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Connecting the Dots Between the Constitution, the Marshall Trilogy, and *United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty

Ann E. Tweedy
California Western School of Law

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**CONNECTING THE DOTS BETWEEN THE CONSTITUTION,
THE MARSHALL TRILOGY, AND *UNITED STATES V. LARA*:
NOTES TOWARD A BLUEPRINT FOR THE NEXT
LEGISLATIVE RESTORATION OF TRIBAL SOVEREIGNTY**

Ann E. Tweedy*

*This law review Article examines: (1) the underpinnings of tribal sovereignty within the American system; (2) the need for restoration based on the Court's drastic incursions on tribal sovereignty over the past four decades and the grave circumstances, particularly tribal governments' inability to protect tribal interests on the reservation and unchecked violence in Indian Country, that result from the divestment of tribal sovereignty; (3) the concept of restoration as illuminated by *United States v. Lara*, and finally (4) some possible approaches to partial restoration.*

*The Article first evaluates the constitutional provisions relating to Indians and the earliest federal Indian law decisions written by Chief Justice Marshall on the premise that these two sources shed light on the upper limits of a potential legislative restoration of tribal sovereignty. Next, the Article examines the judicial trend of divestment of tribal sovereignty, focusing particularly on the latest decisions that evidence this trend. The Article further examines the negative effects of this divestment in Indian Country, from impeding tribes' ability to provide governmental services and to protect their unique institutions, to problems of widespread on-reservation violence, particularly against Indian women. The Article concludes that the judicial trend of divesting tribal sovereignty combined with these dire effects clearly demonstrate a need for restoration. Finally, the Article examines the *Lara* holding and its implications for the types of restoration that will be upheld by Court, concluding with an examination of options for potential legislative restorations.*

* Teaching Fellow, California Western School of Law. Before joining the faculty at California Western School of Law, Professor Tweedy represented tribes in private practice and as tribal in-house counsel. She also clerked for the Honorable Ronald M. Gould of the United States Court of Appeals for the Ninth Circuit and the Honorable Rex Armstrong of the Oregon Court of Appeals. She is a 1999 graduate of the University of California, Berkeley School of Law (Boalt Hall) and was inducted into the Order of the Coif.

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INTRODUCTION

This Article examines tribal sovereignty¹ under United States federal law, both as it exists presently in the weak and degraded state created by the Supreme Court's and Congress' divestment of tribal sovereignty and as it existed historically. The Article also examines the Supreme Court's watershed decision, *United States v. Lara*,² which upheld Congress' restoration of tribal criminal jurisdiction over Indians who are not members of the tribe exercising jurisdiction. Based on this federal law framework and the severe problems in Indian Country that have resulted from the divestment of tribal sovereignty, this Article explores the possibilities for other legislative restorations of tribal sovereignty.

Part I addresses early American legal conceptions of tribal sovereignty with the goal of illuminating the maximum feasible scope of restoration under the current system. Part II looks at the current, depressed and precarious state of tribal sovereignty as formulated under federal law. Part III examines the concept of restoration as illuminated by the *Lara* decision (and informed by other Supreme Court case law). Finally, Part IV outlines some of the most promising types of partial restoration.

I. TRIBAL SOVEREIGNTY AS A HISTORICAL CONCEPT: WHY EARLY TRIBAL SOVEREIGNTY JURISPRUDENCE MATTERS TODAY

Although legislative restoration is only one of many possible approaches to the problem of judicially divested tribal sovereignty,³

1. Tribal sovereignty, "[a]t its most basic, . . . refers to the inherent right or power to govern." WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 66 (1988). "As presently constituted under federal law, tribal sovereignty ensures that Indian tribes enjoy the same inherent rights of self-government over their members and retained territories as any other nation, except as limited by the doctrine of discovery, treaty-based cessions of authority, or explicit congressional abrogation under the plenary power doctrine." Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 821 (2007). For the purposes of this Article, it is useful to think of sovereignty as comprised of criminal jurisdiction and civil jurisdiction, both of which have adjudicatory and regulatory aspects.

2. *United States v. Lara*, 541 U.S. 193 (2004).

3. There are at least three possible alternatives to the restoration approach this Article explores. First, tribes could elect instead to attempt to extricate themselves from the federal system in order to regain their historical, undiminished level of sovereignty. See generally William Bradford, "Another Such Victory and We Are Undone": A Call to an American Indian Declaration of Independence, 40 TULSA L. REV. 71 (2004); see also ANDREA SMITH, *CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE* 5, 185 (2005) (arguing for the abolition of the United States).

Alternatively, tribes may want to stay within the federal system but advocate for more complete sovereignty within the system, thus seeking to have early Indian law decisions over-

this Article is primarily concerned with elucidating the restoration option, and it takes as its basis the following premises. Assuming tribes remain within the federal system, the possible scope of restoration is arguably limited to the most expansive range of sovereignty tribes possessed within this system, which presumably would have been immediately after the formation of the United States.⁴ Under this view, legislative restoration of any sovereignty that is absolutely incompatible with tribes' continued relationship to, and location within, the United States would be extremely unlikely.⁵

Among the best sources as to the scope of sovereignty tribes possessed immediately after the creation of the United States are: (1) constitutional provisions referring to tribes and (2) the Supreme

ruled on the basis that they, too, put impermissible limits on sovereignty. See ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE HISTORY OF RACISM IN AMERICA* 161–95 (2005) (arguing, based on the racist language of Supreme Court Indian law jurisprudence dating from the early 1800s through the present, that the only workable solution for tribes is to (1) confront the members of the Court with evidence of the Court's past unconscious racial stereotyping of Indians and (2) advocate that the Court look to international law on indigenous rights, rather than its own racist precedent, in deciding cases).

Finally, building on the second approach, tribes could attempt to create structural protections for tribal sovereignty, for example by amending the Constitution, and thereby avoid the need for relying on, and building on, the existing legal framework. See generally Frank Pommersheim, *Is There a (Little or Not so Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271 (2003); see also Rebecca Tsosie, *Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit Within Civil Society?*, 5 U. PA. J. CONST. L. 357, 398 (2003) (noting the lack of structural protections in the Constitution for tribal sovereignty as compared to those supporting state sovereignty).

These approaches could have numerous advantages for tribes that would not be available under tribal restoration, although all of them would also be very difficult, if not impossible, to achieve. See, e.g., L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty After Atkinson and Hicks*, 37 NEW ENG. L. REV. 669, 687 (2003) (opining that the day the states ratify a constitutional amendment bolstering tribal sovereignty "will never arrive").

In my view, the strategy questions of which approach to pursue and what level of risk is acceptable are for tribes to decide rather than for a non-Indian scholar. Accordingly, this Article looks to the earliest Supreme Court Indian law decisions as well as federal constitutional provisions to explicate the most probable (at least practically speaking) upper limit of potential restoration. Its goal is the modest one of elucidating what gains may be available by pursuing the avenue of legislative restoration.

4. *But see* United States v. Enas, 255 F.3d 662, 679 n.4 (9th Cir. 2001) (Pregerson J., concurring) (stating that a tribal inherent power recognized by Congress need not have historical roots to qualify as a valid restoration of tribal sovereignty). Even if greater restoration than that which existed in early American history is possible, as Judge Pregerson suggests, restorations within these historical limits should nonetheless be safest from the standpoint of surviving court review.

5. Although Congress, based on the plenary power discussed in Part I.C., *infra*, theoretically could overrule common law doctrines, like discovery and the idea that the relationship between tribes and the United States is analogous to that between a ward and a guardian, which were announced in the Marshall Trilogy decisions discussed in Part I.B., *infra*, such an outcome appears highly unlikely. For one, it could call into question both the legitimacy of title to the entire United States and Congress's authority over tribes.

Court's earliest federal Indian law jurisprudence.⁶ Accordingly, this Article will give a very brief overview of tribal sovereignty prior to Columbus' discovery of the New World and the European occupation of America and then turn to what is more relevant for purposes of restoration: tribal sovereignty's constitutional underpinnings and early Supreme Court conceptions of tribal sovereignty.

A. Pre-contact Sovereignty

Prior to European contact, tribes enjoyed the full panoply of sovereign rights.⁷ This sovereignty "arose out of a history in which distinct communities of American Indian peoples lived, created institutions and systems, and governed themselves, sharing territories within North America."⁸ Moreover, "although the degree and kind of organization varied widely among them," most tribes were politically organized as "independent, self-governing societies"⁹ This sovereignty "by nature and necessity" meant that tribes "conducted their own affairs and depended upon no outside source of power to legitimize their acts of government."¹⁰

It was European contact and the eventual establishment of the United States, at least under the Supreme Court's understanding of tribal sovereignty,¹¹ that disrupted and fundamentally changed the numerous ancient systems of tribal governance.

6. See, e.g., Will Trachman, *Comment: Tribal Criminal Jurisdiction After United States v. Lara: Answering Constitutional Challenges to the Duro Fix*, 93 CAL. L. REV. 847, 879 (2005) (noting that "constitutional text and subsequent judicial interpretations of the Framers' meaning both offer insight into the proper status of tribes in relation to the U.S. government and the Constitution").

7. See, e.g., *Worcester v. Georgia*, 31 US. (6 Pet.) 515, 559 (1832) (recognizing that "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as undisputed possessors of the soil, from time immemorial"); see also *id.* at 542–43.

8. Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 683 (2002).

9. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a], at 204 (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN'S HANDBOOK]; accord *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 192 (1978) ("Two hundred years ago, the area bordering Puget Sound consisted of a large number of politically autonomous Indian Villages . . .").

10. Seielstad, *supra* note 8, at 683 (quoting WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 68 (1998)).

11. Many also understand sovereignty among Native tribes within the United States to exist independently of federal law, although federal law's diminished recognition of it impedes the exercise of sovereign rights. See, e.g., Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1154 (2004) (describing the view of Raymond Etcitty, Navajo Nation's Chief Legislative Counsel, that "the source of Navajo Nation sovereignty is the Navajo people; the federal government did not grant sovereignty and the federal government cannot take it away"); Bradford, *supra* note 3,

B. The Constitution's Implications for Tribal Sovereignty

The Constitution is a seminal source for understanding the Framers' conception of tribal sovereignty and hence the maximum possible scope of restoration (absent a constitutional amendment). Although the Constitution does not contain many references to tribes or textual provisions that otherwise relate to them,¹² the text that does pertain to tribes is implicitly supportive of tribal sovereignty. Furthermore, given that tribes were functioning as governments at the time the Constitution was drafted and that the Constitution did not purport to alter tribal sovereignty (except insofar as providing Congress with authority to regulate commerce with tribes effected an alteration), the Constitution, through its very silence on the subject, affirms tribal sovereignty.¹³

1. Explicit Textual References

The Constitution has a scant three references to Indians. Two are generic references to "Indians not taxed," which simply exclude them from legislative apportionment.¹⁴ The final reference is contained in the Commerce Clause, which provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with

at 134 ("[Indian] nation[s] continue to possess [their] full range of sovereign rights even as their violation occurs." (internal quotation marks and citation omitted)); cf. *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994) (stating that "[t]he Tribe's retained sovereignty predates federal recognition—indeed, it predates the birth of the Republic—and it may be altered only by an act of Congress" and holding that tribal jurisdiction accordingly predated the tribe's relatively recent federal recognition (citations omitted)).

12. As Sarah Krakoff notes, the lack of discussion of tribes in the Constitution may, at least in theory, be substantively beneficial because it means that tribal sovereignty claims are not dependent on any document of positive law. Krakoff, *supra* note 11, at 1155–56 (noting that, as a theoretical matter, it is unclear whether the lack of structural protections for tribal sovereignty makes tribes' sovereignty claims stronger or weaker than those of states); see also *Lara*, 541 U.S. at 210–11 (Stevens, J., concurring); Riley, *supra* note 1, at 823.

13. See Riley, *supra* note 1, at 823 ("At the time of the Constitution's creation, Indian nations were already established in the U.S. and exercised inherent sovereignty over their people and territories. Thus, the U.S. Constitution, which has never been amended to formally incorporate tribal governments into the federal-state system, does not regulate the conduct of Indian tribal governments.") (citations omitted).

14. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2. As suggested above, these references are "not a grant of tax exemption"; rather, they "described an existing status." COHEN'S HANDBOOK, *supra* note 9, § 8.01[2], at 674. These provisions excluding tribes from legislative apportionment also indicate that tribes were viewed as largely separate from the federal-state relationship.

foreign Nations, and among the several States, and with the Indian Tribes.”¹⁵

Scholars have noted that these provisions envision tribes to be largely outside of the political system of the United States,¹⁶ and thus that tribal sovereignty is both pre-constitutional and extra-constitutional.¹⁷ At the same time, the Commerce Clause “clearly recognizes some kind of significant and enduring sovereignty in Indian tribes” in that they are listed “in a series that includes the states and sovereign nations.”¹⁸ Moreover, as Gloria Valencia-Weber explains, the viability of the incipient United States depended upon developing a federalist framework that could procure a peaceful coexistence with tribes, and, thus, “[b]y its very existence, the Indian Commerce Clause demonstrates the unique role that tribes as nations played in constructing the foundations of the Constitution.”¹⁹

15. U.S. CONST. art. I, § 8, cls. 1, 3. The portion of this clause relating to tribes is now popularly called “the Indian Commerce Clause.” Although this terminology is odd given the fact that the entire text of Clause 3 comprises one cohesive clause, I adhere to this terminology to avoid confusion.

16. See, e.g., David E. Wilkins, *Keynote Address: A Constitutional Confession: The Permanent If Malleable Status of Indigenous Nations*, 37 NEW ENG. L. REV. 473, 479 (2003).

17. Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 417 (2003).

18. Pommersheim, *supra* note 3, at 273; accord *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 19 (1831) (explaining that the Court bases its conclusion that Indian tribes are not foreign nations in part on the Commerce Clause’s distinction between tribes and foreign nations, but that the court does not presume that tribes cannot be nations but rather concludes that they are not foreign to the United States); see also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832) (“The words ‘treaty’ and ‘nation’ are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.”). But see Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 260, 265 (2007) (arguing that the use of the word “nation” in reference to tribes did not clearly denote a view of tribes as sovereign entities and that the Indian Commerce Clause largely “did not . . . abolish or alter the pre-existing state commercial and police power over Indians within state borders”).

19. Valencia-Weber, *supra* note 17, at 451; accord Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509, 553 (Dec. 2007) (quoting President George Washington’s statement that the settlement “‘of the Western Country and making a Peace with the Indians [were] so analogous that there [could] be no definition of the one without involving considerations of the other’”). But see Natelson, *supra* note 18, at 265 (arguing that the Indian Commerce Clause largely “did not . . . abolish or alter pre-existing state commercial and police power over Indians within state borders”).

2. The Treaty Clause

The only other constitutional text relating to tribes is the Treaty Clause, authorizing the President, “by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”²⁰ The Treaty Clause affirms tribal sovereignty in several different ways. First, the fact that the federal government utilized the treaty power so extensively to make agreements with tribes prior to, during the formation of, and in the early years of the Republic evidences a strong federal recognition of tribal sovereignty as a practical matter.²¹ Moreover, given that several Indian treaties pre-dated the Constitution, the Treaty Clause, which did not retroactively or prospectively limit the power to make such treaties with tribes, affirms this power as a matter of constitutional intent.²² Next, and relatedly, although the Clause does not explicitly reference tribes, the Court has consistently construed the Clause as authorizing the President to make treaties with tribes.²³ Thus, given that “the federal judiciary is supreme in the exposition of the law of the Constitution,”²⁴ the Clause legally embodies an understanding of tribes as sovereign nations who have the power to enter into treaties. Accordingly, both the history of treaty-making with tribes prior to adoption and ratification of the Constitution and subsequent judicial review and validation of tribal treaties affirm that the Clause constitutes a strong recognition of tribal sovereignty. Finally, the Clause’s allocation of federal treating power to the President underpins and validates the numerous treaties ratified between tribes and the federal government, many of which included strong recognitions of tribal sovereignty.²⁵ Thus, in this additional sense, the Clause indirectly recognizes tribal sovereignty.

20. U.S. CONST. art. II, § 2.

21. Trachman, *supra* note 6, at 852; *see also* Pommersheim, *supra* note 3, at 285–86; Valencia-Weber, *supra* note 17, at 423–24.

22. *Worcester*, 31 U.S. at 519 (“The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties.”); *see also* Pommersheim, *supra* note 3, at 285–86; Trachman, *supra* note 6, at 852; Valencia-Weber, *supra* note 17, at 423–24.

23. *See, e.g.*, *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 197 (1876) (describing the President’s power to treat with tribes to be “coextensive with that to make treaties with foreign nations”).

24. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

25. *See, e.g.*, Hope Babcock, *A Civic-Republican Vision of “Domestic Dependent Nations” in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Re-invigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 458–59 (2005) (noting that treaties “impart[ed] a distinctive legal relationship” between the federal government and tribes and that, “[f]or some scholars, . . .

Although Congress, in 1871, passed a statute prohibiting the President from making further treaties with tribes but protecting existing treaty rights,²⁶ this statute merely evidences the 1871 Congress' negative view of tribal sovereignty.²⁷ As a statute, it can have no effect on the constitutional status of tribes,²⁸ and, moreover, scholars have argued persuasively that the statute itself, as a congressional attempt to curb constitutionally accorded executive power, is unconstitutional.²⁹

3. The Contrast Between the Textual Implications of These Constitutional Provisions and Their Judicial Interpretations

Taken together, the three explicit constitutional references to Indians and the Treaty Clause embody a view that tribes are sovereign, and permanently so, but that their sovereignty operates largely outside of the constitutional framework. Despite the positive implications of these constitutional provisions for tribal sovereignty, the lack of explicit structural protections for such sov-

erties provide the primary doctrinal grounding for the recognition of tribal sovereignty") (citations and internal quotation marks omitted).

26. 25 U.S.C. § 71 (2006) ("No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.").

27. See, e.g., David P. Currie, *Indian Treaties*, 10 GREEN BAG 2d 445, 445–50 (2007) (discussing the legislative history of the statute as originally enacted). Although the statute was amended in 1988, the 1988 amendments were solely concerned with increasing protections for established treaty rights. See H.R. 4333, 100th Cong., § 3042 (1988) (enacted).

28. Cf. *United States v. Lara*, 541 U.S. 193, 218 (2004) (Thomas, J., concurring) (describing 25 U.S.C. § 71 as "constitutionally suspect" but opining that it nonetheless "reflects the view of the political branches that the tribes had become purely a domestic matter"). Justice Thomas places inordinate importance on the views evident in the statute, while ignoring other, more recent and more direct federal acknowledgements of tribal sovereignty. See, e.g., Executive Order 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000) (stating that "[t]he United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination"); see also Indian Reorganization Act, 25 U.S.C. §§ 461–479 (2006); 33 U.S.C. § 1377(e) (2006) (authorizing the Environmental Protection Agency to treat tribes as states under the Clean Water Act); Valencia-Weber, *supra* note 17, at 469 ("Before and after the Court began confiscating political power, Congress passed numerous acts that strengthened the authority of tribal governments in directional action opposite that of the Courts. The governmental autonomy of American Indian governments was strengthened in the self-determination statutes such as the Indian Self-Determination and Education Assistance Act of 1988, Tribal Self-Governance Act of 1994, Indian Health Care Amendments of 1990, and the Indian Land Consolidation Act of 1991. These acts presume the tribes' ability as governments to design and administer the necessary programs." (citations omitted)).

29. See generally Currie, *supra* note 27.

ereignty has, as a practical matter, harmed tribes. Indeed, the oblique provisions appear to have functioned as a Rorschach ink blot test for the Court,³⁰ enabling adoption of radical, seemingly baseless principles such as Congress' unbounded (or, at the very least, nearly unbounded) plenary power over tribes.³¹ In *United States v. Wheeler*,³² for example, the Court described tribal sovereignty as being wholly under Congressional control and further held, broadly extending a recent holding regarding tribal criminal jurisdiction over nonmembers to other contexts,³³ that tribal sovereignty would be considered implicitly divested any time it appeared to be inconsistent with tribes' dependent status:

The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.³⁴

30. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2002) (describing a "Rorschach test" as "a psychological test of personality and intelligence consisting of 10 standard black or colored inkblot designs that the subject describes in terms of what they look like to him and reveals through his selectivity the manner in which intellectual and emotional factors are integrated in his perception of environmental stimuli").

31. See, e.g., Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intra-sentence Uniformity*, 55 ARK. L. REV. 1149, 1168 (2003) (noting that plenary power over Indian affairs was created by "judicial fiat," that the "Court has never explained how the Commerce Clause could be the source of a federal plenary power over Indian tribes," and that it has similarly failed to explain "how the Commerce Clause can grant plenary power over some sovereigns . . . but not others . . ."); see also Fletcher, *supra* note 19, at 521 & n.79 (stating that Congress's plenary power "could once have been described as all but 'absolute'," but that, in recent years, the Court has "on rare occasions, [struck] down Indian affairs regulation . . .").

32. 435 U.S. 313 (1978).

33. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

34. 435 U.S. at 323; see also *Lara*, 541 U.S. at 200-01 (linking congressional plenary power to the Indian Commerce Clause and the Treaty Clause, as well as to preconstitutional powers over military affairs and foreign relations); Valencia-Weber, *supra* note 17, at 407, 472-73 (discussing the prevalence in federal Indian law of rootless principles formed out of whole cloth by the Court, including *Wheeler's* conceptualization of implicit divestiture); Pommerstein, *supra* note 3, at 278 (describing the plenary power doctrine as extra-constitutional in origin and "extravagant in its placement of unlimited authority in the hands of the Congress at the expense of tribal sovereignty"); Philip P. Frickey, *A Common Law for our Age of Colonialism: The Judicial Divestiture of Indian Tribal Sovereignty Over Nonmembers*, 109 YALE L.J. 1, 70 (1999) ("In light of the narrowness of [the text of the Indian Commerce Clause], it is something of a legalistic mystery how Congress ended up with 'plenary power' over Indian affairs. But despite the rejection of the notion in an earlier case, the Court has stated that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." (citations omitted)).

Thus, the Court has held that Congress wields vast plenary power over tribes in *Wheeler* and other cases despite the bedrock constitutional principle that “[t]he powers of the legislature are defined and limited” by the Constitution³⁵ and the fact that neither the Commerce Clause nor the Treaty Clause supports such broad constitutional authority.³⁶

35. *United States v. Morrison*, 529 U.S. 598, 607 (2000) (quoting *Marbury v. Madison*, 1 Cranch 137, 176 (1803)); see also Natelson, *supra* note 18, at 207 (stating that one reason for the Tenth Amendment “was precisely to re-assure Anti-Federalists who feared that the new government might claim powers beyond those enumerated”).

