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Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law through the Lens of Lone Wolf

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DOCTRINE, CONTEXT, INSTITUTIONAL RELATIONSHIPS, AND COMMENTARY: THE MALAISE OF FEDERAL INDIAN LAW THROUGH THE LENS OF *LONE WOLF*

Philip P. Frickey*

I. INTRODUCTION: *DRED* AGAIN?[1]

Lone Wolf v. Hitchcock[2] has been called "the Indians' *Dred Scott* decision."[3] *Dred Scott* is notorious because of its racism—its inhuman conceptualization of African-Americans—and because of its troubling aftermath—it greased the slide into the Civil War. *Lone Wolf* is similarly shocking. It, too, reeks of racism—its treatment of Indians as subjugated, backward peoples under the unconstrained rule of Congress—and had a troubling aftermath—the breakup of many Indian reservations, the disintegration of many tribal governments, and the forced assimilation of many Indians.

Most educated Americans have heard of *Dred Scott.* In contrast, only a small segment even of the American legal community is aware of *Lone Wolf.* Of course, this is why the comparison of *Lone Wolf* and *Dred Scott* is crafted the way it is, and not the other way around. Although the comparable substance of *Lone Wolf* and *Dred Scott* belie the common belief that federal Indian law involves impenetrably dull and unimportant issues, the contrasting notoriety of the two decisions reinforces the status of the field as a backwater of public law.[4]

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1. With apologies to Chris Eisgruber. *See* Christopher L. Eisgruber, Dred *Again: Originalism's Forgotten Past*, 10 Constitutional Commentary 37 (1993).

2. 187 U.S. 553 (1903).

3. *See Sioux Nation of Indians v. U.S.*, 601 F.2d 1157, 1173 (Ct. Cl. 1979) (Nichols, J., concurring) ("The day *Lone Wolf* was handed down, January 5, 1903, might be called one of the blackest days in the history of the American Indian, the Indians' *Dred Scott* decision"), *aff'd, sub nom. U.S. v. Sioux Nation of Indians*, 448 U.S. 371 (1980); Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 Ga. L. Rev. 481, 484 (1994). The reference is, of course, to *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

4. One of the goals of my work is to suggest that "[f]ederal Indian law does not deserve its image as a tiny backwater of law inhabited by impenetrably complex and dull issues." Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 383 (1993).

The Supreme Court in *Lone Wolf* attributed to Congress a "plenary authority"[5] over Indian affairs, including the capacity to break Indian treaties at its discretion. In the treaty in question, the federal government had promised that no further tribal land cessions would occur without the approval of a supermajority of the tribe.[6] Congress ignored this provision and enacted a statute mandating the allotment of the Indian reservation.[7] The Court refused to entertain any complaint about this treatment,[8] thereby solidifying the allotment program as a cornerstone of federal Indian policy. Allotment remained the dominant federal policy until it was formally abandoned in the Indian Reorganization Act of 1934 ("IRA").[9]

Allotment attacked Indian tribalism root and branch.[10] In the allotment statutes, the federal government unilaterally took tribal land and redistributed it in parcels ("allotments") to be held in trust for a term of years by the federal government for the benefit of tribal members.[11] "Surplus" lands left over became available for non-Indian settlement.[12] The notion was that Indians should be forced to leave their collective landholdings and homogeneous communal life. During the period in which the allotments were in trust status, Indians were to be groomed to become fee simple agriculturalists—yeoman farmers and ranchers of Jeffersonian lore, small-time capitalists with individual stakes in the American system. The assumption was that eventually the descendants of Indians and non-Indian settlers would mix freely in a western melting pot.[13] Theodore Roosevelt called allotment "a mighty pulverizing machine to break up the tribal mass. It acts directly upon the family and the individual."[14] My colleague Joe Sax has put it more bluntly: "allotment was ethnic cleansing by eminent domain."[15]

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5. 187 U.S. at 565 ("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.").

6. *See id.* at 564.

7. *See id.* at 568.

8. *Id.* ("as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation").

9. *See Indian Reorganization Act*, 48 Stat. 984 (1934) (codified as amended 25 U.S.C. §§ 461-479 (2000)).

10. *See* Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1 (1995) (providing a description of the allotment process and a thorough examination of its contemporary consequences).

11. *See e.g.* Janet A. McDonnell, *The Dispossession of the American Indian, 1887-1934*, at 6-7 (Ind. U. Press 1991).

12. *See id.* at 7.

13. *See id.* at 6-8.

14. Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* 19 (Yale U. Press 1987) (quoting S. Lyman Tyler, *A History of Indian Policy* 104 (Bureau of Indian Affairs 1973)).

15. Professor Sax made this remark when commenting on a draft of one of my earlier articles on federal Indian law. In referring to "eminent domain," even this comment is optimistic. It was not until 1980, in the *Sioux Nation* decision discussed in the text *infra*, that the Supreme Court confirmed that Congress could not confiscate tribal property without triggering the just-compensation requirement of the Fifth Amendment's Takings Clause. *See* text accompanying *infra* notes 46-49. In *Lone Wolf*, Congress had provided the tribe with some money for the surplus lands made available for non-Indian

During the allotment era, Indians lost seventy percent of their lands.[16] Some of this land had been declared surplus and homesteaded by non-Indians, but much of it was lost by even more unattractive means. When the allotments ripened into fee simple, they became targets for opportunistic (and often fraudulent) non-Indian land acquirers. Other parcels that became fee simple lands went through tax foreclosures by local governments.

As noted, Congress did put a stop to further allotments by enacting the IRA and decreeing that the parcels that remained in allotment format would stay in trust in perpetuity.[17] Congress did not attempt to undo other ongoing problems with the program, however. Allotment has remained a cancer upon the landscape of many reservations. Many allotted reservations have ended up today with a dysfunctional checkerboard pattern of land ownership, with fee simple land (often owned by nonmembers) scattered among Indian allotments and tribal land.[18] Many of the parcels that have remained in the allotment format have passed by intestate succession over the generations, so that now they are owned in fractional shares by a multitude of persons. Over time, the management of such allotments has, as a practical and statutory matter, become the domain of the federal government, with the fractional owners receiving an occasional small check as the only practical reminder of a program that was supposed to empower their ancestors to become fee simple owners of the American dream.[19]

The story of allotment vividly documents that *Lone Wolf* has two key facets. First, it concerns the attribution of a dangerous, unchecked power to Congress, authority that seems inconsistent with the rule of law. Second, it involved the use of that power for misbegotten purposes with disastrous consequences.

Dred Scott controlled American race relations for only a brief period. Of course I do not mean to suggest that the Civil War and the Reconstruction Amendments have solved America's racial dilemma. My point is that, doctrinally, no precedent is more derelict than *Dred Scott.* Moreover, when our legal system is faulted for current dilemmas in race relations, the finger should be pointed not at *Dred Scott* so much as at the failure to provide meaningful implementation to the Reconstruction Amendments that relegated it to the dustbin.

Lone Wolf's story is more complicated. Its doctrinal embrace of colonialism and its contextual aftermath—the ongoing devastations wrought by allotment—continue to haunt federal Indian law and contribute to the sense that the field

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settlement. *Lone Wolf* left unclear whether this compensation was a mere gratuity, and there was no inquiry whether the payment was sufficiently adequate to constitute the "just compensation" required by the Fifth Amendment.

16. *See e.g. Felix S. Cohen's Handbook of Federal Indian Law* 138 (Rennard Strickland et al. eds., Michie Co. 1982).

17. McDonnell, *supra* n. 11, at 115, 121.

18. *Id.* at 121.

19. *See Babbit v. Youpee*, 519 U.S. 234 (1997) (striking down congressional statute that recognized this problem and attempted to ameliorate it by providing that small fractional shares in allotments escheat to the tribe).

remains perhaps the most dismal of all areas routinely visited by the Supreme Court.[20] Unlike *Dred Scott*, *Lone Wolf* provoked no constitutional amendment reconstructing the federal policy on Indian affairs. Instead of such higher lawmaking, a subtler shift in federal institutional responsibility has slowly occurred.

In recent years, as explained below, the Supreme Court has attempted to ameliorate some of *Lone Wolf*'s doctrinal harshness. Had that been the extent of it, the developments might have been an unalloyed progressive development in federal Indian law. Unfortunately, the Court's entry into the field has not been limited to providing review to congressional intrusions upon tribes. Instead, the Court has gradually undertaken a broader role.[21] It has been displacing the primary congressional responsibility for Indian affairs with a judicial attempt to address contemporary contextual dilemmas in federal Indian law on a case-by-case basis. As I have argued elsewhere[22] and will elaborate further below, the Court has performed this role quite poorly in recent years. It has produced incoherent doctrinal compromises, jettisoned the longstanding institutional understandings in the field in favor of an ill-defined judicial role, and destroyed practical incentives for congressional and negotiated solutions to the myriad of invariably differentiated local problems of tribal relations with states, local governments, and nonmembers. Rather than moving the field toward sounder structural, normative, and practical moorings, the Court has left the law in a mess, done little to promote effective solutions to practical problems, and been more normatively concerned about undermining tribal authority to protect nonmembers than about promoting a viable framework for tribal flourishing in the twenty-first century.

In this essay, I use *Lone Wolf* as a window on these developments. This symposium provides me the opportunity to reflect upon my scholarship as it may illuminate *Lone Wolf* and the century of federal Indian law following it. In Part II, I identify four objections to federal Indian law. Part III ties them to *Lone Wolf* and the Court's role in the aftermath of that opinion. Part IV suggests some conclusions that may follow from using these vantage points to examine federal Indian law within the broader public law.

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20. To reiterate my view of the subject:

> If the "life of the law" for legal formalists is logic and for legal pragmatists is experience, then federal Indian law is for neither. More than any other field of public law, federal Indian law is characterized by doctrinal incoherence and doleful incidents. Its principles aggregate into competing clusters of inconsistent norms, and its practical effect has been to legitimate the colonization of this continent—the displacement of its native peoples—by the descendants of Europeans.

Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 Harv. L. Rev. 1754, 1754 (1997) (footnotes omitted).

21. *See* 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, 17 (1999).

22. *See id.*

II. FOUR OBJECTIONS TO FEDERAL INDIAN LAW

A. Normative and Substantive Problems

The first and most fundamental objection is normative and substantive. Put simply and straightforwardly, federal Indian law concerns the legal doctrines developed by colonizing Anglo-Americans to accomplish the involuntary displacement of the indigenous peoples of this continent. It involves a set of legal rules developed not only to rationalize colonialism, but also to legitimate it.[23] These doctrines are contrary to the basic assumptions of our common law tradition, which forbid nonconsensual deprivations of the fundamental interests of those who have not through their fault contributed to the problems of others.

One way to imagine this inconsistency is to see federal Indian law and the general federal public law as "layers of law," the latter constructed on top of the former. Above the surface, where the general legal community operates, many of us congratulate ourselves on creating a society with a Constitution that serves as a model throughout the world by protecting individual autonomy from government overreaching and by fostering a democratic resolution of social conflict. On the surface, most of us believe—or would at least very much like to believe—that we live in a society that generally respects the rule of law. Below the surface exists federal Indian law, a set of doctrines imposed upon indigenous peoples to displace them unilaterally, without fundamental legal protection for their *ex ante* interests and without their meaningful participation in a democratic process. It is a nice question whether the attractive "above the line" legal system could have been constructed without the ugly layer underneath. Whatever might have been, it was done the way it was done, and the underlying layer is so deeply rooted as to be virtually invisible to both the general population and the larger legal community.

B. Practical Problems

Second is a practical objection. A common lament is that federal Indian law is riddled with doctrinal inconsistency.[24] Even Supreme Court Justices sometimes admit that the law is a mess.[25] The few people who attempt to understand it are

23. *See* text accompanying *infra* notes 70-75.

24. For example, one recent summary quotes one scholar after another complaining that, "'[m]ore than any other field of public law, federal Indian law is characterized by doctrinal incoherence,'" that the Court has taken a "'bifurcated, if not fully schizophrenic, approach to tribal sovereignty,'" that the Court has created "'an almost daunting set of inconsistencies,'" and even that the Court's work has been "'a rudderless exercise in judicial subjectivism.'" Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 U. Dayton L. Rev. 437, 439-40 (1998) (footnotes omitted).

25. *See e.g. Nev. v. Hicks*, 533 U.S. 353, 376 (2001) (Souter, Kennedy & Thomas, JJ., concurring) ("Petitioners are certainly correct that '[t]ribal adjudicatory jurisdiction over nonmembers is . . . ill-defined,' since this Court's own pronouncements on the issue have pointed in seemingly opposite directions.").

often left in a muddled state. Tribal, federal, and state officials frequently have little idea what the legal answer is to common practical problems.

Illustratively, some years ago I participated in a continuing legal education program on federal Indian law. An attorney for the state of Minnesota provided a wonderful example of this confusion and its practical effects. She mentioned that she had been asked whether a county could apply its licensing and inspection laws to a day-care facility operating on an Indian reservation in the county. A woman ran the center in her own home. She was a member of the tribe, but her husband was not. They owned the home on fee simple land on the reservation, a result of the allotment process. Some of the children involved were tribal members, while some were not. The attorney reported to the assembled audience that, based on the current state of the law, she had no idea whether the county or the tribe had regulatory authority.[26] As a practical matter, the county and the tribe both decided to regulate. Rather than indulge in the costs of litigation, the woman ultimately acquiesced in having two licenses, one from the county and one from the tribe, and two sets of regulators periodically visiting her home. Obviously, this is regulatory nonsense as a doctrinal and functional matter, which practical people can only respond to by getting on with their lives as best they can.

C. *Institutional Problems*

Third is an institutional objection. In *Lone Wolf*, the Court ceded Congress a plenary power over Indian affairs. As a practical matter, however, these days it is the Supreme Court, not Congress, that, on a case-by-case basis, is constantly readjusting the relations of the federal government, the states, tribes and their members, and nontribal people who live in Indian country.[27] The Court's performance in Indian law has been subjected to withering criticism.[28] Much of this has related to the first two objections: the Court is more enthusiastic about current colonial impulses than tribally sensitive commentators would like, and the Court has not successfully managed the doctrinal aspects of federal Indian law, leaving it in a state of incoherence. But there is another problem as well, rooted in comparative institutional competence.

Congress has the capacity to operate on a local basis, attempting to find ways to work with individual tribes, and with the states and counties that include their reservations, to reach practical, functional resolutions of problems. Indeed, in the ideal situation, the tribes and their state and county counterparts could negotiate practical solutions on the ground without any federal involvement at all. In

26. At the time of the program, the primary precedent was *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Even for federal Indian law, *Brendale* is a remarkably muddled decision because the Court split into three nonmajority factions of four, three, and two Justices each. The results in the case were governed by the swing votes of the two Justices, Stevens and O'Connor, who concurred only in the judgments.

27. *See* Frickey, *supra* n. 21.

28. *See e.g.* 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); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 Am. U. L. Rev. 1177 (2001).

contrast, the Court generally resolves cases based on universal principles, imposing one-size-fits-all "solutions" to problems that have a myriad of local wrinkles. The supposed neutrality and generality of the rule of law are among its most important beneficial aspects to our legal system as a whole, for they can at least sometimes protect less powerful interests against selective abuse by restraining the discretion of decisionmakers. In federal Indian law, however, especially in recent years, the Court has not only failed to perform a checking function upon congressional and state intrusions upon tribes, the Court has itself enthusiastically imposed colonizing doctrines that undercut what remains of tribal self-government.[29] The Court has lost a sense that it is a guardian of tribal interests as against congressional and state encroaching.[30] Instead, the Court has brought a variety of non-Indian-law values into play from the general public law and is in the process of flattening the unique, tribal-protective aspects of federal Indian law by harmonizing the field with more generally applicable principles.[31]

Decisional law is supposedly principled; negotiated outcomes by sovereigns are inherently political. From an institutional standpoint, these days, at least, federal Indian law is an area where the political seems preferable to the principled.[32]

D. Academic Problems

Fourth, and certainly the most myopic and parochial, is an academic objection. With federal Indian law in such a doleful state, commentators are hard-pressed to make a meaningful contribution, or even to be energized to attempt to do so. The law may be so fundamentally incoherent that sheer conceptual reasoning and reformist proposals have little practical value. Moreover, reformist rhetoric in support of tribes has a quixotic quality in the context of the current Supreme Court.[33] Furthermore, proposals for incremental doctrinal reform have the uncomfortable quality of implicitly accepting much of the doctrinal status quo.[34] Most academics are much less qualified and not well situated to promote what often seem to be the best outcomes, which are hands-on, practical negotiated solutions on a localized basis.

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29. *See* Frickey, *supra* n. 21, at 6.

30. Whether the Court ever performed this role well is subject to debate. *See* Wilkinson, *supra* n. 14 (presenting the optimistic view); Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 Am. B. Found. Res. J. 1, 115 (1987) (presenting the pessimistic perspective).

31. *See* Frickey, *supra* n. 21, at 7; *see generally* Getches, *supra* n. 28.

32. *See generally* Frickey, *supra* n. 20.

33. As David Getches has demonstrated, the tribes have lost over three-fourths of their cases in the Rehnquist Court. *See* Getches, *supra* n. 28, at 280.

34. *See* Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 Ariz. St. L.J. 75 (2002).

The notion that "[c]ritique is all there is" is a respected (if controversial) idea in the general public law,[35] and some federal Indian law scholarship takes a related tack.[36] For many academics, however, a relentlessly critical attitude may seem unduly unworldly—too academic, if you will. In any event, once that has been done, it is difficult to see what other scholarly contribution can be made, other than perhaps the utopian one of imagining a world in which tribes exercised serious sovereignty. Caught between a frequent sense of hopelessness on the practical level and arguably unduly abstract critique on the conceptual level, my sense is that at least some scholars (and some practitioners) in the field operate within a psychological environment of bitter frustration and disappointment. Our colleagues who work with Indian law clinics, where students are able to provide practical help to tribes and their members, are more likely to feel efficacious and rewarded by their involvement in the field.[37]

III. LONE WOLF *REVISITED*

The Court in *Lone Wolf* viewed Congress as having a special fiduciary responsibility toward tribes and presumed that Congress would act in good faith in Indian affairs,[38] but saw no judicial role in second-guessing congressional acts in

35. *See* Mark V. Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 318 (Harv. U. Press 1988).

36. *See* Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 Wis. L. Rev. 219 (pathbreaking criticism of federal Indian law from critical perspective).

37. The dichotomy drawn here between frustrated scholars and flourishing clinicians is a familiar one in social justice circles, but it may be overdrawn in the context of federal Indian law. Many scholars practiced in the field and continue to take an active role in practical affairs. Despite the trend in Supreme Court decisions, in many respects tribal self-government continues to flourish, which nurtures a will to carry on the work despite the frustrations tribes face in the federal courts. One major piece that is missing in the law review writing is a narrative of success, which identifies the local triumphs that arise in the field and demonstrates how more achievements along these lines can occur within the confines of the current state of the law. Scholars need to educate the federal courts—as well as ourselves—that tribal self-government can prosper in the twenty-first century in ways that are efficacious and appropriate. Indeed, in my judgment, because public law is an inherently practical enterprise, such a narrative of success that legitimates tribal governance in the eyes of the larger legal community is more likely than grand scholarly theorizing to result in gradual doctrinal evolution benefiting tribes. *See* Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 Cal. L. Rev. 1137 (1990).

38. The Court made repeated references to this effect:

> The [Indians' legal] contention . . . ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians . . . .

Lone Wolf, 187 U.S. at 564.

