power of criminal jurisdiction over non-Indians within reservation boundaries (as the U.S. Supreme Court below effectively conceded), that power remains intact. The U.S. Supreme Court's erroneous invention and application of a theory of "implicit divestiture" by which the Court licenses itself — independent of any treaty provision or statute — to deem tribes' sovereign powers "inherently lost" is an affront to longstanding, core principles of the field of Indian law protective of tribes' sovereign governing authority. To restore stability, integrity, trust, and honor to the federal-tribal relationship, the U.S. Supreme Court's *Oliphant* decision must be overturned.

ARGUMENT

THE SUQUAMISH INDIAN TRIBE RETAINS AUTHORITY TO EXERCISE CRIMINAL JURISDICTION OVER NON-INDIANS WITHIN THE BOUNDARIES OF THE TRIBE'S OWN RESERVATION BECAUSE THE TRIBE HAS NEVER RELINQUISHED THIS AUTHORITY BY TREATY OR OTHER BILATERAL CONSENSUAL AGREEMENT AND BECAUSE NO CONSTITUTIONALLY PERMITTED UNILATERAL ACT OF CONGRESS OR OVERRIDING NATIONAL SOVEREIGNTY INTEREST OF THE UNITED STATES PRECLUDES THE TRIBE FROM EXERCISING THIS INHERENT SOVEREIGN POWER

In denying the Suquamish Indian Tribe its authority to try and (if convicted) to punish the non-Indian Respondents accused of committing crimes within the boundaries of the Tribe's own reservation, the United States Supreme Court issued a ruling at odds with core principles of federal Indian law protective of inherent tribal sovereignty, principles that have been consistently embraced and acknowledged by the Supreme Court in decisions dating to the Court's foundational Indian law cases of the early nineteenth century.[6] The Supreme Court's decision below is equally incompatible with current congressional policy supporting inherent tribal sovereignty and self-determination. Indeed, the United States Supreme Court's creation and deployment of what it terms an "implicit divestiture" rationale[7] for denying the sovereign authority of Indian tribes in Indian country where the tribes have not relinquished such authority and where Congress has not legislatively precluded it jeopardizes the United States' regulation of Indian affairs by national deliberative means, threatening to replace Congress's established, exclusive policymaking role in Indian affairs with case-by-case policy predilections and ideological preferences of unelected, politically unaccountable judges. Notwithstanding the U.S. Supreme Court's assertions to the contrary, the history of relations between the United States government and Indian nations evinces no "unspoken assumption"[8] that tribes lack the inherent authority and right to safeguard themselves and their reserved territories by exercising criminal jurisdiction over non-Indians who commit violent offenses within the boundaries of Indian reservations. Nor is tribes' exercise of this inherent prerogative of every sovereign to prohibit and punish criminal conduct within the sovereign's own territory a threat to the federal government's national territorial security or otherwise in conflict with "the overriding sovereignty of the United States"[9] so as to license judicial prohibitions on tribes' exercise of inherent sovereign powers of criminal jurisdiction over non-Indians. The judicial denial of inherent tribal power in this case is a dangerous aberration that undermines and destabilizes more than two centuries of congressional legislation, treaties, and U.S. Supreme Court decisions in the field of federal Indian law. To restore stability, integrity, trust, and honor to the federal-tribal relationship, the U.S. Supreme Court's *Oliphant* decision must be overturned.

I. THE SUQUAMISH INDIAN TRIBE POSSESSES THE INHERENT SOVEREIGN POWER OF CRIMINAL JURISDICTION OVER NON-INDIANS IN ACCORDANCE WITH GENERAL PRINCIPLES OF FEDERAL INDIAN LAW PURSUANT TO WHICH AN INDIAN TRIBE RETAINS ALL THE ORIGINAL INHERENT POWERS OF ANY SOVEREIGN NATION THAT THE TRIBE HAS NOT VOLUNTARILY RELINQUISHED BY TREATY OR OTHER BILATERAL CONSENSUAL AGREEMENT OR THAT CONGRESS

HAS NOT CLEARLY AND UNAMBIGUOUSLY PRECLUDED UNILATERALLY BY MEANS OF CONSTITUTIONALLY PERMITTED LEGISLATION

"Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers that are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather 'inherent powers of a limited sovereignty which has never been extinguished.'"[10] This statement from the *Cohen* treatise of federal Indian law embodies the insight of the great scholar Felix Cohen, who culled this crucial observation from a multitude of judicial opinions in the course of drafting the watershed original edition of the *Cohen Handbook.*[11] Cohen elaborated on the nature of inherent tribal sovereignty within the historic framework of federal Indian law:

> Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its source or its positive content. *What is not expressly limited remains within the domain of tribal sovereignty.*[12]

The *Cohen* treatise's observation that Indian tribes retain all the inherent "powers of sovereignty" except those that have been expressly precluded by treaty or congressional statute comports with core principles of federal Indian law dating to the foundational "Cherokee cases" of the 1830s. In *Cherokee Nation v. Georgia,*[13] the U.S. Supreme Court held that the Cherokee Nation is not a "foreign state" within the meaning of the United States Constitution's grant of original jurisdiction to the Supreme Court over controversies "between a state . . . and foreign states."[14] In an often-cited opinion announcing the Court's judgment, Chief Justice John Marshall explained that although the Cherokee Nation's unique "domestic dependent" relationship, as an Indian tribe, with the United States government deprived the Cherokee Nation of a "foreign" status for purposes of the Court's original jurisdiction in state-foreign state diversity cases, a majority of the justices found "completely successful" the Cherokee Nation's efforts "to prove [its] character . . . as a *state*, as a distinct political society, separated from others, capable of managing its own affairs and governing itself."[15]

Cherokee Nation's recognition of the sovereign status of Indian tribes under United States law matured into a holding of the Court in *Worcester v. Georgia*,[16] the culminating case of the "Marshall trilogy" synthesizing all the decisions and distilling the foundational principles of federal Indian law. In rebuffing efforts by the state of Georgia to defy and obliterate the political existence of the Cherokee Nation and distribute Cherokee lands, upon which gold had been discovered, to five Georgia counties, the Supreme Court repeatedly emphasized Indian tribes' distinctive status as *nations*, possessing, as such, plenary attributes of inherent national sovereignty, acknowledged and protected under federal law:

> 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 the European potentates imposed upon 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. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.[17]

By virtue of its status as a tribal *nation* protected, as such, under paramount federal law from all intrusions of state law, the Court held that

> [t]he Cherokee nation . . . 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.[18]

