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THE LIBERAL FORCES DRIVING THE SUPREME COURT'S DIVESTMENT AND DEBASEMENT OF TRIBAL SOVEREIGNTY

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I. INTRODUCTION

This paper examines the Supreme Court's substantial abandonment of a territorially based conception of Indian tribal sovereignty in favor of a consent-based conception and its recent characterization of tribal sovereignty as a special right, which may be claimed only by weak and dependent tribes. It ultimately attributes these trends, in significant part, to the Supreme Court's increasing preoccupation with liberal goals in the decades following the Civil Rights Movement. The Supreme Court's use of liberalism to erode well-established Indian law doctrines suggests that the continued application of liberal ideals poses serious problems for multicultural societies like the United States. These problems include the abolition of Indian tribes' special status under the law and, more broadly, a threat to all subordinated groups of involuntary assimilation into the majority white culture.

In part II, I analyze in chronological order several Supreme Court cases, decided within the last two decades that have made significant encroachments upon tribal sovereignty. This part demonstrates the prevalence of the two previously identified trends in the Supreme Court's recent Indian law jurisprudence: firstly, the move toward a conception of sovereignty which is entirely consent-based (i.e., the divestment of tribal sovereignty), and secondly, the view of tribal sovereignty as a special right belonging only to unsophisticated and economically disadvantaged tribes (i.e., the debasement of tribal sovereignty). The purposes of this part are threefold: 1) to demonstrate the degree to which the Supreme Court has, in recent years, shrunk the breadth of Indian

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tribal sovereignty—largely on its own initiative, 2) to demonstrate the vast shift in the Supreme Court's view of the justification for tribal sovereignty, and 3) to identify the implicit liberal bases of many of these decisions.

Part III focuses more narrowly on two of the suspect methods the Supreme Court has used in recent cases to shrink and degrade tribal sovereignty: 1) ignoring or diminishing the force of the canons of construction in Indian law in order to reach a result unfavorable to Indian tribes, and 2) construing the legislative intent of acts of Congress without reference to subsequent legislative history, such as amendment or outright repudiation, in order to reach a result which disfavors Indian tribes and substantially erodes their sovereignty. This part demonstrates the lengths to which the Supreme Court has gone in pursuing its own assimilationist agenda in Indian law—which has come at a tremendous cost to settled expectations and tribal sovereignty.

In part IV, I discuss the Supreme Court's use of social contract theory as an implicit basis of its decisions, especially those that evince a consent-based view of tribal sovereignty. Based on Rawls' version of social contract theory and Kymlicka's criticisms of Rawls, I argue that social contract theory does not adequately provide for the continuing viability of culturally distinct groups—especially those with their own claims to sovereignty. Additionally, I suggest that social contract theory is misapplied by the Court; that mainstream American society is unjust under Rawls' standards; that it makes no sense to force Indian tribes to create a just society according to social contract standards; and lastly, that the Supreme Court's view of Indian tribal governments as non-neutral or biased is based not on any substantive criticism of tribes derived from social contract theory, but rather on the racist idea that whiteness connotes neutrality whereas Indianness or color connotes bias or special interest.

In part V, I argue that the Supreme Court is motivated to dismantle Indian sovereignty because of its increasingly liberal view that such sovereignty is a special, race-based right, which, through its very focus on race, violates liberal equality theory. I argue that this effect is indicative of the severe problems liberal equality theory poses for recognized Indian tribes, as well as for subordinated groups generally, and that the Supreme Court's

degraded view of tribal sovereignty contrasts sharply with its view of state sovereignty as a necessary attribute of power. I conclude that liberalism must be drastically modified or abandoned in order to preserve the uniqueness of subordinated cultures in general and the sovereignty of Indian tribes in particular.

II. THE ACTIVIST COURT'S DIVESTMENT AND DEBASEMENT OF TRIBAL SOVEREIGNTY

A. The Gradual Divestment of Tribal Sovereignty: Moving from a Territorially-Based to a Consent-Based Conception

Territorially-based sovereignty means that an Indian tribe's sovereignty is coextensive with its territory (usually an Indian reservation). Thus, it extends to all those who are present within reservation boundaries, whether or not they are members or nonmembers of the tribe, as well as to the land itself. Consent-based sovereignty means that the tribe may only exercise authority over its members and to some extent their land because, by agreeing to become tribal members and by remaining so, the members have consented to the tribe's authority.[1] Thus, the only basis for sovereignty under a wholly consent-based view is the revocable agreement of individual members to be bound by the tribe's authority.[2]

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[1] As will be shown, the reservation boundaries become much less important under a consent-based view due to the fact that many non-Indians now own land within the reservation. Under a consent-based view, tribal sovereignty does not extend to these non-Indian owned lands, whereas, under a territorially-based view, tribal sovereignty would extend to all land within reservation boundaries. The view of sovereignty espoused by the current Court remains a hybrid of the consent- and territorially-based views, although, as I will show, the Court has been steadily moving closer to an entirely consent-based view over approximately the past.

[2] *See, e.g.*, L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996); 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).