> "It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. . . ." 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. . . . 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

the field. *Lone Wolf* provided that congressional authority "has always been deemed a political one, not subject to be controlled by the judicial department of the government."[39] This understanding of the congressional and judicial roles in Indian affairs has evolved since *Lone Wolf* in ways that illuminate the identified problems in the field.

A. Lone Wolf *and the Normative and Substantive Objections*

Consider, first, *Lone Wolf* and its aftermath from the normative and substantive perspective. It may well be the most starkly colonial opinion of the Supreme Court. To be sure, in holding that Congress may unilaterally abrogate an Indian treaty, the Court purported simply to be following the parallel rule of international law embraced in the *Chinese Exclusion Cases*,[40] whereby international treaties were subject to congressional unilateral abrogation. The differences are obvious, however.

Although a country may have the raw power under its domestic law to breach an international treaty, consequences can flow under international law from such a breach. In contrast, when *Lone Wolf* embraced the notion that congressional abrogation of an Indian treaty is a political question unresolvable in domestic courts, the Court left tribes without a remedy to prevent the abrogation and without hope of retrospective relief for the consequences of the abrogation unless they successfully beseeched the tender mercies of a later Congress. For the Court had long viewed tribes as lacking sovereignty under international law, instead possessing a unique, peculiar sort of status under domestic law. In Chief Justice Marshall's famous phraseology, an Indian tribe is a "domestic dependent nation," which is "in a state of pupilage" with a relation to the United States that "resembles that of a ward to his guardian."[41] Thus, the denial of domestic judicial

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> 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.... [I]t 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).

> We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation.

Id. at 568.

39. *Id.* at 565.

40. *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889).

41. In *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), Chief Justice Marshall rejected the argument that tribes were foreign states and suggested instead that they 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."

relief meant that Congress itself was the only body from which the Indians could seek redress.[42]

In short, *Lone Wolf* saw indigenous peoples as the subjects of colonialism. The tribal-federal relationship was one of subjugated sovereignty, where power had displaced principle. The property of the tribe was subject to involuntary federal distribution to the individual members free from legal constraint. Congress had provided some compensation for the surplus lands unilaterally severed and made available to non-Indians, but the Court in *Lone Wolf* left unclear whether that payment was merely gratuitous.[43] No compensation of any kind was available for the shattering of the geographical domain of tribal authority, the forced encroachment of outsiders into the tribal community, or the attempted imposition of western values upon individual tribal members.

B. Lone Wolf *and Practical Objections: Doctrinal Incoherence, Contextual Result-Orientation*

What has emerged in the case law since *Lone Wolf* has been a muted effort to blunt some of the harshest normative and substantive problems through doctrinal evolution that has reinforced the second critique, that of the practical perspective. In later cases, according to the Court, it has required that "Congress' intention to abrogate Indian treaty rights be clear and plain."[44] According to the canons of interpretation in federal Indian law, ambiguities in a congressional act arguably inconsistent with a prior treaty are to be interpreted generously from the tribal perspective to preserve pre-existing treaty rights.[45]

Moreover, no longer is congressional activity in Indian affairs a nonjusticiable political question.[46] Congress continues to have the authority to abrogate Indian treaties and take tribal lands, but when it does the Court will provide some review. If the congressional action is that of a good-faith trustee toward its beneficiary, the Court will continue to defer; on the other hand, if the act cannot be so characterized, it becomes one of eminent domain subject to the Takings Clause of the Fifth Amendment.[47]

42. *See Lone Wolf*, 187 U.S. at 568 ("If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts.").

43. *See id.* at 568 (the statutes in question "purported to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit" and, in effect, perhaps amounted to "a mere change in the form of investment of Indian tribal property," but, in any event, because Congress has plenary power over Indian affairs, the Court considered these possibilities nonjusticiable).

44. *U.S. v. Dion*, 476 U.S. 734, 738 (1986).

45. *See* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 Cal. L. Rev. 601 (1975).

46. *See Sioux Nation*, 448 U.S. at 413-15; *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977).

47. *See Sioux Nation*, 448 U.S. at 408.

This doctrinal backfilling provides a good example of the incoherence of federal Indian law. It illustrates that when, as is often the case, the law begins with a starkly colonial proposition that seems normatively dubious in a later era, the Court will attempt to ameliorate some of the harshness through precedential evolution while maintaining that it is ultimately the primary responsibility of Congress to control Indian affairs. This is not a mixture likely to produce doctrinal cogency, either normatively or descriptively. Consider three examples.

1. Tribal Property

A good illustration is the *sui generis* nature of most tribal property. Unlike private property, the equitable title to the land constituting an Indian reservation is ordinarily deemed to be held by the United States in trust for the tribe.[48] The United States, as trustee, continues to have the wide-ranging authority to manage and transmute Indian property. As explained immediately above, the Takings Clause kicks in only when congressional conduct cannot be defended as arguably good-faith fiduciary behavior designed to give equivalent value. Congress can take tribal lands and provide compensation, and, so long as it is arguably adequate, that seems to be the end of the matter, and the Fifth Amendment remains irrelevant. When Congress takes private lands, of course, the Fifth Amendment is triggered automatically.

Thus, a normative compromise concerning tribal property was judicially implemented through a spongy standard that requires courts to place a dichotomous label (either good-faith trusteeship or bad-faith intermeddling) upon the seemingly endless variation of what the federal government has actually done with tribal property on a reservation-by-reservation basis. In place of the doctrinal possibilities that would be easy for courts to apply—either forbid congressional unilateral abrogation of Indian treaties protecting tribal property or treat such disputes as raising political questions—normative compromise has meant doctrinal muddling. Furthermore, the courts have never suggested that equitable relief might be available to prevent the congressional taking of indigenous lands. Thus, at most, the courts have made the legal treatment of indigenous lands more similar to that of fee simple property. Finally, the courts have assumed that indigenous lands are fungible with money, despite clear cultural differences that often give unique spiritual and communal meanings to such lands that make monetary compensation in return for their loss an inadequate substitutionary remedy.[49]

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48. *See Felix S. Cohen's Handbook of Federal Indian Law*, *supra* n. 16, at 472-73.

49. *See* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31, 80-82 (1996). Indeed, the tribes that recovered over $100 million for the taking of the Black Hills in South Dakota ultimately refused to take the money and are still holding out for the return of the area. *Id.* at 82.

Another example of an anomalous approach to property in federal Indian law that represents a compromise of sorts is found in the cases concerning whether the United States may be sued for

2. Reservation Boundaries

By breaking up tribal lands and distributing tribal property to members in trust and to nonmembers in fee simple, the allotment process left undisturbed by *Lone Wolf* did not specify what legal status remained of pre-existing reservation boundaries. In its principal attempt at explicating a doctrinal approach to resolving this dilemma, *Solem v. Bartlett*,[50] the Court found itself already written into a corner.

The Court in *Solem* began by explaining that the allotment statutes rarely "detail whether opened lands retained reservation status or were divested of all Indian interests."[51] During the allotment era, it was assumed that reservation status was coextensive only with Indian land ownership.[52] These days, however, the Court defines "Indian country," the domain of tribal authority, by reference to a federal statute that includes within it "all land within the limits of any Indian reservation . . ., notwithstanding the issuance of any patent."[53] Thus, the fact that land was declared surplus, homesteaded by a non-Indian, and owned today by a nonmember of the tribe would not, in itself, remove the land from reservation status.

Two logical, if dichotomous, principles would seem to vie for application in these circumstances.[54] The first one would embrace the general canons of interpretation in federal Indian law. As noted,[55] the Court maintains that congressional abrogation of an Indian treaty can be effectuated only by a clear manifestation of congressional intent. It would seem inescapably to follow from the application of this canon that the allotment statutes—which, by the Court's hypothesis, did not mention reservation boundaries and were adopted without any clear, articulated legislative statement on the subject—did not alter reservation boundaries established by a pre-existing treaty. The second possibility would be to abandon these canons because of the unique problems of allotment. By bringing non-Indians into the tribal domain, allotment was designed to shatter the geographical capacity for meaningful tribal sovereignty. Indeed, as discussed earlier,[56] a major purpose of allotment was to destroy collective Indian landholding and assimilate individual tribal members into the American melting pot. Maintaining pre-existing reservation boundaries runs directly contrary to these congressional purposes. Thus, a purposive interpretation of the allotment

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damages for mismanagement of Indian property held in trust by the United States. *See U.S. v. Mitchell*, 463 U.S. 206 (1983); *U.S. v. Mitchell*, 445 U.S. 535 (1980).

50. 465 U.S. 463 (1984).

51. *Id.* at 468.

52. *Id.*

53. 18 U.S.C. § 1151 (2000). This statute only squarely governs federal criminal jurisdiction, but the Court has borrowed its definitions to resolve questions of civil jurisdiction as well. *See DeCoteau v. Dist. County Ct.*, 420 U.S. 425, 428 n. 2 (1975).

54. Here I borrow from Frickey, *supra* n. 21, at 17-27.

55. *See* text accompanying *supra* note 44.

56. *See* text accompanying *supra* note 14.

statutes would seem to compel the conclusion that outright disestablishment of the reservation, or at least its diminishment so that it encompassed only the Indian lands that survived allotment, occurred in every instance.

Solem acknowledged the doctrinal force of the canonical approach[57] and denied that the purposive alternative had precedential validity.[58] Nonetheless, the Court found itself unable to reach the logical conclusion, which would have generally maintained reservation boundaries despite allotment. The reason was that in four earlier cases the Court had split on the ultimate question, twice finding diminishment[59] and twice holding reservations intact.[60] The Court in *Solem* gamely tried to find distinguishing principles explaining the logical consistency of these results.[61] As demonstrated elsewhere,[62] however, the only substantial factor driving the precedents has been the current demographics of the area. Indeed, although the Court in *Solem* could not bring itself fully to admit the stark legal realism at work, it did acknowledge the role played in the precedents by "subsequent demographic history," which it referred to as a "necessary expedient."[63] The discussion is so self-consciously tortured that it is painful to read.[64]

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57. *See* 465 U.S. at 468 ("Diminishment . . . will not be lightly inferred. Our analysis of surplus land acts requires that Congress clearly evince an 'intent to change boundaries' before diminishment will be found.") (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977)).