Professor Fletcher provides an interesting variation on the traditional view that federal powers include only those enumerated in the Constitution in his article “Preconstitutional Federal Power,” in which he argues that expansive federal powers over Indian affairs may well have survived the ratification of the Constitution despite their lack of clear enumeration in the Constitution. See generally Fletcher, *supra* note 19. He further argues that the preconstitutional federal authority alluded to in *Lara* arguably has a stronger basis than the preconstitutional federal foreign affairs power held to exist in *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936). Fletcher, *supra* note 19, at 509, 519–21, 527–29, 554–61. But see *Lara*, 541 U.S. at 200–01 (suggesting that plenary power over Indian affairs may be partially derived from foreign affairs powers).

Consideration of the idea of preconstitutional federal power raises the additional question of how to deal with the Tenth Amendment’s reservation of most non-enumerated powers to the states. US CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). The Court’s oft-criticized opinion in *Curtiss-Wright* provides one possible solution that has, at least, some superficial logical appeal. *Curtiss-Wright*, 299 U.S. at 315–16 (“The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs That this doctrine applies only to powers which the states had is self-evident.”). In other words, if the states never had a given power in the first place, then the Tenth Amendment would have no application. See, e.g., *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 403 (1963) (“The Tenth Amendment ‘states but a truism that all is retained which has not been surrendered.’”) (citation omitted).

The convention of making treaties with tribes prior to and after ratification of the Constitution and the Supreme Court’s enshrined validation of those treaties as legitimate exercises of federal power also confirm that the federal government viewed tribes as separate sovereigns that were not incorporated within states and subject to state power. See Valencia-Weber, *supra* note 17, at 412, 420–21. But see Natelson, *supra* note 18, at 265 (arguing that States had preexisting power over tribes and Indians).

At any rate, the issue of the analytical viability of the concept of plenary power over Indian affairs need not be conclusively resolved here because this Article assumes its continued existence.

36. Nonetheless, the Court has alternately located plenary power in one clause or the other or in both together, although occasionally it has defined plenary power to be outside of the Constitution entirely. Compare *Williams v. Lee*, 358 U.S. 217, 219 n.4 (1959) (federal power over Indians derives from the Commerce Clause and Indians’ dependency and consequent need for protection), with *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 172 n.7 (1973) (federal power derives from the Commerce power and the Treaty Clause), and *United States v. Kagama*, 118 U.S. 375, 378–79, 381 (1886) (rejecting asserted constitutional bases for a federal criminal statute governing Indian Country but concluding that it is “too firmly and clearly established to admit of dispute, that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority . . .”). See also Natelson, *supra* note 18, at 238–39, 241, 243–44, 248, 265 (analyzing the original under-

Starting with the Indian Commerce Clause, the textual authorization to regulate commerce with tribes cannot be logically interpreted to authorize the legislative annihilation of tribes' political existence sanctioned in *Wheeler*.³⁷ Even the broadest Commerce Clause cases outside of the Indian law context³⁸ require that there be some nexus between commerce and the regulated activity,³⁹ despite the "plenary" quality of federal Commerce power.⁴⁰ Moreover, the Court has required stronger nexuses in recent years.⁴¹ Looking at the ordinary meaning of the text of the Indian Commerce Clause, the Clause appears to authorize federal regulation regarding what entities may trade with Indians and the

standing of the Indian Commerce Clause and concluding that it granted Congress the "power to regulate Indian trade between people under state or federal jurisdiction and the tribes" and that "[i]t did not grant to Congress a police power over the Indians, nor a general power to otherwise intervene in tribal affairs"; *id.* at 207–08 (examining and dismissing other purported constitutional bases for plenary power).

Note that, as suggested above, if the plenary power doctrine has no basis in the enumerated powers in Article I (or elsewhere in the Constitution), the prevailing constitutional view holds that it should be declared unconstitutional. *See Morrison*, 529 U.S. at 607 (quoting *Marbury v. Madison*, 1 Cranch 137, 176 (1803)); accord WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 64 (8th ed. 1996) (noting that "[w]ith one debatable exception [relating to federal power over foreign affairs] . . . , the Court has consistently ruled that federal legislation must be based on powers granted to the federal government in the Constitution"). *But see generally* Fletcher, *supra* note 19 (arguing that federal plenary power over Indian affairs may be properly viewed as deriving from preconstitutional federal power that survived ratification of the Constitution). For additional discussion of Professor Fletcher's view and related issues, *see supra* note 35.

37. *See, e.g., Kagama*, 118 U.S. at 378–79 ("[W]e think it would be a very strained construction of [the Indian Commerce Clause], that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes."); *see also* Prakash, *supra* note 31, at 1160 ("[N]othing in the Commerce Clause's text or original understanding actually suggests that the Founders understood 'regulate commerce' as having multiple meanings.").

38. It is worth noting again here that the so-called Indian Commerce Clause and the Commerce Clause are part of the very same simple, declarative sentence; indeed the terms "several States" and "Indian Tribes" are adjacent to one another. U.S. CONST. art. I, § 8, cl. 3. This textual construction militates in favor of construing the powers similarly. *See generally* Prakash, *supra* note 31.

39. *See, e.g., Hodel v. Indiana*, 452 U.S. 314, 323–24 (1981) (holding in part that federal legislation must be upheld so long as there is a rational basis for a congressional finding that the regulated activity affects interstate commerce).

40. *Gibbons v. Ogden*, 22 U.S. 1, 197 (1824).

41. *See, e.g., Morrison*, 529 U.S. at 616–18 (striking down civil damages provisions of the Violence Against Women Act because the legislation was "not directed at the instrumentalities, channels, or goods involved in interstate commerce"); Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 *FORDHAM L. REV.* 799, 801–02 (2006) (describing the recent Commerce Clause decisions).

types of trading that may occur.⁴² Regarding tribal sovereignty itself, it implies only that tribes are separate sovereigns and will remain so.

Similarly, as the Court has recently acknowledged,⁴³ the President's treaty power cannot logically give rise to congressional plenary power because the two powers reside in separate entities.⁴⁴ Moreover, to the extent the Treaty Clause can be construed to be applicable to the issue of plenary power, it would appear to authorize, at most, federal good faith negotiation with tribes regarding their continued political existence, not unilateral annihilation of tribes as legal entities.⁴⁵

To briefly sum up, as a textual matter the Constitution does recognize tribal sovereignty in the Indian Commerce Clause and the

42. *Cf.* *Worcester v. Georgia*, 31 US. (6 Pet.) 515, 553–54 (1832). In *Worcester*, the Court examined a provision of a treaty with the Cherokees that gave the United States “the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, as they think proper.” *Id.* at 553 (emphasis subtracted). Rather than holding that the Cherokee Nation actually granted the United States the right to manage all of the Nation's affairs through that provision, however, the Court held that the reference to managing the Cherokee's affairs was limited by the earlier reference to “trade.” *Id.* at 553–54; *accord* Natelson, *supra* note 18, at 265; Valencia-Weber, *supra* note 17, at 467–69. *But see* *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (identifying the Indian Commerce Clause as the source of plenary power and stating that “[i]t is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications”); *United States v. Lomayaoma*, 86 F.3d 142 (9th Cir. 1996) (contrasting the Commerce Clause with the Indian Commerce Clause and concluding that Congress's power under the latter is much broader).

While Justice Thomas, in his concurrence in *Lara*, makes a similar point regarding the lack of constitutional underpinnings of Congress's plenary power over tribes, *United States v. Lara*, 541 U.S. 193, 224–26 (2004) (“The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty.”), he does not take his point to the logical conclusion that Congress's (and the Court's) unauthorized limitations on tribal sovereignty may well be invalid. *See supra* notes 35–38 for further discussion of these issues.

43. *Lara*, 541 U.S. at 201.

44. *Accord* Natelson, *supra* note 18, at 209 (“Congressional authority granted by Indian treaty is . . . a tribe-by-tribe inquiry, and not a basis for plenary congressional power over all tribes”).

45. In a perversion of logic, courts have held that the Treaty power cannot be used to preclude future exercises of plenary power. *See, e.g., Anderson v. Gladden*, 188 F. Supp. 666 (D. Or. 1960), *aff'd* 293 F.2d 463 (9th Cir. 1960). Such holdings make Gloria Valencia-Weber's analogy between Supreme Court Indian law doctrines such as plenary power and life-threatening smallpox microbes seem particularly apt, since the doctrines, like the microbes, cannot be stamped out once they arrive on the scene out of nowhere. *See generally* Valencia-Weber, *supra* note 17. Such holdings also reveal an important limit to the potential scope of a restoration of tribal sovereignty: they signal that plenary power cannot be used to limit prospective applications of plenary power. Rather, limits on plenary power would have to come from Supreme Court decisions (an unlikely source based on recent jurisprudence), a constitutional amendment, or more drastic measures. *See supra* note 3.

Notably, however, the Treaty Clause implicitly precludes states' attempts to exercise power over tribes. *See, e.g., supra* note 35.

Treaty Clause. Furthermore, the lack of Congressional power to limit tribal sovereignty (except in the course of regulating commerce with Tribes) calls into serious question the constitutionality of Congress' non-commerce-based limitations on sovereignty as well as the Supreme Court's conclusion that tribal sovereignty is subject to complete defeasement.⁴⁶

Nonetheless, as previously noted, the Supreme Court has the last word on the meanings of constitutional provisions,⁴⁷ and given the number of decisions already on the books that link plenary power to the Constitution, the Supreme Court is unlikely to invalidate plenary power at any point in the foreseeable future.⁴⁸ Thus, constitutional provisions relating to tribes, while textually positive overall, have been irretrievably associated with Congress' often damaging plenary power. The good news from a restoration perspective is that, outside of the realm of commerce⁴⁹ and judicial contortions of commerce into congressional plenary power, there are no constitutionally imposed limits on tribal sovereignty. Moreover, as tribes appear to be stuck with plenary power for the time being, an exploration of the positive uses that can be made of such power serves tribal interests.⁵⁰

46. This conclusion is stated in a number of Supreme Court decisions. *See, e.g.*, *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 787 n.30 (1984); *Rice v. Rehner*, 463 U.S. 713, 719 (1983); *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

Plenary power has also been traced to the Marshall Trilogy generally, *infra* note 96, and specifically to the federal government's "protective relationship over tribal governments" as recognized in the Trilogy decisions. DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW: CASES AND MATERIALS* 325 (3d ed. 1993). However, Marshall's notion of a protective relationship was not unlimited. *See Worcester*, 31 U.S. at 552 ("Protection does not imply the destruction of the protected.").

47. *Cooper v. Aaron*, 358 U.S. 1, 17 (1958).

48. *But see WILLIAMS, supra* note 3, at 167–70 (arguing that because the doctrine of plenary power is based on racial stereotyping of Indians, lawyers who advocate for tribes must expose these stereotypes to Supreme Court justices, and that once these stereotypes have been exposed, there will be cause for hope that a majority of the Court will cease relying on racist Indian law doctrines).

49. Even in the realm of commerce, Congress could legislate to permit tribes to exercise full sovereign power. *Cf. United States v. Enas*, 255 F.3d 662, 680 n.5 (9th Cir. 2001) (en banc) (Pregerson, J., concurring) ("[T]he Supreme Court has held that the Commerce Clause of the United States Constitution prohibits the states from enacting legislation that unduly burdens interstate commerce in the absence of Congressional authorization. But Congress has the authority to permit the states to enact legislation that would otherwise be unconstitutional under the Commerce Clause. When Congress authorizes a state to act, the state nonetheless acts in its own sovereign capacity. The fact that Congress authorized the state legislation does not mean that when the state legislates, it acts as an arm of the federal government.") (citations omitted).

50. *See, e.g.*, Ann E. Tweedy, *Using Plenary Power as a Sword: Tribal Civil Regulatory Jurisdiction Under the Clean Water Act After United States v. Lara*, 35 ENVTL. L. 471, 484–85 (2005) (discussing possible gains through positive uses of plenary power).

C. The Supreme Court's Early Indian Law Jurisprudence

Along with the federal constitutional provisions relating to tribes, the Supreme Court's early Indian law jurisprudence also helps inform the potential extent of legislative restoration of tribal sovereignty. Widely termed the "Marshall Trilogy" because Chief Justice Marshall authored them,⁵¹ the first Supreme Court Indian law cases⁵² wrestled with the meaning of the fact that the United States housed within its borders separate tribal nations who, by treaty (and also as a result of brute force), had ceded some portion of their power to the United States. While it is not entirely clear that a legislative restoration effort would have to operate within the framework of the Marshall Trilogy,⁵³ the decisions nonetheless are crucial to understanding the federal law framework that governs the exercise of tribal sovereignty.⁵⁴ Furthermore, regardless of whether Congress could theoretically overrule the decisions, it is highly unlikely both that Congress would attempt to do so and that the Supreme Court would uphold such an attempt.⁵⁵ Accordingly,

51. See, e.g., Seielstad, *supra* note 8, at 686–89 (discussing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823)); see also Frickey, *supra* note 34, at 9–10 (discussing the same three cases).

52. The Supreme Court issued an earlier decision involving Indian land title that addressed Georgia's ability to transfer land, part of which was subject to lawful Indian occupancy. *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 141–43 (1810). While determining Georgia's land transaction to be valid, the Court held that the transfer was subject to Indian title, without elaborating on the nature of that title. *Id.* Thus, *Fletcher*, which merely touches on issues about Indian land title that were later resolved in *Johnson v. M'Intosh*, is not of significant help in understanding the early Court's conception of tribal rights and status. See COHEN'S HANDBOOK, *supra* note 9, § 15.04[2], at 971–72; see also ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 32 (2008).

53. *Accord Natelson*, *supra* note 18, at 206, 260–61 (noting that Chief Justice Marshall's opinion in *Worcester v. Georgia* "tells us nothing" about the original meaning of the Indian Commerce Clause).

54. See, e.g., David P. Weber, *United States v. Lara—Federal Power Couched in Terms of Sovereignty and a Relaxation of Prior Restraints*, 83 N.D. L. REV. 735, 738 (describing the Marshall Trilogy as "provid[ing] the foundation for all future jurisprudence regarding Indian sovereignty").

55. As shown below, the decisions are primarily based on federal common law, and it is their common law holdings that are most offensive from a tribal self-determination perspective, while their pronouncements on constitutional issues, such as *Cherokee Nation v. Georgia*'s determination that tribes are not foreign nations under the constitution, are not as difficult for tribes to live with. 30 U.S. (5 Pet.) 1 (1831). Thus, it appears that Congress could, as a legal matter, prospectively alter the common law portions of the Marshall decisions. However, such a result seems highly unlikely for the following reasons. First, as shown below, the decisions justified the United States' colonial land title and defined the United States' overriding sovereignty in relation to Indians, and the surrender of these Indian law constructs would arguably put the United States in a precarious position in terms of the theoretical viability of the government's claims to legitimate authority. It would require great strength of character and creativity to make a serious attempt to transcend the need for the legal foun-

analysis of the Marshall decisions is essential to an understanding of the realistic potential for legislative restoration.

1. Johnson v. M'Intosh

The first such case, *Johnson v. M'Intosh*,⁵⁶ involved two non-Indian parties and concerned the validity of land title purchased from Indians as opposed to land title obtained from the United States.⁵⁷ In *Johnson*, the Court first sets forth the doctrine of discovery, under which the European nation that “discovers” a certain portion of the New World gains, despite Native peoples’ pre-existing occupancy, a superior claim to it *vis-à-vis* the other European nations engaged in colonization.⁵⁸ According to the *Johnson* Court, while this imperialist doctrine did not “entirely disregard[]” the rights of native inhabitants, who retained a right of occupancy in the discovered lands, it “necessarily, to a considerable extent, impaired” their rights.⁵⁹ Justice Marshall’s opinion in *Johnson* also implicitly

dated provided by these decisions. Secondly, because the Marshall decisions were the first to elucidate the tribes’ status within the United States, the Court might view a congressional attempt to overrule them as overstepping Congress’s rightful role and attempting to fundamentally (and impermissibly) alter tribes’ status within the United States. See, e.g., Babcock, *supra* note 25, at 470 (describing the Trilogy decisions as “[t]he commonly acknowledged sources of the doctrine of inherent tribal sovereignty (and—paradoxically—of the doctrines that undermine it)”). Some scholars disagree with this view and believe that the Court can become more fair in dealing with tribes once its racist stereotyping of Indians is exposed. See, e.g., *supra* notes 3, 48 (describing the views of Robert A. Williams, Jr.); see also WILLIAMS, *supra* note 3, at 47–70 (documenting the racist language of the Marshall Trilogy).

Additionally, while the decisions may be the source of the federal doctrine of inherent tribal sovereignty, or at least the first documents to flesh out the doctrine, they are not and cannot be the source of tribal sovereignty itself, which predates the Constitution. See *supra* note 11 and accompanying sources; see also *supra* note 13 and accompanying sources and text.

Based on the above analysis, I have assumed that, while Congress could alter other Indian law court decisions that are based on federal common law, these three decisions will remain in place, and, in conjunction with the constitutional provisions relating to tribes, they thus form the framework within which restoration would likely occur.

56. 21 U.S. (8 Wheat.) 543 (1823).

57. *Johnson*, 21 U.S. at 543. The fact that the first Indian law case after ratification of the Constitution involved only non-Indians seems unfortunate; one has to wonder if the result may have been at least incrementally better if Indian interests were directly at stake. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831) (stating, in a case brought by the Cherokee Nation against Georgia to curb the latter’s extensive abuses of power, that, “[i]f courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined”). On the other hand, a tribal action against the state itself could not have been heard due to the jurisdictional problems addressed in *Cherokee Nation*. *Id.* at 16–18.

58. *Johnson*, 21 U.S. at 572–73, 592; COHEN’S HANDBOOK, *supra* note 9, § 15.06[1], at 1000.

59. *Johnson*, 21 U.S. at 574.

recognizes some degree of tribal sovereignty in that it suggests that, when non-Indians purchase lands from Indians, those transactions, to the extent they are valid at all, are governed by tribal law and custom.⁶⁰

Given that the opinion relies to a large extent not on legal theory but on assumptions that this “discovery” gave rise to powers and legal rights, assumptions that were shared among the European nations and defended by England especially,⁶¹ the *Johnson* decision is perhaps remarkable for the pretensions it does not make. For example, the *Johnson* Court recognizes that “[t]he history of America”⁶² is one of the primary bases of its decision that Indian sovereignty has been limited so that Indians can no longer unilaterally convey a fee simple title to a private party, and the Court further acknowledges that this history is based on bloodshed.⁶³ Since the course of history itself is hardly a legal justification,⁶⁴ we might conclude from this reliance on history that Chief Justice Marshall felt constrained in drafting the opinion by the practical realities of the day.⁶⁵ Indeed, as Chief Justice Marshall himself recognizes later in the opinion, his and the entire Court’s authority is contingent upon the validity of the United States’ claim to Indian land:

Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been asserted. . . . These claims have been maintained and established as far west as the river Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. It is not for the Courts of this coun-

60. *Id.* at 593.

61. *Id.* at 576, 582–586.

62. *Id.* at 574.

63. *See, e.g., id.* at 576 (noting that the “pretensions [of the Dutch to land title] were finally decided by the sword”); *id.* at 588 (noting that the United States’ land claims as far west as the Mississippi “have been maintained and established . . . by the sword”); *id.* at 590 (“The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued.”).

64. *See, e.g.,* Bradford, *supra* note 3, at 109 (stating that “‘might makes right,’ the thinly-veiled principle around which federal Indian law has been constructed, is neither a legal argument nor a moral basis for a system of law”).

65. *See, e.g.,* Frickey, *supra* note 34, at 10–11 (describing the Marshall Trilogy decisions as accepting the inevitable fact of colonization and suggesting that the Court viewed itself as powerless to undo it). Robert A. Williams, Jr. takes a harsher view of Chief Justice Marshall’s language in *Johnson*, viewing it as evidence of judicial abdication of responsibility for the harms wrought by the Court’s decision. WILLIAMS, *supra* note 3, at 55.

try to question the validity of this title, or to sustain one which is incompatible with it.⁶⁶

Thus, with what now seems like startling candor, Chief Justice Marshall elucidates the central conundrum of Indian law: the courts must be disinterested in order to dispense justice, but, when it comes to tribal land claims (and perhaps all tribal sovereignty claims), they have a very serious conflict of interest.⁶⁷

Johnson, then, relies in large part on the fact of colonialism in holding that European “discovery” of Indian lands diminished full tribal land ownership rights and that this discovery, at least in terms of land ownership rights, impaired tribal sovereignty.

66. *Johnson*, 21 U.S. at 588–89. See also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543 (1832) (engaging in similar questioning as to the validity of American title and sovereignty claims *vis-à-vis* Indian claims but concluding that “power, war, conquest, give rights, which after possession, are conceded by the world; and which can never be controverted by those on whom they descend”).

67. This conflict of interest remarked upon in *Johnson* also illustrates a central problem with the concept of legislative restoration, namely that it relies on the current system and expects it to work better than it has. Indeed some contemporary Native scholars have concluded that the history of colonialism upon which the United States is based defeats any opportunity for the government to deal justly with Native peoples. See, e.g., SMITH, *supra* note 3, at 5 (“If we acknowledge the state as a perpetrator of violence against women . . . and as a perpetrator of genocide against indigenous peoples, we are challenged to imagine alternative forms of governance that do not presume the continuing existence of the U.S. . . .”); *id.* at 185 (“[I]t is fundamentally nonsensical to expect that we can fundamentally challenge white supremacy, imperialism, and economic exploitation within the structures of U.S. colonialism and empire *in the long term*”); accord Bradford, *supra* note 3, at 109–10 (“[I]f Indians and non-Indians cannot agree that the subordination of Indian sovereignty—the necessary precondition for the creation and maintenance of a settler-state upon prior Indian sovereignties—was and continues to be fundamentally unjust, then legal relations between Indian and non-Indian peoples may be ‘unsuited to regulation by the methods of the common law.’”). Notably, Chief Justice Marshall had a personal conflict of interest as well in that he was a land speculator. ANDERSON ET AL., *supra* note 52, at 29.