Viewed chronologically, the Supreme Court's Indian law decisions began with a territorially-based conception of sovereignty in *Worcester v. Georgia*[3] and have moved to a predominantly consent-based conception of sovereignty[4] that is exemplified by cases such as *Duro v. Reina*[5] and *Strate v. A-1 Contractors*.[6]

This movement, however, was not inevitable. In several of the cases decided since *Worcester*, the Supreme Court has retained significant aspects of territorially-based sovereignty in its overall conception of sovereignty.[7] However, beginning with *Oliphant v. Suquamish Indian Tribe*,[8] the Supreme Court has arrogated to itself broad power in determining the scope of tribal sovereignty, which used to belong solely to Congress.[9] The Supreme Court has also abrogated the presumption in favor of tribal sovereignty that used to control in the absence of Congressional action to the contrary.[10] The result has been that the Supreme Court—which has become

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

4 *See generally* Gould, *supra* note 3; *see also* Dussias, *supra* note 3. As this paper will show, territorially-based sovereignty has been rejected even more firmly in the Court's most recent decisions, which were issued after the above articles were published.

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

6 Strate v. A-1 Contractors, 117 S. Ct. 1404, __ U.S. __ (1997).

7 *See, e.g.,* Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987) (holding that there is a presumption in favor of the tribal court's jurisdiction when a tribal member sues a nonmember and the suit arose within reservation boundaries); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (holding that the tribe had sovereign power to impose a severance tax on a nontribal business that was mining the tribe's land); United States v. Mazurie, 419 U.S. 544 (1975) (holding that Congress could delegate the authority to regulate on-reservation liquor licensing to the tribe, in part because the tribe could exercise sovereign powers of its own); Williams v. Lee, 358 U.S. 217 (1959) (holding that a nonmember of tribe must sue a member in tribal court, rather than state court, when the suit arose on the reservation).

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

9 *See* Gould, *supra* note 3, at 848.

10 *See* Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Nonmember Indians: An Examination of the Basic Framework of Inherent Tribal Sovereignty Before and After* Duro v. Reina, 38 FED. B. NEWS & J. 70, 71 (1991).

increasingly hostile to Indian sovereignty in the years following *Oliphant*—has increasingly encroached upon Indian sovereignty, pursuant to its own self-accorded powers.

1. The Beginning of the End: *Oliphant v. Suquamish Indian Tribe*

In *Oliphant*, the Supreme Court decided that the tribe had no jurisdiction to try non-Indians for criminal offenses committed on the reservation. The decision was based four separate factors: 1) the fact that treaties with Indians typically did not mention the power—and in one case proscribed it; 2) "unspoken" Congressional assumptions that such jurisdiction did not exist;[11] 3) the silence of the federal government's treaty with the Suquamish Tribe as to the reach of the tribe's criminal jurisdiction; and 4) the perceived inconsistency of the exercise of criminal jurisdiction over non-Indians with the tribe's dependent status.[12]

The Court's decision flew in the face of established Indian law doctrine, which previous to *Oliphant*, mandated that "'[w]hat is not expressly limited [by Congressional action or treaty] remains within the domain of tribal sovereignty.'"[13] Moreover, the Court's decision relied on dubious evidence including unenacted bills, district court decisions, and assumptions of Congress and other branches of government.[14] Other irregularities include the fact that one of the administrative opinions the Court relied upon had been withdrawn with no explanation—as the Court itself admitted,[15] the fact that the drafters of the Suquamish Tribe's treaty had rejected

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[11] *Oliphant*, 435 U.S. at 203 (referring to Congress' "unspoken assumption" as to the lack of criminal jurisdiction).

[12] *Id.* at 196-211.

[13] Deloria and Newton, *supra* note 11, at 71 (quoting FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942)). *See also* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 453 (1989) (Blackmun, J., concurring and dissenting) (noting that Oliphant marked the only instance since the Cherokee Cases, decided in the 1820s and 1830s, in which the Court had found aspects of tribal sovereignty to be divested by virtue of the tribes' dependence on the federal government).

[14] *See* Deloria and Newton, *supra* note 11, at 71.

[15] *Oliphant*, 435 U.S. at 201 n.11.

language granting the federal government power to criminally try white offenders (which tends to suggest that the tribe was to retain this power),[16] and the Court's exaggeration of the force of its own precedent.[17]

In addition to the suspect bases of its decision, the Court also appeared to be relying on social contract theory to find that the tribe lacked criminal jurisdiction over non-Indians. On the first page of the decision, the Court points out that only 37% of the land on the reservation was Indian-owned and that only fifty tribal members resided there compared to almost 3,000 non-Indians.[18] Soon after, the Court notes that, while the tribal courts are bound

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[16] *See* Dussias, *supra* note 3, at 27; *Oliphant*, 435 U.S. at 207 n.17.