58. *See id.* at 468-69 ("Although the Congresses that passed the surplus land acts anticipated the imminent demise of the reservation and, in fact, passed the acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land act.").

59. *See Rosebud Sioux*, 430 U.S. at 587; *DeCoteau*, 420 U.S. at 445.

60. *See Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962).

61. *See* Frickey, *supra* n. 21, at 17-21.

62. *Id.* at 20, 20 n. 99 (citing Robert Laurence, *The Dominant Society's Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography and the Indian Civil Rights Act*, 30 U. Rich. L. Rev. 781 (1996), and James M. Grijalva et al., *Diminishment of Indian Reservations: Legislative or Judicial Fiat?*, 71 N.D. L. Rev. 415 (1995)).

63. 465 U.S. at 472 n. 13.

64. The Court's discussion began as follows:

> On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred.

Id. at 471 (citations omitted). The Court then referred to "the obvious practical advantages of acquiescing to *de facto* diminishment," *id.*, which it explained this way:

> When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of State and local governments. Conversely, problems of an imbalanced checkerboard jurisdiction arise if a largely Indian opened area is found to be outside Indian country.

Id. at 472 n. 12 (citations omitted). The Court also stated that "we look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." *Id.* at 471-72. Presumably because clairvoyance is not one of Congress's strong suits, the Court then dropped a footnote: "Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of

The Court in *Solem* deserves credit for trying, but it could not successfully mediate century-old colonial policies with more normatively attractive interpretive principles without overruling precedent, which in federal Indian law the Court has been remarkably resistant to do.[65] To be sure, the Court also did not capitulate entirely to original congressional goals, as it would have had it followed the purposive approach. The Court was willing to buttress contemporary tribal sovereignty—and thwart the interests of nonmembers to be free from potential tribal regulation—but only when the opened areas of the reservation had not "lost their Indian character,"[66] as *Solem* put it.

Thus, as is the case with the judicial protection of Indian property from congressional appropriation, the Court in the diminishment scenario has ended up with a compromise in which the application of a generally applicable legal principle is abandoned in favor of a case-by-case contextual inquiry. Each examination is rooted in factual questions: Did Congress act as a good-faith trustee or a confiscating sovereign? Has a reservation area "lost its Indian character"? These questions demand a yes or no answer when the reality will be a continuum of extremely difficult, culturally skewed judgment calls. After all, can federal judges really be expected to find an adequately objectively valid, cross-cultural answer to the question whether land has retained "Indian character," or whether Congress's behavior many years ago, in times long since lost and under pressures long since relieved, looks to contemporary eyes as mostly fiduciary or mostly confiscatory? In recent years, this approach has played out about the way one would expect. The Rehnquist Court, which has generally been unreceptive to tribal claims,[67] has continued to find diminishment in circumstances that the Justices think would make tribal authority over nonmembers problematic even though the better doctrinal arguments supported maintaining original reservation boundaries.[68]

3. Tribal Authority over Nonmembers

As a final example of post-*Lone Wolf* muddling, consider the cases involving whether tribes may regulate nonmembers found in Indian country—that is, within the tribal geographical domain notwithstanding the diminishment cases. These decisions have emerged as the most important work of the Court in federal Indian

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statutory interpretation. However, in the area of surplus land acts, where various factors kept Congress from focusing on the diminishment issue, ... the technique is a necessary expedient." *Id.* at 472 n. 13. Obviously, if either the clear-statement canon or the purposive approach were applied, no "expedient" would be necessary. What impels the expedient is the dual power of precedent and context, with logic and doctrinal coherence falling by the wayside.

65. *See* Philip P. Frickey, *Scholarship, Pedagogy, and Federal Indian Law*, 87 Mich. L. Rev. 1199, 1213 n. 95 (1989).

66. *Solem*, 465 U.S. at 480.

67. *See supra* n. 33.

68. In the two cases since *Solem*, the Rehnquist Court has found diminishment both times. *See S.D. v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994). *See* Frickey, *supra* n. 21, at 22-24 (giving reasons why these decisions are doctrinally dubious).

law in recent years and provide the most vivid examples of the normative, doctrinal, practical, institutional, and academic problems in the field.

Although they have been extensively examined,[69] for present purposes it seems impossible to be succinct. The issues are explicable only by an examination of the federal common law background concerning the extent to which inherent, pre-existing tribal authority is tempered by colonial pretensions and then by an excursion through the many recent precedents.

In 1823, in the first major precedent in federal Indian law, *Johnson v. McIntosh*,[70] Chief Justice Marshall conceptualized the American colonial process as follows: Before contact with Europeans, Indian tribes were sovereign unto themselves.[71] European contact resulted in two major divestments of inherent, pre-existing Indian interests: the European sovereign that "discovered" a tribal region now possessed the bare *legal* title to that tribe's lands, and the tribe was locked into a sovereign-to-sovereign relationship with that European government, such that the former could have treaty relations with no country other than the latter.[72] Tribes retained *equitable* title to their lands (in effect, a possessory interest), good against the encroachment of third parties.[73] Only the European sovereign—not private interests or other countries—could acquire the tribal title and merge it with the European-held legal title to create fee simple interests.[74] In the 1823 decision, Marshall wrote, in dictum, that the European sovereign could obtain the tribal land estate "by purchase or by conquest,"[75] but in short order he acknowledged the legitimacy of consensual arrangements alone.[76]

These understandings obviously presage *Lone Wolf*'s attribution to Congress of a plenary power over Indian affairs. They left unclear whether "plenary" meant absolute (as with the conquest idea) or simply complete and preemptive of any competing Anglo-American legislative authority (such that states could not have sovereign relations with tribes, but that Congress's authority concerning Indian affairs might be limited by some legal constraints). Under either understanding of "plenary," however, as a matter of federal common law, tribes retained inherent sovereignty except with respect to land transfers and government relations. It was

69. *See e.g.* N. Bruce Duthu & Dean B. Suagee, *Supreme Court Strikes Two More Blows against Tribal Self-Determination*, 16 Nat. Resources & Envtl. 118 (Fall 2001); Frickey, *supra* n. 21; Getches, *supra* n. 28; Krakoff, *supra* n. 28; Alexander Tallchief Skibine, *Making Sense Out of* Nevada v. Hicks*: A Reinterpretation*, 14 St. Thomas L. Rev. 347 (2001).

70. 21 U.S. 543 (1823).

71. *Id.*

72. *Id.* at 573-74.

73. *Id.* at 574.

74. *Id.* at 592-93.

75. *Johnson*, 21 U.S. at 587.

76. *Cherokee Nation*, 30 U.S. at 17 ("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").

the responsibility of Congress as successor to the European sovereigns, and not of the courts, to implement the ongoing colonial process.

In short order, Chief Justice Marshall invoked the federal judicial power to safeguard this understanding of tribal authority. In *Worcester v. Georgia*,[77] Marshall sought to entrench two essential protective elements into federal Indian law. The first, a modification of ordinary American federalism, understood states to have no authority to impose law unilaterally upon Indian reservations and the persons found on them.[78] The second amounted to an aggressive application of what have come to be understood as the canons of interpretation of federal Indian law.[79] Marshall interpreted a treaty between the federal government and a tribe protectively, so that the tribe had not ceded away any authority unless the treaty included a clear statement to that effect.[80] In later cases, the Court applied the canons to require that unilateral congressional intrusions upon tribal sovereignty also had legal effect only if they were clear.[81]

Thus, it would seem elementary that, except for the land title and treatymaking limitations recognized in *Johnson*, tribes retained all aspects of inherent sovereignty not divested by Congress or ceded away consensually. The judicial role was a structural one—to safeguard tribal interests as against all but clear losses, but to leave Congress ultimate control of the colonial process—rather than a common law one, which would have instead foisted upon the courts the difficult role of case-by-case development of principles of colonialism appropriate for the evolving social context.

This basic understanding of the nature of federal Indian law remained in place for many years. In his famous treatise on the field published in the 1940s, Felix Cohen thoughtfully explained and elaborated upon this conception.[82] This vision also captured the practical reality of the Court/Congress interaction in federal Indian law. For example, nearly contemporaneously with *Lone Wolf*'s attribution of a plenary authority over Indian affairs to Congress, the Court had the opportunity to begin to develop, on a case-by-case basis, judicially defined limitations upon tribal authority when Congress had not exercised its plenary power to impose such limitations. Consistent with the model developed above, the Court refused to embark on this common law process, instead invoking the structural, political-question-like nature of the field. In *Talton v. Mayes*,[83] it held that tribal authority over members was rooted in inherent tribal sovereignty that predated the Constitution and that was not bound by constitutional limitations upon government power. Many years later, Congress, operating on this

77. 31 U.S. 515 (1832).

78. *Id.* at 561.

79. On the canons, *see* Wilkinson & Volkman, *supra* n. 45; *Dion*, 476 U.S. at 738. *See* Frickey, *supra* n. 4 (my understanding of Marshall's interpretive model).

80. *See Worcester*, 31 U.S. at 552-54.

81. *See e.g. Bryan v. Itasca County*, 426 U.S. 373 (1976); Frickey, *supra* n. 4, at 429-32.

82. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 37, 122-23 (GPO 1942).