Of crucial significance to the present dispute between the Suquamish Indian Tribe and the non-Indian Respondents is *Worcester*'s prescription for construing

provisions of treaties and federal statutes purported to have the effect of diminishing tribes' original national sovereignty. Writing for the *Worcester* Court, Chief Justice Marshall rejected all efforts by the state of Georgia to persuade the Court to interpret provisions of the 1785 Treaty of Hopewell and the 1791 Treaty of Holston as effecting "a surrender of [the Cherokees'] national character."[19] For instance, with respect to a provision of the Treaty of Hopewell "acknowledg[ing] the Cherokees to be under the protection of the United States of America, and of no other power," the Court observed that, like similar provisions "found in Indian treaties generally," such language of protection denoted only that

> 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.[20]

The Court concluded that, contrary to Georgia's arguments, the "protection" language of the Treaty of Hopewell must be construed as *preserving*, not diminishing, "the national character" of the Cherokee Nation: "The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. *Protection does not imply the destruction of the protected.*"[21]

Another important illustration of *Worcester*'s implementation of a treaty interpretation methodology that is highly protective of the original inherent sovereignty of Indian tribes is the Court's response to Georgia's argument that by referring to the Cherokee Nation's reserved territory as "[t]he boundary allotted to the Cherokees for their hunting grounds,"[22] the Treaty of Hopewell diminished the tribe's title and sovereignty within the territory described.[23] Rejecting Georgia's argument, the Court instructed that a given term in an Indian treaty must be construed as the Indians would have understood such language in view of "the whole transaction," even where the disputed term otherwise would seem to "admit of no other signification" than the one argued by the Indians' adversaries in the dispute:

> Is it reasonable to suppose, that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word "allotted" from the words "marked out." The actual subject of contract was the dividing line between the two nations; and their attention may very well be supposed to have been confined to that subject. When, in fact, they were ceding

> lands to the United States, and describing the extent of their cession, it may well be supposed that they might not understand the term employed, as indicating that, instead of granting, they were receiving lands. If the term would admit of no other signification, which is not conceded, its being misunderstood is so apparent, results so necessarily from the whole transaction; that it must, we think, be taken in the sense in which it was most obviously used.
>
> So with respect to the words "hunting grounds." Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed that any intention existed of restricting the full use of the lands they reserved.
>
> . . . .
>
> These terms had been used in their treaties with Great Britain, and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government.[24]

A third instructive example of *Worcester*'s protection of tribal sovereignty through its prescribed use of special rules of treaty and statutory construction is the Court's explanation as to why a treaty provision acknowledging the United States government's "sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper"[25] *cannot* be read as impliedly divesting the tribe of any of it original inherent sovereign authority:

> To construe the expression "managing all their affairs," into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is Indian trade. The influence it gave, made it desirable that congress should possess it. The commissioners brought forward the claim, with the profession that their motive was "the benefit and comfort of the Indians, and the prevention of injuries and oppression." This may be true, as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade, but cannot be true, as respects the management of all their affairs. The most important of these, are the cession of their lands, and security against intruders on them. Is it

> credible, that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made? or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade. Such a measure could not be "for their benefit and comfort," or for "the prevention of injuries and oppression." Such a construction would be inconsistent with the whole spirit of this and all subsequent treaties . . . . It would convert a treaty of peace covertly into an act, annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed.[26]

Beginning with the *Worcester* decision, American courts over the ensuing 170 years have developed and implemented a series of special interpretive canons for construing provisions of treaties, federal statutes, and other sources of positive law arguably impacting the sovereignty and rights of Indian tribes and Indian people. These special Indian law canons of construction include interpreting treaty provisions to give effect to the terms as the Indians themselves would have understood them,[27] interpreting treaty provisions liberally in favor of the Indians,[28] and resolving all ambiguities in the Indians' favor.[29] A crucial corollary principle of federal Indian law reflected and manifested in these historic Indian law canons of construction and frequently acknowledged by the United States Supreme Court is that ambiguous provisions of federal law must be "construed generously in order to comport with . . . traditional notions of [tribal] sovereignty and with the federal policy of encouraging tribal independence."[30] Moreover, consistent with these longstanding interpretive rules and principles of federal Indian law, the Supreme Court has instructed that with respect to judicial decisionmaking in the present era of congressional support for tribal sovereignty and self-determination, the courts "will not strain to implement [a] policy that Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship."[31]

In its holding and analysis in the present dispute denying the Suquamish Indian Tribe's inherent sovereign authority to exercise criminal jurisdiction over non-Indians, the U.S. Supreme Court has rendered a decision at war with all these time-honored interpretive rules and principles protective of tribal sovereignty and Indian rights. Disregarding every principled judicial directive admonishing courts to find a diminishment of the original sovereign powers of Indian tribes only upon clear indications that Congress intended to produce such a diminishment, the Court instead purported to divine a historic "unspoken assumption," shared by all three branches of

the federal government, that Indian tribes lack inherent authority, as governmental sovereigns, to exercise criminal jurisdiction over non-Indians.[32] For a number of reasons, the aberrant, deeply flawed interpretive methodology fashioned by the U.S. Supreme Court in *Oliphant* must be rejected and the field of Indian law thereby restored to its pre-*Oliphant* posture broadly supporting tribal sovereignty in the absence of deliberate limiting action by Congress.

It should be noted at the outset that in simultaneously devising and deploying its "unspoken assumption" methodology, the Supreme Court in *Oliphant* appears to concede the novelty of this unprecedented judicial device for ascertaining the effect of sources of positive law on the inherent sovereign authority of Indian tribes. Thus, while admitting that the isolated instances of federal action (and non-action) it analyzes ultimately "would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction,"[33] the Court also inexplicably portrays its denial of tribal authority as simply the product of statutory construction, insisting that the Court "now make[s] express our implicit conclusion of nearly a century ago that Congress believed [preclusion of tribal criminal jurisdiction over non-Indians] to be the necessary result of its repeated legislative action."[34] The Supreme Court's equivocating statements as to whether *Oliphant* is based on statutory construction betrays the Court's own underlying ambivalence about the integrity of its legal reasoning and the credibility of its decision in the face of all the Court's previous countervailing decisions supporting inherent tribal sovereignty.

This ambivalence is understandable, for the Supreme Court's *Oliphant* decision has been sharply criticized as a travesty of judicial lawmaking in disregard of settled, time-honored methodologies of construction in the field of Indian law.[35] The avalanche of criticism unloosed by *Oliphant* has generated numerous compelling analyses by legal scholars carefully explaining, inter alia, why the Court's alleged discernment of an "unspoken assumption," purported to be shared by all three branches of the federal government, that tribes lack inherent criminal jurisdiction over non-Indians is in fact completely without merit. In the present dispute, the Supreme Court ultimately conceded that the sources it relied on in this part of the *Oliphant* opinion "would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction."[36] Because of this concession, and because detailed scholarly critiques of these dubious sources are readily available elsewhere,[37] those detailed analyses need not be repeated here.