[17] In justifying its decision to ignore the canons of construction, which mandate that all treaty and statutory ambiguities (in cases where the statutes were enacted for the benefit of the Indians) be resolved in favor of the Indians, the Court cited *DeCoteau v. District County Court* as lending support to the proposition that "treaty . . . provisions which are not clear on their face may 'be clear from the surrounding circumstances and legislative history.'" *Oliphant*, 435 U.S. at 207 n.17 (quoting DeCoteau v. District County Court, 420 U.S. 425, 444 (1975)). This is a somewhat dishonest interpretation of *DeCoteau*, in which the Court found itself constrained to rule that the tribe had been terminated based on "the face of the Act" in question, as well as on the bases of the "surrounding circumstances" and "legislative history," all of which pointed squarely toward termination. *DeCoteau*, 420 U.S. at 444 (citations omitted). *See also* Part III A., *supra*.

Moreover, in the primary case cited by the *DeCoteau* Court for the proposition that legislative history and surrounding circumstances may be taken into account in determining Congressional intent, the Court used the auxiliary factors of legislative history and surrounding circumstances to find in favor of the tribe in spite of the face of the Act itself, which tended to indicate Congressional intent to terminate the reservation. *See* Mattz v. Arnett, 412 U.S. 481, 504 (1973). It perverts the holdings of *DeCoteau* and *Mattz* to use them to interpret the silence in the Suquamish Tribe's treaty as to criminal jurisdiction, coupled with vague or irrelevant treaty and statutory provisions, as basis's for finding that the tribe lacked jurisdiction. *Cf.* United States v. Wheeler, 435 U.S. 313 (1978) (relying on the presumption in favor of tribal sovereignty to uphold concurrent criminal jurisdiction of tribes and the federal government over tribal members and also finding no double jeopardy violation where both sovereigns tried the criminal defendant).

[18] *Oliphant*, 435 U.S. at 192 n.1.

by most rights guaranteed in the Bill of Rights, non-Indians have no right to serve on Suquamish tribal court juries.[19]

The fact that Indians comprise a majority on the reservation should be irrelevant to whether the tribe's inherent sovereignty has been divested in the area of criminal jurisdiction. However, the Court appears to be viewing the low ratio of Indians to non-Indians on the reservation as evidence that it would be inherently unfair to allow Indians, a small minority on the reservation, to rule whites and other non-Indians, who represent the majority. Implicit in this conclusion of unfairness is the social contract idea that government is only justified in asserting authority if those subject to the authority would consent to it or would have consented to it in a theoretical state of nature.[20] Here the Court has apparently concluded that no racial majority would consent to be ruled by a racial minority, especially where members of the racial majority are excluded from jury service. Not only should the Supreme Court's own policy considerations have little bearing in an area of law under the plenary control of Congress,[21] but, as will be discussed in more detail later, the Court is enforcing an idea of justice on Indian tribes that the United States and individual state governments do not abide by themselves. Moreover, a person's very presence on an Indian reservation is a form of consent,[22] and presumably even property values on the reservation reflect non-Indians' views of the value of living there as opposed to somewhere where the rules and customs are more familiar. In summary, in the absence of any clear Congressional intent to disallow tribal criminal jurisdiction, the Court should have viewed

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19 *Id.* at 193-94.

20 *See* JOHN RAWLS, A THEORY OF JUSTICE 11 (1971).

21 *See, e.g.*, United States v. Kagama, 118 U.S. 375 (1886). Another reason the Court's implicit application of social contract theory to Indian tribes is dubious is that tribes are not technically part of the United States' governmental structure—as are states. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (holding that tribes are "domestic dependent nations"). Thus, the Court's authority to interfere in their internal governmental affairs—which, contrary to the Court's view, sometimes involve nonmembers—seems questionable.

22 *See* Dussias, *supra* note 3, at 87 (noting that "one consents to criminal jurisdiction by presence in the jurisdiction").

itself as constrained to find in favor of the tribe on the issue of criminal jurisdiction. Instead, by delegating to itself the duty to constrict tribal sovereignty in the absence of Congressional action affirming it, the Court usurped tribal authority and Congress' role as the primary architect of federal and tribal relations. The decision paved the way for the Court's own unprecedented divestment of tribal sovereignty.

2. Expanding the *Oliphant* Presumption of Divestment of Tribal Sovereignty to Civil Regulation of Nonmembers: *Montana v. United States*

In *Montana v. United States*,[23] the Supreme Court held: (1) that the United States had not conveyed the bed of the Big Horn River to the Crow Indian Tribe when it conveyed the land comprising the reservation, and (2) that tribal regulatory authority over nonmembers on fee-owned land within the reservation is implicitly divested except in cases where (a) the nonmember has entered into a consensual relationship with the tribe, or (b) the nonmember's activity has or threatens to have a "direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[24] At issue in *Montana* was the Crow Indian Tribe's authority to regulate hunting and fishing by nonmembers on land within the reservation that nonmembers owned in fee. The Court found that the tribe had no such regulatory authority.

As two commentators have suggested, the Court set itself up to arrive at the first part of its holding by erroneously framing the issue.[25] Instead of viewing the treaty as documenting the tribe's reservation or retention of existing rights in accordance with traditional practice, the Court viewed the treaty as a land grant by the United States, thus enabling it to hold that the language of the grant was not sufficiently clear to warrant a finding that the United

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[23] Montana v. United States, 450 U.S. 544 (1981).