While gains through restoration may turn out to be disappointing in scope or to have less longevity than tribes hope for, restoration is an important option to explore due to the comparative ease with which it may be achieved and the its ability to offer at least temporary solutions to the very severe problems that have resulted from divestment. As repeated elsewhere in this Article, however, tribes and tribal organizations must decide whether to pursue legislative restoration, and in order for it to be successful and truly consonant with self-determination, tribes must also determine the content of any restoration sought. See, e.g., *Hearing Before the U.S. Senate Committee on Indian Affairs on a Draft Bill to Address Law and Order in Indian Country*, 110th Cong. 2 (2008) (statement of Kelly Stoner, Director of Native American Legal Resource Center and Clinical Programs, Oklahoma City University School of Law), http://indian.senate.gov/public/_files/KellyStonerTestimony.pdf (emphasizing the importance of “continued consultation with tribal leaders, tribal officials, and tribal communities” throughout the legislative process) (last visited Feb. 20, 2009).

2. Cherokee Nation v. Georgia

In *Cherokee Nation v. Georgia*,⁶⁸ the Court again relies to some extent on such assumptions in deciding that Indian tribes are not “foreign States” for purposes of federal court jurisdiction, as the term is defined in the Constitution:⁶⁹

The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of the same restraints which are imposed on our own citizens.⁷⁰

In addition to these widely held colonial assumptions, the Court relies on the construction of the Indian Commerce Clause,⁷¹ and specifically the fact that it differentiates between tribes and foreign nations, to support the holding that the Cherokee Nation is not in fact a foreign state.⁷² It is in *Cherokee Nation*, in the course of distinguishing between foreign nations and tribes, that the Court first uses the much-quoted term “domestic dependent nations” to describe tribes.⁷³ The Court further explains that tribes are in “a state of pupilage” and that “[t]heir relation to the United States resembles that of a ward to his guardian.”⁷⁴

Despite implying that tribal sovereignty has been diminished by the Cherokee Nation’s relationship with the United States and describing tribes as subject to the protective power of the United States as a result of this wardship arrangement, *Cherokee Nation* also has strong language affirming tribal sovereignty. For instance, in accepting the Tribe’s argument regarding the extent of its sovereignty, the Court acknowledges the tribe “as a state, [and] as a distinct political society, separated from others, capable of managing its own affairs and governing itself”⁷⁵ The Court elaborates that:

68. 30 U.S. (5 Pet.) 1 (1831).

69. *Id.* at 16–18; U.S. CONST. art. I, § 2, cl. 1.

70. *Cherokee Nation*, 30 U.S. at 17.

71. U.S. CONST. art. I, § 8.

72. *Cherokee Nation*, 30 U.S. at 18.

73. *Id.* at 17.

74. *Id.*

75. *Id.* at 16.

They [the Cherokees] have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.⁷⁶

Thus, despite struggling to define the Tribe's relationship to the United States and ultimately holding that the Tribe lacked recourse to the courts of the United States for very severe abuses suffered at the hands of Georgia,⁷⁷ the *Cherokee Nation* Court, at the same time, reaffirms tribal sovereignty in several important respects.⁷⁸

3. Worcester v. Georgia

*Worcester v. Georgia*⁷⁹ addresses the same course of conduct by the State of Georgia described in *Cherokee Nation*. However, this time the complainant is a white minister who has been charged, convicted, and sentenced in Georgia Superior Court to four years of hard labor for the state crime of residing within the limits of the Cherokee Nation without having obtained a license from the State.⁸⁰ In overturning the conviction,⁸¹ the Supreme Court affirmed tribal sovereignty with language that was its strongest yet.

76. *Id.*

77. *Id.* at 7–8, 12–13, 20. Indeed, reading the Court's statements that “[i]f it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted” and that “[i]f it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future,” *id.* at 20, almost leaves a present-day reader to wonder if the Court meant to suggest that the claim should have been brought in tribal court (although it is quite clear from the facts outlined in *Cherokee Nation* that Georgia would have flouted such an attempt). A more plausible reading may be that the Court's musing was rhetorical, perhaps meant to imply that there existed no court in which the Cherokee Nation could successfully litigate its claims.

78. The Court's laudatory description of Cherokee Nation's functionality as a government stands in sharp contrast to the flagrant disregard of rules of law and even brutal savagery engaged in by the State of Georgia at this point in time. *See id.* at 7–8, 12–13; *see also* Valencia-Weber, *supra* note 17, at 454 (documenting instances of violence perpetrated by citizens of Georgia against Indians in the late 1700s).

79. 31 U.S. (6 Pet.) 515 (1832).

80. *Id.* at 536–37.

81. *Id.* at 596–97.

The Court starts by defining the discovery doctrine narrowly so as to limit its effects on tribal sovereignty. With regard to the doctrine's effects on aboriginal land ownership rights, the Court states that the doctrine:

regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

....

... The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man.^[82]

Thus, the Court in *Worcester* scales back the view expressed in *Johnson* that discovery considerably impaired the rights of tribes,⁸³ instead concluding that discovery wrought only very limited changes on tribal sovereignty, solely affecting to whom tribes might sell land. Later in the opinion, the Court affirms this view, explaining with respect to colonial charters that “[t]he crown could not be understood to grant what the crown did not affect to claim”⁸⁴ and “that these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned.”⁸⁵

In addition to clarifying that discovery effected only a very limited alteration of tribal sovereignty, the Court concludes that the United States and its predecessor, the “United Colonies,” considered tribes to possess full-fledged sovereignty. The Court gleans this from the fact that the United States (and the United Colonies)

82. *Id.* at 544.

83. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574; *see also* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. Rev. 627, 639, 647 (2006) (explaining that the *Worcester* Court limited the broad doctrine of discovery formulated in *Johnson* but that the *Johnson* formulation was readopted in *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835)).

84. *Worcester*, 31 U.S. at 545.

85. *Id.* at 546. *Cf.* *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 203 n.1 (2005) (containing broader characterization of effects of discovery).

attempted to make treaties and other agreements with tribes.⁸⁶ The Court also derives this understanding from the United States' and United Colonies' need for the tribes' lands, allegiance, and other resources and their decisions to fill these needs through agreements such as treaties and other methods that demonstrated mutual respect.⁸⁷ For example, the Court notes that the United Colonies earnestly sought reconciliation with tribes at the beginning of the Revolutionary War, since most tribes had historically been aligned with Britain and could be formidable adversaries. At the commencement of the War, "securing and preserving the friendship of the Indian nations" was deemed "a subject of utmost moment to . . . [the] colonies."⁸⁸ In other words, both the fact that the United Colonies approached the tribes respectfully, as it would any other sovereign, and the fact that the Colonies desperately needed tribal assistance with the War reaffirm that the Colonies viewed the tribes as sovereign and that the tribes were functioning as sovereign political entities.

Furthermore, in the course of construing one of the treaties between the United States and the Cherokee Nation, the Court concludes, despite ambiguous language,⁸⁹ that the Cherokee Nation consented only to federal management of its trading activities, rather than of its entire system of self-government.⁹⁰ The Court also makes the point (which regrettably seems to have become lost in later years⁹¹), that although, by treaty, the Cherokees acknowledged

86. *Worcester*, 31 U.S. at 559, 560–61.

87. *Id.* at 549–58; *see also* Valencia-Weber, *supra* note 17, at 421–22 (noting tribal superiority over European Americans at the onset of treaty-making and describing the nation builders' need for tribal resources such as land and their need for peaceful co-existence).

88. *Worcester*, 31 U.S. at 549; *see also id.* at 551.

89. This decision appears to mark the first instance of the Court's utilization of the canons of construction for Indian treaty interpretation. *Id.* at 552–54 (attempting to interpret a treaty with the Cherokee Nation as the Indians would have understood it and resolving ambiguities in their favor); *see also* Fletcher, *supra* note 83, at 667 (noting that the "venerable canons of construction of Indian treaties originate in . . . the Marshall Trilogy" and specifically citing language in *Worcester* (citations omitted)). For a brief discussion of the canons of construction, see Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147, 183 (2000) (explaining that "the canons stand for the proposition that [t]reaties are to be construed as they were understood by the tribal representatives who participated in their negotiation and should be liberally interpreted to accomplish their protective purposes, with ambiguities to be resolved in favor of the Indians," and further noting that "[t]he canons of construction were originally limited to treaty construction but were subsequently expanded to statutory construction as well") (citations and internal quotation marks omitted).

90. *Worcester*, 31 U.S. at 554.

91. *See infra* Part II (describing the Supreme Court's more recent Indian law cases that divest tribal sovereignty and the devastating effects of this divestment on tribes).

themselves to be under the protection of the United States, “[p]rotection does not imply the destruction of the protected.”⁹²

Finally, the Court concludes that the Trade and Intercourse Acts⁹³ evidence a strong view of tribal sovereignty on the part of the federal government: “All these acts . . . manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.”⁹⁴

Thus, the Court bases its decision to overturn the state conviction of Samuel Worcester in large part on the vitality of tribal sovereignty, with which the state law in question had unlawfully interfered. Importantly, the Court also views tribal jurisdiction as exclusive within the jurisdictional boundaries of Indian reservations.⁹⁵

4. The Marshall Trilogy’s Implications for Tribal Sovereignty.

Trenchant criticisms have been leveled at the decisions that comprise the Marshall Trilogy, in large part with good reason.⁹⁶

92. *Worcester*, 31 U.S. at 552.

93. For an overview of the Trade and Intercourse Acts, see FELIX COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 109–17 (1982 ed.); see also COHEN’S HANDBOOK, *supra* note 9, § 1.03[2], at 37–41.

94. *Worcester*, 31 U.S. at 557.

95. As Robert Natelson points out, this conclusion was based on the treaty with the Cherokees. Natelson, *supra* note 18, at 211. Nonetheless, because treaties are “not a grant of rights to the Indians, but a grant of right from them, a reservation of those [rights] not granted,” *United States v. Winans*, 198 U.S. 371, 381 (1905), the Cherokee treaty right at issue in *Worcester*, that of exclusive tribal jurisdiction within the reservation, is properly viewed as one of inherent tribal sovereignty that was merely reaffirmed in the treaty.

96. William Bradford, for example, suggests that the decisions “reduced Indian nations from sovereigns to dependencies,” and further that the *M’Intosh* holding “fueled subsequent claims that Indians were conquered as soon as John Cabot set foot on American soil,” and that tribal property rights merely constitute permission to occupy white-owned lands, and finally that the *Worcester* decision, by creating federal plenary power over tribes without establishing any meaningful limits to it, made tribes vulnerable to an “often hostile Congress.” Bradford, *supra* note 3, at 79–81. Similarly, Robert A. Williams, Jr. views the racist premises of the decisions as infecting with racism any future Indian law decision that relies on them:

First, the Marshall model is based upon a foundational set of beliefs in white racial superiority and Indian racial inferiority. Second, the model defines the scope and content of the Indian’s inferior legal and political rights by reference to the doctrine of discovery and its organizing principle of white racial supremacy Third, the model relies on a judicially validated language of Indian savagery to justify the asserted privileges. Finally, the Court’s role as a creature and instrument of these

However, while the Court has undoubtedly used the Marshall decisions to support incursions on tribal sovereignty,⁹⁷ the ends for which they are used do not necessarily reflect the decisions' actual content: as the first decisions in a stare decisis framework, it makes sense that they would be cited over and over again regardless of what level of substantive support they lend to whatever holding the Court is announcing at the moment. Nonetheless, it is important to recognize that the decisions do contain colonialist constructs that were cobbled together to support a fundamentally unjust situation. The doctrine of discovery, the notion of tribes as wards who are in a state of pupillage, and the concept of domestic dependent nations have all lived on and continue to cause harm to tribes.⁹⁸ Given Justice Marshall's self-acknowledged conflict of interest as a colonial jurist, it is perhaps not surprising that the Court of the Conqueror would feel compelled to justify the source of its own power in rendering a decision on facts that so clearly called it into question. However, it might have been hoped that contemporary jurists would understand the harmful constructs in these decisions as politically-motivated justifications rather than sound legal doctrines. Indeed Marshall himself questioned and doubted the principles even as he laid them down; subsequent generations should be able to see the defects in them more, not less, clearly than he did.

Despite their damaging aspects, the Trilogy decisions do, in many ways, provide a view of tribal sovereignty that is functionally robust, at least compared to the current federal construction. As discussed above, *Cherokee Nation* reaffirms tribes' well-entrenched status as independent, functional governments. *Worcester*, which is

originating sources makes it impossible for the justices to do anything meaningful or lasting to protect Indian rights

WILLIAMS, *supra* note 3, at 70.

While the roots of the concept of plenary power have been traced to the Marshall Trilogy, *see, e.g.*, *GETCHES*, *supra* note 46, at 325, the power of the federal government envisioned in those cases is clearly much narrower than the virtually limitless plenary power doctrine that developed later. *See, e.g.*, *Frickey*, *supra* note 34, at 11 (discussing the concept of plenary power). For example, the *Worcester* Court suggests that the federal government could not gain tribal lands without tribal consent and that a tribe's federal protection did not compromise tribal independence or give rise to unlimited federal power. *Worcester*, 31 U.S. at 545, 546–47, 552. These limits on federal power are in conflict with the current conception of plenary power. *Accord* *Frickey*, *supra* note 34, at 13 (affirming that Marshall Trilogy decisions have limiting principles intended to protect tribal sovereignty).

97. *See, e.g.*, *Wilkins*, *supra* note 16, at 479.

98. *See, e.g.*, *Valencia-Weber*, *supra* note 17, at 420 (noting that "counterfactual legal constructs continue to coexist with Justice Marshall's ultimate recognition that the tribes were sovereigns that predated the arrival of Europeans").

regarded as the most important of the Trilogy decisions,⁹⁹ builds on this conclusion. In particular, it elucidates the extent to which tribes were understood to be respected sovereigns during and immediately after the formation of the nation. *Worcester* is also important for its holding that tribes have exclusive jurisdiction within their reservations. Finally, *Worcester* imposes important limitations on the doctrine of discovery and federal power over tribes generally¹⁰⁰ and recognizes that states cannot interfere with the federal-tribal relationship.¹⁰¹ *Johnson*, which is probably the least positive for tribes, is notable for its acknowledgment of continuing tribal land rights, its implicit recognition of some measure of tribal jurisdiction, and its frank admission that the dominance of the United States in relation to tribes is based largely on the fact of conquest, rather than on any firm legal justification.¹⁰² The potential scope of restoration apparent from these early decisions is thus quite extensive compared to the current state of tribal sovereignty.¹⁰³

II. TRIBAL SOVEREIGNTY IN THE EARLY TWENTY FIRST CENTURY

A. *The Current Depressed State of Tribal Sovereignty Under Federal Law*

As many scholars have documented, the Court has persistently diminished tribal sovereignty over the past three decades.¹⁰⁴ The trend of divestment of tribal sovereignty has continued, in one way or another, with nearly every Indian law case decided by the Court. Even when the Court announces a holding that is positive for tribes, it often adds harmful language to undercut the next case or

99. Frickey, *supra* note 34, at 10.

100. For a discussion of the limitations on federal power imposed in *Worcester*, see *supra* note 96; see also *Worcester*, 31 U.S. at 552 (“Protection [of the Cherokee Nation by the federal government] does not imply the destruction of the protected.”).

101. *Worcester*, 31 U.S. at 561 (“The Cherokee Nation . . . is a distinct community . . . in which the laws of Georgia can have no force . . .”); see also Valencia-Weber, *supra* note 17, at 420–21 (discussing the fact that the federal-tribal relationship recognized in *Worcester* was commensurate with the actual reality of the day). For an extensive discussion of the importance of preserving the federal-tribal relationship to the exclusion of states and the necessity of undoing contrary Supreme Court precedent, see generally Valencia-Weber, *supra* note 17.

102. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 574, 576, 582–86, 593 (1823).

103. The Court’s progressive divestment of tribal sovereignty has been widely documented. See, e.g., Krakoff, *supra* note 11, at 1148–53; see generally Frickey, *supra* note 34; Tweedy, *supra* note 89; Valencia-Weber, *supra* note 17; see also Trachman, *supra* note 6, at 853–56.

104. See *supra* note 103 and sources cited therein.

spur congressional action to divest sovereignty.¹⁰⁵ Generally, the cases have moved from a territorially-based vision of tribal sovereignty, under which tribes have complete or nearly complete jurisdiction over their entire reservations, to a consent-based vision, under which only tribal members are subject to tribal jurisdiction, under the theory that through voluntary membership in the tribe these members consented to tribal jurisdiction.¹⁰⁶

*Oliphant v. Suquamish Indian Tribe*¹⁰⁷ was one of the first cases to evidence this trend of divestment of tribal sovereignty. In *Oliphant*, the Court held that the Suquamish Tribe's criminal jurisdiction over non-Indians had been implicitly divested as a result of the Tribe's dependent status. As many have pointed out, the Court relied on very suspect sources in reaching this conclusion.¹⁰⁸ The trend progressed¹⁰⁹ with *Montana v. United States*,¹¹⁰ *Brendale v. Confederated Tribes of the Yakima Indian Nation*,¹¹¹ *Duro v. Reina*,¹¹² *Strate v. A-1 Contractors*,¹¹³ *Atkinson Trading Co. v. Shirley*,¹¹⁴ *Nevada v. Hicks*,¹¹⁵ and, finally, *Plains Commerce Bank v. Long Family Land and Cattle Co.*¹¹⁶ Other cases during this period also whittled away at tribal sovereignty over nonmembers in slightly different and sometimes quite creative ways.¹¹⁷

105. See, e.g., Bradford, *supra* note 3, at 84 (discussing *United States v. Wheeler*, 435 U.S. 313 (1978)); Valencia-Weber, *supra* note 17, at 472-74 (same); see also Tweedy, *supra* note 89, at 177-80 (discussing *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998)).

106. See, e.g., L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996) (examining the change in the nature and extent of tribal power, and noting the decline of sovereignty based on land ownership); Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993) (examining geographically-based and membership-based sovereignty and the implications of rejecting a geographically-based concept of sovereignty and emphasizing a more membership-based concept of sovereignty); see also Tweedy *supra* note 89, at 149, 153, 208-09 (summarizing differences between territorial- and consent-based definitions of tribal sovereignty and addressing the extreme narrowness of Court's definition of consent).

107. 435 U.S. 191 (1978).

108. See, e.g., WILLIAMS, *supra* note 3, at 102-03; Tweedy, *supra* note 89, at 151-52; Valencia-Weber, *supra* note 17, at 470-72; see also Frickey, *supra* note 34, at 64-65 (discussing other aspects of the *Oliphant* opinion). But see Weber, *supra* note 54, at 741-42 (suggesting that *Oliphant* was correctly decided).

109. See, e.g., Tweedy, *supra* note 89, at 149-71 (describing course of trend from *Oliphant* through *Strate v. A-1 Contractors*, 520 U.S. 438 (1997)).

110. 450 U.S. 544 (1981).

111. 492 U.S. 408 (1989).

112. 495 U.S. 676 (1990).

113. 520 U.S. 438 (1997).

114. 532 U.S. 645 (2001).

115. 533 U.S. 353 (2001).

116. 128 S.Ct. 2709 (2008).

117. See, e.g., *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 119-31 (2005) (Ginsburg, J., dissenting) (discussing majority's decisions (1) to jettison the traditional

In Montana, which the Court later described as its “pathmarking case concerning tribal civil authority over nonmembers,”¹¹⁸ the Court expanded *Oliphant* and held that Indians’ “dependent status . . . within our territorial jurisdiction” had implicitly divested¹¹⁹ tribal civil regulatory authority over nonmembers on fee lands. Thus, the Court held that a tribe’s civil regulatory authority over nonmembers on fee lands was extant only in two very limited circumstances, which are now commonly termed “the Montana exceptions”:

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.¹²⁰

interest-balancing test for evaluating state taxes that burden on-reservation activities and (2) to uphold the state tax despite the fact that this approach would, as a practical matter, foreclose the Tribe from imposing an on-reservation fuel tax that supported much-needed tribal services, such as road maintenance); *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 203–08, 215–16, 219 (2005) (recounting extensive loss of tribal lands due to state and federal abuses during 1800s and early 1900s but holding that the Tribe was not entitled to immunity from state taxes on reacquired, on-reservation lands because tribal tax immunity would thwart non-Indians’ “justifiable expectations” and because “the unilateral reestablishment of present and future Indian sovereign control, even over land purchased at market price, would have disruptive practical consequences”); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that Congress lacked the power, under the Indian Commerce Clause, to abrogate states’ Eleventh Amendment immunity); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154–59 (1980) (holding that state may tax nonmember cigarette purchases at tribal smokeshops, that tribes must collect state taxes from nonmembers, and that tribes are not “authorize[d] to market an exemption from state taxation to persons who would normally do business elsewhere”); *see also Carcierri v. Salazar*, 129 S. Ct. 1059 (Feb. 24, 2009) (holding that the Secretary of the Interior is not authorized to take land into trust for tribes that were not recognized as of 1934 when the Indian Reorganization Act was enacted); *City of Sherrill*, 544 U.S. at 196 (Stevens, J., dissenting) (discussing the fact that the majority in *Sherrill* usurped Congress’s plenary authority and that its decision “is at war with at least two bedrock principles of Indian law”); Associated Press, “N.H. touts year-round tax free status” (Aug. 12, 2007), (reflecting New Hampshire’s luring of Massachusetts consumers based on its lack of sales tax and thus demonstrating that adjacent sovereigns do, notwithstanding the *Colville* Court’s alarm at a tribe’s having done so, commonly market tax exemptions to the residents of other sovereigns).

118. *Strate*, 520 U.S. at 445.

119. *Montana v. United States*, 450 U.S. 544, 564–65 (1981) (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978)).

120. *Id.* at 565–65 (citations omitted).