For present purposes it is sufficient to observe that in the *Oliphant* Court's invocation of all these dubious sources — selected treaty language, federal criminal jurisdiction statutes silent on tribal jurisdiction, doubtful opinions of attorneys general issued in 1834 and 1856, defeated congressional bills, legislative reports, dictum from an 1878 federal district court opinion, and a withdrawn 1970 opinion of the Solicitor of the Department of the Interior[38] — the Court steadfastly refused to conduct its inquiry

into the alleged impact on tribal authority of these sundry fragments of law (and nonlaw) in accordance with the Indian law canons as derived from the foundational cases of the field. Despite longstanding Indian law principles mandating that tribal powers be judicially upheld in the absence of clear, countermanding legislation or treaty language, the *Oliphant* Court strained to interpret every fragment under its inspection as evincing — "beyond [its] actual text"[39] — an "unspoken assumption" in derogation of Indian tribes' criminal jurisdiction over non-Indians. There simply is no precedent for an interpretive methodology in the field of Indian law that is as hostile to the sovereignty of Indian tribes and as evasive of the field's foundational principles as the methodology devised and employed in *Oliphant.*

The ubiquitous criticisms of *Oliphant*'s interpretive methodology are well founded. The sources relied on by the Court in divining an "unspoken assumption" that tribes lack criminal jurisdiction over non-Indians do not exhibit any clear and unambiguous preclusion of tribes' exercise of criminal jurisdiction over non-Indians, as the foundational principles of Indian law require and as the *Oliphant* Court effectively conceded. There is no evidence, moreover, that the Suquamish Indian Tribe has ever voluntarily relinquished its pre-existing sovereign authority over the criminal behavior of non-Indians within the boundaries of the Port Madison Reservation. The Suquamish Tribe's inherent sovereign authority to try and to punish Respondents Oliphant and Belgarde therefore remains intact.

II. THE SUQUAMISH INDIAN TRIBE'S RETAINED INHERENT SOVEREIGN AUTHORITY TO EXERCISE CRIMINAL JURISDICTION OVER NON-INDIANS WITHIN THE BOUNDARIES OF THE SUQAUMISH RESERVATION IS NOT "IMPLICITLY DIVESTED" BECAUSE THE TRIBE'S EXERCISE OF THIS AUTHORITY DOES NOT THREATEN THE UNITED STATES' TERRITORIAL SECURITY AND HENCE DOES NOT CONFLICT WITH THE "OVERRIDING SOVEREIGNTY OF THE UNITED STATES"

While most of the United States Supreme Court's majority opinion in *Oliphant* endeavors to persuade readers that prohibiting Indian tribes from exercising criminal jurisdiction over non-Indians comports with a historic "unspoken assumption" by the federal government that tribes lack such authority,[40] the Court conceded in Part II of its opinion that this "assumption" *alone* would be insufficient to compel the conclusion that the Suquamish Tribe lacked inherent sovereign power to try and to punish non-Indian criminal defendants like Respondents Oliphant and Belgarde.[41] Rather, the Court stated that this "assumption" merely "carrie[d] considerable weight"[42] in the Court's *independent* determination to effectively impose a *judicial* prohibition of the

Court's own making on tribes' exercise of criminal jurisdiction over non-Indians. As elaborated previously,[43] the Court erred in ascertaining the existence of this purported "unspoken assumption," and hence such "assumption" cannot "carr[y] considerable weight" with respect to any sound and principled judicial inquiry into whether Indian tribes retain inherent sovereign authority to exercise criminal jurisdiction over non-Indians within the tribes' own respective reservations. However, quite apart from the Court's egregiously flawed handling of the issue of congressional intent, it is *Oliphant*'s creation of an unprecedented *judicial* mechanism for curtailing inherent tribal powers in the absence of treaty or statutory limitations that has had the most deleterious impact on longstanding doctrines of Indian law protective of tribal sovereignty and self-government within reservation boundaries.[44] *Oliphant*'s invention and application of this repressive judicial device — which the Court subsequently termed its "implicit divestiture" rationale[45] — derives from demonstrably unsound judicial reasoning and produces a result that is unjust and an affront to longstanding doctrinal traditions of federal Indian law broadly supporting the inherent sovereign powers of Indian nations. The Supreme Court's *Oliphant* decision therefore must be overturned.

In licensing itself to find a diminishment of inherent tribal sovereignty in the absence of treaty or statutory limitations, the U.S. Supreme Court below purported to rely on three decisions of the John Marshall Supreme Court of the early 1800s — *Fletcher v. Peck*,[46] *Johnson v. M'Intosh*,[47] and *Cherokee Nation v. Georgia*.[48] With respect to each of these early cases *Oliphant*'s reliance is misplaced. In *Johnson v. M'Intosh* — a case that forms part of the "Marshall trilogy" of foundational Indian law cases, together with *Cherokee Nation* and *Worcester v. Georgia*[49] — the Court held that the non-Indian plaintiffs' alleged acquisition of title to Indian land through purchase directly from Indian tribes without Congress' legislative authorization is not cognizable in the federal courts.[50] The Court discussed at length the history of relations between Indian tribes and colonizing nations, including the United States, as that history shed light on the issue of the alienability of lands in the possession of the tribes but "discovered" by the colonizing nations.[51] In the Court's view, this history exhibited an operant principle of "discovery" informing relations between Indian tribes and colonizing powers, a principle which "gave the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it."[52] Because each colonizing sovereign had, in the first instance, "the sole right" to purchase tribal lands, citizens or subjects of that sovereign had no "right" to acquire title to such lands without first securing an affirmative grant of such "right" from the "discovering" sovereign. As stated by the Court, the existence of the United States' exclusive power to grant rights to acquire tribal lands "must negative the existence of any right which may conflict with, and control it."[53]

The Supreme Court's decision in *Johnson v. M'Intosh* thus rests primarily on the preclusive effect of the United States government's "discovery"-based title to tribally occupied lands on claims of right under federal law asserted by the putative *purchasers* of those lands. However, the Court's opinion also addresses a collateral preclusion on the federally cognizable rights of the would-be *sellers* of those lands, i.e., the Indian tribes themselves:

> In the establishment of these relations [between the discoverer and the natives], the rights of the original inhabitants were, in no instance, entirely disregarded; but they were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.[54]

In the *M'Intosh* Court's view, the existence of the United States' "discovery"-based title to tribal lands meant that neither the purchase *nor the sale* of tribal lands without affirmative congressional authorization could be acknowledged by the federal courts.[55] As a matter of federal law, then, Indian tribes' "rights to complete sovereignty . . . were necessarily diminished," for the federal government's "discovery"-based title to the tribes' own lands was "incompatible with an absolute and complete title in the Indians."[56]