[24] *Id.* at 566.

[25] *See* Russell Lawrence Barsh and James Youngblood Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After* Montana v. United States, 56 WASH. L. REV. 627, 675 (1981).

States had conveyed the river bed to the tribe.[26] Instead, the Court should have seen that this ambiguity precluded a finding that the tribe had conveyed the riverbed to the United States. As in *Oliphant*, there is also evidence that the Court misconstrued precedent in arriving at the first prong of its holding in *Montana*.[27]

In the second part of its holding, the Court cited *Oliphant* for "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[28] Having underhandedly erased tribal sovereignty over a broad range of reservation activity not considered in *Oliphant*, the Court was then able to appear generous in stating exceptions to its newfound "general proposition." As others have pointed out, one effect of the above novel formulation was to shift the burden from the state to the tribe of showing the extent of tribal sovereignty.[29]

Not surprisingly, the Court subsequently concluded that the non-Indians living on the reservation "do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction, [a]nd nothing in this case suggests that such non-Indian hunting and fishing so threaten the Tribe's political or economic security so as to justify tribal regulation."[30] The fact that the Crow Indians were originally buffalo hunters, not fishermen, and that the tribe did not allege that its subsistence was imperiled by the non-Indian hunting and fishing appeared to be integral to the Court's decision.[31]

The *Montana* Court's focus on whether the nonmembers had entered into any consensual relationship with the tribe is itself

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[26] *Id.*

[27] Barsh and Henderson point out that the Montana Court erroneously relied on a factually distinguishable case in finding that the United States had not conveyed the river bed in United States v. Holt State Bank, 270 U.S. 49 (1926). *See* Barsh and Henderson, *supra* note 26, at 677 (stating that, "[a]pplied in the Crow context, *Holt* should mean simply that, should the Crows ever cede their reservation, full title to the riverbed would vest automatically in the State of Montana").

[28] *Montana*, 450 U.S. at 565.

[29] *See* Gloria Valencia-Weber, *Shrinking Indian Country: A State Offensive to Divest Tribal Sovereignty*, 27 CONN. L. REV. 1281, 1285 (1995).

[30] *Montana*, 450 U.S. at 566.

[31] *Id.* at 556, 566.

a direct invocation of social contract theory and liberal ideals generally. Apparently, the Court assumes that a tribal government is not the type of unbiased, neutral institution to which people can be presumed to have consented (such as state and national governments), and that the only way non-Indians may be bound is if they make some sort of formal gesture of consent—such as entering into a contract with the tribe. This requirement stands in stark contrast to the mainstream view of state and federal jurisdiction under which citizens and noncitizens alike are irrebuttably presumed to have consented by virtue of the supposed fairness of the system.[32] The *Montana* Court's opinion also invokes liberal ideals in more subtle ways. For example, while the Court did not fully repeat the social contract language it employed in *Oliphant*—perhaps because the ratios were not as striking—it did indicate that 28% of land within the boundaries of the Crow Indian reservation is owned in fee by non-Indians.[33] It also noted that the State of Montana stocks the river with fish.[34] Again both facts are irrelevant to the divestment of tribal sovereignty. Even if 28% of the property owners in the State of Florida were non-resident vacationers, it would be hard to imagine the Court holding that the State lacked regulatory authority over those property owners and that only the vacationers' home states could regulate the Florida land.[35] Moreover, the State of Montana could not divest tribal sovereignty by stocking the river with fish; this fact merely shows that Montana was either being generous or thought it

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32 *See, e.g.,* Dussias, *supra* note 3, at 87.

33 *Montana*, 450 U.S. at 548.

34 *Id.*

35 This comparison between states and tribes is not meant to imply that the two types of entities are equivalent to each other. Instead, it is employed to show that both are considered "quasi-sovereigns." *See* Morton v. Mancari, 417 U.S. 535, 554 (1974) (describing tribes as quasi-sovereigns); Testa v. Katt, 330 U.S. 386 (1947) (holding that state courts must enforce federal claims in most cases and thus suggesting that state sovereignty is less complete than federal sovereignty). States are often treated much more favorably by the Court and receive a much greater degree of respect from it. Thus, my point is not that states and tribes should always be treated the same by the federal government, but rather that tribes should not be treated any less favorably than states without some reasoned justification.

owned the riverbed. Either way, the State remained at all times free to stock or not stock the river as it chose.

The Court seems to be stating these facts to implicitly invoke liberal ideas of fairness rather than to further any substantive Indian law discussion. After all, if the state of Montana bought the fish, why shouldn't Montanans be able to catch the fish? Also, why should a significant percentage of the reservation residents be subject to an alien regulatory authority—i.e., Indian—which they have not consented to, and which rational beings would never willingly consent to? These are knee-jerk reactions by the Court rather than compelling reasons to destroy tribal sovereignty.