As evidenced in the above quote, one of the fundamental attributes of this trend of divestment of tribal sovereignty is the transmutation of the longstanding presumption in favor of tribal sovereignty into a presumption that such sovereignty, at least over nonmembers, has been divested.¹²¹ Another important attribute is the watering down of the canons of construction that had previously protected tribes in treaty interpretation as well as in the interpretation of statutes enacted for their benefit.¹²² Finally, some of the decisions also evidence the Court's abandonment of the search for congressional intent in applicable statutes in favor of enacting its own rules,¹²³ as well as other encroachments on congressional authority.¹²⁴ Several scholars have linked this disturbing trend of divestment to the Court's espousal and enforcement of liberal values.¹²⁵ Other scholars have linked the trend to the Court's estimation of the effects of Congress' abandoned and repudiated policy of allotting Indian reservations in the hopes of assimilating Indians.¹²⁶

To evaluate the current status of this trend of divestment of tribal sovereignty, it is useful to examine the language of the Court's most recent decisions on tribal sovereignty, *Atkinson Trading Co.*, *Hicks*, and *Long Family Land and Cattle*. *Atkinson Trading Co.* concerned the Navajo Nation's ability to tax the guests of a hotel located on fee land.¹²⁷ The *Atkinson Trading Co.* Court stated, contrary to the Court's earlier jurisprudence treating taxing authority more favorably than other types of tribal regulation,¹²⁸ that tribal taxing power over nonmembers on non-Indian fee land within the

121. See Frickey, *supra* note 34, at 32; Tweedy, *supra* note 89, at 181; Valencia-Weber, *supra* note 17, at 470–72.

122. See Frickey, *supra* note 34, at 58–60; Tweedy, *supra* note 89, at 183–88; see also *supra* note 89 summarizing canons).

123. See Frickey, *supra* note 34, at 56.

124. See Frickey, *supra* note 34, at 80; Valencia-Weber, *supra* note 17, at 468.

125. See, e.g., Frickey, *supra* note 34, at 64–65; see generally David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001); Tweedy, *supra* note 89; see also Gould, *supra* note 3, at 674 (alluding to Court's concern for individual rights). Other scholars have also explained that tribal differences from mainstream American culture "implicitly challenge the supremacy of colonial rule because they are refusing to adapt to the ways of the colonizers." SMITH, *supra* note 3, at 26.

126. Krakoff, *supra* note 11, at 1119; Frickey, *supra* note 34, at 17–26, 36–37; see also *Montana v. United States*, 450 U.S. 544, 558–60 (1981) (holding that, while a treaty provision authorizing the tribe to exclude most nonmembers from the reservation arguably conferred civil regulatory jurisdiction over nonmember hunting and fishing, the General Allotment Act undermined this treaty provision).

127. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 648–49 (2001).

128. Krakoff, *supra* note 11, at 1174–75.

reservation was “sharply circumscribed.”¹²⁹ It further explicitly limited tribal taxing authority over nonmembers to activities occurring on tribal lands.¹³⁰

In so holding, the Court summarily dismissed the potential applicability of both *Montana* exceptions. With respect to the consensual relationship exception, the Court held that the trading post owner had not consented to the tax simply by applying to become an Indian trader. The consent evidenced in his application to become a trader did not give rise to jurisdiction because the relationship lacked the required nexus to the challenged regulation.¹³¹ Thus, the *Atkinson Trading Co.* Court injected a new, stringent nexus requirement into the *Montana* test.¹³² With respect to *Montana*’s second exception for activities threatening or having a direct effect on tribal health or welfare, political integrity, or economic security, the Court “fail[ed] to see” how the trading post and hotel could have such a direct effect,¹³³ despite the fact that the tax paid for valuable tribal services used by the trading post and the hotel.¹³⁴

In *Nevada v. Hicks*,¹³⁵ the Court refused to allow a tribal member to bring a § 1983 claim¹³⁶ in tribal court against a state officer for actions undertaken in executing a state search warrant on the reservation. The Court expanded the *Montana* test to tribally-owned land, holding that the status of land ownership was only “one factor” to consider in applying the test.¹³⁷ The Court also declined to apply its longstanding rule requiring that a party who objects to tribal court jurisdiction fully exhaust all tribal remedies before seeking relief in federal court, holding that exhaustion would

129. *Atkinson Trading Co.*, 532 U.S. at 650.

130. *Id.* at 653.

131. *Id.* at 655–56.

132. While the *Atkinson* Court, with some basis in reason, attributes the existence of a nexus requirement to *Strate v. A-1 Contractors, Atkinson Trading Co.*, 532 U.S. at 656, the Court in *Strate* merely rejected tribal jurisdiction based on the lack of any logical connection (aside from but-for causation) between the consensual relationship and traffic accident allegedly caused by the nonmember. See *Strate v. A-1 Contractors*, 520 U.S. 438, 456–57 (1997). It thus was not until *Atkinson* that the Court indicated that the nexus must be a stringent one.

133. *Atkinson Trading Co.*, 532 U.S. at 657.

134. *Id.* at 655; Krakoff, *supra* note 11, at 1176 (describing tribal services, including fire and police protection, emergency medical, and health inspection services, from which the plaintiff benefited and the ways in which he marketed his on-reservation location); see also Valencia-Weber, *supra* note 17, at 477 (questioning whether, under *Atkinson Trading Co.*, a tribe must show that it is on the “verge of death” before jurisdiction will be held to exist based on the second *Montana* exception).

135. 533 U.S. 353 (2001).

136. 42 U.S.C. § 1983 (2006).

137. *Hicks*, 533 U.S. at 360.

“serve no purpose other than delay.”¹³⁸ Finally—and perhaps most disturbingly for tribal sovereignty’s future if left in the Court’s unforgiving hands—the Court noted in dicta that “we have never held that a tribal court had jurisdiction over a nonmember defendant.”¹³⁹

Finally, in *Long Family Land and Cattle Co.*, the Court struck down, due to lack of tribal court jurisdiction, a discrimination claim verdict that the jury had issued in favor of the plaintiff, a corporation that was located on the reservation and majority-owned by tribal members.¹⁴⁰ The defendant, an off-reservation bank, had been held liable (and required to set aside a subsequent land sale) based on its disparate treatment of the “overwhelmingly tribal” corporation because of the race and tribal affiliation of the corporation’s owners.¹⁴¹ The federal district court in South Dakota and the Eighth Circuit both upheld the tribal jury verdict, as did the Cheyenne River Sioux Tribal Court of Appeals.¹⁴² The lower federal courts and tribal court of appeals had all determined that tribal jurisdiction was proper because the bank had entered into a consensual relationship with the corporation and its owners.¹⁴³ Moreover, the lower federal courts particularly noted, as did Justice Ginsburg, who concurred in part and dissented in part, the fact that the bank had knowingly benefited from loan guarantees from the Bureau of Indian Affairs, which are reserved for businesses that are majority-owned by tribal members.¹⁴⁴

138. *Id.* at 369 (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997)).

139. *Id.* at 358 n.2. This statement, although technically correct when made, cuts the issue quite finely. In *Brendale v. Confederated Tribes of the Yakima Indian Nation*, 492 U.S. 408 (1989), the Court, in a fractured set of opinions, upheld tribal regulatory authority, in the form of zoning power, over nonmembers. See *infra* note 154 (discussing *Brendale*); accord *Plains Commerce Bank v. Long Family Land & Cattle Co.*, No. 07-411, 2008 WL 2511728 at *12 (U.S. June 25, 2008) (discussing *Brendale*). Furthermore, *United States v. Lara*, 541 U.S. 193 (2004), has since rendered the statement obsolete.

140. *Plains Commerce Bank*, 2008 WL 2511728, at *4-5.

141. *Id.* at *17-18 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

142. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 491 F.3d 878, 881 (8th Cir. 2007); see also *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 440 F. Supp. 2d 1070 (D.S.D. 2006); *Bank of Hoven v. Long Family Land and Cattle Co.*, No. 03-002-A/R-120-99, slip op. (Cheyenne River Sioux Trib. Ct. App. Nov. 24, 2004), available at <http://turtletalk.files.wordpress.com/2007/12/tribal-coa-opinion-bank-of-hoven.pdf>, *aff'd* *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 440 F. Supp. 2d 1070 (D.S.D. 2006), *aff'd*, 491 F.3d 878 (8th Cir. 2007), *rev'd*, 128 S. Ct. 2709 (2008).

143. 491 F.3d at 886-88; 440 F. Supp. 2d at 1078-81; No. 03-002-A/R-120-99, at 10. The Cheyenne River Sioux Court of Appeals also relied on the other *Montana* exception in upholding the tribal trial court’s jurisdiction. No. 03-002-A/R-120-99, slip op. at 10.

144. 128 S. Ct. at 2728-29 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); 491 F.3d at 886; 440 F. Supp. 2d at 1078; see also No. 03-002-A/R-120-99, slip op. at 2-3, 10 (mentioning the Bureau of Indian Affairs’ loan

The Supreme Court, however, rather than confronting the applicability of *Montana's* consensual relationship exception head on, framed the question in a way that obscured the true importance of the case to the Tribe and its members.¹⁴⁵ By focusing exclusively on one of the remedies sought in the case, specific performance, the Court converted the transaction to one between the nonmember bank and the subsequent nonmember purchasers: “[t]his case concerns the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals.”¹⁴⁶ This twist in presentation is analogous to stating that a Title VII discrimination case brought by a person of color seeking a remedy of reinstatement against an employer really concerned not the plaintiff, but the white employee who was subsequently hired to fill the plaintiff’s position.¹⁴⁷ As Justice Ginsburg’s opinion implicitly recognized, it was unconscionable for the Court to write the plaintiff tribal members out of the very case they brought to protect their right to be treated with “a minimum standard of fairness.”¹⁴⁸ Indeed, the bulk of the majority opinion reads as if the Court had difficulty seeing that the tribal members existed at all,¹⁴⁹ an ironic

guarantee and the Bureau’s participation in the transactions generally but not appearing to significantly rely on the loan guarantee).

145. 128 S. Ct. at 2714.

Another troubling aspect of the case is the inordinate importance the Court places on the fact that the reservation had been allotted pursuant to the subsequently repudiated allotment policy. *Id.* at 2719, 2721; *see also supra* note 126 and accompanying text; Tweedy, *supra* note 89, at 189–94.

146. 128 S. Ct. at 2714 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“As the Court of Appeals correctly understood, the Longs’ case, at heart, is not about ‘the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals,’ *ante* at 2417. ‘Rather this case is about the power of the Tribe to hold nonmembers like the bank to a minimum standard of fairness when they voluntarily deal with tribal members.’”) (some internal quotation marks and citations omitted).

147. *See, e.g.*, 42 U.S.C. § 2000e-5(g)(1) (2006) (allowing the court, under Title VII, to impose reinstatement on an employer, as well as other equitable remedies, upon a holding of intentional discrimination).

148. 128 S. Ct. at 2727 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

149. For example, the Court states confusingly that:

[t]he Bank may reasonably have anticipated that its various dealings with the Longs could trigger tribal authority to regulate those transactions—a question we need not and do not decide. But there is no reason the Bank should have anticipated that its general business dealings with respondents would permit the Tribe to regulate the Bank’s sale of land it owned in fee simple.

Id. at 2725. Thus, the Court writes as if it failed to grasp that the discrimination claim was actually about the Longs’ transactions with the bank. The bank’s subsequent sale was only involved because the Longs sought a specific performance remedy for the discrimination and because the Longs used the more favorable terms of the subsequent transaction as indirect proof that they were discriminated against, a common practice in discrimination cases. *See, e.g., id.* at 2730–32 (Ginsburg, J., concurring in part, concurring in the judgment in part,

twist on the concept of color-blindness that the Court has extolled in recent years.¹⁵⁰

Given that the *Long Family Land & Cattle Co.* Court's holding is primarily based on its reading of the consensual relationship exception but that its analysis of that exception is only cursory, it is difficult to know precisely how the Court will construe the majority opinion in future cases. A narrow view of the holding is that it exempts land sales from *Montana's* consensual relationship exception and holds that tribal courts lack jurisdiction to impose specific performance as a remedy when such a remedy would in any way affect nonmembers who are not directly involved in the case at issue.¹⁵¹ More broadly, the opinion arguably narrows further *Montana's* consensual relationship exception by prefacing the question of whether a consensual relationship with a sufficient nexus exists with the question of whether the challenged regulation is "necessary to protect tribal self-government [and] to control internal relations."¹⁵² Furthermore, the case may signify that the Court will continue to narrow the definition of what qualifies as a nonmember "activ[er]" for purposes of the consensual relationship exception so as to further limit the applicability of the exception.¹⁵³

and dissenting in part); *Slack v. Havens*, No. 72-59-GT, 1973 WL 339 (S.D. Cal. 1973) (holding employer liable for racial discrimination under Title VII based in part on evidence that the plaintiffs, who were African-American employees, were required to perform undesirable tasks from which a white employee with less seniority was inexplicably excused), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975).

At one point, the Court goes so far as to imply that discrimination against tribal members has no "discernable effect on the tribe or its members." 128 S. Ct. at 2721 (attempting to distinguish four cases discussed in *Montana* on the basis that they had such "discernable effects").

150. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2757-58 & 2758 n.14 (2007); *Georgia v. Ashcroft*, 539 U.S. 461, 490-91 (2003); see *infra* note 233.

151. See, e.g., *Long Family Land & Cattle Co.*, 128 S. Ct. at 2720-21 (characterizing the discrimination law "as a restraint on alienation"); *id.* at 2721 ("*Montana* does not permit Indian tribes to regulate the sale of non-Indian fee land."); *id.* at 2723 ("The distinction between the sale of land and conduct on it is well-established in our precedent . . ."); *id.* at 2725 ("[W]hatever 'consensual relationship' may have been established through the Bank's dealing with the Longs, the jurisdictional consequences of that relationship cannot extend to the Bank's subsequent sale of its fee land.").

152. *Id.* at 2723 (citations and internal quotation marks omitted; alteration in original); cf. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (describing the quoted language as "key" to the application of *Montana's* second exception).

153. *Long Family Land & Cattle Co.*, 128 S. Ct. at 2722-23; see also *id.* at 2729 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (noting that she does not read *Montana* or any other Supreme Court case to support the Court's holding that land-related transactions cannot fall under one of the *Montana* exceptions and that she finds the Court's reasoning "perplexing"). The term "activity" is quite broad in ordinary usage, so narrowing it cannot be accomplished without some analytical difficulty, as the majority's strained analysis demonstrates. See WEBSTER'S THIRD NEW INTERNATIONAL

One thing that is clear from the opinion is that the newly constituted Supreme Court is unlikely to be of any help to tribes in their pursuit of orderly, well-governed reservations.

Thus, *Atkinson Trading Co.*, *Hicks*, and *Long Family Land & Cattle Co.* equally lend the impression that the Court has little patience for tribal sovereignty whenever it threatens to inconvenience a nonmember. Rather, the Court seems willing to work hard to construct rationales to avoid the reach of the *Montana* exceptions; indeed, in the Supreme Court, their primary function may well be to exist in theory but never actually apply.¹⁵⁴ It is difficult to see, for example, how a tax that pays for services that are used by a trading post and hotel owner and that are available to his customers would lack the required nexus to his status as an Indian trader. Similarly, though perhaps less obviously, state officers' on-reservation activities may well imperil a tribe's political integrity.¹⁵⁵ Finally, it is

DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED (2002) (defining "activity" as a "natural or normal function or operation" or "an occupation, pursuit or recreation in which a person is active," among other definitions).

Another possible conclusion from the Court's cursory analysis of the *Montana* exceptions in *Long Family Land & Cattle Co.* is that the newly constituted Court is dissatisfied with the *Montana* test and could conceivably jettison it at some point in the future.

154. *Brendale v. Confederated Tribes of the Yakima Indian Nation*, 492 U.S. 408 (1989), does not hold to the contrary. Although a plurality of the Court upheld the Tribe's authority to zone part of its reservation (and struck down its authority to zone another part), the plurality did not rely on the *Montana* test in so holding. *Id.* at 439–46 (plurality); *see also* Tweedy, *supra* note 89, at 163–65 (discussing Justice Stevens' plurality opinion). Accordingly, *Brendale* is properly seen as having created another, equally unworkable rule for evaluating tribal zoning authority. *See* Valencia-Weber, *supra* note 17, at 475 (noting that the *Brendale* plurality's distinction between the area over which the Tribe maintained zoning authority and the area over which it lacked such authority was "without any discernible standard" and that the content of the concept of land's essential Indian character, on which the plurality predicated tribal zoning authority, "is mysterious and could doom any efforts of the tribe for economic development that would alter the land"). *But see* Krakoff, *supra* note 11, at 1135 (suggesting that the *Brendale* holding is "arguably obsolete").

155. *See* Valencia-Weber, *supra* note 17, at 407; *see also* SMITH, *supra* note 3, at 139, 145–50 (explaining that Native people, per capita, are "most victimized by police brutality of any ethnic group in the country" and detailing specific instances of such brutality); Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1418 (1997) (stating that, when state authorities exercise jurisdiction in Indian country, "gross abuses of authority are not uncommon"). Thus, Professor Smith's and Goldberg's analyses suggest that allowing state officers to serve warrants on-reservation may well endanger tribal members' health and welfare.

On the other hand, it is important to note that there have been constructive efforts at the state level to find cooperative solutions to these intractable law enforcement problems. *E.g.*, WIS. STAT. ANN. § 165.90 (providing for grants to support joint county-tribal law enforcement agreements); *see also* Engrossed House Bill 2476, 60th Leg., Reg. Sess. (Wash. 2008) (providing, subject to certain conditions and limitations, for tribal law enforcement and public safety officers to have "general authority peace officer powers over non-Indians" when authorized by an agreement between the tribe and Washington State Patrol); Rob Carson, *Tribal Police Hopeful for Increased Authority*, NEWS TRIB., Mar. 18, 2008, at A1 (describing Washington State Bill cited above before it was enacted into law).

difficult, if not impossible, to make sense of both the *Long Family Land & Cattle Co.* Court's implicit conclusion that discrimination against tribal members has no discernable effect on the tribe or its members and the Court's holding that the sale of land is not an activity.¹⁵⁶

Indeed, despite the tortuousness of the reasoning it adopts in favor of nonmembers, the Court appears unwilling to give tribal interests genuine weight or to make the effort necessary to grasp the genuine import of tribal interests. Instead, the Court seems eager to drive tribes further down the road to assimilation,¹⁵⁷ having transformed itself from the "court of the conqueror into the court as the conqueror."¹⁵⁸ Given this exigent situation, it behooves tribes, so far as possible, to remove themselves from the Court's reach. An examination of the negative practical effects of this trend of divestment of tribal sovereignty on tribes and reservation life confirms this conclusion.

156. See *Long Family Land & Cattle Co.*, 128 S. Ct. at 2720. The psychological injuries caused by racial discrimination have been well-documented and undoubtedly rise to the level of being "discernable." Cf. Robert E. Suggs, *Poisoning the Well: Law & Economics and Racial Inequality*, 57 HASTINGS L.J. 255 (2005) (describing the psychological costs of racial discrimination for victims and arguing that economic analysis of racial discrimination has been skewed by its failure to consider these costs); accord SMITH, *supra* note 3, at 12 ("Native peoples internalize the genocidal project through self-destruction."). Additionally, as the jury confirmed, the Longs suffered economic injuries in that they received a less favorable deal than white debtors would have received.

157. The Court's temporal view of tribal sovereignty as a one-way fall down a steep hill, with the top representing full sovereignty and the bottom representing zero sovereignty, is evident in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). The case's actual holding is narrow in that the Court concedes that the Tribe could potentially reacquire some sovereignty over its lands by obtaining federal trust status for its recently re-purchased lands. *Id.* at 221. Nonetheless, the Court also holds that, despite the "grave . . . wrongs" suffered by the Tribe at the hands of the state and federal governments, *id.* at 216 n.11, wrongs which resulted in the loss of nearly its entire reservation and the removal of most of its population to a new reservation in Kansas, which the federal government also sold off to non-Indians, *id.* at 207, "[t]he Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases . . ." *Id.* at 203. Given the tribe's history as recounted by the Court, the Court's use of the term "relinquish," which implies voluntary action, is ironic. A much more reasoned and doctrinally sound view of tribal sovereignty can be found in *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994) ("The Tribe's retained sovereignty predates federal recognition—indeed, it predates the birth of the Republic—and it may be altered only by an act of Congress.") (citations omitted). The *City of Sherrill* case is also notable for its novel application of the doctrine of laches to federally protected, tribal sovereignty rights. 544 U.S. at 217–18.

158. Frickey, *supra* note 34, at 73.

*B. The Negative Effects of the Sovereignty Divestment
Trend on Tribes and Reservation Life*

The negative effects of the Court's divestment of tribal sovereignty, combined with related institutional ills, such as the federal government's failure to adequately fund tribal justice systems, reverberate throughout Indian country. These effects are pervasive but are most acute in the criminal context. In the criminal context, due largely to the ineffective jurisdictional framework on reservations created by divestment, Native Americans, particularly females, are victimized at an alarming rate. Below is a brief overview of some of the documented effects of the divestment of tribal sovereignty followed by a more detailed exploration of its effects in the criminal context.

1. Overview of the Effects of the Divestment of Tribal Sovereignty

The effects of divestment of tribal sovereignty on tribal life cannot be overestimated. Sarah Krakoff, for instance, has documented that some tribal officials see the move toward divestment as an attempt to “eliminate tribes.”¹⁵⁹ Taking this idea a step further, she and others have shown (or documented others' conclusions) that the on-reservation lawlessness that flows from this divestment may be evidence of Native American genocide.¹⁶⁰

159. Krakoff, *supra* note 11, at 1153 (quoting Navajo Legislative Counsel Raymond Etcity); *see also id.* at 1153 (quoting Robert Yazzie, former Chief Justice of the Navajo Nation, as stating that the Court's decisions create a “threat of cultural, economic, and political genocide”); Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1063 (2007) (“When actions of the courts and Congress diminish tribal sovereignty, tribes are pushed closer and closer to cultural and political annihilation.”); Valencia-Weber, *supra* note 17, at 407 (comparing blankets intentionally infected with smallpox to Supreme Court federal Indian law decisions: “[b]lankets infected with smallpox had hidden organisms that, at minimum, debilitated the victim and among the especially vulnerable, like the American Indians, almost certainly resulted in death. The pronouncement in *Nevada v. Hicks* that states have inherent jurisdiction on reservations is another unacknowledged, but intentional, judicial microbe that endangers the cultural and political life of American Indians.”) (citations omitted).

160. SMITH, *supra* note 3, at 12 (“The project of colonial sexual violence establishes the ideology that Native bodies are inherently violable—and by extension, that Native lands are also inherently violable.”); *id.* (“Native peoples internalize the genocidal project through self-destruction.”); *id.* at 33 (“It is undeniable that U.S. policy has codified the ‘rapability’ of Native women.”); *id.* at 33 (“[T]he U.S. and other colonizing countries are engaged in a “permanent social war” against the bodies of women of color and indigenous women.”); Krakoff, *supra* note 11, at 1153 (quoting Robert Yazzie, former Chief Justice of the Navajo Nation, as stating that the Court's decisions create a “‘threat of cultural, economic, and political genocide’”); *see also* Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 Art. 2(c), U.N. (Dec. 9, 1948) (defining genocide to include

The practical effects of divestment¹⁶¹ include (1) erosion of tribal culture and institutions,¹⁶² (2) disempowerment of tribal courts in cases involving nonmembers,¹⁶³ (3) lack of respect for tribes and

"[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part").