In its majority opinion in the present dispute, the U.S. Supreme Court distorted and misrepresented the Marshall Court's carefully elaborated reasoning for finding Indian tribes' power to alienate their own lands precluded in *Johnson v. M'Intosh*, erroneously portraying that precedent as authorizing the judiciary to proclaim, on a case-by-case basis, "inherent limitations on tribal powers that stem from their incorporation into the United States."[57] Far from viewing tribes' "incorporation into the United States" as the proper starting-point for determining whether tribal powers continue to exist, *M'Intosh* expressly *denies* that tribes ever had been "incorporated."[58] Wielding this "incorporation" fiction as a subterfuge, the *Oliphant* Court ignored *M'Intosh*'s numerous invocations of positive law as the Marshall Court's true starting-point for ascertaining the preclusive effect of the United States' "discovery"-based title on the sovereign powers of Indian tribes as recognized under federal law.[59] As one commentator aptly has noted, at the hands of the *Oliphant* Court *Johnson v. M'Intosh* "underwent a forced metamorphosis into its opposite," with the Court invoking the

name of that foundational Indian law precedent "to support what it exactly and expressly repudiates."[60]

It should be noted, moreover, that within a decade of issuing its decision in *Johnson v. M'Intosh*, the Marshall Court rendered another, more comprehensive decision concerning the retained inherent sovereignty and federally protected rights of Indian tribes that appears to alter that portion of *M'Intosh*'s rationale which suggested a limitation on the power of tribes to sell their lands. In *Worcester v. Georgia*[61] the Court clarified that the "discovery" principle — a principle "which all [the nations of Europe] would acknowledge, and which should decide *their* respective rights *as between themselves*"[62] — did *not* restrict the rights of the tribes:

> This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; *not one which could annul the previous rights of those who had not agreed to it.* It regulated the right given by discovery among the European discoverers; but *could not affect the rights of those already in possession*, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to the purchaser, but *did not found that right on a denial of the right of the possessor to sell.*[63]

Worcester's clarification concerning the "discovery" principle's limited scope of operation casts considerable additional doubt on the *Oliphant* Court's portrayal of *Johnson v. M'Intosh* as having effected an "inherent limitation[ ] on tribal powers."[64]

Purporting to rely on another influential early decision of the John Marshall Supreme Court, the *Oliphant* majority likewise distorted and misrepresented the 1810 case of *Fletcher v. Peck*.[65] Labeling *Fletcher* as "the first case to reach this Court dealing with the status of Indian tribes," the *Oliphant* Court wrote:

> Mr. Justice Johnson in a separate concurrence summarized the nature of the limitations inherently flowing from the overriding sovereignty of the United States as follows: "[T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves.*"[66]

This asserted reliance on Justice Johnson's commentary in *Fletcher v. Peck* to support *Oliphant*'s denial of tribal criminal jurisdiction over non-Indians exhibits several serious errors of analysis. First, the *Oliphant* Court erred in aggrandizing Justice Johnson's remarks by misleadingly referring to them as constituting a "concurrence." Indeed, Justice Johnson conceded that his viewpoint amounted to a *dissenting* position relative to that of the *Fletcher* Court majority, observing that his commentary on the nature and extent of state property interests in Indian lands (which the *Oliphant* excerpt misrepresents)[67] was a "point on which I *dissent* from the opinion of the court."[68] *Oliphant*'s false labeling of Justice Johnson's remarks in *Fletcher* as a "concurrence" is an especially corrosive error in view of the numerous subsequent instances in which the Supreme Court has repeated that false characterization in purporting to forge a link between its own imposition of judicially created limitations on tribal sovereignty and the early decisions of the John Marshall Court.[69]

A second, more troubling error regarding *Oliphant*'s appropriation of Justice Johnson's opinion in *Fletcher v. Peck* is the Court's inventive distortion of the *substance* of Johnson's commentary. Notwithstanding *Oliphant*'s misleading use of alterations and omissions to posit an out-of-context misrepresentation of Justice Johnson's views, when read in the broader context of his full separate opinion Johnson's reference to "the right of governing every person within [the Indians'] limits except themselves"[70] is revealed to be a statement about the limited nature of *state* power in Indian country, not *tribal* power as falsely depicted by the *Oliphant* majority. A closer, contextual examination of Justice Johnson's commentary thus is crucial for appreciating the egregiousness of the Court's misplaced reliance on that commentary for stripping Indian tribes of their inherent sovereign criminal jurisdiction over non-Indians.

As Justice Johnson explained, his dissenting commentary in *Fletcher v. Peck* concerning the nature and extent of state property interests in tribal lands was put forward to "entertain . . . an opinion different from that which has been delivered by the court."[71] In particular, Justice Johnson dissented from the Court's conclusion that "the nature of the Indian title . . . is not such as to be absolutely repugnant to seisin in fee on the part of the state."[72] Positing that the "[t]he correctness of this opinion will depend on a just view of the state of the Indian nations," Justice Johnson elaborated:

> [I]f the Indian nations be the absolute proprietors of their soil, no other nation can be said to have the same interest in it. What, then, practically, is the interest of the states in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusive of all competitors within certain defined limits. All the restrictions upon the right of soil in the

> Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves. If the interest in Georgia was nothing more than a pre-emptive right, how could that be called a fee-simple, which was nothing more than a power to acquire a fee-simple by purchase, when the proprietors should be pleased to sell? And, if this ever was any thing more than a mere possibility, it certainly was reduced to that state when Georgia ceded, to the United States, by the constitution, both the power of pre-emption and of conquest, retaining for itself only a resulting right dependent on a purchase or conquest to be made by the United States.[73]

There is, admittedly, some ambiguity in Justice Johnson's reference to "the right of governing every person within their limits except themselves."[74] However, when viewed in the broader context of his disagreement with the Court's determination that Georgia had a fee simple ownership interest in Indian lands (albeit an interest encumbered by Indian title), Justice Johnson in this passage most likely was merely suggesting that tribal self-government collaterally limits state power in Indian country, just as Indian title collaterally limits state property interests in Indian lands. This reading is supported by Justice Johnson's prior, parallel assertion that "[w]e legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties formed with them acknowledge them to be an independent people, and the uniform practice of acknowledging their right of soil, by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their right of soil."[75]

The Supreme Court majority in *Oliphant* deliberately obscured this reading, however, by altering the sentence it extracted from Justice Johnson's opinion in *Fletcher v. Peck*, replacing the word "only" with an ellipsis and inserting the phrase "to the United States":

> [T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves.*[76]

This altered version suggests, erroneously (via the Court's insertion of the bracketed phrase "to the United States"), that the sentence addresses *federal* proprietary interests and sovereign authority in Indian country rather than the limited interests and authority of the *states* prior to the establishment of the federal government under the Constitution.[77] Semantically, *Oliphant*'s misleading insertion of the bracketed phrase

"to the United States" in its altered version of Justice Johnson's original sentence tends to strip that sentence of an ambiguity that, viewed in the original, unaltered context of an argument asserting a limitation on states' property interests in Indian lands, is most sensibly resolved by reading the statement as asserting a parallel limitation on the *states'* — not the *tribes'* — governing authority in Indian country. In Justice Johnson's view, it was the sovereignty of the *states* that was necessarily restricted — by reason of the Indian tribes' pre-existing rights of self-government — to "the right of governing everyone in [the Indians'] limits except [the Indians] themselves."[78]

The *Oliphant* Court thus erred in forcing a revised reading of the statement it excerpted and edited from Justice Johnson's separate opinion in *Fletcher v. Peck*, a statement that appears in its original context as part of a broader argument insisting that that the proprietary interests and sovereign governing authority of the states in Indian country are necessarily limited. Invoking its altered rendition of Justice Johnson's position in *Fletcher* therefore lends no legitimate support to the Court's unavailing efforts to harmonize its decision to deprive Indian tribes of criminal jurisdiction over non-Indians with the foundational Indian law decisions of the Marshall Court. Indeed, the Court's *Oliphant* decision is at war with those foundational precedents.