In conclusion, *Montana* is most important for its extension of the *Oliphant* holding that tribal sovereignty is implicitly divested in criminal cases involving non-Indians to the regulatory arena. Its focus on nonmember consent to tribal jurisdiction[36] and its recitation of irrelevant facts clearly demonstrates that the Supreme Court is using liberal notions of fairness and social contract theory as implicit rationales for its increasing encroachment on tribal sovereignty.

3. *Merrion v. Jicarilla Apache Tribe*: An Ominous Dissent

In *Merrion v. Jicarilla Apache Tribe*,[37] the Court actually affirmed the Jicarilla Apache Tribe's sovereign power to tax oil and gas extracted by nonmember lessees pursuant to contracts with the tribe. The Court did not mention *Montana*, holding simply that the power to tax is "an essential aspect of Indian sovereignty because it is a necessary instrument of self-government and

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[36] The terms "nonmember" and "non-Indian" were conflated by the Court until Duro v. Reina, 495 U.S. 676 (1990). In *Duro*, the Court held that Indian nonmembers had to be treated similarly to non-Indian nonmembers; thus, after *Duro*, the decisive distinction in determining the reach of tribal sovereignty, under the Court's view, has been between nonmembers of the tribe (both Indian and non-Indian) and tribal members. However, Congress overrode *Duro* by statute, although the constitutionality of the statutory provision has yet to be tested by the Supreme Court. *See* 25 U.S.C.A. § 1301(4) (West 1998).

[37] Merrion v. Jicarilla, 455 U.S. 130 (1982).

territorial management."[38] In the absence of "'clear indications' that Congress has implicitly deprived the Tribe of its power to impose the severance tax," the tribe retained the power to tax.[39] As the opinion does not divest tribal sovereignty, it is interesting for the purposes of this article only for Justice Stevens' dissent, which is heavily infected with liberal ideals.[40]

In Stevens view, tribal sovereignty over nonmembers derives solely from the tribe's power to exclude them from the reservation.[41] Under this interpretation, because the tribe had entered into contracts with the lessees (by which the tribe effectively forfeited its right to exclude the lessees for the duration of the leases), prior to enacting the tax, the tax was invalid as applied to the lessees.[42] In tying the sovereign power to tax to the power to exclude, Stevens explicitly relied on the liberal notion of government by the consent of the governed: "[t]he tribe's authority to enact legislation affecting nonmembers is . . . of a different character than their broad power to control internal tribal affairs. This difference is consistent with the fundamental principle that '[in] this Nation each sovereign governs only with the consent of the governed.'"[43] Moreover, Stevens asserted that, because of nonmembers' exclusion from participation in tribal

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38 *Id.* at 137.

39 *Id.* at 152.

40 The Stevens dissent is also notable for its revisionist view of tribal sovereignty: "[i]n sharp contrast to the tribes' broad powers over their own members, tribal powers over nonmembers have always been narrowly confined." *Merrion*, 455 U.S. at 171 (Stevens, J., dissenting). Although Stevens cites three treaties in a footnote to support this proposition, directly after making the statement he launches into a discussion of *Oliphant* and *Montana*, thus suggesting that those cases merely applied a well-established rule of law rather than a novel doctrine. *See id.* Moreover, it is doubtful that three specific treaties merely imposing limits on the jurisdiction of the tribes that were parties to the treaties could be read to support Stevens' proposition that tribes always were severely limited in their jurisdiction over nonmembers. *See id.* at 171, n.21.

41 *Merrion*, 455 U.S. at 173 (Stevens, J., dissenting).

42 *Id.*

43 *Id.* (quoting Nevada v. Hall, 440 U.S. 410, 426 (1979)).

government, "the powers that may be exercised over them are appropriately limited."[44]

While these statements have intrinsic appeal to minds trained in the liberal tradition,[45] Stevens' practical application of the principle of government by consent is actually quite novel.[46] African-Americans, for example, could not vote in the United States until 1870, and had problems effectively asserting the right well into the 1960s.[47] Yet no one seriously argued that their unconstitutional exclusion from the governmental process rendered them exempt from state or federal criminal laws. Similarly women, while historically excluded from juries and officially disenfranchised until 1920,[48] remained subject to state and federal criminal laws throughout their overt subordination. Finally, and most pertinently, Indians were made United States citizens in 1924,[49] although they had been subject to the federal Major Crimes Act since 1885.[50] While one might question the justice of these policies, they do render suspect Stevens' attempt to impose more stringent policies upon Indian tribes in the name of justice and the American way. In short, categorical exclusion from governmental processes, while sometimes considered a wrong in itself, has never been construed to wholly divest the sovereign of power over the entire excluded group in the United States.[51]

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[44] *Id.* The majority properly points out the error in this view of tribal sovereignty, noting that consent "has little if any role in measuring the validity of an exercise of legitimate sovereign authority." *See id.* at 147.

[45] *See* Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495, 513 (1994).

[46] *Cf.* Robert N. Clinton, *Peyote and Judicial Political Activism: Neo-Colonialism and the Supreme Court's New Indian Law Agenda*, 38 FED. B. NEWS & J. 92, 99 (March 1991) (making a similar argument with respect to Duro v. Reina, 495 U.S. 676 (1990)).