83. 163 U.S. 376 (1896).

understanding, adopted the Indian Civil Rights Act of 1968 ("ICRA"),[84] which applies to tribal governments by statute many of the limitations imposed on the federal and state governments by the Constitution. Tellingly, in this exercise of congressional plenary power, Congress advertently drafted the statute extending the Constitution to Indian country to protect "any person," not simply Indians, from tribal authority.[85]

In a nutshell, then, the extent of tribal authority would seem to be defined by the following equation: (1) full, inherent sovereignty (prior to European contact), minus (2) judicially defined limits on land transactions and treaty relations, which may take place only with the United States as successor to the discovering European sovereigns (*Johnson*), minus (3) voluntary cessions of tribal authority (subject to the clear-statement canon protecting against inadvertent losses of power), minus (4) abrogations of tribal power by Congress (again, subject to the clear-statement canon), such as ICRA.[86] Under this formulation, it would follow that a tribe's inherent authority to impose criminal and civil regulation upon all persons found in the tribe's geographical domain (category 1) is unaffected by category 2 and is retained today unless the tribe clearly ceded away this authority (category 3) or Congress has clearly altered or abolished it (category 4).

We can now, finally, return to the question posed in this section concerning the extent of tribal authority over nonmembers found in Indian country. Because ICRA does not purport to abolish tribal geographical jurisdiction over any set of persons, but instead simply imposes some constitutionally analogous limitations upon that power when applied to "any person," it would seem quite clear that, unless a tribe has entered into a treaty or agreement to the contrary, the tribe retains geographical criminal and civil jurisdiction over any person, subject to ICRA's protection of individual rights.

Alas, when this understanding was put to the test, it arose in a case presenting a context in which the Court could not abide it. The context was a particularly devastating aftermath of allotment, the process sanctioned by *Lone Wolf*.

In *Oliphant v. Suquamish Indian Tribe*,[87] a non-Indian who resided on the reservation assaulted a tribal police officer. It was a miserable test case for asserting tribal criminal jurisdiction over non-Indians, because only about fifty tribal members and almost 3,000 non-Indians lived on the reservation in

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84. 25 U.S.C. § 1302 (2000).

85. *See* Frickey, *supra* n. 37, at 1162-63.

86. In actuality, one more category exists, which although irrelevant to the current conversation should be mentioned. Congress is authorized to delegate authority to tribes. *See U. S. v. Mazurie*, 419 U.S. 544 (1975). On the difficulty in distinguishing a federal statute that delegates federal power to a tribe from a federal statute removing the preemptive force of federal law so that inherent tribal authority may be executed, *see infra* note 149.

87. 435 U.S. 191 (1978).

question.[88] This shattering of the tribal domain, which was the result of allotment, was unremarked upon by the Court save for an off-hand footnote near the beginning of the opinion. Instead of denying this tribe jurisdiction because of the dreadful circumstances, the Court announced a general rule: tribes lack criminal jurisdiction over non-Indians.[89] Congress had never divested this tribe of that authority, however, nor had the tribe ceded it away. Accordingly, to deny tribal jurisdiction, the Court was forced to take the 150-year-old lid off category 2 above and aggrandize to itself the theretofore unknown judicial common law power of limiting tribal authority on a case-by-case basis.

The cases following *Oliphant* have taken the Court's predictable pattern of muddling to a new extreme. As in *Oliphant*, many of these developments can be traced to the contemporary problems flowing from the allotment process sanctioned by *Lone Wolf.*

In the first important case following *Oliphant*, *Montana v. United States*,[90] the Court held that a tribe could not regulate nonmember hunting and fishing on nonmember fee lands found on an Indian reservation. The Court clearly assumed that the tribe could regulate such activity on Indian lands, however.[91] Thus, the allotment process again had the practical effect of diminishing tribal authority on a case-by-case, contextual basis. Indeed, unlike in *Oliphant*, the Court attempted to be especially contextually sensitive, in that it stated that although the assertion of tribal authority over nonmember lands was presumptively invalid, it could be defended if the nonmember had consented or if the nonmember activity threatened a significant tribal interest.[92]

In a later case involving another allotted reservation, *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*,[93] the Court, with no operative majority at work, held that the tribe could zone nonmember fee land found within the closed area of the reservation (where virtually all land was Indian) but could not zone nonmember fee land found in the opened area of the reservation (where most of the land was non-Indian). That result appears

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88. *Id.* at 193 n. 1.

89. *Id.* at 208.

90. 450 U.S. 544 (1981).

91. *See id.* at 557 ("The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, and with this holding we can readily agree.") (citations omitted).

92. The Court stated:

> 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. 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.

Id. at 565-66 (citations omitted).

93. 492 U.S. 408 (1989).

consistent with the inquiry driving the outcomes in the diminishment cases—whether the land has retained its Indian character[94]—but seems hopelessly *ad hoc* and immune to principled application. Moreover, the Court in *Brendale* seemed unsure what to make of *Montana* as a precedent, and none of the three opinions in the case purported to be a straightforward application of *Montana* to the facts.[95]

Allotment did not reach all reservations, however, including several that provided the context for post-*Oliphant* Supreme Court cases. Moreover, as the common law hydraulically attempts to do, the Court has sometimes gamely tried to articulate more general principles concerning tribal authority over nonmembers that transcend litigative context.

As already suggested, *Oliphant* provides one example of the chaotic relationship between context and principle in these cases. The Court there was surely driven mostly by the weak contextual argument for tribal jurisdiction, yet stated its rule forbidding tribal criminal jurisdiction over non-Indians as a universal proposition, not one limited to tribes that have suffered the devastation of allotment and the influx of nonmembers holding fee simple lands. Although its reasoning is not a paragon of transparency, *Oliphant* seems to have held that tribes universally lost this jurisdiction when the United States generally asserted supervening authority over them, not on a tribe-by-tribe basis as the result of allotment or other congressional intrusions.[96]

As a historical and contextual matter, this understanding seems absurd. To be sure, under the precedential framework articulated above, category 2—federal common law limitations upon tribal power as the result of European contact—was the only avenue that the Court could open on its own authority in support of its conclusion. Yet it seemingly could have invoked category 3—diminishment of tribal authority through congressional lawmaking—and held that, when Congress opens a reservation for allotment and the process devastates the practical tribal capacity to regulate nonmembers, Congress has clearly (if implicitly) divested the tribe of that authority. Of course, while this tack would have been truer to the later approaches taken in *Montana* and *Brendale*, it would have been inconsistent with the canons of interpretation, for nowhere can be found a federal statute that clearly works this jurisdictional limitation. Nonetheless, the outcome would have been similar to those in the diminishment cases, where as a practical matter the canons have fallen by the wayside and the Court understands allotment to create demographical dilemmas that are to be solved on an *ad hoc* basis depending upon whether the region in question has retained its Indian character. Unlike the diminishment cases, however, where the Court had written itself into a corner when it finally attempted to articulate some general reconciling principles,

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94. For additional information, review the text accompanying *supra* notes 59-68.
95. *See* Frickey, *supra* n. 21, at 44-45 (for fuller examination of *Brendale*).
96. For elaboration, *see* Frickey, *supra* n. 21, at 36.

Oliphant, *Montana*, and *Brendale* seem to create the opposite problem, leaving later courts with no directional markers for determining which of several radically different and under-theorized paths should be taken.

It may seem impossible, but later cases only made things worse. Some years after *Oliphant*, the Court returned to the path of generalized principle when it held, in *Duro v. Reina*,[97] that tribes lack criminal jurisdiction over all nonmembers, including nonmember Indians, not simply over non-Indians, on all reservations, whether allotted or not. Why tribal criminal jurisdiction is amenable to general principles but civil jurisdiction is subject to *ad hoc* contextual inquiries was no more explained in *Duro* than it had been in earlier cases.[98]

Indeed, the muddling is deeper than merely a criminal/civil divide. For in an early civil regulatory case, *Merrion v. Jicarilla Apache Tribe*,[99] the Court upheld tribal authority to impose a severance tax upon the extraction of oil and gas from tribal lands on an unallotted reservation by a non-Indian company. *Merrion* did not focus on context—instead, like *Oliphant*, but unlike *Montana*, *Merrion* articulated general principles of federal common law under which tribal taxation authority seemed geographical in scope.[100] Indeed, *Merrion* never even cited *Montana*, much less attempted to distinguish it. Thus, in the area of civil regulatory jurisdiction, the precedents left later courts with two paths—*ad hoc* contextual outcomes or generalized common law principles embracing or denying tribal authority on a widespread basis—and little guidance for channeling later disputes along one or the other.

More recently, in *Atkinson Trading Company v. Shirley*,[101] the Court, in an opinion by Chief Justice Rehnquist, cut back on the implications of *Merrion* by denying tribal authority to tax nonmember activities on fee land. The case, which involved the tribe's attempt to tax nonmember occupancy of rooms at a nonmember-owned hotel, vividly demonstrates the chaotic quality of Indian law precedent. *Atkinson Trading Company* is arguably consistent with *Montana* (in treating nonmember land as presumptively immune from tribal regulation). It is

97. 495 U.S. 676 (1990).

98. To be sure, the Court stressed that criminal jurisdiction was "a far more direct intrusion on personal liberties," *id.* at 688, but in precedential context this seems dubious. Because of ICRA, the tribe had little sanctioning authority and was clearly bound to follow most guarantees of fair criminal procedure, with habeas corpus relief available if the tribal proceeding defaulted on these obligations. *See* 25 U.S.C. § 1303 (2000). In contrast, in the cases involving the civil jurisdiction of tribal courts over nonmember defendants assessed below, as well as in the cases in which tribes assert civil regulatory power over nonmembers, such as *Montana*, ICRA provides no federal avenue for relief from a tribal court judgment. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (only federally enforceable remedy under ICRA is habeas corpus).

99. 455 U.S. 130 (1982).

100. The Court stated that "there is a significant territorial component to tribal power," *id.* at 142, and that "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Id.* at 137. Left unexplained was why criminal jurisdiction (*Oliphant*) and basic civil police-power regulation like hunting and fishing rules (*Montana*) fail to quality under this approach.