Ironically, this tension between *Oliphant*'s view of tribal sovereignty and that of the Marshall Court is underscored by noting the incompatibility between the deterioration in Justice Johnson's subsequent regard for tribal sovereignty in *Cherokee Nation v. Georgia*[79] — a deterioration not unlike that manifested in *Oliphant* itself — and the increasingly expansive and protective view of tribal sovereignty as articulated by Chief Justice John Marshall in both *Cherokee Nation* and *Worcester v. Georgia*.[80] In his separate opinion in *Cherokee Nation*, Justice Johnson's derogatory view of the sovereignty of Indian nations is abundantly evident. Dismissing tribes as "hunter horde[s]" and as "wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state,"[81] Johnson wrote:

> I cannot but think that there are strong reasons for doubting the applicability of the epithet state, to a people so low in the grade of organized society as our Indian tribes generally are. . . .
>
> . . . .
>
> There is one consequence that would necessarily flow from the recognition of this people as a state, which of itself must operate greatly against its admission.

> Where is the rule to stop? Must every petty kraal of Indians, designating themselves a tribe or a nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state? We would indeed force into the family of nations, a very numerous and very heterogeneous progeny.[82]

Contrasting sharply with Justice Johnson's views, Chief Justice Marshall in *Cherokee Nation* explained that "[s]o much of the [Cherokees'] argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of the majority of the judges, been completely successful."[83] In *Worcester*, the Marshall Court majority went even farther in effectively denouncing the denigrated view of tribal sovereignty pressed by Justice Johnson in *Cherokee Nation*, squarely affirming that "[w]e have applied [the words 'treaty' and 'nation'] to the Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense."[84] These affirmations of tribal sovereignty from the majority of justices in *Cherokee Nation* and *Worcester* demonstrate that to the extent *Oliphant* signals the Court's inclination to embrace Justice Johnson's derogatory view of tribal sovereignty as articulated in *Cherokee Nation*, that judicial choice is entirely at odds with the foundational Indian law decisions of the Marshall Court.

The *Oliphant* Court's reliance on dictum from Chief Justice Marshall's principal opinion in *Cherokee Nation* is likewise flawed. The Court asserted its reliance as follows:

> [I]n *Cherokee Nation v. Georgia* . . . the Chief Justice observed that since Indian tribes are "completely under the sovereignty and dominion of the United States, . . . any attempt [by foreign nations] to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility."[85]

As in its discussion of *Johnson v. M'Intosh*, *Oliphant* here portrays the quoted fragment from *Cherokee Nation* as reflecting another "inherent limitation[ ] on tribal powers stemming from their incorporation into the United States,"[86] presumably recognized as such by the Marshall Court. On closer examination, however, it is apparent that Chief Justice Marshall advanced this observation not to denigrate inherent tribal sovereignty, but simply "to support the opinion, that the framers of the constitution had not the Indian tribes in view, when they opened the courts of the union to controversies between a state . . . and foreign states."[87] In any event, to the extent the fragment *Oliphant* extracts from *Cherokee Nation* reflects a prohibition on the

exercise of inherent tribal powers, in terms of its import that prohibition does not stand apart from the one concerning the alienability of tribal lands, discussed previously. Both are simply aspects of what *Worcester* identifies as "the single exception" to the federal government's acknowledgment of tribes' continuing retention of "their original natural rights"[88] — an exception "imposed by irresistible power"[89] and necessarily implied in the multiple sources of positive law, addressed in *Johnson v. M'Intosh*, that mediated the relationship between Indian tribes and the United States and, earlier, between Indian tribes and Great Britain.[90]

For the Marshall Court this "single exception" to the federal courts' affirmation of Indian tribes' inherent sovereign authority amounted to a preclusion of any exercise of tribal power that undermined or threatened the territorial security of the United States. As Professor David Getches explains, at the time the Marshall decisions were rendered "the possibility that Indians would convey land to foreign nations or subjects formed a palpable threat to the integrity of the young nation."[91] This concern about tribes conveying their lands to foreign nations via international agreements is clearly manifested in the Marshall Court's analysis of the historic sources of law regulating the relationship between tribal nations and "discovering" nations. For instance, in *Worcester*, the Court observed:

> Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances.[92]

The Marshall Court's dictum in *Cherokee Nation*, quoted in *Oliphant*, hence does *not* signify a judicial disparagement of inherent tribal sovereignty, as suggested by the *Oliphant* Court. Rather, that dictum merely reflects the Marshall Court's deference to prohibitions on alliances between tribes and foreign nations based on concerns about national territorial security and emanating from the historical operation of positive law.

The Supreme Court's decision in *Oliphant* to deprive Indian tribes of their inherent sovereign power to exercise criminal jurisdiction over non-Indians thus finds no support in the foundational Indian law decisions of the John Marshall Supreme Court. The Marshall Court decisions simply do not countenance judicial adventurism in independently prohibiting tribes "from exercising . . . those powers [of autonomous states that are] '*inconsistent with their status.*'"[93] Indeed, the Supreme Court has forced a construction of the phrase "inconsistent with their status" that is contrary to the meaning intended by the United States Court of Appeals for the Ninth Circuit in coining the phrase, for the appellate court's citation to particular passages from *Worcester* and *Cherokee Nation*, together with the appellate court's conclusion that

tribes *retain* their inherent sovereign authority to try and to punish non-Indians, make clear that the tribes' dependent status does *not* effect any destruction of the tribes' original sovereign powers.[94] The *Oliphant* Court's insistence that Indian tribes' ability to impose criminal penalties on non-Indians is "inherently lost"[95] because of "the tribes' forfeiture of full sovereignty in return for the protection of the United States"[96] defies the letter, spirit, and clear trajectory of the foundational Indian law decisions as well as the whole course of Indian law jurisprudence predating the *Oliphant* decision itself.[97]