[47] *See* MARY BECKER ET AL., FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 907 (1994).

[48] *Id.* at 13, 26.

[49] *See Duro v. Reina*, 495 U.S. at 692.

[50] *See* United States v. Kagama, 118 U.S. 375 (1886).

[51] *See* Duro v. Reina, 495 U.S. 676, 707 (Brennan, J., dissenting) (stating that participation in the political process has never been held to be a "prerequisite to

Stevens' application of the consent-of-the-governed notion to tribes, which are considered domestic dependent nations, is equally novel. For example, if a United States citizen went to France and committed a crime, she would be automatically subject to the jurisdiction of France (although it is possible that a United States official could use his or her political clout to persuade France to relinquish its jurisdiction). It is doubtful, however, that a member of the U.S. federal government would presume to tell France that it lacked jurisdiction over the U.S. citizen based on some perceived injustice in the French system. Indeed, such an assertion would probably be considered exceedingly disrespectful, although the Supreme Court persistently divests Indian tribes of jurisdiction in this manner. Stevens' dissent in *Merrion* heralded in a new era in which liberal ideals (which arguably have no place in the special rights arena of Indian law) would be used as explicit tools to thwart Indian attempts at self-determination that remain in accordance with Congress' articulated Indian law policies.[52]

4. Further Narrowing *Montana* and Finding Tribal Zoning Authority to Fit within the Second *Montana* Exception only in Special Circumstances: *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*

In a confusing array of plurality opinions, the Supreme Court, in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,*[53] held that the Yakima Tribe retained sovereign power to zone nonmember lands in one part of its reservation, which had not been significantly developed—an overwhelming majority of which was held in trust for the tribe (i.e., "the closed area"), whereas it lacked authority to zone nonmember lands in another section of its reservation, only a little

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exercise of criminal jurisdiction by a sovereign," for such a holding would preclude state prosecutions of nonresidents and federal prosecution of aliens).

[52] *See* Barsh and Henderson, *supra* note 26, at 685 (recognizing that Congress' official policy towards Indian tribes is one of self-determination).

[53] Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

more than one half of which was held in trust for the tribe (i.e., "the open area").[54]

a. Complete Divestment of Tribal Sovereignty in Cases Relating to Nonmembers: The White Plurality Opinion

Justice White, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, delivered one plurality opinion in which he agreed that the tribe lacked authority to zone the open area but disagreed that it retained authority to zone the closed area. Arguing that "[a] tribe's inherent sovereignty . . . is divested to the extent that it is inconsistent with the tribe's dependent status, *that is, to the extent it involves a tribe's 'external relations,'*"[55] the White plurality contended that the tribe had lost jurisdiction to zone the land when it alienated the land to nonmembers.[56] Under the White plurality's view, the second *Montana* exception[57] could only be applied on a case-by-case basis[58] and should be treated as discretionary (i.e., the tribe would not have the federal right to have enjoined all conduct which would have a direct effect on its survival, but would only be granted enjoinment by a federal court in certain "demonstrably serious" circumstances in which it faced such a threat).[59]

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54 *Id.*

55 *Id.* at 425-26 (emphasis added) (plurality opinion) (quoting United States v. Wheeler, 435 U.S. 313, 326 (1978)). *See also* Justice Blackmun's concurring and dissenting opinion in *Brendale*, arguing that the *Wheeler* dicta is taken out of context here and misconstrued. *Brendale*, 492 U.S. at 452, n.3 (Blackmun, J., concurring and dissenting). The White plurality also recited the familiar litany of facts as to the extent of non-Indian ownership on the reservation. *Id.* at 415.

56 *Id.* at 422.

57 Under this exception, a tribe has sovereign authority to regulate nonmembers' conduct when that conduct threatens or has a direct effect on the tribe's health and welfare, political integrity, or economic security. *See Montana*, 450 U.S. at 566.

58 *Brendale*, 492 U.S. at 431.

59 *Id.* at 428-29 (reaching this result by focusing on the word "may," which proceeds the Court's articulation of the second exception in *Montana*).

Under this view, the tribe was required to assert its interests under the second *Montana* exception at the county's zoning hearings, which were to decide whether the proposed developments on the reservation were legal under the county's zoning laws. After the conclusion of the hearings, if the proposed development was found to be legal, the tribe could argue to the district court that this particular use of the land would threaten to have or would have some direct effect in one of the specified areas; the district court could then decide how severe the direct effect would be, whether circumstances warranted federal protection, and accordingly enjoin or not enjoin the proposed development at its discretion.[60]

The White plurality's interpretation serves to further narrow *Montana* by reading it to hold that a tribe's sovereignty is always divested as to nonmembers but that a tribe may invoke federal protection (rather than asserting its own sovereign authority) when nonmembers' conduct seriously imperils its survival.[61] Presumably, a federal court would have to engage in some sort of balancing test to determine whether the circumstances warrant protecting the tribe in that particular case. How serious the conduct must be remains a mystery, but it is clear that it must rise to a very high level of egregiousness.[62] The White plurality thus saw *Montana* as completely divesting tribal sovereignty as to nonmembers. Only if the conduct rose to an extraordinary level—sufficient to invoke the second *Montana* exception—could the tribe argue for its protection from nonmember conduct under federal law.[63]

This is a striking reading of *Montana*, which actually held that a tribe's sovereign authority to regulate nonmembers is

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60 *Id.* at 431.