101. 532 U.S. 645 (2001).

also arguably inconsistent with *Montana*, which dealt with an allotted reservation with nonmember fee land interspersed with tribal land and Indian allotments, because the nonmember fee land in *Atkinson Trading Company* was isolated and surrounded by an Indian domain. Thus, arguably, the closer precedent was *Brendale*'s holding that the tribe in that case could zone the nonmember land isolated in a largely pristine Indian area. Indeed, the controlling opinion in *Brendale* contained language strongly supporting such a contextual approach to tribal authority.[102] Moreover, recall that even though *Merrion* dealt with tribal taxation of nonmember activities on *tribal* land, that precedent contained language strongly suggesting that tribal taxation authority was geographical in sweep and did not depend upon who owned the land in question.[103] Thus, *Atkinson Trading Company* is arguably inconsistent with *Merrion* when that precedent is understood for what it was, an attempt to articulate general common law principles rather than simply resolve a fact-bound dispute.

The relationship between general principles and context is further muddied in *Atkinson Trading Company* because, unlike in his majority opinion in *Oliphant*, Chief Justice Rehnquist chose to emphasize contextual factors supposedly favoring freedom of the non-Indian operation from tribal regulation. According to his opinion, the trading post and hotel in question serve almost exclusively non-Indian customers who happen to be traveling by them simply because they are located on a major thoroughfare for tourists visiting the Grand Canyon.[104] The impression is that the business obtains few benefits from its reservation location. In the rare instance when it might use tribal public services (e.g., police or fire protection), the Court suggested that the tribal interest could be accommodated on a fee-for-use basis.[105] But this picture of a non-Indian business merely coincidentally located in Indian country and partaking of no benefits from the surrounding domain is radically inconsistent with Atkinson Trading Company's own website,[106] which portrays itself as an attractive stop for non-Indian tourists because of its reservation location and its native merchandise.[107] From this different contextual vantage point, when the Court in *Atkinson Trading Company* immunized this business from tribal taxation authority, it allowed the business to free-ride on its reservation location. As with the reservation diminishment cases, the Court seems to be interested in whether non-Indians are in an area that has retained its Indian character—without any sort of criteria to make this assessment

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102. *See Brendale*, 492 U.S. at 438-44 (Stevens, J., joined by O'Connor, J., concurring in the judgment).
103. *See supra* n. 100.
104. *See Atkinson Trading Co.*, 532 U.S. at 648.
105. *See id.* at 655.
106. Cameron Trading Post, <http://www.camerontradingpost.com/> (accessed Oct. 13, 2002).
107. In addition, Sarah Krakoff has pointed out to me that, by being on the reservation, the trading post has a readily available labor pool and need not provide housing for its workers, as do concessionaires at the south rim of the Grand Canyon.

free from cultural myopia and in a way that might be generalized beyond *ad hoc* judgments.

Much along similar lines could also be said about the Court's decisions involving tribal court jurisdiction over nonmembers in civil cases. In a pre-*Oliphant* case, *Williams v. Lee*,[108] the Court held that state courts could not entertain a collection action brought by a reservation-based non-Indian company that had sold goods to reservation-residing tribal members. The decision, consistent with Chief Justice Marshall's principle that state law ordinarily does not apply in Indian country,[109] understood that it was relegating the non-Indian seller to tribal court[110] and was untroubled by this outcome.[111] In two later cases, both involving tort actions brought by members against nonmembers for activities in Indian country, the Court held that *Oliphant*'s flat prohibition against tribal court criminal jurisdiction over non-Indian defendants was inappropriate in the context of civil cases.[112] The Court reinterpreted *Oliphant* as based not so much on a flat federal common law rule (category 2) as driven by the implicitly preemptive power of federal statutes providing federal criminal jurisdiction over nonmembers who victimize members in Indian country (category 4).[113] This shift allowed the Court to conclude that tribal court civil jurisdiction over nonmember defendants was not automatically foreclosed by federal law.[114] The Court required the nonmember defendants to exhaust all tribal court remedies before seeking federal court relief on the argument that the tribal court was somehow exceeding the authority allowed it under federal law.[115]

For a decade, these cases seemed to fall into a third category (in addition to tribal criminal and tribal civil-regulatory jurisdiction), that of tribal court civil jurisdiction.[116] For it makes little sense to require nonmember defendants to exhaust all tribal court remedies unless the tribal courts would, in the end, often have jurisdiction. Strongly reinforcing this surmise was language in the second of these two cases, which stated that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless

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108. 358 U.S. 217 (1959).

109. *See* text accompanying *supra* note 78.

110. Federal jurisdiction was not possible because there was no diversity of citizenship and no federal question involved.

111. *See Williams*, 358 U.S. at 222-23 (noting that defendant was consensually on the reservation and had entered into the transaction there).

112. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Natl. Farmers Union Ins. Companies v. Crow Tribe*, 471 U.S. 845 (1985).

113. *See Natl. Farmers Union*, 471 U.S. at 854-55.

114. *Id.* at 852-54.

115. *Id.* at 857.

116. The cases held out the important possibility that the tribal courts could become the effective, legitimating linkage between other tribal institutions and tribal members, on the one hand, and the broader legal system on the other. *See* Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* 50, 57, 81, 93, 96-98, 194 (U. Cal. Press 1995).

affirmatively limited by a specific treaty provision or federal statute."[117] Yet the Court never explained why tribal court civil jurisdiction over nonmembers was presumptively proper while tribal council civil regulatory jurisdiction over them was presumptively improper under *Montana*. Obviously, when a tribal court imposes tribal common law or tribal statutory law to resolve a case before it, it is applying tribal regulatory power. Why the tribal courts are more trustworthy in doing this than a tribal council was left unsaid, especially since the tribal court would presumably sometimes be applying rules of law developed by the tribal council and hearing nonmember challenges to tribal council actions.

So it was inevitable that a collision between the *Montana* line of cases and the tribal court civil jurisdictional cases would occur. When it did, in *Strate v. A-1 Contractors*,[118] the Court again was faced with such chaotic precedent that it could do essentially anything it wished. It chose to apply *Montana* to tribal court as well as tribal council jurisdiction over nonmembers by understanding the earlier tribal court cases as requiring only the exhaustion of tribal remedies, not as recognizing presumptive tribal court jurisdiction.[119]

At least *Strate* maintained *Montana*'s attempted connection to context. The auto accident involving a nonmember defendant in *Strate* occurred on a public highway.[120] Thus, it occurred outside tribal lands, and tribal court jurisdiction was arguably inconsistent with *Montana*'s teachings. This understanding of the relationship of land ownership and tribal authority is also consistent with the later decision in *Atkinson Trading Company*. Yet a month after *Atkinson Trading Company*, in *Nevada v. Hicks*,[121] the Court reinterpreted *Montana* in a particularly aggressive and acontextual way to deny tribal court civil jurisdiction over an alleged tort that occurred on Indian land.

Hicks involved the execution of search warrants by state and tribal officials at the home of a tribal member who was suspected of having evidence of off-reservation illegal activity there.[122] The Supreme Court held that the tribal court could not entertain a tort action brought by the tribal member against the state officers, alleging that the officers had exceeded the scope of the warrant and had improperly damaged the tribal member's property.[123] Surely the outcome was driven largely by contextual concerns: a tribal court might seem to be an unfair forum in which state officers must defend themselves, and presumably both the federal courts and state courts would be open to hear the controversy. Indeed, some language in the opinions in *Hicks* stressed the concern that allowing tribal

117. *Iowa Mut. Ins. Co.*, 480 U.S. at 18.
118. 520 U.S. 438 (1997).
119. *Id.* at 453.
120. *Id.* at 442.
121. 533 U.S. 353 (2001).
122. *Id.* at 356.
123. *Id.* at 374.

court jurisdiction (of which there would be no effective federal or state review) could chill state officers properly enforcing state law violated outside the reservation,[124] could make reservations enclaves where lawbreakers were effectively immune from state arrest and prosecution,[125] and could deprive the Supreme Court and state supreme courts of control over the definition of qualified immunity for state officers exercising official functions.[126] Justice Scalia's majority opinion in *Hicks* can be read as limited to denying tribal courts jurisdiction over such state officers in such contexts.

Yet the majority opinion in *Hicks*, especially when read in light of the separate opinions of Justices Souter[127] and O'Connor,[128] seems to reach much further. Under this broader understanding, *Montana* now not only controls tribal court jurisdiction, it applies regardless of whether the cause of action arose outside tribal lands.[129] It is yet to be seen how this reworking of *Montana* will play out as a practical matter,[130] but suffice it to say it is a radical revision of the longstanding notion that tribal civil authority was presumptively valid when applied to nonmembers on Indian lands.

The chaotic combination of context and precedent at the heart of *Hicks* suggests that the Justices' wish for greater coherence in the field[131] is chimeric at best. *Hicks* recalls for me an analogy that I drew over a decade ago, in my first attempt to analyze federal Indian law. I suggested that federal Indian law is like the novelist Mark Harris's wonderful card game, TEGWAR: "The Exciting Game Without Any Rules."[132] I continue to think that the analogy is apt, but I was wrong, or at least too vague, about the culprit. I suggested that the only rule was that "the federal government" always got to deal.[133] The more recent cases involving tribal authority over nonmembers lack any sort of coherent core, but that is not the fault of the federal government in general, or of specific applications of congressional plenary power in particular, or of specific instances of federal executive action. The problem lies with the Court. In the contemporary post-*Lone Wolf* environment, the Court has attributed to itself the task of incremental decisionmaker, accommodator, contextualizer, balancer of all interests notwithstanding the incommensurable cross-cultural dynamics. As this section has demonstrated, it has succeeded only in exacerbating the doctrinal and

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124. *See id.* at 365.

125. *See id.* at 364.

126. *Hicks*, 533 U.S. at 373-74.

127. *See id.* at 375 (Souter, J., concurring).

128. *See id.* at 387 (O'Connor, J., concurring in the judgment).

129. *Id.* at 359-60 (majority opinion).