In the final analysis, the U.S. Supreme Court in *Oliphant* opined that Indian tribes are "implicitly divested" of criminal jurisdiction over non-Indians because of the federal government's "great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty."[98] ."By submitting to the overriding sovereignty of the United States," the Court asserted, "Indian tribes . . . necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[99] At the time the *Oliphant* case was litigated, Congress had, of course, enacted the Indian Civil Rights Act (ICRA),[100] thereby instituting numerous substantive protections for criminal defendants like Respondents Oliphant and Belgarde vis-à-vis tribal court proceedings. As Professor Robert Laurence observes, the *Oliphant* Court simply failed to "explain why Suquamish conforming with the ICRA was not precisely the 'manner acceptable to Congress.'"[101] Professor Bruce Duthu elaborates on the unsettling implications of this judicial failure:

> Oliphant's obvious concern for the protection of individual liberty rights fails to consider that Congress may have taken that matter into account when it passed the Indian Civil Rights Act. From this perspective, the Court's interpretive function involved reconsidering legislative intent and reordering the resulting political dynamic — a function outside the traditional role of the judiciary.[102]

More fundamentally, by equating the United States' supposed "great solicitude" in protecting non-Indians from "unwarranted intrusions on their personal liberty" with "[p]rotection of territory within [the United States'] external boundaries,"[103] the *Oliphant* Court effectively subverted *Worcester*'s teaching that there exists but a "single exception" to federal acknowledgment of tribes' retention of their original inherent sovereignty.[104] In so doing, "the Court reopened a category of diminished tribal authority that had been thought closed forever by the Marshall Court."[105] Notwithstanding *Oliphant*'s invocation of its supposed "great solicitude" rationale, the Court's defiance of the foundational principles of Indian law in stripping tribes of their inherent criminal jurisdiction over non-Indians clearly lacks persuasive justification. As Professor Getches points out,

> The potential for individual violations of civil liberties by tribes was not then [in Chief Justice John Marshall's time] and is not now a similar threat to national security [compared with the possibility that Indians would convey land to foreign nations or subjects]. Furthermore, the suggestion that tribal exercise of criminal jurisdiction will subject non-Indian defendants to unfair process is unsupported by the facts.[106]

In theory, of course, the notion that the judiciary is precluded from acknowledging exercises of tribal authority that conflict with "the overriding sovereignty of the United States"[107] might be regarded as merely the modern-day equivalent of the Marshall Court's view that courts are precluded from acknowledging exercises of tribal power that jeopardize the United States' national territorial security — a contemporary restatement of "the single exception" to the courts' plenary recognition and protection of tribes' original sovereign powers, as noted in *Worcester*.[108] A sound and principled judicial analysis of the issue of tribal authority in the present dispute thus would conclude that the Suquamish Indian Tribe's exercise of criminal jurisdiction (as delimited by the Indian Civil Rights Act) over non-Indians like Respondents Oliphant and Belgarde does not conflict with the United States' "overriding sovereignty" precisely because (1) Congress has not expressly prohibited tribes from exercising such authority and (2) tribes' exercise of this authority does not threaten the national territorial security of the United States. Unfortunately, the U.S. Supreme Court's *Oliphant* decision demonstrates that the "overriding sovereignty" rubric in fact is vulnerable to judicial abuse; for in *Oliphant* itself the Court wielded that rubric in an aggressive manner never before contemplated by the federal judiciary, defying longstanding foundational principles of federal Indian law protective of tribes' original sovereign powers. Far from exhibiting consistency with prior Supreme Court jurisprudence protective of tribal powers, "*Oliphant* is perhaps the most dangerous threat to tribal sovereignty of the [Court's] recent cases, as it completely distorts the logic of tribal sovereignty."[109]

Because the Suquamish Tribe's exercise of criminal jurisdiction over Respondents Oliphant and Belgarde is not in conflict with "the overriding sovereignty of the United States"[110] as properly understood in view of the foundational principles of Indian law, the Supreme Court of the American Indian Nations should uphold the Tribe's sovereign authority by reversing the United States Supreme Court's contrary ruling below. As a result of *Oliphant* and the subsequent Supreme Court cases decided under its influence,[111] "[t]he ongoing colonization of the continent now includes a judicial role . . . , adjudicating the depreciated status of tribal authority on a case-by-case basis."[112] Overturning the Supreme Court's *Oliphant* decision is the necessary

first step in the long journey toward restoring honor, respect, and trust to the historic and ongoing relationship between Indian tribes and the United States government.

CONCLUSION

For the foregoing reasons, the Suquamish Indian Tribe requests that the Supreme Court of the American Indian Nations reverse the decision of the United States Supreme Court, below, and thereby restore plenary federal recognition of Indian tribes' inherent sovereign power to exercise criminal jurisdiction over non-Indians.

Respectfully submitted,

John P. LaVelle
Counsel for Petitioner

Notes

* Professor of Law, University of New Mexico School of Law. J.D. Boalt Hall School of Law; A.B. Harvard University. Member of the Santee Sioux Nation.

1. Oliphant v. Schlie, 544 F.2d 1007, 1012-13 (9th Cir. 1976).
2. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194-95 (1978).
3. *Id.* at 212.
4. *Id.* at 206-08.
5. *Id.* at 210.
6. *E.g.* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). *See generally* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001).
7. United States v. Wheeler, 435 U.S. 313, 326 (1978).
8. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 203 (1978).
9. *Id.* at 210.
10. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 231 (1982 ed.) (quoting *Wheeler*, 435 U.S. at 322-23 (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945)) (internal quotation marks and Cohen's original emphasis omitted).
11. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945 ed.).
12. *Id.* (emphasis added).
13. 30 U.S. (5 Pet.) 1 (1831).
14. U.S. CONST. art. III, § 2, *quoted in Cherokee Nation*, 30 U.S. (5 Pet.) at 15 (principal opinion of

Marshall, C.J.).