61 *Id.* at 430.

62 Presumably, the tribe would also have to be sufficiently cohesive so that the nonmember conduct at issue—and not other forces—threatened the health and welfare, political integrity or economic security of the tribe. If it were in dire straits, one can imagine this plurality stating that enjoining the conduct at issue would make little difference. The plurality would probably view this as an opportunity to step back and allow assimilation to occur.

63 *See* Clinton, *supra* note 47, at 99.

divested except in certain circumstances—such as when it is threatened in specified ways.[64] In addition, the factual context of *Montana* makes clear that the Court was concerned with certain categories of regulatory authority, such as hunting and fishing on nonmember fee land. The idea that, even if the category of conduct threatened or had a direct effect in one of the specified areas, the tribe would only be able to invoke federal assistance to curb hunting and fishing in specific, egregious circumstances (e.g., to enjoin the killing of a particular fish) reveals the absurdity of Justice White's reasoning in *Brendale*. Justice White and the justices that joined his plurality were on the Court when *Montana* was decided and presumably understood the case. Their conscious or unconscious misconstrual of the case indicates their personal bias shrinking tribal sovereignty at any cost.

b. The Stevens Plurality: The Power to Control the Land's Character as Determinative of Tribal Zoning Authority

Justice Stevens, joined by O'Connor, based his finding in favor of the tribe as to the closed area of the reservation on the facts that: only a small portion of the area was owned in fee (25,000 acres out of 807,000), access to the area was very restricted, and the area contained "natural foods, medicines, and other natural resources" which were important to the tribe.[65] To Stevens, these facts indicated that the tribe had maintained "the power to exclude nonmembers from all but a small portion of the closed area . . . [and thereby] preserved the power to define the essential character of that area."[66] Furthermore, he compared the tribe's power to zone to an equitable servitude.[67]

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[64] *See Brendale*, 492 U.S. at 456 (Blackmun, J., concurring and dissenting). *See also* Gould, *supra* note 3, at 878 (noting that "[b]y eliminating a tribe's direct authority to regulate nonmembers, Justice White effectively dispensed with the [second *Montana*] exception").

[65] *Brendale*, 492 U.S. 439 (plurality opinion) (internal quotation marks omitted).

[66] *Id.* at 441. Although Stevens does not explicitly say so, the last fact appears to suggest that the Tribe's zoning authority (as to the closed area) is preserved

As to the open area, Justice Stevens stated that the tribe had lost the power to zone this portion because a large portion of the land (almost half) was owned in fee (a result of the assimilationist Dawes Act) and because nonmembers leased additional land in the open area.[68] These facts indicated that the tribe had lost the power to exclude substantial numbers of nonmembers from the open area and that it had therefore lost the capacity to determine the essential character of the land in the open area.[69] Justice Stevens also mentioned the seemingly extraneous facts that only members of the tribe could participate in tribal elections, whereas both Indians and non-Indians could participate in county elections, and that only tribal members tended to take advantage of tribal services.[70] By reciting these facts, Stevens again invoked liberal notions of fairness and social contract theory as bases for his decision.

Notably, Stevens' notion of the power to exclude has a strong liberal basis—i.e., the liberal notion of individual property rights. In his interpretation, Indian tribes are like large landowners or even a condominium association that makes restrictive covenants on its land.[71] The point of Indian sovereignty, however, is to allow tribes the right to self-determination—i.e., the right to practice their indigenous cultures and live according to their mores. Because Western European ideas of personal land ownership are notoriously foreign to most Indian tribes, it is ironic for the Supreme Court to limit tribal sovereignty to a sort of individualized Western property right aggregated in a group. Such a conception is inconsistent with self-determination, which would allow Indian tribes to utilize their own conceptions of property and government on the reservation. While, under a traditional view of sovereignty, the Indians would retain authority to regulate both the open and closed areas unless Congress had specifically divested

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under the second *Montana* exception. The last fact also suggests that the Tribe was exercising its right to determine the essential character of the area.

67 *Id.* at 442.

68 *Id.* at 445-46.

69 *Id.* at 446.

70 *Id.* at 445.

71 *Id.* at 442 (noting that Indian sovereignty over reservation land in the closed area is tantamount to an equitable servitude).

them of the authority, under Stevens' view, facts such as how many non-Indians are present on the reservation and whether they can participate in the tribal government may be weighed against a finding of tribal sovereignty in an implicit formula. This formula is invoked whenever liberal ideals make the Court uncomfortable with a particular assertion of Indian tribal sovereignty.