130. Various Justices opined that it might not require abandoning the results in earlier cases, in that it creates only a rebuttable presumption against tribal authority over nonmembers on Indian lands, and the Indian status of the land may be important in how that presumption is applied. *See id.* at 375-76 (Souter, J., concurring); *id.* at 395 (O'Connor, J., concurring in the judgment).

131. *See supra* n. 25.

132. *See* Frickey, *supra* n. 65, at 1201.

133. *Id.*

practical problems in the field. In turn, its role is subject to serious institutional reevaluation, to which the next section turns.

C. *Institutional Problems*

When read against Chief Justice Marshall's precedents, *Lone Wolf* established a clear institutional paradigm: Congress controlled Indian affairs, and the Court's role was simply to insure that pre-existing tribal rights were not lost through inadvertent actions by Congress or by the tribes themselves.[134] The federal-tribal relationship was one of sovereignty and power, not easily amenable to the rule of law. Complaints of hardship, harshness, and unfairness must be addressed to Congress, not the courts.

In the abstract, much can be said in defense of the Court's efforts to soften the regime of *Lone Wolf*, to domesticate the political relationship so that it becomes more subject to the rule of law.[135] Perhaps it is not surprising that such judicial elaborations will end up in a muddled, compromised state, where longstanding colonial pretensions can be accommodated but not eliminated, and where the outcomes of cases seem driven by context rather than by clear principle. After all, this is the land of the common law. Much in our tradition supports Holmes' point that "[i]t is the merit of the common law that it decides the case first and determines the principle afterwards"[136] and that only over time will the reconciliation of cases result in "well settled legal doctrine embod[ying] the work of many minds . . . [that] has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step."[137] It is possible that we are in the middle of the transition from *ad hoc* decisionmaking to reconciling, generalizing principle and can see only the former clearly while the latter is, at best, through a glass darkly.

With respect, however, I do not think so. The preceding section demonstrates, I believe, that in leaving the moorings of the *Lone Wolf* paradigm and arrogating to itself a case-by-case role of refereeing disputes in Indian country, the Court has undertaken a rudderless task for which it is particularly poorly suited. This doctrinal and practical critique is rooted in a series of institutional and contextual problems. The Court cannot possibly understand the dynamics of tribal-nonmember interactions in the multitudinous contexts in which they arise. The Court can only apply "[t]he felt necessities of the time,"[138] as

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134. For more information, review the text accompanying *supra* notes 70-81.

135. Indeed, many of us in the field have attempted to develop new frameworks for greater judicial review of congressional actions in Indian affairs. *See e.g.* Frickey, *supra* n. 49; Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195 (1984).

136. Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of the Law*, 44 Harv. L. Rev. 725, 725 (1931) (reprinting an article originally published in 1870).

137. *Id.*

138. Oliver Wendell Holmes, Jr., *The Common Law* 1 (Little, Brown & Co. 1909) (originally published 1881).

Holmes might say, which include "the prejudices which judges share with their fellow-men [and women]."[139] It seems particularly troublesome that in recent years the Court has followed its vision of felt necessities to *diminish*, not to ratify, tribal prerogatives.

Consider how the different institutional analysis from the *Lone Wolf* era would have resolved the diminishment cases and the disputes concerning tribal authority over nonmembers in Indian country. Under the work of Chief Justice Marshall, as seen through the congressional-plenary-power lens of *Lone Wolf*, tribes should have prevailed in all the diminishment cases. This is so because, while *Lone Wolf* would not prevent Congress from destroying Indian reservation boundaries, the Marshall interpretive approach would allow this to happen only if Congress had clearly considered the precise issue in question and had squarely resolved it. As discussed earlier,[140] the Court in *Solem* persuasively demonstrated that no such clear congressional resolution concerning reservation boundaries occurred in the usual allotment statute. It is only because of the Court's decision to abandon that paradigm in favor of a case-by-case contextual inquiry about whether the area has retained its Indian character that the tribes have lost many of the diminishment cases.

Why would the Court abandon a relatively stable and clear paradigm and undertake such a tortured case-by-case role? It seems apparent that the Court has been motivated primarily by two practical factors: a desire to protect nonmembers from tribal regulation (by excluding regions with lots of nonmembers from the reservation), and a desire to allow states and their subdivisions to administer public services efficiently, especially where nonmembers are the beneficiaries of these services. Rather than relegate these nonmembers and their governments to negotiating with the tribes or beseeching Congress for relief, the Court has stepped into what it sees as a legal void and tried to resolve the disputes in a rough-and-ready manner.

The impetus for this judicial solicitude—to undercut tribal prerogatives as against those of nonmembers and states—seems at least much more normatively controversial than the Court has openly deliberated. The application of this judicial solicitude has been *ad hoc*. The institutional effects of this judicial solicitude have been to short-circuit processes that might well have led to more sensible local resolutions of the contextual problems *from the standpoint of all interests concerned*. More broadly, from the standpoint of the separation of powers, the Court has moved from a regime of congressional plenary power to what I have called "a common law for our age of colonialism,"[141] in which the Court itself has become the primary federal decisionmaker determining when

139. *Id.*
140. For more information, review the text accompanying *supra* notes 51-58.
141. *See* Frickey, *supra* n. 21, at 58.

tribal prerogatives must be sacrificed in the face of the perceived contemporary needs of the broader American society.

Precisely the same set of conclusions applies to the cases involving tribal authority to regulate nonmembers found in Indian country. As *Oliphant* recognized, the tribe in question had not ceded that authority, nor had Congress clearly abrogated it.[142] Yet the disastrous demographic context of *Oliphant* seemingly cried for judicial intervention—or did it? On the one hand, it seems odd to think that a tribe with fifty resident members should be able to incarcerate any of the 3,000 nonmembers who live on the reservation. Yet the institutional perspective, along with a deeper contextual understanding, mutes this problem at least to some extent.

First, the legal regime in place before *Oliphant* provided substantial protections to nonmember criminal defendants in tribal court. Had the tribe been allowed to prosecute Oliphant, ICRA would have required the tribe to accord him with most of the protections he would have received in federal or state court.[143] To be sure, the similarities are not seamless: for example, an all-Indian jury would have been allowed, a matter the Court specifically remarked upon.[144] Yet ICRA also contained an important limitation not found in the Constitution: it limited punishment to a maximum of six-months' imprisonment or a fine of $500.[145] ICRA also expressly provided for habeas corpus review in federal court,[146] so that any abuses in the tribal court could be rectified.

Second, Oliphant was not some outsider without any reservation contacts or situation sense. He lived on the reservation, and he supposedly committed a clear breach of the peace by assaulting a tribal police officer.[147] Any requirements of jurisdictional due process—of minimum contacts and legitimate jurisdictional motivation—would seem easily satisfied.

Third, Oliphant was not some powerless person standing in pitiful anonymity against the exercise of the coercive power of a foreign sovereign. To be sure, he was not a member of the tribe and had no vote in tribal affairs. He did have a powerful champion in the case, however: Slade Gorton, then the Attorney General of Washington and later a United States Senator. It was Gorton himself who argued on behalf of the state of Washington as amicus curiae that Oliphant should be free from tribal authority.[148]

In light of these factors, consider what might have happened if the Court had allowed the tribe to prosecute. Had fundamental unfairness occurred, a federal

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142. For more information, review the text accompanying *supra* note 89.
143. For more information, review *supra* note 98.
144. *See Oliphant*, 435 U.S. at 194.
145. *See id.* at 203 n. 14 (describing this limitation). Later the statute was amended to authorize tribal punishments of up to one year in jail and a $5,000 fine. *See* 25 U.S.C. § 1302.
146. *See* 25 U.S.C. § 1303.
147. *Oliphant*, 435 U.S. at 194.
148. *See id.* at 191.

court, through habeas corpus, could have remedied it. Moreover, Gorton and other opponents of tribal power would surely have pressed Congress for legislation altering the Court's result.

In the final analysis, the Court in *Oliphant* did not fully balance the long-term likelihood of harm in tribal jurisdiction against the consequences of allowing that jurisdiction to proceed. I remain convinced that the Court incorrectly abandoned its longstanding institutional role of deferring to the congressional power over Indian affairs by abstaining from common law making in federal Indian law that would undercut tribal authority. It preempted what would likely have been some sort of political solution—indeed, perhaps many localized political solutions. Instead, it embarked on an agonizing, case-by-case process that likely has proved to be anathema to all parties concerned and that surely has been a time-consuming, frustrating, and unrewarding series of events for the Justices themselves.

Of course, these decisions on tribal power are "only" federal common law, so Congress may alter them.[149] Nonetheless, by turning off the political pressure from nonmembers and their state and local governments, the Court has shifted the burden of legislative inertia from where it would have belonged and imposed it upon the tribes. It is elementary that it is much easier to kill proposed legislation than to pass it.[150] Although generalizations are treacherous, the political facts of *Oliphant* suggest that nonmembers, bolstered by state and local officials, would have more capacity than tribes to move Congress to enact legislation and, especially, to block legislation that would restore tribal prerogatives. That the Court has reworked the practical political dynamics in this fashion is especially remarkable in light of the many precedents that portray the supposed political weakness and unsophistication of Indians as a primary justification for the federal-tribal trust relationship and the special canons of interpretation.[151]

149. Or can it? Following *Duro*, Congress passed legislation overturning the decision by recognizing inherent tribal sovereignty to apply criminal jurisdiction to nonmember Indians. *See* 25 U.S.C. § 1301(2) (2000). The statute was drafted in this manner to immunize tribal prosecutions from the argument that they involved delegated federal authority (instead of inherent tribal power) and thus were subject to the Constitution. In a stunning decision, the Eighth Circuit held that Congress had no authority to acknowledge inherent tribal power, viewing the definition of tribal authority as a judicial, not congressional, question. *See U.S. v. Weaselhead*, 156 F.3d 818 (8th Cir. 1998). (What in the world has become of the congressional plenary power over Indian affairs?) Judge Morris Arnold's dissent, which is surely correct, argued that *Duro* was simply a federal common law decision that Congress could override by ordinary legislation. *See id.* at 825. The issue divided the *en banc* Eighth Circuit down the middle, resulting in a *per curiam* reinstatement of the district court's opinion, which had followed the same tack as Judge Arnold later took. *See U.S. v. Weaselhead*, 165 F.3d 1209 (8th Cir. 1999) (en banc), *cert. denied*, 528 U.S. 829 (1999). In a more recent case, the Ninth Circuit has agreed with Judge Arnold. *U.S. v. Enas*, 255 F.3d 662 (9th Cir. 2001) (en banc), *cert. denied*, 122 S. Ct. 925 (2002).