15. *Cherokee Nation*, 30 U.S. (5 Pet.) at 16-18 (principal opinion of Marshall, C.J.) (emphasis added).
16. 31 U.S. (6. Pet.) 515 (1832).
17. *Id.* at 559-60.
18. *Id.* at 561.
19. *Id.* at 552.
20. *Id.* at 551-52 (discussing Treaty of Hopewell, Nov. 28, 1785, art. III, 7 Stat. 18).
21. *Id.* at 552 (emphasis added).
22. Treaty of Hopewell, Nov. 28, 1785, art. IV, 7 Stat. 18.
23. *See Worcester*, 31 U.S. (6 Pet.) at 552-53.
24. *Id.*
25. Treaty of Hopewell, Nov. 28, 1785, art. IX, 7 Stat. 18.
26. *Worcester*, 31 U.S. (6 Pet.) at 553-54 (quoting Treaty of Hopewell, Nov. 28, 1785, art. IX, 7 Stat. 18).
27. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196, 200 (1999); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1979); United States v. Winans, 198 U.S. 371, 380-81 (1905).
28. *Mille Lacs*, 526 U.S. at 200; *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 675-76; Choctaw Nation v. United States, 318 U.S. 423, 432 (1943).
29. *Mille Lacs*, 526 U.S. at 200; McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973); Winters v. United States, 207 U.S. 564, 576-77 (1908).
30. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980); *see also, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59-60 (1978) (in construing provisions of federal Indian law "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that [courts] tread lightly in the absence of clear indications of legislative intent"); *cf., e.g.*, Mille Lacs, 526 U.S. at 202 ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 224 (1982 ed.) ("Once powers of tribal self-government or other Indian rights are shown to exist, by treaty or otherwise, later federal action which might arguably abridge them is construed narrowly in favor of retaining Indian rights.").
31. Bryan v. Itasca County, 426 U.S. 373, 389 n.14 (1976) (quoting Santa Rosa Band v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975)) (internal quotation marks omitted).
32. *Oliphant*, 435 U.S. at 191.
33. *Id.* at 208; *see also infra* discussion at Part II.
34. *Id.* at 204; *see also* Nat'l Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 853-54 (1985) (stating that *Oliphant*'s "holding . . . concluded that federal legislation conferring jurisdiction on the federal courts to try non-Indians for offenses committed in Indian Country had implicitly pre-empted tribal jurisdiction").
35. *See, e.g.*, Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 214 (2002) (noting that the *Oliphant* Court "engaged in an inventive process of judicial historical revisionism to suggest that Indian tribes were never understood to exercise criminal jurisdiction over non-Indians"); Peter C. Maxfield, Oliphant v. Suquamish Tribe: *The Whole is Greater Than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 396 (1993) ("[T]he justification that the

[*Oliphant*] Court used to reach its result can only be characterized as reprehensible."); Catherine Baker Stetson, *Decriminalizing Tribal Codes: A Response to* Oliphant, 9 AM. INDIAN L. REV. 51, 54 (1981) ("[Justice Rehnquist's] misuse of precedent and other authority, his failure to apply traditional canons of construction, his false assumptions and poor arguments have served as fertile ground for criticism."); Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 Minn. L. Rev. 609, 637 (1979) ("The ultimate danger of *Oliphant* is . . . to the entire judicial system. A judicial system cannot long maintain its authority when its written opinions appear insincere, or the product of distortion, unreason, or sloppiness.").

36. *Oliphant*, 435 U.S. at 208; *see also infra* discussion at Part II.
37. *E.g.*, Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1, 11-15 (1995); *see also supra* note 35 and accompanying text.
38. *See Oliphant*, 435 U.S. at 197-206.
39. *Id.* at 206
40. *See id.* at 195-206.
41. *See id.* at 206 (noting that a presumptive lack of tribal criminal jurisdiction over non-Indians is "not conclusive on the issue before us").
42. *Id.*
43. *See supra* discussion at Part I.
44. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353 (2001) (extending prior reliance on *Oliphant* to judicially prohibit tribal court from adjudicating tribal and federal causes of action against state officials accused of violating tribal member's civil rights and damaging his property while searching tribal member's land within reservation boundaries for evidence of alleged off-reservation crime); Strate v. A-1 Contractors, 520 U.S. 438 (1997) (extending prior reliance on *Oliphant* to judicially prohibit tribal court from adjudicating tribal tort case arising from non-Indians' conduct on state's federally granted right-of-way across tribal trust lands within reservation boundaries); Montana v. United States, 450 U.S. 544 (1981) (relying on *Oliphant* to judicially prohibit tribe from regulating non-Indian fishing and hunting on non-Indian fee lands within reservation boundaries).
45. United States v. Wheeler, 435 U.S. 313, 326 (1978).
46. 10 U.S. (6 Cranch) 87 (1810).
47. 21 U.S. (8 Wheat.) 543 (1823).
48. 30 U.S. (5 Pet.) 1 (1831); *see Oliphant*, 435 U.S. at 209-10.
49. 31 U.S. (6 Pet.) 515 (1832).
50. *M'Intosh*, 21 U.S. (8 Wheat.) at 604-05 (concluding that "the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States").
51. *See id.* at 572-88.
52. *Id.* at 573.
53. *Id.* at 588.
54. *Id.* at 574.
55. *See* Lindsay G. Robertson, Johnson v. M'Intosh *Reargument: Case No. 99-1 In the Supreme Court of the American Indian Nations, 1999 Term*, 9 KAN. J.L. & PUB. POL'Y 852, 859-60 (2000) (brief for the appellants) (noting that a preclusion of individuals' "legal right to purchase Indian lands" as well as a preclusion of tribes' right to sell their lands absent congressional consent were the two

consequences that followed from the *M'Intosh* Court's analysis of the preemptive effect of the United States' asserted "discovery"-based title).

56. *M'Intosh*, 21 U.S. (8 Wheat.) at 574, 588.
57. *Oliphant*, 435 U.S. at 209.
58. *See M'Intosh*, 21 U.S. (8 Wheat.) at 589-90 (observing that while "[m]ost usually" colonized peoples "are incorporated with the victorious nation," with respect to "the tribes of Indians inhabiting this country" the usual process of conquest and incorporation "was incapable of application," requiring "resort to some new and different rule, better adapted to the actual state of things"); *see also* Milner S. Ball, *John Marshall and Indian Nations in the Beginning and Now*, 33 J. MARSHALL L. REV. 1183, 1188-89 (2000) (quoting *M'Intosh*, 21 U.S. (8 Wheat.) at 590) ("Tribal members [according to *M'Intosh*] could not be incorporated into the settlers' government. Indians were 'high-spirited' and 'fierce.' They had not been conquered, and they would not mingle. They were 'a people with whom it was impossible to mix.'").
59. *See, e.g.*, *M'Intosh*, 21 U.S. (8 Wheat.) at 580 (royal charters granting land title in the British colonies conveyed proprietary interest inconsistent with unrestricted tribal power to alienate property); *id.* at 583-84 (1763 treaty in which Great Britain ceded lands to France implied preclusion of tribal power to reconvey portion of the ceded lands to Great Britain); *id.* at 604 (acts of American colonial assemblies prohibiting land purchases from the Indians evince national policy of non-alienability of Indian lands).
60. Ball, *supra* note 58, at 1189.
61. 31 U.S. (6 Pet.) 515 (1832).
62. *Id.* at 543 (emphases added).
63. *Id.* at 544 (emphases added); *cf.* Dean B. Suagee, *The Supreme Court's "Whack-a-Mole" Game Theory in Federal Indian Law, a Theory that Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RES. J. 90, 116 (2002) ("A close reading of [*Johnson v. M'Intosh*] shows that the doctrine of discovery was a mutually accepted rule that was established for the primary purpose of defining the rights of the European sovereigns vis-à-vis each other, rather than for the purpose of limiting the rights of Indian tribes.").
64. *Oliphant*, 435 U.S. at 209; *see also* N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353, 371 (1994) (noting that "Marshall in no place indicates that [*M'Intosh*'s] limitation on tribal power stemmed from qualities or characteristics inherent to tribes").
65. 10 U.S. (6 Cranch) 87 (1810).
66. *Oliphant*, 435 U.S. at 209 (quoting *Fletcher*, 10 U.S. (6 Cranch) at 147 (opinion of Johnson, J.)) (alterations and emphasis added by the *Oliphant* Court).
67. *See infra* discussion at notes 70-78 and accompanying text.
68. *Fletcher*, 10 U.S. (6 Cranch) at 145-46 (opinion of Johnson, J.) (emphasis added).
69. *E.g.* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 650 (2001); Montana v. United States, 450 U.S. 544, 565 (1981); *see also* Nevada v. Hicks, 533 U.S. 353, 376 (2001) (Souter, J., concurring) (quoting from *Oliphant*'s misrepresentation of Justice Johnson's remarks in *Fletcher* without indicating that these remarks are part of a separate minority opinion, thereby lending the false impression that these remarks are part of the Court's majority opinion in *Fletcher*).
70. *Fletcher*, 10 U.S. (6 Cranch) at 147 (opinion of Johnson, J.).