161. In addition to concerns about the practical effects of divestment of tribal sovereignty, there are strong normative reasons for retaining and enhancing tribal sovereignty. Among the most salient is the fact that this Nation is literally built on the sacrifices of tribes. Moreover, in numerous cases, promises were made to tribes in return for those sacrifices, many or most of which were memorialized in treaties or executive orders (although many treaties were reneged upon to accommodate non-Indian interests, often before such treaties could even be ratified, as was the case with treaties for numerous California tribes). See, e.g., Alexa Koenig and Jonathan Stein, *Lost in the Shuffle: State-recognized Tribes and the Tribal Gaming Industry*, 40 U.S.F. L. REV. 327, 332 (2006). If the country is to retain any pretense of justice, it must make every effort to keep the promises that facilitated its emergence as a nation. See *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J. dissenting) ("Great nations, like great men, should keep their word."); see also Indian Health Care Improvement Act Amendments of 2008, S.B. 1200, 110th Cong. Title III, § 301 (2008) (referred to House Committee after Being Received from Senate) (entitled "Resolution of Apology to Native Peoples of the United States"); S. COMM. ON INDIAN AFFAIRS, 110TH CONG., Concept Paper 10 (Nov. 7, 2007) (discussing generally the United States' "legal and moral obligation" to tribes that was incurred in "over two centuries of dealings with tribal governments" and which is based in part on tribes' having "ceded hundreds of millions of acres of their homelands to help build this Nation").

International human rights treaties also support the tribal right to sovereignty. See, e.g., WILLIAMS, *supra* note 3, at 173–83 (describing sources of protection in international human rights law for indigenous peoples); AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 20 (2007) ("[E]volving [international human rights] norms and standards are consistent in recognizing that Indigenous peoples have the right to maintain their distinct collective identities, and, towards that end, must have greater control over their own lives and futures."); see also Declaration on the Rights of Indigenous Peoples, G.A. Res. A/61/L.67, Art. 3-5, 34, U.N. GAOR, 61st Sess., Supp. No. 53, U.N. Doc. A/61/53 (Sept. 7, 2007) (addressing indigenous peoples' right to self-determination and related rights, including the right to "develop and maintain their . . . juridical systems"); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), Art. 1, U.N. Doc. A/2200 (Dec. 19, 1966) (affirming right to self-determination); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Art. 1, U.N. Doc. A/2200 (Dec. 19, 1966) (same).

In the International Human Rights context, a primary reason for protecting the existence of cultural minority groups is that the individual member often derives her identity, at least in part, from membership in the group. If the group were destroyed (e.g., through the legal annihilation of tribal sovereignty), the individuals comprising the group would suffer significant harm to their personal identities. See, e.g., Honing Lau, *Transcending the Individualist Paradigm in Sexual Orientation Law*, 94 CAL. L. REV. 1271, 1280–84 (2006).

162. See Krakoff, *supra* note 11, at 1122–23, 1194–95; Babcock, *supra* note 25, at 445 (noting that "the current diminished status of tribal sovereignty is taking its toll on the ability of tribes to survive as unique cultural and political communities . . .").

163. Krakoff, *supra* note 11, at 1157 (noting that, after *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), tribal judges have become more tentative in their rulings on jurisdictional issues as well as becoming "extremely conscious of non-Indian perceptions of fairness"). Psychologically, it also can be expected that judges whose jurisdiction is consistently in question, and who are otherwise disrespected in terms of popular opinion and funding, may have less of an incentive (as well as less ability because of poor funding) to thoroughly analyze their cases and take the substantial time required to draft well-reasoned decisions.

tribal governments among litigants and the general public (which both drives and results from divestment),¹⁶⁴ (4) lack of funding for tribal justice systems (also a reaction to and a driving force behind divestment),¹⁶⁵ (5) waste of resources due to the resource expenditures necessary to evaluate jurisdictional issues in the face of chronic uncertainty and the multiple layers of proceedings before different sovereigns that also commonly take place because of this same uncertainty,¹⁶⁶ (6) inability to protect tribal interests on the reservation,¹⁶⁷ and (7) finally lawlessness.¹⁶⁸

Imagine going to a job every day where you are told that your analysis is worthless and where your latest completed project is dismantled and redone by someone else.

It appears that tribal courts generally do exemplary jobs overall. See Angela Riley, *supra* note 159, at 1062 & n.75 (2007) (noting that “the vast majority of evidence—often ignored by critics—indicates that many Indian nations are already engaged in good governance”); Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 489 (1998) (“[A]n analysis of published tribal court opinions suggests that despite serious financial constraints, tribal courts have been no less protective of civil rights than have federal courts.”). But they are nonetheless trapped in a vicious circle of disenfranchisement that is based on erroneous (and racist) perceptions of lower quality but which actually compromises their ability to produce high caliber jurisprudence. See Frickey, *supra* note 34, at 61 (noting that prejudice against tribal courts is driving incursions on their sovereignty); McCarthy, *supra*, at 469 (describing prejudicial conceptions of tribal courts).

164. See Frickey, *supra* note 34, at 61; Krakoff, *supra* note 11, at 1154–55, 1186; McCarthy, *supra* note 163, at 466, 469; Seielstad, *supra* note 8, at 730–33.

165. McCarthy, *supra* note 163, at 492; *Law Enforcement in Indian Country: Hearing Before the S. Comm. on the Judiciary*, 110th Cong., 44 (2007) (testimony of Joseph A. Garcia, President, National Congress of American Indians), [hereinafter *Hearing on Law Enforcement*]; see also Frickey, *supra* note 34, at 83 (recommending increased federal funding for tribal courts in order to potentially improve the quality of their adjudications and the perceived quality among outsiders, such as Congress); Krakoff, *supra* note 11, at 1166, 1172–73, 1177–78 (addressing fact that sovereignty divestment in tax arena has seriously impeded tribal governments’ ability to raise funds).

166. See, e.g., Krakoff, *supra* note 11, at 1157–59 (including a description of a case involving a full tribal court proceeding in addition to two rounds of state court proceedings); AMNESTY INT’L., *supra* note 161, at 34 (describing extensive title searches necessary in many Oklahoma cases to determine, for jurisdictional purposes, whether a crime was committed on Indian land).

167. Krakoff, *supra* note 11, at 1158–59, 1162, 1174, 1180.

168. Krakoff, *supra* note 11, at 1186–89, 1199 (detailing problems of lawlessness on reservations and linking them directly to the federal government’s impairment of tribal jurisdiction); see also *Examining the Prevalence of and Solutions to Stopping Violence Against Women in Indian Country: Hearing Before S. Comm. on Indian Affairs*, 110th Cong. 12 (2007) [hereinafter *Hearing on Violence Against Women*] (statement of Alexandra Arriaga, Director of Governmental Relations, Amnesty International U.S.A.) (quoting Professor Andrea Smith’s statement that “[n]on-Native perpetrators often seek out a reservation place because they know they can inflict violence without much happening to them,” and Professor David Lisak’s statement that, “[t]o a sexual predator, the failure to prosecute sex crimes against American Indian women is an invitation to prey with impunity”); S. COMM. ON INDIAN AFFAIRS, *supra* note 161, at 9, 14 (stating, with regard to illegal drug sale operations, that “[i]n a recent reservation drug raid, Federal law enforcement officials seized a drug organization’s business model, which outlined the distribution plans to replace alcohol with methamphetamine on reservations . . . [and that t]he plan made a note to have non-Indians handle the drugs, because of the limits on the arrest authority of tribal police” and, with

While most of the problems outlined above are self-explanatory, it is useful in terms of formulating solutions to look a bit more closely at (6) and (7).

2. Tribes' Inability to Protect Their Governmental Interests

Beginning with (6), I will focus particularly on the problems in the civil regulatory arena that demonstrate tribes' increasing inability to protect their governmental interests on-reservation. For instance, in her focused study of the effects of divestment of tribal sovereignty on the Navajo Nation, Sarah Krakoff discusses the increased resistance the Navajo government now faces to its consumer protection and repossession statutes.¹⁶⁹ She further documents the important interests that the Nation's repossession law serves in "warding off unscrupulous business practices by car dealers," a significant problem on the Navajo reservation.¹⁷⁰ Other problems include the Nation's inability to protect its interest in gaining higher levels of employment for its members.¹⁷¹ This is due

respect to violence against women, reiterating advocates' statements that "serial rapists plague reservations with impunity, in part because there is no system of accountability in place [and] . . . that these criminals target reservations based on the lack of police presence[] and a known lack of coordination among state and tribal officials"); AMNESTY INT'L., *supra* note 161, at ii, 83 (concluding, after an extensive two-year study in which the organization interviewed indigenous survivors of sexual assault, healthcare and social services workers that serve these women, and tribal, state, and federal law enforcement officials, that "the high rate of sexual violence against Indigenous women in the USA is directly linked to the failure of the authorities to bring those responsible for these crimes to justice" and that part of the solution must be to "put[] an end to the erosion of tribal authority and the chronic under-resourcing of trial law enforcement agencies and justice systems"); Alex B. Roberts, *Reservations on Tribal Sovereignty: How United States v. Lara Will Affect Indians, Tribes, and the Fight to Regain Independence*, 43 Hous. L. Rev. 527, 549 (2006) (stating that, "[i]n the time between *Duro* and the *Duro* fix, representatives from the Yakima [sic] Indian Nation testified before the Senate Select Committee on Indian Affairs that they were forced 'to dismiss pending charges against 43 Indians because they were not enrolled members of the Yakima Indian Nation' [and t]he Suquamish tribe testified that 'tribal police were openly taunted, and tribal law flaunted, by non-member Indians' ") (citations omitted).

169. Krakoff, *supra* note 11, at 1158–59, 1162.

170. *Id.* at 1139–40.

171. Navajo Nation has extremely high unemployment rates, ranging from 36% to over 50%. *Id.* at 1140. Such astronomical rates are the norm rather the exception for tribal members living on or near reservations. See, e.g., BUREAU OF INDIAN AFFAIRS, AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT 1 (2003) ("National Totals" table), available at <http://www.doi.gov/bia/laborforce/2003LaborForceReportFinalAll.pdf> (reflecting unemployment rates for Indians living on or near reservations of between 35% and 76%).

After *Long Family Land & Cattle Co.*, tribes will no doubt have increased difficulty in enforcing their anti-discrimination laws against nonmembers as well, with the result that discriminatory practices may well increase. In addition to direct economic losses (such as job and opportunity losses) that stem from discriminatory conduct, tribal members who fall victim to discrimination will most likely also experience feelings of demoralization and

to the perceived vulnerability of the Navajo Preference in Employment Act¹⁷² and the Nation's inability to attract businesses to the reservation because of state taxing authority and Court-imposed limitations on tribal taxing authority.¹⁷³ These same taxing restrictions also compromise the Nation's ability to provide governmental services and to engage in economic development.¹⁷⁴ Finally, the Nation's transactional environment for negotiations with non-Native businesses is compromised in that "every negotiation with a non-Indian business is now conducted in a context in which non-Indian perceptions of the uncertainty and strangeness of tribal law are bolstered by their sense that these laws need not apply to them."¹⁷⁵

While not as dire as the problems Indians face due to criminal lawlessness, the civil regulatory problems that Krakoff describes are all likely to have serious effects on tribal members' quality of life. Becoming prey to unscrupulous business practices can cause distress to the most sophisticated consumer, but when compounded with a lack of employment opportunities,¹⁷⁶ such practices may well increase tribal members' sense of helplessness and vulnerability, thus maintaining a cycle of powerlessness. On the governmental level, the limited ability to tax and a compromised transactional environment are likely to create serious financial problems for the government, which in turn will seriously impede its ability to provide services to its members, particularly the most needy among them.

It is difficult to see how a hotel owner's reluctance to pass on a tribal tax to his customers could possibly outweigh such significant tribal interests. The fact that the Court has held that relatively minor nonmember concerns outweigh core tribal interests in providing governmental services shows that tribes should seriously consider restoration and other proactive solutions in the hopes of warding off yet more threats to tribal existence.

powerlessness. See Suggs, *supra* note 156, at 271–72 (describing how the psychological costs of experiencing discrimination may translate into societal economic losses).

172. 15 Navajo Nation Code Annotated §§ 601–619, available at <http://www.ongd.navajo.org/files/nncac.pdf>; see also Krakoff, *supra* note 11, at 1162.

173. Krakoff, *supra* note 11, at 1172, 1174.

174. *Id.* at 1178–79.

175. *Id.* at 1161.

176. See *supra* notes 171, 173 and associated text.

3. Lawlessness on Indian Reservations

Considerable recent attention has focused on the extent to which Indian women are victimized by violent crime and the inadequacy of the response to this problem. Thus, this aspect of lawlessness is quite well-documented and, because of the levels of brutal violence involved, it undoubtedly represents one of the most pressing areas for reform. Although other serious problems exist¹⁷⁷ and also deserve prompt attention, my analysis of lawlessness and its relationship to the divestment of tribal sovereignty focuses on violence against women.

a. The Extent of the Problem of Violence Against Indian Women

American Indians are victimized by violent crimes more often than any other group,¹⁷⁸ and American Indian women in particular are (1) “twice as likely to be victimized by violent crime as women or men in any other ethnic group”¹⁷⁹ and (2) 2.5 times more likely to be raped than other women in the United States, with more than one in three Native women being raped at some point in their lives.¹⁸⁰ These figures, however, almost certainly underestimate the scope of the problem for Native women.¹⁸¹ Evidence

177. See, e.g., Elizabeth Burleson, *Tribal, State, and Federal Cooperation to Achieve Good Governance*, 40 AKRON L. REV. 207, 229–33 (2007) (describing methamphetamine crisis in Indian country); Elizabeth Ann Kronk, *The Emerging Problem of Methamphetamine: A Threat Signaling the Need to Reform Criminal Jurisdiction in Indian Country*, 82 N.D. L. REV. 1249, 1251–54 (2006) (describing a methamphetamine problem in Indian Country so severe that 25% of babies born in 2004 on one reservation were born to meth-addicted mothers and that “some tribes have reported that families were selling their furniture, personal belongings, family heirlooms, cars, and homes, and even prostituting their children to maintain their meth addictions”) (internal quotation marks and citations omitted); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 736–37 (2006) (describing problems with federal prosecution of child sexual abuse where both the victim and the offender are tribal members); Sarah Kershaw, *Dizzying Rise and Abrupt Fall for a Reservation Drug Dealer*, N.Y. TIMES, Feb. 20, 2006 at A1 (describing drug problem in Indian country and linking it to “gripping poverty” and “the weakness of law enforcement” among other causes); Michael Riley, *Which Way to Turn? Empower the Tribes, or Beef up the Federal Role? Each Side Has Its Own History of Failure*, DENVER POST, Nov. 14, 2007, at 1A (reciting the fact that Indians living on reservations are more than twice as likely to be murdered than other Americans).

178. Krakoff, *supra* note 11, at 1188.

179. SMITH, *supra* note 3, at 28.

180. *Hearing on Violence Against Women*, *supra* note 168, at 6 (statement of Alexandra Arriaga); see also Washburn, *supra* note 177, at 713–14 (stating that, “[f]rom 1992 through 2001, the average annual rate of violent victimizations among Indians was 101 per 1,000 residents twelve years of age and older”).

181. *Hearing on Violence Against Women*, *supra* note 168, at 6 (statement of Alexandra Arriaga); see also S. COMM. ON INDIAN AFFAIRS, *supra* note 161, at 14–15 (discussing National

indicates that Native women often do not report sexual violence.¹⁸² Amnesty International, which recently completed an in-depth report on violence against indigenous women in the United States, found that, on “the Standing Rock Sioux Reservation, . . . many of the women who agreed to be interviewed *could not think of any Native women within their community who had not been subjected to sexual violence.*”¹⁸³ Furthermore, much evidence suggests that Indian women suffer physical violence accompanying rape at significantly higher rates than other women.¹⁸⁴ Finally, 86% of the perpetrators of rape against Native women are non-Native men.¹⁸⁵

Amnesty International further determined that indigenous women in the United States “may be targeted for acts of violence and denied access to justice on the basis of their gender and indigenous identity” and that they commonly “experience contemporary sexual violence as a legacy of impunity for past atrocities.”¹⁸⁶ On a related note, the organization found that:

Indian women face considerable barriers to accessing justice. Native American and Alaska Native women may never get a police response, may never have access to a sexual assault forensic examination and, even if they do, they may never see their case prosecuted. . . . [These] barriers [] includ[e] a complex jurisdictional maze and a chronic lack of resources for law enforcement and health services¹⁸⁷

Public Radio report of rapes on the Standing Rock Sioux Reservation in which it was “found that a number of cases are going unreported, uninvestigated, and unprosecuted”) (internal quotation marks omitted); see also Washburn, *supra* note 177, at 737–38 (noting that many on-reservation crimes against Indians are “never even reported” and connecting this problem to victims’ lack of trust that the federal government will protect them from retaliation).

182. AMNESTY INT’L., *supra* note 161, at 2, 4, 33.

183. *Hearing on Violence Against Women*, *supra* note 168, at 10 (statement of Alexandra Arriaga) (emphasis added).

184. AMNESTY INT’L., *supra* note 161, at 5.

185. *Hearing on Violence Against Women*, *supra* note 168, at 6 (statement of Alexandra Arriaga); cf. S. COMM. ON INDIAN AFFAIRS, *supra* note 161, at 14 (reciting Bureau of Justice Statistics that “at least 70% of the violent victimizations [of] Indians are committed by non-Indians”). A significant portion of these assailants are reported to be intimate partners; indeed Indian women appear to be victimized by intimate partners at almost three times the rate of white women. *Hearing on Law Enforcement*, *supra* note 165, at 46 (testimony of Joseph A. Garcia); see also AMNESTY INT’L., *supra* note 161, at 6 (reporting that a quarter of Native women are subjected to intimate violence). One limitation of the currently available statistics is that they generally do not distinguish between off-reservation and on-reservation crime against Indians.

186. AMNESTY INT’L., *supra* note 161, at 5.

187. *Hearing on Violence Against Women*, *supra* note 168, at 10 (statement of Alexandra Arriaga); see also Michael Riley, *Promises, Justice Broken: A Dysfunctional System Lets Serious Reservation Crimes Go Unpunished and Puts Indians at Risk*, DENVER POST, Nov. 11, 2007, at 1A

More specifically, Amnesty's report charges that "[t]he U.S. government has interfered with the ability of tribal justice systems to respond to crimes of sexual violence by underfunding tribal justice systems, prohibiting tribal courts from trying non-Indian suspects and limiting the custodial sentences which tribal courts can impose for any offence."¹⁸⁸

Furthermore, federal prosecutors rarely prosecute violent crime in Indian country, which is very problematic for tribes because of the extent to which the Court and Congress have divested tribal criminal jurisdiction over such crimes.¹⁸⁹ According to one recent estimate, U.S. Attorneys decline to prosecute approximately 85% of felony cases referred to them by tribal prosecutors.¹⁹⁰ Even more

(describing instances of grave reservation crimes left unprosecuted by the federal government and other injustices); *Draft Legislation to Address Law and Order in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. (2008) (introductory remarks of Sen. Byron Dorgan, Chairman, S. Comm. on Indian Affairs) [hereinafter Dorgan, *Hearing on Law and Order*], available at http://indian.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=a0fd16ca-23f2-4075-a044-196378eec19f (follow "View Webcast" hyperlink) (stating that the United States government "must take credit for much of the problem" of lawlessness on Indian reservations).

188. AMNESTY INT'L., *supra* note 161, at 8; see also S. COMM. ON INDIAN AFFAIRS, *supra* note 161, at 11 (describing underfunding of tribal justice systems and the practical consequences of this underfunding).

Preliminary steps toward remedying some of these problems have recently been made at the federal level. For instance, a bill providing for a study of tribal justice systems in North and South Dakota passed the Senate in February 2008 and then was considered in the House of Representatives, although it never became law. Indian Health Care Improvement Act Amendments of 2008, S. 1200, 110th Cong. Title VIII, § 107 (as referred to in H. Comm. on Natural Resources and H. Comm. on Energy and Commerce and Ways and Means after being received from Senate); Govtrack.us, <http://www.govtrack.us/congress/bill.xpd?bill=s110-1200>. Additionally, a bill that authorizes some additional funding for federal and tribal law enforcement in Indian Country and for detention centers that serve Indian Country was signed into law in July 2008. Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. 110-293 § 601(a), (f)(1), (f)(2) (2008). Finally, Senate Indian Affairs Committee Chairman Byron Dorgan introduced legislation into the Senate in July 2008 that would have, among other measures, increased tribal sentencing authority to three years of imprisonment (contingent on tribes' providing counsel to indigent defendants and meeting other requirements), authorized funding for cooperative law enforcement agreements between tribes and states or local governments, and required federal prosecutors to document reasons for declining to prosecute crimes in Indian Country. Tribal Law and Order Act of 2008, S.B. 3320, 110th Cong. §§ 102, 202, 304(3) (2008). This bill, however, was never voted upon by either house. Govtrack.us, <http://www.govtrack.us/congress/bill.xpd?bill=s110-3320>.

189. See *supra* Part II.A. (discussing *Olyphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)) & *infra* Part II.B.3.b. (discussing the current criminal jurisdictional framework in Indian Country); see also *infra* note 190.