150. *See e.g.* Kay Lehman Schlozman & John T. Tierney, *Organized Interests and American Democracy* 314-15, 395-96, 398 (Harpercollins College Div. 1986).

151. *See e.g. Carpenter v. Shaw*, 280 U.S. 363, 367 (1930) (In applying the favorable canons of interpretation, the Court wrote: "Such provisions are to be liberally construed. Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.").

In summary, *Lone Wolf*, as read against Chief Justice Marshall's earlier cases developing an interpretive paradigm, allowed Congress to call the shots in federal Indian policy so long as it acted clearly. Federal Indian policy was political, largely beyond the rule of law. The Court has eroded all aspects of this paradigm. By bringing the field somewhat under the rule of law, the Court has sometimes helped tribes (a muddled conception of Indian property, which is sometimes protected by the Fifth Amendment, is surely more normatively defensible than allowing Congress to confiscate Indian property without constraint so long as Congress operates clearly). But the Court's sense that it can find justice on a case-by-case basis has often been invoked to undermine tribes, not help them. Most fundamentally, it has elevated the Court into the role as arguably our most powerful contemporary agent of an ongoing, evolving colonialism. This method is contrary to the foundational approach to the field taken by Chief Justice Marshall, who saw a necessary judicial role in ratifying the original premises of colonialism but considered the courts to be free to put up barriers to further encroachments upon tribes and viewed negotiation or congressional policymaking superior to judicial undermining of tribal prerogatives.[152]

D. *The Academic Quandary*

In light of the foregoing, it is not surprising that perusing recent federal Indian law scholarship is much like reading a transcript of a group therapy session for masochists afflicted with an inferiority complex. Scholars rail—perhaps a better word for it is flail—against the trend in the cases, in which the tribes' batting average in the Supreme Court is so dismal[153] that, we are told, experienced practitioners now advise tribes to avoid the Supreme Court at all costs. We complain that the Court has lost the sense of prior precedential understandings under which it was supposed to protect pre-existing tribal interests as against all but crystal-clear congressional intrusions. We demonstrate that the doctrinal aspects of federal Indian law are a mess. We recognize that the current reservation context is itself sometimes a maze of mixed land ownership patterns that makes the delivery of government services a nightmare. Some of us suggest that all this is beyond the Court's ken—that doing best would be doing *nothing* other than freezing the status quo and requiring further legal and social evolution to come through a dialogue among the tribes, Congress, state and local governments, and nonmembers who have legitimate interests in Indian country. As the years have gone by, the jurisprudential spread between the Court and the scholarly community has become a gulf that now may be impassible.

Of course, federal Indian law is not unique in this regard. It probably goes without saying that the notion that constitutional and civil rights law will ordinarily

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152. *See* Frickey, *supra* n. 4, at 388-89.
153. *See* Getches, *supra* n. 28.

unfold, in common-law-like fashion, in a largely progressive and functional direction to promote a better balance of freedom, equality, and governmental responsibility has collapsed. Of the many examples in which the progressive scholarly community is at odds with today's Court, perhaps the area involving a series of cases most illustrative of this disjunction involves the dispute about congressional authority to impose civil rights measures upon unwilling state governments.[154] Even more acute, though, has been the scholarly anguish over the Court's resolution of the 2000 presidential election.[155]

As my colleague Robert Post has explained,[156] *Bush v. Gore*[157] presents a unique challenge to many of us. The decision seems not just merely quite wrong both doctrinally and politically. Disturbingly, it seems so brutally result-oriented as to disqualify itself from the legitimating label "law"—so narrowly written as to apply only to its precise facts and to no analogous circumstances, so unlikely to recur that the Court will never need to reconcile cases and thereby make, in Holmesian fashion, a "true induction to state the principle which has until then been obscurely felt," much less eventually work such a mid-level generalization against even later cases to develop "the abstracted general rule."[158] Instead, the case seems to epitomize what Justice Roberts once suggested was the paradigmatic abuse of judicial power, when a case falls "into the same class as a restricted railroad ticket, good for this day and train only."[159]

Larry Kramer has eloquently argued that the disdain shown for political rather than judicial solutions in *Bush v. Gore* is not unique.[160] In his judgment, the current Court has frequently displaced the political process and imposed the Justices' own sense of situational justice.[161] Understandably, given the status and

154. *See e.g.* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 Yale L.J. 441 (2000).

155. *See e.g.* Bush v. Gore: *The Question of Legitimacy* (Bruce Ackerman ed., Yale U. Press 2002); *A Badly Flawed Election: Debating* Bush v. Gore, *the Supreme Court, and American Democracy* (Ronald Dworkin ed., New Press 2002); *The Vote: Bush, Gore and the Supreme Court* (Cass R. Sunstein & Richard A. Epstein eds., U. Chic. Press 2001); Symposium, *Votes and Voices: Reevaluations in the Aftermath of the 2000 Presidential Election*, 23 Cardozo L. Rev. 1145 (2002).

156. *See* Robert Post, *Sustaining the Premise of Legality: Learning to Live with* Bush v. Gore, in Bush v. Gore: *The Question of Legitimacy, supra* n. 155, at 96-109.

157. 531 U.S. 98 (2000).

158. Holmes, *supra* n. 136, at 725.

159. *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). I am not the first to make this analogy to *Bush v. Gore*. *See e.g.* Samuel Issacharoff, *Political Judgments*, in *The Vote: Bush, Gore and the Supreme Court, supra* n. 155, at 70; Michael Herz, *The Supreme Court in Real Time: Haste, Waste, and* Bush v. Gore, 35 Akron L. Rev. 185, 194 (2002).

160. *See* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 Harv. L. Rev. 4 (2001).

161. Other commentators have seen *Bush v. Gore* as symptomatic of a broader problem of overly aggressive judicial intervention in cases raising constitutional objections to the regulation of politics itself, such as regulation of political parties. *See e.g.* Elizabeth Garrett, *Is the Party Over? The Court and the Political Process*, 2002 S. Ct. Rev. __ (forthcoming 2003). *See generally* Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. Colo. L. Rev. 923 (2001) (discussing the possibility that criticism might lead the Court to constrict its overly expansive judicial review of politics).

opaqueness of federal Indian law, his article does not consider that field. Those of us in this field would, I think, invite the comparison. Kramer's criticism fits federal Indian law to a T: the Court has micromanaged the field, largely out of a vague sense of justice, and thereby displaced political resolutions of the issues that would have almost certainly been more productive.[162] So if I may be so arrogant as to speak for my colleagues in federal Indian law to my other colleagues in the general public law: take it from one with a foot in both fields, you should come on over, there is plenty of malaise to go around.[163]

IV. CONCLUSION

In announcing an unreviewable congressional authority over Indian affairs, *Lone Wolf* expressed a drastic vision of colonialism. At first blush, it would seem that any sort of demise of this doctrine would be an unalloyed progressive measure. But there are many ways to modify a precedent. The Court's gradual, incremental displacement of the political process in Indian affairs with judicial *ad hoc* judgments has had the effect of an ongoing judicial colonial management program, not a progressive counterweight to historical and current colonial pretensions. It is as if the Court views Congress as having shirked its responsibility to manage colonial affairs, thereby leaving the Court the thankless responsibility of filling the breach on a case-by-case basis.[164]

In *Bush v. Gore*, the majority of the Court expressed a similar instinct: "When contending parties invoke the process of the courts, . . . it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront."[165] It is hard to take this view seriously as a general matter in light of such factors as the discretionary certiorari process. In any event, in the context of federal Indian law, it seems clear that the Court's recent decisions amount to unforced errors, not thankless tasks.

In the final analysis, the Justices in federal Indian law would profit from heeding the wisdom of two analysts who became famous in Yankee surroundings, the B & B boys—Berra and Bickel. Yogi counseled that "[y]ou got to be very

162. In his thoughtful book, *Taking the Constitution Away from the Courts* (Princeton U. Press 1999), Mark Tushnet contends that judicial review has generally had a negative impact upon progressive politics.

163. The malaise extends to teaching federal Indian law as well. Post laments the challenge of teaching *Bush v. Gore* to students already prone to avoid the hard work of improving their legal analytical skills by the easy out of political explanation. *See* Post, *supra* n. 156, at 97-98. A similar challenge runs through much of the corpus of federal Indian law. Federal Indian law does have one advantage over some other areas of public law, however, in that the often stronger relationship between theory and practice makes it possible to contribute to practical solutions in the real world even if the theoretical aspects of the venture are distressing. *See supra* n. 37.

164. *See* Frickey, *supra* n. 21, at 68 (analogy to dormant Commerce Clause).

165. 531 U.S. at 111.

careful if you don't know where you're going, because you might not get there."[166] In such circumstances, Alexander suggested, the prudent course is sometimes the passive one, doing nothing at all.[167] A Bickelian twist on a Berraism counsels that, when the Court next comes to a fork in the road in federal Indian law, it should not take it.[168]

166. *See Famous Yogi Berra Quotes* <http://www.yogiberraclassic.org/quotes.htm> (accessed Sept. 20, 2002).

167. The reference, of course, is to Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40 (1961).

168. *Cf. Famous Yogi Berra Quotes*, *supra* n. 166 ("When you come to a fork in the road, take it!").