71. *Id.* at 143 (opinion of Johnson, J.).
72. *Id.* at 142-43 (majority opinion); *see id.* at 146 (opinion of Johnson, J.) ("[T]o me it appears that the facts in the case are sufficient to support the opinion that the state of Georgia had not a *fee-simple* in the land in question. . . . To me it appears that the interests of Georgia in that land amounted to nothing more than a mere possibility, and that her conveyance thereof could operate legally only as a covenant to convey or to stand seised to a use.").
73. *Id.* at 147 (opinion of Johnson, J.).
74. *Id.* (opinion of Johnson, J.).
75. *Id.* at 146-47 (opinion of Johnson, J.) *cf.* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542 (1832) (noting that Georgia's legislative acts amounted to an assertion of territorial jurisdiction over the Cherokee Nation because "[t]he extra-territorial power of every legislature [is] limited in its action, to its own citizens or subjects").
76. *Oliphant*, 435 U.S. at 209 (quoting *Fletcher*, 10 U.S. (6 Cranch) at 147 (opinion of Johnson, J.)) (alterations and emphasis added by the *Oliphant* Court).
77. *See Fletcher*, 10 U.S. (6 Cranch) at 147 (opinion of Johnson, J.) (noting that if the states' original, pre-constitutional interest in Indian lands (as described in the unaltered, original version of the sentence at issue) "ever was any thing more than a mere possibility, it certainly was reduced to that state when Georgia ceded, to the United States, by the constitution, both the power of pre-emption and of conquest, retaining for itself only a resulting right dependent on a purchase or conquest to be made by the United States"); *see supra* note 73 and accompanying text.
78. *Fletcher*, 10 U.S. (6 Cranch) at 147 (opinion of Johnson, J.); *see supra* note 73 and accompanying text.
79. 30 U.S. (5 Pet.) 1 (1831).
80. 31 U.S. (6 Pet.) 515 (1832).
81. *Cherokee Nation*, 30 U.S. (5 Pet.) at 27-28 (Johnson, J., concurring).
82. *Id.* at 21, 25 (Johnson, J., concurring).
83. *Id.* at 16 (principal opinion of Marshall, C.J.).
84. *Worcester*, 31 U.S. (6 Pet.) at 559-60.
85. *Oliphant*, 435 U.S. at 209 (quoting *Cherokee Nation*, 30 U.S. at 17-18 (principal opinion of Marshall, C.J.)) (second omission and second alteration made by the *Oliphant* Court).
86. *Id.*
87. *Cherokee Nation*, 30 U.S. at 18 (principal opinion of Marshall, C.J.).
88. *Worcester*, 31 U.S. (6 Pet.) at 559.
89. *Id.*
90. *See supra* discussion at notes 49-64 and accompanying text.
91. David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1597 (1996).
92. 31 U.S. (6 Pet.) at 547.
93. *Oliphant*, 435 U.S. at 208 (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976) (appellate court decision below)) (emphasis added by the U.S. Supreme Court).
94. *See, e.g., Worcester*, 31 U.S. (6 Pet.) at 560-61, *cited in Oliphant v. Schlie*, 544 F.2d at 1009 (emphasis added) ("[T]he 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.").

95. *Oliphant*, 435 U.S. at 209.
96. *Id.* at 211.
97. *Cf., e.g., Worcester*, 31 U.S. (6 Pet.) at 552 (emphasis added) ("Protection does *not* imply the destruction of the protected.").
98. *Oliphant*, 435 U.S. at 210.
99. *Id.*
100. 25 U.S.C. §§ 1301-1303.
101. Robert Laurence, *Symmetry and Asymmetry in Federal Indian Law*, 42 ARIZ. L. REV. 861, 904 (2000) (quoting *Oliphant*, 435 U.S. at 210).
102. Duthu, *supra* note 64, at 381.
103. *Oliphant*, 435 U.S. at 209-10.
104. *Worcester*, 31 U.S. (6 Pet.) at 559.
105. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 36 (1999).
106. Getches, *supra* note 91, at 1597 (1996); *see also* Maxfield, *supra* note 35, at 400 (questioning *Oliphant*'s "great solicitude" rationale by noting that "[i]n fact, the Constitution did not protect citizens from unwarranted intrusions on their personal liberty by state criminal courts until [ratification of the Fourteenth Amendment in] 1868").
107. *Oliphant*, 435 U.S. at 210.
108. *See* 31 U.S. (6 Pet.) at 559.
109. Anthony G. Gulig & Sidney L. Haring, *"An Indian Cannot Get a Morsel of Pork . . . .": A Retrospective on* Crow Dog, Lone Wolf, Blackbird, *Tribal Sovereignty, Indian Land, and Writing Indian Legal History*, 38 TULSA L. REV. 87 108-09 (2002); *see also* Duthu, *supra* note 64, at 353 ("The Court [in its treatment of tribal powers beginning with *Oliphant*] has substantially diluted the theory and substance of tribal sovereignty formulated in the early days of the republic.").
110. *Oliphant*, 435 U.S. at 210.
111. *E.g.* Nevada v. Hicks, 533 U.S. 353 (2001); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 650 (2001); Strate v. A-1 Contractors, 520 U.S. 438 (1997); Duro v. Reina, 495 U.S. 676 (1990) (overturned by 25 U.S.C.§ 1301(2) and (4); South Dakota v. Bourland, 508 U.S. 679 (1993); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989); Montana v. United States, 450 U.S. 544 (1981).
112. Frickey, *supra* note 105, at 37.