190. *Hearing on Law Enforcement*, *supra* note 165, at 46 (testimony of Joseph A. Garcia) (This figure does not mean that 85% of felony cases necessarily go unprosecuted because the federal government can initiate a prosecution without a referral.). In AMNESTY INT'L., *supra* note 161, at 66, Amnesty International reports that, over a year-long period, federal prosecutors declined to prosecute just over 60% of the sexual violence cases filed involving indigenous women. See also S. COMM. ON INDIAN AFFAIRS, *supra* note 161, at 15 ("The BIA

shocking, some evidence suggests that the Bush Administration implemented a policy of discouraging (or perhaps disallowing) Assistant United States Attorneys from prosecuting crimes in Indian Country.¹⁹¹ Amnesty International concludes that the United States government is complicit in violent crimes in Indian Country as a result of its failure to adhere to the international law concept of due diligence, which requires that states take appropriate steps to prevent human rights abuses that they know or should know of.¹⁹²

b. A Very Brief Overview of the Criminal Jurisdictional Framework in Indian Country

As noted above, the Amnesty report identifies the complicated jurisdictional framework for determining criminal jurisdiction in Indian Country as a key cause of the continuing epidemic of violence against Indian women.¹⁹³ Furthermore, in addition to the federal government's widespread failure to prosecute crimes within its jurisdiction, Amnesty International also learned of numerous instances of state law enforcement systems discriminating against indigenous female victims and otherwise failing to serve them effectively.¹⁹⁴ It concluded that tribal courts are the courts best-suited

[Bureau of Indian Affairs] is consistently among the federal investigating agencies with the highest percentage of cases declined by federal prosecutors. Once declined in the federal system, there is little chance of prosecution.”); Riley, *supra* note 187 (“Between 1997 and 2006, federal prosecutors rejected nearly two-thirds of the reservation cases brought to them by FBI and Bureau of Indian Affairs investigators, more than twice the rejection rate for all federally prosecuted crime.”).

191. See Dorgan, *Hearing on Law and Order*, *supra* note 187 (alluding to evidence, in questioning Gretchen Shappert, U.S. Attorney for the Western District of North Carolina, that the Department of Justice “reprimands” U.S. Attorneys who spend too much time prosecuting crimes in Indian Country); see also *Hearing on Law Enforcement*, *supra* note 165, at 46 (testimony of Joseph A. Garcia) (“[S]ix of the members of the Native American Issues Subcommittee were among those who were recently replaced, including both the former Chair and Vice-Chairs Thomas Heffelfinger and Margaret Chiara. Monica Goodling, former aide to Attorney General Gonzales, stated in her House Judiciary Committee testimony that Thomas Heffelfinger was replaced because he spent ‘too much time’ on the Native American Issues Subcommittee.”); *Continuing Investigation Into the U.S. Attorneys Controversy and Related Matters: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 95 (2007) (testimony of Monica Goodling, Former Senior Counsel to the Att’y Gen. of the United States) (stating, in reference to Thomas Heffelfinger, that “[t]here were some concerns that he spent an extraordinary amount of time as the leader of the Native American Subcommittee”).

192. AMNESTY INT’L., *supra* note 161, at 20.

193. *Id.* at 27–30, 34, 51; see also SMITH, *supra* note 3, at 31–33; Kronk, *supra* note 177, at 1255 (explaining that “the criminal jurisdictional scheme that applies in Indian country is inadequate to effectively deal with the emerging meth problem.”).

194. AMNESTY INT’L., *supra* note 161, at 47, 67, 69–71; see also SMITH, *supra* note 3, at 28, 145–49.

to prosecute crimes within Indian country and that their jurisdiction and funding should therefore be expanded.¹⁹⁵ To illustrate the complexities of determining who has criminal jurisdiction in Indian country, below is a very brief overview of the jurisdictional framework.

i. Tribal Jurisdiction

Generally, in an Indian reservation, Indian allotment, or other dependent Indian community,¹⁹⁶ tribes have criminal jurisdiction over their members as well as other Indians.¹⁹⁷ However, the Indian Civil Rights Act limits the sentences they may impose to a prison term of one year, a fine of \$5,000, or both.¹⁹⁸ Moreover, while constitutional provisions requiring protection of individual rights do not generally bind tribes as they are neither federal nor state actors,¹⁹⁹ most Bill of Rights protections have been imposed on tribes through the Indian Civil Rights Act (ICRA).²⁰⁰ In the criminal milieu, the most notable individual right that does not apply to tribes is the right to free counsel for an indigent defendant.²⁰¹

Additionally, the federally imposed division of labor between the federal government and tribes contains complexities that may not be immediately obvious. For instance, under the Major Crimes Act,²⁰² federal courts have jurisdiction over enumerated Indian-on-Indian felonies such as murder and rape, but courts have nonetheless held that tribal courts retain concurrent jurisdiction in such cases (although the federal government, through the ICRA, has sharply curtailed tribal sentencing authority).²⁰³ Furthermore, the

195. AMNESTY INT'L., *supra* note 161, at 12, 62–63, 90; *see also Draft Legislation to Address Law and Order in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 2–3 (2008), available at http://indian.senate.gov/public/_files/JoeGarciaatt.pdf [hereinafter Garcia, *Hearing on Law and Order*] (testimony of Joseph A. Garcia, President of the National Congress of American Indians) (explaining that “the federal justice system is simply not designed or equipped to handle domestic violence cases” and that, when such crimes occur on-reservation, they are best addressed by tribal governments); Kronk, *supra* note 177, at 1259 (arguing that tribal criminal jurisdiction needs to be increased and that the tribes are better able to deal with the meth problem on reservations than the federal government).

196. 18 U.S.C. § 1151 (2006).

197. 25 U.S.C. § 1301(2) (2006); *United States v. Lara*, 541 U.S. 193, 198 (2004).

198. 25 U.S.C. § 1302(7) (2006).

199. *Talton v. Mayes*, 163 U.S. 376, 381–83 (1896); *Barta v. Ogala Sioux Tribe of Pine Ridge Reservation of S.D.*, 259 F.2d 553, 556–57 (8th Cir. 1958).

200. 25 U.S.C. § 1302 (2006).

201. *See, e.g.*, COHEN'S HANDBOOK, *supra* note 9, § 14.04[2], at 953; Trachman, *supra* note 6, at 880.

202. 18 U.S.C. § 1153 (2006).

203. 25 U.S.C. § 1302(7) (2006); *Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995).

only federal review available of a tribal conviction that is alleged to violate the Indian Civil Rights Act is habeas corpus.²⁰⁴

ii. Federal Jurisdiction

As mentioned above, the federal government has jurisdiction over certain major crimes committed by an Indian against another Indian on the reservation.²⁰⁵ The federal government also has jurisdiction over interracial on-reservation crimes under the Indian Country Crimes Act²⁰⁶ and the Assimilative Crimes Act.²⁰⁷

iii. State Jurisdiction

States have jurisdiction over non-Indian-on-non-Indian crimes within Indian country.²⁰⁸ Additionally, under a federal law popularly known as Public Law 280,²⁰⁹ some states have additional criminal jurisdiction over Indian Country as a substitute for federal jurisdiction.²¹⁰ Although the issue is not entirely clear, it appears that tribes have concurrent jurisdiction with states in these circumstances, to the same extent they otherwise would have had concurrent jurisdiction with the federal government.²¹¹ In Alaska, the general absence of Indian Country further complicates matters; it means that the state, in most cases, has broad criminal jurisdiction over Native Villages.²¹² Finally, states have jurisdiction over crimes not in Indian Country regardless of the perpetrator's and victim's Indian status or lack thereof.²¹³

As this framework makes abundantly clear, determining which government has jurisdiction over a crime committed in Indian

204. 25 U.S.C. § 1303 (2006); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 70 (1978).

205. 18 U.S.C. § 1153 (2006).

206. *Id.* § 1152; *see also* Washburn, *supra* note 177, at 716–17 (discussing federal statutes providing federal jurisdiction over crimes in Indian Country).

207. 18 U.S.C. § 13 (2006); *see also* Washburn, *supra* note 177, at 716–17 (discussing federal statutes providing federal jurisdiction over crimes in Indian Country). The term “interracial” in this context refers to crimes involving a non-Indian perpetrator and an Indian victim or vice versa.

208. United States v. McBratney, 104 U.S. 621, 624 (1881).

209. 18 U.S.C. § 1162 (2006), 25 U.S.C. §§ 1321–26, 1360 (2006).

210. *See* COHEN'S HANDBOOK, *supra* note 9, § 6.04[3], at 544–65 (explaining Public Law 280); AMNESTY INT'L., *supra* note 161, at 29 (same).

211. *See* COHEN'S HANDBOOK, *supra* note 9, § 6.04[3][c], at 560–61.

212. Alaska v. Native Vill. of Venetie, 522 U.S. 520 (1998); COHEN'S HANDBOOK, *supra* note 9, § 4.07[3][d] at 362–63; AMNESTY INT'L., *supra* note 161, at 36–37.

213. *See, e.g.*, COHEN, *supra* note 93, at 348–49.

Country is no simple matter. In some states, such as Oklahoma, where extensive allotment has occurred, the determination of whether an area *is* Indian Country may take weeks or even months.²¹⁴ Given this framework and the fact that criminal perpetrators naturally try to hide their identities (and in these circumstances may also try to hide their races),²¹⁵ the considerable difficulty in bringing criminals to justice is not surprising. The question is how best to remedy these problems.

III. *United States v. Lara* AND THE COURT'S AFFIRMATION OF CONGRESS' ABILITY TO RESTORE TRIBAL SOVEREIGNTY

Because Congress has been held to have plenary power over tribal sovereignty, logically Congress should be able to restore abrogated tribal sovereignty, just as it can reduce tribal sovereignty.²¹⁶ The Supreme Court finally settled the question of Congress' ability to restore previously abrogated tribal sovereignty through its plenary power in *United States v. Lara*.

In *Lara*, the Supreme Court validated for the first time a congressional attempt at restoration, upholding Congress' amendment to the Indian Civil Rights Act,²¹⁷ which provided for tribal criminal jurisdiction over nonmember Indians.²¹⁸ Congress enacted the statute in response to the Court's decision in *Duro v. Reina*,²¹⁹ which held that such tribal jurisdiction had been implicitly divested.²²⁰ The statute "recognized and affirmed" the "inherent power" of tribes to criminally prosecute non-member Indians.²²¹ The Court upheld the statute, concluding that "Congress has the constitutional power to relax restrictions that the political branches have . . . placed on a tribe's inherent legal authority."²²² While the Court acknowledged that it had not previously recognized that Congress could restore tribal authority, it nonetheless stated that allowing

214. AMNESTY INT'L., *supra* note 161, at 34.

215. SMITH, *supra* note 3, at 26; *see also* Kronk, *supra* note 177, at 1249–50 (noting that a drug lord "with connections to the Mexican drug cartel....blended into" the Wind River Indian Reservation community and that this increased his confidence that he would be able to carry out his plan to ensnare the community in a web of meth addiction).

216. *See, e.g.*, *United States v. Enas*, 255 F.3d 662, 680 (9th Cir. 2001) (en banc) (Pregerson, J., concurring).

217. 25 U.S.C. §§ 1301–03 (2006).

218. *United States v. Lara*, 541 U.S. 193, 196 (2004); *see also* Tweedy, *supra* note 50, at 482–85 (discussing *Lara*).

219. 495 U.S. 676 (1990).

220. *Lara*, 541 U.S. at 197–98; *Duro*, 495 U.S. at 693.

221. 25 U.S.C. § 1301(2) (2006).

222. *Lara*, 541 U.S. at 196.

such congressional action was consistent with its earlier Indian law cases:

[T]he Court in these [early] cases based its descriptions of inherent tribal authority upon the sources as they existed at the time the Court issued its decisions. Congressional legislation constituted one such important source. And that source was subject to change. . . . *Duro* (like the other cases) simply did not consider whether a statute, like the present one, could constitutionally achieve the same end [as federal delegation] by removing restrictions on the tribes' inherent authority. Consequently, we do not read any of these cases as holding that the Constitution forbids Congress to change "judicially made" federal Indian law through this kind of legislation.²²³

Prior to *Lara*, whether the Court would uphold congressional attempts at restoration was uncertain.²²⁴ While the Court has, at least for the time being, answered the question in the affirmative, considerable uncertainties remain. First, as shown below, *Lara* explicitly left open questions about the constitutionality of the statute at issue there. Justice Kennedy's opinion concurring in the judgment in *Lara* has heightened concerns about how the Court will address such challenges in the future.²²⁵ Additionally, the concerns that Justice Kennedy raises tie in with more general concerns about how the Court might respond to additional restorations of tribal authority in light of its apparent hostility to tribal sovereignty. I will address these questions in turn before moving on to outline possible proposals for partial restorations of tribal sovereignty.

The defendant in *Lara* was tried first in tribal court and did not challenge the statute during the initial prosecution.²²⁶ It was not until his subsequent federal prosecution that he raised a double jeopardy²²⁷ challenge, contending that his tribal prosecution could only have been based on federally delegated power and therefore

223. *Id.* at 206–07 (citations omitted).

224. *See, e.g.,* Gould, *supra* note 3, at 689 (suggesting that if the Court did uphold the legislation at issue in *Lara* it would likely view the legislation as creating a delegation rather than as restoring tribal sovereignty).

225. *Lara*, 541 U.S. at 211–14 (Kennedy, J., concurring in judgment); *see also* Trachman, *supra* note 6 at 877–78, 883 (discussing Justice Kennedy's concurrence); Weber, *supra* note 54, at 756 (stating that "Justice Kennedy provided some insight of what may come if a similar case [to *Lara*] were to be challenged at an earlier stage").

226. *Lara*, 541 U.S. at 196.

227. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.").

that jeopardy had attached during the tribal prosecution.²²⁸ Accordingly, the Court rejected the double jeopardy challenge because the tribe was not exercising federal power and declined to reach the defendant's due process²²⁹ and equal protection²³⁰ challenges to the statute, holding that they should have been raised during the tribal prosecution.²³¹

Lara's due process challenge was based on the fact that, as an indigent defendant, he had not been offered free counsel during the tribal prosecution.²³² His equal protection challenge was based on the fact that the federal statute that recognized tribal jurisdiction only recognized such jurisdiction over Indians, thus allegedly creating a racial classification.²³³ The Court declined to reach the due process and equal protection issues because they related only to the validity of the initial, tribal prosecution, not to its federal or tribal character.²³⁴

While the Court stated that future defendants were free to bring such challenges,²³⁵ as a purely legal matter such challenges should, *in theory*, not be cause for concern among tribes. Constitutional provisions apply only to state and federal actors, and courts have

228. See *Lara*, 541 U.S. at 197–98, 208–09.

229. U.S. CONST. amend. V (prohibiting federal deprivations “of life, liberty, or property, without due process of law”).

230. The Fifth Amendment Due Process Clause has been held to encompass equal protection principles as well. *Weinberger v. Salfi*, 422 U.S. 749, 768–70 (1975).

231. *Lara*, 541 U.S. at 207–09.

232. *Id.* at 207–08.

233. *Id.* at 209. Based on *Morton v. Mancari*, 417 U.S. 535 (1974), courts have traditionally viewed Indianness as a political status rather than a racial classification and thus have not subjected it to heightened scrutiny within the equal protection context. However, this exemption from heightened scrutiny may be more precarious given the Court's apparent drive to obliterate all explicitly race-based categorizations. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2758–59 (2007) (plurality opinion) (stating that “remediating past societal discrimination does not justify race-conscious governmental action” and that “[h]owever closely related race-based [school] assignments may be to achieving racial balance, that itself cannot be the goal”); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 709, 738–41 (2001) (discussing *Rice v. Cayetano*, 528 U.S. 495 (2000)). *Mancari* has also been critiqued from an indigenous perspective. See Judge Sally Willett, *Identity Crisis in Indian Country*, in SOVEREIGNTY SYMP. II-1 (16th ed. 2003) (arguing that Indianness should not be tied to membership status). For another perspective on why Indian preferences are not properly understood as racial, see Fletcher, *supra* note 83, at 669 (suggesting that one of the most important justifications for differential treatment of tribes and tribal members is the fact that tribal rights are, in many cases, guaranteed by treaty).

However, the Ninth Circuit addressed the equal protection issue in *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005), and concluded that, “[d]espite the force of *Means's* argument,” the statute survived an equal protection challenge based on *Mancari*. *Id.* at 932–33.

234. *Lara*, 541 U.S. at 208–09.

235. *Id.* at 209.

conclusively held that tribes (except in cases of federally delegated power) are neither.²³⁶ Because federal statutes restoring tribal power simply resuscitate ancient tribal powers, rather than creating new powers, tribal actions authorized by such statutes are not subject to constitutional challenge.²³⁷

Despite the longstanding precedent holding that tribes are not subject to the constitutional obligations of states or the federal government, any Indian law student knows that relying on precedent in the Indian law context has become like expecting the earth to remain steady during an earthquake.²³⁸ This is particularly true here, where the issue is one of constitutional rights.²³⁹ Philip Frickey has recognized the Court's trend of increasingly "'quasi-constitutionaliz[ing]' the relationship between tribes and non-members,"²⁴⁰ by which he means that the Court uses constitutional values in constructing federal common law pertaining to tribes.²⁴¹

236. *Talton v. Mayes*, 163 U.S. 376, 381–83 (1896); *Barta v. Ogala Sioux Tribe of Pine Ridge Reservation of S.D.*, 259 F.2d 553, 556–57 (8th Cir. 1958); Trachman, *supra* note 6, at 878–80.

237. See, e.g., Trachman, *supra* note 6, at 878; Gould *supra* note 3, at 686. For a discussion of the state action requirement for constitutional violations, and particularly when private action may be fairly attributable to the state, see *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 52 (1999) (holding that "state action requires both an alleged constitutional deprivation caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible, and that the party charged with the deprivation must be a person who may fairly be said to be a state actor," and also stating that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment.") (citations and internal quotation marks omitted). Of course a tribe is not a private party but rather a governmental entity. Nonetheless, the principles of state action in cases such as *Sullivan* provide useful guidance on this somewhat analogous issue and bolster the conclusion that the federal government's regulation of tribes and its recognition and affirmation of their ancient sovereign rights do not convert tribal action into federal action for Fifth Amendment or other constitutional purposes. Judge Pregerson has made a similar point in comparing congressional restoration of tribal sovereignty to congressional authorization of state regulation of commerce. *United States v. Enas*, 255 F.3d 662, 680 n.5 (9th Cir. 2001) (Pregerson, J., concurring).

238. See Frickey, *supra* note 34, at 62–63 (quoting Justice Scalia's statement to Justice Brennan regarding the opinion in *Duro v. Reina* that "our opinions in this field have not posited an original state of affairs that can subsequently be altered only by explicit legislation, but have rather sought to discern what the current state of affairs ought to be by taking into account all legislation, and the congressional 'expectations' that it reflects, down to the present day.") (emphasis added). Thus, Justice Scalia himself has explicitly recognized the Court's project of creating Indian law anew with each successive case.

239. Frickey, *supra* note 34, at 64–65; see also Roberts, *supra* note 168, at 528 ("Federal Indian Law is a struggle to fabricate a legal regime in the context of text-based constitutional discourse when textual dictates are absent. . . . Constitutional text is not at work, but constitutional principles are, and those principles are not fixed but evolving.") (quoting Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and Methods of Marbury v. Madison to Tribal Courts' Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77, 130 (2004)).

240. Frickey, *supra* note 34, at 65 (emphasis omitted).

241. *Id.* at 65 n.311.

He also notes that Supreme Court “cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right.”²⁴² He analogizes this current trend of quasi-constitutionalizing Indian law to the Court’s creation of the incorporation doctrine and the reverse incorporation doctrine.²⁴³ He remarks that, in formulating both of these doctrines, “the Court essentially took it upon itself to complete” what it viewed as “an incomplete Constitution.”²⁴⁴

Frickey’s perceptions are borne out by Justice Kennedy’s concurrence in the judgment in *Lara*,²⁴⁵ which departs significantly from existing Indian law precedents but which nonetheless provides important guidance for crafting a successful restoration statute. According to Justice Kennedy, since the tribal prosecution was never challenged in *Lara*, the Court should have avoided the question of the validity of Congress’ amendment to the Indian Civil Rights Act altogether.²⁴⁶ Calling the Court’s holding that Congress can restore tribal sovereignty “surprising” and “most doubtful,” Justice Kennedy goes on to comment that “[i]t is a most troubling proposition to say that Congress can relax the restrictions on inherent tribal sovereignty in a way that extends that sovereignty beyond those historical limits.”²⁴⁷ Finally, he suggests that, contrary to the constitutional design allocating power between the federal government and the states,

the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity to be tried for conduct occurring wholly within the territorial borders of the Nation and one of the States. This is unprecedented. There is a historical exception for Indian tribes, but only to the limited

242. *Id.* at 40 (quoting *Duro v. Reina*, 495 U.S. 676, 693–94 (1990)). As Frickey explains, in creating the incorporation doctrine, the Court imposed Bill of Rights obligations on states by way of the Due Process Clause of the Fourteenth Amendment, and, similarly, in crafting the reverse incorporation doctrine, the Court held that the Equal Protection Clause of the Fourteenth Amendment applied to the federal government by way of the Due Process Clause of the Fifth Amendment. *Id.* at 66. While Frickey’s point regarding the Supreme Court’s views is well-taken, it is important to understand that the Court’s conception is incorrect in that Congress does not subject non-Indians to tribal process; rather, non-Indians subject themselves to it by virtue of their presence within the reservation. See Tweedy, *supra* note 89, at 160.

243. Frickey, *supra* note 34, at 66.

244. *Id.*

245. Accord Trachman, *supra* note 6, at 877–78, 883 (incorporating many of the ideas discussed by Philip Frickey, *supra* note 34, and explaining the danger of other justices’ joining Justice Kennedy in a subsequent case on these issues).

246. *United States v. Lara*, 541 U.S. 193, 211 (2004) (Kennedy, J., concurring).

247. *Id.* at 211–12.

extent that a member of the tribe consents to be subjected to the jurisdiction of his own tribe.²⁴⁸

There are obvious problems with Justice Kennedy's analysis.²⁴⁹ For one, he takes the Supreme Court's somewhat recent, unilateral divestment of tribal sovereignty not as the culmination of a progressive deterioration (which is evident from a chronological examination of the case law), but as a description of the state of tribal sovereignty at the birth of the republic. Consistent with this revisionist approach, he views tribal sovereignty as never having extended beyond tribal members, an extremely limited view of tribal sovereignty that has not even been officially endorsed by the Court. Finally, as discussed above, his analysis is problematic because there is no precedent for subjecting tribes to constitutional obligations, a step the text of the Constitution does not support.²⁵⁰

Despite the problems with Justice Kennedy's analysis, it is important for those involved in crafting a restoration statute to pay close attention to his views and those of other members of the Supreme Court. Such close attention will help facilitate the crafting of a restoration statute that stands the best possible chance of surviving Supreme Court review. The fact that Justice Kennedy's opinion fits with the Supreme Court's practice of quasi-constitutionalizing common law pertaining to tribes²⁵¹ means that it warrants special attention because his concerns are likely shared, at least in some measure, by other members of the Court. Thus, putting aside the criticisms of Justice Kennedy's analysis that are discussed above and viewing Justice Kennedy's analysis solely from a restoration standpoint, his opinion unequivocally suggests that to decrease its vulnerability, any restoration statute should, to the extent possible, provide for protection of individual constitutional rights.²⁵² Specific

248. *Id.* at 212.

249. Professor Kevin Washburn provides an interesting counterpoint to Justice Kennedy's concurrence in his article documenting the extent to which the current Indian law jurisdictional framework likely violates the constitutional rights of Indian defendants. *See generally* Washburn, *supra* note 177. Another irony is that some important tribal rights, such as aboriginal tribal property rights, have been held *not* to be constitutionally protected. *See* WILLIAMS, *supra* note 3, at 89 (describing the Court's holding in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955)). Indeed, the doctrine of discovery, especially as initially formulated in *Johnson v. M'Intosh*, 21 U.S. 543 (1823), an interpretation that was later re-adopted by the Court and continues to be in force today, may well effect a taking without just compensation. *See supra* notes 83 and 85 and sources cited therein.

250. *See supra* notes 238–244 and associated text (discussing analysis of Philip Frickey).

251. *Id.*

252. The remaining opinions in *Lara* do not provide much assistance in crafting a restoration statute. Justice Thomas sees a conceptual problem with a notion of sovereignty that is subject to complete defeasement by Congress. *United States v. Lara*, 541 U.S. 193, 217–18 (2004) (Thomas, J., concurring.) He makes important points, such as plenary power's lack

recommendations for achieving this goal are discussed below in Part IV.

IV. OPTIONS FOR RESTORATION

There are so many important areas in which tribal sovereignty has been divested that the options for restoration seem almost limitless. How to prioritize among the various options is clearly a policy choice for tribes to make, as is the decision of whether restoration is a worthwhile option at all.²⁵³ Furthermore, passage of any restoration statute that applies to non-Indians will likely be extremely difficult to obtain.²⁵⁴ Accordingly, if tribes decide to pursue

of a constitutional basis and the fact that the Court exercises common law, not constitutional power, in defining tribal sovereignty, *id.* at 215, 220–23, but, at the same time, he limns some very troubling ideas, such as the apparent suggestion that tribal sovereignty may have become defunct when Congress passed 25 U.S.C. § 71, which purported to limit the President's treaty power with respect to tribes. *Lara*, 541 U.S. at 218–20.

Justice Souter, dissenting in an opinion joined by Justice Scalia, would have held that sovereignty could not be restored while tribes remained in a dependent status and therefore would have read the amended Indian Civil Rights Act as a delegation. *Lara*, 541 U.S. at 226–27, 229 (Souter, J., dissenting). Thus, it is unlikely that a restoration statute could ever meet with his or Justice Scalia's approval.

Given the two new justices' (Justice Roberts' and Justice Alito's) lack of Indian law experience, it is hard to know how the newly constituted Supreme Court will approach the next restoration issue that comes before it. Roberts, *supra* note 168, at 552–53. However, the Court's decision in *Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008), can be taken to suggest that the newly constituted Court, including both Chief Justice Roberts and Justice Alito, will carefully and perhaps suspiciously scrutinize any restoration effort to ensure that nonmembers are not disadvantaged in any way. *See supra* notes 140–153 and accompanying text (discussing *Long Family Land & Cattle Co.*).

253. *See supra* note 3 and sources cited therein. Because plenary power, as currently constituted, is a dangerous doctrine for tribes, they may wish not to utilize it. *See, e.g.*, Bradford, *supra* note 3, at 96. Although evidence suggests that tribes are gaining political traction and therefore may be better able to get their interests implemented in Congress, *see, e.g.*, Lewis Kamb, *Tribes Flex Growing Muscles at Ballot Box: "Great Victory" Over Gorton in 2000 Points the Way*, SEATTLE POST-INTELLIGENCER, Mar. 9, 2004, at A1, other evidence suggests that tribes may still be more vulnerable than other entities to Congress' underhanded actions. *See Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users*, Pub. L. No. 109-59, § 10211, 119 Stat. 1144, 1937 (2005) (authorizing Oklahoma, in a rider to a transportation bill, to extend its jurisdiction as administrator of federal environmental programs into Indian Country by request of the state and requiring Oklahoma tribes to enter a cooperative agreement with the state prior to being approved to administer any federal environmental programs).

254. *See generally* Tom Zoellner, *Homeland Security Concerns Continue*, INDIAN COUNTRY TODAY, Sept. 18, 2003, at A1 (discussing public outcry against a bill to amend the Homeland Security Act of 2002 to accord some power and funding to tribes with reservations adjacent to an international border); Garcia, *Hearing on Law and Order Hearing*, *supra* note 195, at 3 (testimony of Joseph A. Garcia) (noting with disappointment that it appears legislation restoring tribal sovereignty to prosecute domestic violence crimes committed by non-Indians "cannot be introduced even for purposes of discussion").

restoration, they and their allies should view it as a long-term endeavor that may require years or even decades of effort.

Below are the outlines of a few possibilities for restoration. In terms of whether to pursue criminal or civil restoration first, pursuing a limited civil restoration may be a good first step, because witnessing the benefits of (or at least the lack of harm from) such increased jurisdiction could make courts and Congress more amenable to restoration of criminal jurisdiction. On the other hand, tribal members are now desperately in need of protection from violent crime. They may be unwilling to wait longer for that form of restoration, which would empower them with the legal means to protect their communities from violent crime. Additionally, tribal members' compelling need for protection from crime may legitimize restoration in courts and the legislature in ways that would not be possible under less exigent circumstances.

A. Possibilities for Civil Restoration

There are numerous civil options for restoration. Even small gains in the civil context appear to offer significant positive consequences for tribes. Additionally, beginning with a limited civil restoration could have strategic advantages in terms of the relative ease of passage in Congress and may also lessen the likelihood and severity of backlash against tribes.²⁵⁵

1. Background Issues to Consider

In considering the possibilities for civil restoration, two additional concepts should be borne in mind. One is the distinction between adjudicatory and regulatory tribal civil jurisdiction. Adju-

255. Because a small increase in tribal civil jurisdiction would be the least intrusive of the possible types of restoration and thus would constitute the least potential threat to non-members, *see, e.g.*, *Duro v. Reina*, 495 U.S. 676, 688 (1990) (describing the intrusiveness of tribal exercises of criminal jurisdiction), *Tweedy, supra* note 50, at 484 (discussing the fact that civil restoration is less intrusive than criminal jurisdiction and therefore may be more likely to occur), it follows that any backlash against tribal sovereignty due to a limited civil restoration should be less than for other types and perhaps that a successful civil restoration could actually, in time, lead to outsiders' increased comfort with tribal jurisdiction. *Cf. Krakoff, supra* note 11, at 1134 (discussing the idea that lack of availability of federal review of tribal court decisions may have motivated backlash against tribes, including later abrogations of tribal sovereignty); *McCarthy, supra* note 163, at 186–89 (noting that “[t]he assertion of tribal sovereignty on an expanding scale has paralleled a resurgence of hostility toward Indian tribes” and explaining how the growth and success of tribal courts are compromised as a result of this hostility).

dicatory jurisdiction refers to the tribal court's power to hear a case, while regulatory jurisdiction refers to the tribal government's power to regulate. While the federal courts (and particularly the Supreme Court) used to analyze these types of jurisdiction separately,²⁵⁶ in recent years the Court has analyzed them commensurately.²⁵⁷ Despite this recent judicial development, Congress, in restoring tribal sovereignty, would be free to treat these two types of jurisdiction separately or as a unit.²⁵⁸ Thus, in examining the options for civil restoration, we too have this choice and should evaluate which approach makes the most sense for tribes in any civil restoration statute under consideration.

The doctrine of tribal exhaustion also plays a role in the current framework of tribal sovereignty in the civil realm. Under this doctrine, litigants must generally exhaust their tribal remedies before seeking federal adjudication of a dispute for which there is a colorable claim of tribal jurisdiction.²⁵⁹ Although the doctrine, which the Court first enunciated in *National Farmers Union v. Crow Tribe of Indians*,²⁶⁰ was formerly understood to have a substantive component, the Supreme Court later held that the doctrine was simply a procedural rule.²⁶¹ This prudential rule designed to foster and preserve respect for tribal courts and tribal sovereignty does not bear directly on the scope of possible civil restoration but should nonetheless be kept in mind because it forms part of the background against which restoration efforts would operate.

256. See, e.g., David M. Blurton, John v. Baker and the Jurisdiction of Tribal Sovereigns Without Territorial Reach, 20 ALASKA L. REV. 1, 6 & n.28 (2003); see also *Montana v. United States*, 450 U.S. 544, 557 (1981) (framing the question presented in the case as the "narrow one" of tribal regulatory authority over the hunting and fishing activities of nonmembers).

257. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) ("As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.").

258. This is the case because tribal adjudicatory and regulatory jurisdiction as constituted under federal law are common law rather than constitutional matters. See, e.g., *United States v. Lara*, 541 U.S. 193, 207 (2004) (explaining that tribal jurisdiction generally under federal law is a common law issue rather than a constitutional one).

259. See, e.g., Krakoff, *supra* note 11, at 1134.

260. 471 U.S. 845 (1985); see also *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (further elaborating on the doctrine).

261. *Strate*, 520 U.S. at 453, 459 n.14; see also Krakoff, *supra* note 11, at 1134 (discussing implications of the exhaustion doctrine as initially formulated and alluding to the Court's subsequent incursions on it); Tweedy, *supra* note 89, at 168 (discussing the Court's weakening of the exhaustion doctrine in *Strate*). An early view of the significance of the tribal exhaustion requirement is reflected in Michael Taylor, *Modern Practice in Indian Courts*, 10 U. PUGET SOUND L. REV. 231, 231 (1987) ("Rejecting arguments that Indian courts are generally prohibited by federal law from exercising jurisdiction in civil matters involving non-Indians, the Court in *National Farmers Union Insurance* unanimously held that Indian courts are, in the first instance, the exclusive forum for determining their own jurisdiction.").

2. Option 1: Reinstating Tribal Taxing Authority on Fee Lands

In the civil regulatory context, one option for regulatory restoration would be to overrule *Atkinson Trading Co.* and restore tribal taxing authority over the entire reservation. As reflected in Sarah Krakoff's discussion of the hardships already inflicted by the *Atkinson* decision, such a limited restoration would provide significant gains in terms of improving tribal governments' economic functionality, including the ability to provide governmental services.²⁶² Additionally, for tribes located in commercially popular areas, taxing authority may provide a sizable source of revenue and could significantly reduce reliance on federal funding sources.²⁶³ However, to imbue such a restoration with definite practical benefits, Congress would also have to preempt altogether or at least limit state taxing authority on the reservation,²⁶⁴ in order to guarantee tribal ability to reap the benefits of restored taxing authority over nonmembers on fee land.²⁶⁵

3. Option 2: Reinstating Zoning Authority on All On-Reservation Fee Lands

Another option for regulatory restoration would be to reverse *Brendale* and mandate that tribes have zoning authority throughout their reservations regardless of fee ownership by nonmembers.²⁶⁶

262. See Krakoff, *supra* note 11, at 1174, 1178–80.

263. See, e.g., NAT'L CONG. OF AM. INDIANS, CONCEPT PAPER: 2003 LEGISLATIVE PROPOSAL ON TRIBAL GOVERNANCE AND ECONOMIC ENHANCEMENT 2 (July 25, 2002) (describing Tualip Tribes' economic development, including shopping center and business park, which brings in \$11 to \$50 million per year in state taxes of which the Tribes receive no portion due to concurrent state and tribal taxing jurisdiction and the economic impossibility of imposing double taxes).

264. *Id.* at 3. Congress clearly has the authority to preempt or limit state taxing authority on-reservation. COHEN'S HANDBOOK, *supra* note 9, § 8.03[1][d], at 701–02, which would also entail legislatively overruling *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154–59 (1980) (holding that state may tax nonmember cigarette purchases at tribal smokeshops). Practically speaking, this may be particularly difficult to accomplish given the state revenue involved and the fact that both Houses of Congress are comprised of legislators who explicitly represent states and are accountable to state citizens.

265. Some tribes have been able to reach cooperative agreements with states under which the tribe and state share on-reservation taxing revenues. Krakoff, *supra* note 11, at 1173 (describing Navajo Nation's cooperative taxing agreements with New Mexico); see also *Wilbur v. Locke*, 423 F.3d 1101, 1104–06 (9th Cir. 2005) (describing state law authorizing compacts between state and tribes regarding cigarette taxes). However, such agreements are not always possible. See, e.g., NAT'L CONG. OF AM. INDIANS, *supra* note 263, at 3. Thus, limitations on state on-reservation taxing authority should also be enacted.

266. See *supra* note 154 (describing *Brendale v. Confederated Tribes of the Yakima Indian Nation*, 492 U.S. 408 (1989)).

This would enable tribes to determine the character of their reservations and, in particular, the extent to which their reservations, or certain portions of them, will remain rural or will be affected by development. Because reservations are permanent tribal homelands, reservation character is undoubtedly immensely important to tribes. Moreover, as a matter of fairness, given the small size of reservations compared to the vast areas ceded by tribes, the character of the reservations should rightfully reflect tribal values, rather than those of surrounding local governments.²⁶⁷ The fact that the United States government has unconscionably transferred vast amounts of reservation lands to nonmembers²⁶⁸ only makes zoning an even more important tool for tribes because it would facilitate their maintaining some control over the character of their reservations despite the large-scale loss of tribal ownership.

4. Option 3: Reinstating Civil Regulatory and Adjudicatory Authority on Fee and Trust Lands Generally

a. Complete Overruling of Montana

Overruling *Montana* and the subsequent Supreme Court cases that limited further the scope of civil regulatory authority would represent a huge gain for tribes. Under *Montana* and subsequent cases, tribes not only have very limited regulatory opportunities but also face considerable uncertainty as to the validity of their regulations with respect to each individual regulated party²⁶⁹ (not to mention resistance to their regulatory authority). Furthermore, restoring civil adjudicatory jurisdiction generally would be a huge benefit not only for tribes and tribal courts, but for reservation

267. The right of tribes to control the character of their reservations is also supported by International Human Rights Law. See, e.g., United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Art. 32 ¶ 1, U.N. Doc. A/61/L.67 and Add. 1 (Sept. 13, 2007).

268. See, e.g., Frickey, *supra* note 34, at 14–15 (describing the General Allotment Act of 1887).

269. Because *Montana* created such an individualized, case-by-case framework, it has become difficult to judge the validity of a regulation on its face. *Montana v. United States*, 450 U.S. 544 (1981). Instead, in many cases, tribes and courts will have to look at the activities of individual regulated parties to adjudge the validity of the regulation based on these parties' personal behavior and/or level of consent. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655 (2001); *supra* notes 132 and 134 and sources cited therein. While these individualized determinations do not appear to apply in all circumstances, see, e.g., *Montana v. EPA*, 941 F. Supp. 945, 952–53 (D. Mont. 1996) (upholding tribal water quality regulations based on generalized federal finding of water quality's effects on health and welfare), they apply sufficiently broadly to create an unworkable administrative framework.

residents including tribal members and nonmembers who prefer a local, community-operated court system.²⁷⁰

b. Partial Overruling of Montana

Alternatively, short of overruling *Montana* entirely, Congress could enact a limited civil restoration. One option would be to provide that all persons living within reservation boundaries are automatically deemed to have consented to tribal civil regulatory and adjudicatory jurisdiction, or, more broadly, all persons who spend more than twenty-four hours on the reservation could be deemed to be consenting while present there. Another option for partially overruling *Montana* would be to restore tribal civil regulatory and adjudicatory authority as to any entity that enters a contract with the tribe providing for on-reservation activities. Such a restoration would presumably be limited to activities occurring on-reservation during the duration of the contract.

5. Crafting a Civil Restoration Statute That Can Survive Judicial Review

All of these options would raise concerns for the Court, which clearly sympathizes with non-Indians who are subjected to tribal authority in any context.²⁷¹ Particularly with respect to non-Indian fee owners, the Court has often expressed concern about the possibility of thwarting their “justifiable expectations.”²⁷² This concern

270. The plaintiff in *Strate* appears to have been just such a person. She is described in the case as the non-Indian widow of a deceased tribal member, and she apparently resided on the reservation at the time of the accident at issue in the case (although the location of her residence was disputed by one of the parties). *See Strate v. A-1 Contractors*, 520 U.S. 438, 443 & n.2 (1997).

271. Neither of the defendant’s challenges in *United States v. Lara*, 541 U.S. 193 (2004), that worried Justice Kennedy would technically apply. The right to counsel for an indigent defendant only applies in the criminal context, and a global restoration would obviate Lara’s equal protection challenge, which was based on his being subject to tribal prosecution as an Indian while white defendants would not be. Nonetheless, the Court, or some justices of the Court, would undoubtedly remain concerned about other individual rights, as the recent case law bears out.

272. *See Frickey*, *supra* note 34, at 25–26, 38 (documenting concern for such expectations, which the Court often links to the allotment of reservations and the consequent sale of on-reservation land to non-Indians); *see also City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 215 (2005) (voicing concern regarding non-Indians’ “justifiable expectations”).

is highly exaggerated in the Indian law context²⁷³ and also misplaced given the horrific extent to which Indians' justifiable expectations have been thwarted in the course of American history.²⁷⁴ Nonetheless, if tribes decide to pursue any of these

273. The Court does not feel bound to help realize individuals' justifiable expectations in other contexts. *See, e.g.,* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (upholding temporary building moratorium in vicinity of Lake Tahoe against property owners' challenge).

Also, the General Allotment Act, 25 U.S.C. §§ 334, 339, 341–42, 348–49, 354, 381 (2006), was enacted in 1887, and the period of allotment (through this and other allotment statutes) generally extended from the 1880s through the late 1920s. *See* Tweedy, *supra* note 89, at 188. Thus, the vast majority of direct beneficiaries of the Act, *i.e.*, non-Indians who purchased Indian land at cheap prices, are almost certainly now deceased or, if still living, have long since reaped the benefits of their bargains. It is odd for the Court to continually concern itself with the justifiable expectations of such purchasers. Nonetheless, if tribal sovereignty were restored, one way to ameliorate the Court's concerns would be for Congress to authorize payment to current nonmember land owners for the devaluing of their property as a result of restored tribal jurisdiction.

274. *See, e.g.,* Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 116–17 (1993) (describing Tribe's historical relationship with the federal government, which included "many [successive] agreements between the Government and the Tribe in which the Tribe surrendered its land and moved elsewhere" so as to facilitate white settlement, as well as allotment of the Tribe's final reservation, also to facilitate white settlement); United States v. Michigan, 471 F. Supp. 192, 252, 258 (W.D. Mich. 1979) (acknowledging "the great injustice which has been done to treaty Indians during the many years they have been deprived of their full rights for the sake of others without rights" and "the dismal history which generally surrounds the dealings of the United States with these first inhabitants of this land, and the history of this specific treaty negotiation, punctuated by numerous instances of underhanded and perfidious dealings with these trusting and gentle people"), *modified in part*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981); *see also* ANDERSON ET AL., *supra* note 52, at 75 (quoting Alexis de Tocqueville's account of the United States government's forced removal of the Cherokee Nation in 1831 pursuant to an invalid treaty: "It was then in the depths of winter, and that year the cold was exceptionally severe . . . The Indians brought their families with them; there were among them the wounded, the sick, newborn babies, and old men on the point of death. They had neither tents nor wagons, but only some provisions and weapons. I saw them embark across the great river, and the sight will never fade from my memory. Neither sob nor complaint rose from that silent assembly. Their afflictions were of long standing, and they felt them to be irremediable."); HENRIETTA H. STOCKEL, SHAME AND ENDURANCE: THE UNTOLD STORY OF THE CHIRICAHUA APACHE 19, 27, 35, 37, 54–56, 66–67 (2004) (describing numerous promises made to Chiricahua Apache groups to secure their surrender and the subsequent flouting of these promises by the United States government, including promises to the Indians that they could return to Arizona, that they would only be incarcerated for two years, and that they would not be separated from their children, many of whom were kidnapped and forcibly transported to Carlisle Indian school in Pennsylvania where large numbers of them died of disease); Washburn, *supra* note 177, at 735 (discussing the federal government's atrocities and betrayals with respect to tribes and tribal members).

The Court's concern is also ironic given the United States government's current abuses of its "non-members," *i.e.* non-citizens. *See, e.g.,* El-Masri v. United States, 479 F.3d 296, 300 (4th Cir. 2007) (recounting plaintiff's allegations of "being beaten, drugged, bound, and blindfolded during transport; confined in a small, unsanitary cell; interrogated several times; and consistently prevented from communicating with anyone outside the detention facility" by federal officers and their agents but dismissing the suit based on state secrets privilege), *cert. denied*, 128 S.Ct. 373 (2007); Jama v. Immigrations and

restoration options, it would be advisable to take measures to assuage the Court's concerns.²⁷⁵

While "justifiable expectations" is an amorphous, subjective concept, there are several possible measures that could assuage judicial concerns. For instance, in the administrative context, it may be possible for tribes to create advisory (or even regulatory) boards that include nonmembers.²⁷⁶ With respect to adjudicatory jurisdiction, one possibility that would probably be available only to quite well-off tribes would be to provide jury trials in civil matters and to include nonmember reservation residents in the jury pools.²⁷⁷ A less costly alternative that may have no utility beyond giving comfort to individuals potentially subject to tribal jurisdiction would be to hold informational workshops on the operation of the tribal court. Finally, with respect to any restoration option that tribes pursue, it would be best to include detailed findings in the legisla-

Customs Enforcement, No. Civ. 01-1172]RTAJB, 2005 WL 1205160, at *2 & n.2, *3 & n.5, *4 (D. Minn. May 20, 2005) (describing very disturbing facts, including a 49-month detention pending removal of the alien despite the fact that the maximum allowable detention in such circumstances is six months, a botched removal attempt to the fallen state of Somalia (carried out through private contractors rather than federal agents because of the level of peril involved), and finally the court's "growing concern that ICE [Immigration and Customs Enforcement] may be deliberately not informing its counsel of record of what is going on so that he will be, consequently, unable to offer any information in response to the Court's questions"); Daphne Eviatar, *Experts Predict Slew of Torture Suits: Courts Begin to Reconsider Whether Torture Victims May Seek Legal Redress*, WASH. INDEP., Aug. 20, 2008, <http://www.washingtonindependent.com/43/experts-predict-slew-of-torture-suits> (summarizing legal developments relating to torture cases and reporting that "[t]he Detainee Abuse and Accountability Project, an independent non-governmental organization, has already documented more than 330 cases in which U.S. military and civilian personnel are credibly alleged to have abused or killed detainees in detention centers at Guantanamo Bay, Iraq and Afghanistan"); Nina Bernstein, *Ill and in Pain, Detainee Dies in U.S. Hands*, N.Y. TIMES, Aug. 13, 2008, at A1 (describing gruesome death of detained Chinese illegal immigrant from untreated cancer and alluding to other similar cases).

275. Although tribes should not have to worry about the Court's reaction when Congress unequivocally exercises its plenary power in favor of tribal jurisdiction, the more it is possible to allay the Court's fears, the better off tribes will be in terms of the content of opinions that the Court produces. This is not to say that the Court's fears can necessarily be allayed; the task may prove impossible.

276. See, e.g., Swinomish Tribal Code §§ 13-01.100 to 13-01.120, available at http://www.swinomish.org/departments/tribal_attorney/tribal_code/13/13_1housingauthority.pdf (providing for creation of Board of Commissioners of the Housing Authority and providing that these Commissioners may be members or nonmembers of the tribe).

277. The Indian Civil Rights Act currently only provides for the right to a jury trial in criminal cases where there is potential for imprisonment. 25 U.S.C. § 1302(10) (2006). Moreover, in the criminal context, the Court has expressed concern about non-Indians being ineligible for tribal jury service. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193-94 (1978). In *Long*, however, the bank had the right under tribal law not only to a jury trial, but also to a jury pool that included nonmembers. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 491 F.3d 878, 882-83 (8th Cir. 2007).

tion on the harms the legislation seeks to remedy and the protections included for individuals.²⁷⁸

B. Possibilities for Criminal Restoration

Because the divestment of tribal authority has caused the direst problems in the criminal context by exposing tribal members to widespread, unpunished violent crime, tribes may decide to pursue further criminal restoration first. In fact, the Senate, in consultation with tribes, has already made some movement in that direction; in 2007 and 2008, the Senate Committee on Indian Affairs held several hearings addressing law enforcement and the administration of justice in Indian Country, including a September 2007 hearing on the level of violent crime against women in Indian Country.²⁷⁹ Moreover, the National Congress of American Indians (“NCAI”) has drafted proposed legislation on the issue in the past,²⁸⁰ and Byron Dorgan, Chairman of the Senate Committee on Indian Affairs, introduced a bill in the Senate in July 2008, which eventually died without having been voted on, that was aimed at reducing violent crime in Indian Country by, among other measures, increasing inter-jurisdictional cooperation, requiring federal prosecutors to document and explain decisions not to prosecute crimes in Indian Country, and increasing tribal sentencing authority for tribes that provide counsel to indigent defendants and meet other requirements.²⁸¹

278. For an example of a tribal ordinance that was upheld by a federal appellate court under *Montana v. United States*, 450 U.S. 544 (1981), partly due to the tribe’s legislative findings, see *Knight v. Shoshone & Arapahoe Indian Tribes of the Wind River Reservation, Wyoming*, 670 F.2d 900, 903 (10th Cir. 1982).

279. *Hearing on Violence Against Women*, *supra* note 168; see also *Progress and Future of Operation Dakota Peacekeeper: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. (2008), available at http://indian.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=d183ef51-4cfa-4955-8cfe-779bbf1b1407; *Tribal Courts and the Administration of Justice in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. (2008); *Law and Order in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. (2008), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:41590.pdf; *Hearing on Law Enforcement*, *supra* note 165.

280. See NCAI’s November 15, 2002 Draft Bill (prepared for discussion purposes only) (on file with author).

281. Tribal Law and Order Act of 2008, S. 3320, 110th Cong. §§ 102, 202, 304(3) (introduced July 23, 2008), Govtrack.us, <http://www.govtrack.us/congress/bill.xpd?bill=s110-3320>. Except for the increased tribal sentencing authority that section 304(3) provided for, the Tribal Law and Order Act of 2008 would not actually have restored tribal sovereignty but rather focused on functional improvements to the existing jurisdictional framework such as increasing tribal law enforcement capacity and developing cooperative solutions to criminal law enforcement problems in Indian country through intergovernmental agreements. See, e.g., *id.* at §§ 202, 301. It also explicitly authorized the Attorney General to appoint tribal

1. Option 1: Tribal Criminal Jurisdiction over Non-Indians Who Live On-Reservation with an Indian and Are Engaged in an Intimate Relationship

One particularly promising idea is to provide for criminal adjudicative and regulatory tribal jurisdiction over non-Indians when living on-reservation and engaged in an intimate relationship with an Indian.²⁸² This approach has the benefit of being conceptually consonant with the *Montana* opinion's notion of a consensual relationship. Moreover, it would allow a tribe to take strong measures to combat intimate violence against its members as well as to prosecute associated crimes, such as drug crimes, on which it may be easier to convict. While this approach would not fully address the epidemic levels of violence to which female tribal members are exposed, it would address the significant portion of that violence perpetrated by non-Indian family members.²⁸³

2. Option 2: Full Criminal Restoration

Given the momentum currently attached to the issue and the evidence demonstrating the grave problems caused by this violence, however, some tribes may wish to seek full criminal restoration.²⁸⁴ This option should also be considered, especially if

prosecutors to assist in prosecuting federal crimes in Indian Country, a measure that pre-existing law implicitly permitted. *Id.* at § 103(a); *see also* 28 U.S.C. § 543(a) (2006) (authorizing the Attorney General to "appoint attorneys to assist United States attorneys when the public interest so requires").

282. *See Garcia, Hearing on Law and Order*, *supra* note 195, at 2–3 (stating, in regard to the Tribal Law and Order Act of 2008, that "we are disappointed that the legislation does not include a provision for tribal jurisdiction over all domestic violence offenders" and discussing reasons why such legislation is needed); Washburn, *supra* note 177, at 776 (recognizing that the solution to the numerous problems currently plaguing the system of federal prosecution of many crimes in Indian country "may not involve a winner-take-all approach for the federal, state, or tribal governments" and that "there are ways to split the criminal justice function between governments"); R. Stephen McNeil, *Note: In a Class by Themselves: A Proposal to Incorporate Tribal Courts into the Federal Court System without Compromising their Unique Status as "Domestic Dependent Nations,"* 65 WASH. & LEE L. REV. 283, 321 (2008) (arguing for expansion of tribal court criminal jurisdiction to cover both members and nonmembers and to "extend to all violations of tribal law not covered by the Major Crimes Act"); *cf.* S. COMM. ON INDIAN AFFAIRS, *supra* note 161, at 15 (recommending pilot project that would expand tribal jurisdiction over crimes of sexual and intimate violence).

283. *See supra* note 185 and accompanying text.

284. *See, e.g., Krakoff, supra* note 11, at 1184–85 (recounting Navajo Nation Council's resolutions calling for the United States government to restore full territorial sovereignty); *see also* Kronk, *supra* note 177, at 1263–68 (arguing for congressional restoration of full criminal jurisdiction).

more diligent federal prosecutions of major crimes do not ameliorate the current problems.

3. Crafting a Criminal Restoration Statute That Can Survive Judicial Review

a. The Right to Counsel for Indigent Defendants

In crafting a criminal restoration statute that stands a reasonable chance of surviving Supreme Court review, it would almost certainly be necessary for the statute to require tribes who accept restoration to incorporate a right to free counsel for indigent defendants into tribal law.²⁸⁵ While many tribes do afford such rights under tribal law,²⁸⁶ having an across-the-board requirement should allay some of the concerns Justice Kennedy raised in *Lara*.²⁸⁷

b. Avoiding Equal Protection Problems

While an expanded restoration that applied to non-Indians would obviate the specific equal protection challenge raised in *Lara*, other potential equal protection issues would remain.²⁸⁸ To alleviate one of the most weighty of such potential challenges, it is essential to provide for tribes to enact jury summons procedures that include both members and nonmembers, such as nonmember reservation residents, in applicable cases.²⁸⁹ (Again, while neither measure should be required as a constitutional matter, the Court

285. See *Hearing on Violence Against Women*, *supra* note 168, at 42 (statement of Riyaz Kanji) (arguing that imposing a right to counsel is necessary to prevent the Court from invalidating a restoration statute); see also S. COMM. ON INDIAN AFFAIRS, *supra* note 161, at 15 (recommending Pilot Project of expanded tribal jurisdiction that “ensure[s] adequate constitutional protections for defendants”). Providing for tribes to create the right under tribal law should increase the legitimacy of the protections from a tribal standpoint as well as increase the tribes’ stake in the implementation of such provisions. See Kronk, *supra* note 177, at 1258 (referring to the view that the current jurisdictional framework has failed because it “was imposed on Indian country without approval or acceptance . . .”).

286. See, e.g., Swinomish Tribal Code § 3-03.215 (2008), available at http://www.swinomish.org/departments/tribal_attorney/tribal_code/03/3_3-RulesofCriminalProcedure.pdf; 1 Navajo Nation Code Annotated § 7, available at <http://www.ongd.navajo.org/files/nnca.pdf>.

287. 128 S. Ct. 2709 (2008).

288. Accord Weber, *supra* note 54, at 760–61 (expressing concern about *Lara*’s “racial undertones”).

289. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193–94 (1978). Some tribes already provide for nonmembers to serve on juries. See, e.g., 7 Navajo Nation Code Annotated § 654, available at <http://www.ongd.navajo.org/files/nnca.pdf>.

has moved more and more in the direction of enforcing constitutional norms in Indian Country).

*c. Exploring Whether to Make Each Civil Right That Tribes
Must Protect Under Federal Law Identical to the
Analogous Federal Constitutional Right*

Another question to examine is whether the federal, quasi-constitutional rights that tribal court criminal defendants would be entitled to under a restoration statute and associated tribal law (in addition to those rights currently provided for in the Indian Civil Rights Act) should explicitly mirror the corresponding constitutional rights. At this point, each tribe has the ability to interpret the rights prescribed in the Indian Civil Rights Act differently,²⁹⁰ and there are strong tribal sovereignty benefits to this. However, at the same time, uncontrolled variability among tribal courts has caused some Supreme Court justices concern,²⁹¹ and tribes should therefore consider whether it is worthwhile to sacrifice this right to variable interpretation of such quasi-constitutional rights in the hopes of increasing the chances that the Supreme Court will uphold a restoration bill.

*d. Legislative Findings Should Be Included to
Support a Criminal Restoration Bill*

Additionally, as in the civil context, extensive findings demonstrating the need for restoration should be part of any restoration bill. Given the growing body of data regarding lawlessness in Indian Country, such findings should not be difficult to craft, and they could prove convincing to the Court.

e. Provisions Allowing Tribes to Opt in and Opt out

A proposal for criminal (or even civil) restoration will likely contain trade-offs to protect individual rights that some tribes will undoubtedly object to. Therefore, any restoration proposal should be optional for tribes and should also contain opt out provisions so

290. Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Tribal Courts & the Indian Civil Rights Act*, 69 *FORDHAM L. REV.* 479, 487 (2000); see also COHEN'S HANDBOOK, *supra* note 9, § 14.04[2].

291. See *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring).

that, if a tribe finds that it can no longer afford to or does not wish to continue with the program, it can opt out.²⁹²

f. Any Restoration Bill Should Include the Necessary Funding Support

Furthermore, as recognized by Amnesty International and others, strong funding support must accompany restoration.²⁹³ Restoration that is not coupled with federal funding commitments could fail miserably both in terms of the quality of the judicial proceedings and the resulting perceptions of tribal courts. To guarantee that the necessary funding does occur, it would be best to make substantial funding commitments part of the restoration statute itself.

g. Drafters Should Seriously Consider Whether to Provide for Federal Appellate Review

Finally, another provision that would strengthen the viability of a restoration statute is a provision for federal appellate review at least of tribal court criminal decisions, and possibly of some tribal court civil cases as well,²⁹⁴ subsequent to exhaustion of tribal court

292. See, e.g., Kronk, *supra* note 177, at 1262–63 (explaining reasons for enacting opt-in restoration legislation); see also Krakoff, *supra* note 11, at 1198 (stating that in comportment with tribal sovereignty it is “essential” that tribes be able to “opt in or out of any proposed legislative fix”); McNeil, *supra* note 282, at 322 (arguing for opt-in restoration legislation); Riley, *supra* note 177 (describing U.S. Attorney Troy Eid’s view that opt-in legislation expanding tribal jurisdiction is necessary).

293. See, e.g., AMNESTY INT’L., *supra* note 161, at 12; S. COMM. ON INDIAN AFFAIRS, *supra* note 161, at 12 (describing underfunding of tribal justice systems and the practical consequences of this underfunding). See generally *Tribal Courts and the Administration of Justice in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. (2008) (statement of J. Teresa M. Pouley, Tulalip Tribal Court Judge and President of the Northwest Tribal Court Judges Association), http://indian.senate.gov/public/_files/TeresaPouleytestimony.pdf (addressing the need for federal funding of tribal courts and tribal justice systems generally); Garcia, *Hearing on Law and Order*, *supra* note 195, at 2 (addressing the need for federal funding for tribal law enforcement).

294. See, e.g., NCAI’s November 15, 2002 Draft Bill (prepared for discussion purposes only) (on file with author); accord Washburn, *supra* note 177, at 776 (stating that “there are ways to split the criminal justice function between governments” and these should be explored in formulating a solution to the problems plaguing federal prosecutions in Indian country); see also McNeil, *supra* note 282, at 331–32 (arguing for Congressional creation of a United States Court of Appeals for the Indian Circuit”).

In order to maximize tribal sovereignty and also help ensure that these courts do not become overworked, appellate review by these federal courts could be made mandatory for criminal cases and discretionary for some types of civil cases. Cf. Frickey, *supra* note 34, at 83 (suggesting the possibility of discretionary federal review of tribal court decisions generally). Tribes would likely find across-the-board federal review of civil cases to be problematic

remedies.²⁹⁵ Although habeas corpus review for ICRA issues already exists,²⁹⁶ direct federal review should significantly lessen fears among non-Indians about tribal criminal prosecutions (as well as civil prosecutions if such review were provided in the civil context).²⁹⁷

i. The Importance of Subject Matter Specific Courts That Utilize an Indian Employment Preference

If a restoration bill were drafted to incorporate federal review, in order to maintain some protection for tribal sovereignty, subject matter courts should be constituted for such review, and they should utilize an Indian employment preference.²⁹⁸ This subject matter focus of the courts would avoid situations in which an appellate panel, simultaneously deciding a variety of cases on diverse subject matters, simply does not have the time to study the complicated Indian law precedents with the attention necessary to deliver a reasoned decision.²⁹⁹

because it would result in federal interference with internal tribal matters like enrollment. Additionally, a federal court would be ill-suited to evaluate enrollment questions or other issues essential to tribal culture. However, it is possible that tribes would agree to discretionary federal review of certain types of civil cases such as contract disputes.

295. See *supra* Part IV.A.1. (describing existing requirements for exhaustion of tribal court remedies).

296. See *supra* Part II.B.3.b.i. (discussing ICRA).

297. See *supra* note 294; cf. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 939–943 (1988) (arguing that federal court appellate review strengthens the legitimacy of federal agency decisions); accord Krakoff, *supra* note 11, at 1133 (addressing other scholars' views that the lack of availability of federal review (other than habeas corpus) of tribal court decisions has motivated the progressive judicial divestment of tribal sovereignty).

298. See McNeil, *supra* note 282, at 331–32 (arguing for a subject matter specific federal appellate court in which at least half of the judges are Indians). Mr. McNeil's proposal of having half the judges be Indian seems to me to be extremely unlikely to survive Supreme Court scrutiny, given the extent to which racial quotas have been painted in recent years as the embodiment of an unconstitutional affirmative action plan. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003); *Bush v. Vera*, 517 U.S. 952, 976 (1996) (subjecting use of racial quotas to strict scrutiny in redistricting case). But see *Morton v. Mancari*, 417 U.S. 535 (1974) (holding that Indianness is a political rather than a racial classification). Under *Mancari*, then, a 50% quota for tribal judges may well be constitutional, but, given the current Supreme Court climate, such a quota seems unnecessarily risky.

299. There are several Indian law appellate cases in which the opinion was withdrawn or amended as a result of lack of cognizance of some doctrine or prior holding. See, e.g., *Blackfeet Tribal Housing v. Marceau*, 540 F.3d 916 (9th Cir. 2008) (withdrawing the court's opinion on rehearing in order to facilitate exhaustion of tribal remedies but noting that the tribal housing authority had failed to raise exhaustion until after the court had issued the original opinion); *Ford Motor Co. v. Todecheene*, 488 F.3d 1215 (9th Cir. 2007) (granting rehearing and withdrawing prior decision to allow for tribal exhaustion); *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005) (withdrawing previous opinion and substituting

The use of an Indian employment preference would add legitimacy from a tribal perspective and would decrease the potential for federal review to erode the uniqueness of tribal institutions.³⁰⁰ However, it must be borne in mind that a tribal employment preference, while constitutionally valid under current precedent, could be struck down given the Court's increasing distrust of any explicit use of race in governmental decision-making.³⁰¹ A less risky measure that could be used in conjunction with, or as an alternative to, an employment preference would be a requirement that those hired as federal appellate judges have some minimum level of experience, such as two years, working for tribes or in tribal justice systems. While not as beneficial as an employment preference, this measure should help ensure that those hired as appellate judges have reasonable familiarity with, and sensitivity to, tribal issues.

*ii. The Need for and Contours of a Severability
Provision Should Be Carefully Examined*

As a result of the uncertain status of the proposed employment preference and the other uncertainties inherent in any restoration of tribal sovereignty, drafters of any future restoration statute should carefully consider the inclusion and crafting of a severability provision. Moreover, given that tribes will likely view some provisions as essential to a successful statute, any severability provision should explicitly exclude those essential provisions.

amended opinion); *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 509 (9th Cir. 2005) (en banc) (amending opinion, apparently to remove erroneous dictum regarding the Tribe's lack of entitlement to reserved water rights); *see also Lummi Indian Tribe v. Whatcom County, Wash.*, 5 F.2d 1355, 1360 (9th Cir. 1993) (Beezer, J., dissenting) ("[F]ederal Indian law does not have a simple history; no amount of wishing will give it a simple future."). *See generally* William H. Rodgers, Jr., *Judicial Regrets and the Case of the Cushman Dam*, 35 ENVTL L. 397 (2005) (discussing problems with the Skokomish decision both before and after its amendment). While the fact that the courts are taking the time to correct errors is a good sign and lends additional confidence to their final decisions, these actions do demonstrate the incredible complexity of Indian law and the need for specialized courts.

In other legally complex contexts, such as healthcare law, scholars and advocates have also sought to create specialized courts, in part because of the perceived need for specialized judges. *See, e.g.*, Philip G. Peters, *Health Courts?*, 88 B.U. LAW REV. 227, 238 (2008).

300. *See* Riley, *supra* note 1, at 838 (arguing against federal control of tribes and noting that "federal control . . . will subject tribal cultural practices to the discretion of the federal courts, placing both tribal sovereignty and indigenous cultural survival at risk"). However, in most circumstances, even Indian appellate judges hearing a given case would likely not be from the tribe whose decision was under review and thus would lack fluency with that tribe's culture. This situation would undoubtedly cause some erosion of tribal culture to occur.

301. *See supra* note 233 and cases cited therein.

iii. *Article III Courts Appear to Be Preferable to Article I Courts in This Context*

Finally, Congress should create these appellate courts under Article III of the Constitution, rather than under Article I.³⁰² Article III provides protections for judges (such as lifetime tenure and guarantees of continued salary)³⁰³ that generally tend to foster neutrality among such judges.³⁰⁴ Furthermore, Article III courts serve an important separation of powers function of providing checks and balances against legislative and executive assertions of authority, a function that would not be available with an Article I court.³⁰⁵

There are, however, several reasons why separation of powers concerns and the other advantages of Article III courts may be less applicable in this context. First, the lower courts would be tribal, not federal, entities. Thus the independence of these lower (tribal) courts from the executive and legislative branches of the federal government would not be at issue, although the reviewing court's independence would still be a concern. Secondly, the Supreme Court's treatment of tribes over the past several decades seriously calls into question whether tribes and tribal members reap the benefits from Article III courts that appear to be available to other litigants. Nonetheless, Article III protections appear preferable to judicial appointments that may be issued and retracted on legislative whim, particularly given the vast scope of legislative plenary power.³⁰⁶ Furthermore, the tribal member employment preference, the possible tribal experience requirement, and the subject matter specificity of the court should protect, to a significant degree, against formation of a judicial mindset similar to that of the cur-

302. See, e.g., Fallon, *supra* note 297 at 921–22; Peters, *supra* note 299, at 260–61. The constitutional validation of Article I courts, also called legislative courts, can be traced to *American Insurance Co. v. 356 Bales of Cotton*, 26 U.S. (Pet.) 511, 545 (1828). See Fallon, *supra* note 297, at 921.

303. U.S. CONST., art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

304. See Fallon, *supra* note 297, at 939–942.

305. *Id.* at 939.

306. Explicitly providing federal appellate review of tribal court judgments could further muddy the question of whether tribes should be considered federal actors and therefore subject to the full panoply of constitutional obligations. However, the existence of federal appellate review should not be understood to lead to this conclusion given that the Supreme Court currently reviews state court judgments and no one understands this to suggest that the states are federal entities. Moreover, the lack of precise thinking on the role of tribes in the justice system has already reached a crisis point in federal jurisprudence. It is time to explore what changes can be made to effect positive solutions for tribes.

rent Supreme Court, which often appears to be palpably working towards the obliteration of tribal governments.

CONCLUSION

The scope of possible restoration, based on constitutional provisions as well as the Court's earliest Indian law jurisprudence, is quite broad. Furthermore, divestment of tribal sovereignty has caused severe problems for tribes, particularly in terms of exposure to violent crime and lack of cultural sustainability. Nonetheless, because of the danger that the Court's distrust of tribes and increasing enforcement of constitutional norms will influence its evaluation of any legislative restoration, a legislative restoration should include protections for individual rights and extensive findings supporting restoration. To provide safeguards for tribes, both as cultural and political entities, such protections should be afforded as a matter of tribal law, restoration statutes should be optional for tribes, and, most importantly, tribal input and approval must be obtained throughout the process of crafting and passing any restoration bill.