Conversely, Justice Blackmun's plurality, which argued in favor of tribal zoning authority over the entire reservation, simply pointed out the extent to which the other two pluralities misconstrued Indian law precedents and wrongly relied upon a consent-based rather than geographical view of tribal sovereignty.[72] It has no binding effect and is not pertinent to the discussion here.

5. Reifying Consent as a Prerequisite to the Exercise of Tribal Sovereignty: *Duro v. Reina*

In *Duro v. Reina*,[73] the Supreme Court extended its holding in *Oliphant* to apply to nonmember Indians as well as to non-Indians. The Court went into great detail as to the unfairness of allowing nonmember Indians, who had not consented to tribal jurisdiction, to be criminally tried in tribal courts.[74] At bottom, it seemed driven to its conclusion by the racial inequities that would apparently result if non-Indians were automatically exempt from tribal criminal jurisdiction, even if they lived on the reservation, whereas, Indians—whether members or not—remained automatically subject to tribal criminal jurisdiction.[75]

At issue in *Duro* was the Tribe's authority to criminally try a nonmember Indian, who lived and worked on the reservation, for the illegal discharge of a firearm that resulted in the death of a

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72 *Id.* at 448-68.

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

74 *See* Gould, *supra* note 3, at 851.

75 *See Duro*, 495 U.S. at 693-95. *See also* Deloria and Newton, *supra* note 11, at 72 (describing "the Court's recent fixation on racial classifications in Indian law" as a "disturbing trend").

fourteen-year-old boy.[76] Although Duro had originally been charged in federal court with murder and aiding and abetting murder, the indictment was dismissed on a motion by the U.S. Attorney.[77] The Supreme Court displayed uncharacteristic sympathy for a criminal defendant in repeatedly noting that Duro "is not eligible for membership in the Pima-Maricopa Tribe," nor is he "entitled to vote in Pima-Maricopa elections, to hold tribal office, or to serve on tribal juries."[78] Additionally, the Court found there was "no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements."[79] It then held that the evident lack of consent to tribal jurisdiction inherent in lack of tribal membership mandated a finding that Duro was not subject to the tribe's jurisdiction.[80] As previously noted, such consent-of-the-governed language is a clear invocation of social contract theory.[81]

Rather than acknowledging that it was encroaching upon tribal sovereignty, the Court viewed itself as "reject[ing] an extension of tribal sovereignty over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system."[82] Thus, it reaffirmed the *Oliphant* view that tribal powers not affirmatively recognized in Congressional legislation are implicitly divested, and once again portrayed itself as a conscientious adherent to precedent rather than an activist court.

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[76] The reason the Tribe charged *Duro* with such a minor offense was that the Indian Civil Rights Act limits the punishments a tribal court may impose to a year in jail and fines up to $5,000. *See* Deloria and Newton, *supra* note 11, at 70.

[77] *Duro*, 495 U.S. at 679-80.

[78] *Id.* at 679 (repeated at 688).

[79] *Id.* at 687.

[80] *Id.* at 693-95.

[81] *See* Part II.A.1-3 *supra*.

[82] *Duro*, 495 U.S. at 694 (citations omitted). Notably, this formulation neglects the obvious reality, recognized elsewhere in the opinion, that tribal governments are not bound by the U.S. Constitution and therefore should not be bound by the notion of the consent of the governed. *See id.* at 693.

Commentators have pointed out that the *Duro* opinion is problematic because it effectively made reservations ungovernable as a result of the large number of nonmember Indians that live on most reservations and the fact that federal prosecutors do not take much interest in crimes committed on reservations.[83] Indeed, the petitioner in *Duro*, an alleged murderer, avoided both trial and punishment as a result of apparent federal apathy and the Court's divestment of tribal jurisdiction over him. One need only imagine the outcry that would ensue in a white suburb if a suspected child murderer walked away without even a trial to see the racial inequity in the situation created by *Duro*. The holding was swiftly overridden by Congress, however, and the Court has not yet had the opportunity to decide whether to strike down the new legislation.[84]

6. Extending *Montana* to Tribal Court Civil Jurisdiction: *Strate v. A-1 Contractors*

In *Strate v. A-1 Contractors*,[85] the Court extended *Montana* to cover tribal court civil jurisdiction as well as tribal regulatory authority stating that: "[a]s to nonmembers, we hold that a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."[86] At issue in *Strate* was the tribal court's jurisdiction over a nonmember's tort claim against a non-Indian subcontractor that had been engaged by a tribal corporation to do landscaping work.[87] The plaintiff had been married to a tribal member and lived on the reservation. Furthermore, the tort arose on a highway within the reservation to which the state had been granted a right of way.[88]

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83 *See* Deloria and Newton, *supra* note 11, at 71-73.

84 *See* 25 U.S.C.A. § 1301(4) (West 1998). *See also* Gould, *supra* note 3, at 854 (suggesting that the new legislation may be unconstitutional under the Equal Protection Clause).

85 Strate v. A-1 Contractors, 117 S. Ct. 1404, __ U.S. __ (1997).

86 *Id.* at 1413.

87 *Id.* at 1408.

88 *Id.*

a. Weakening the Force of Precedent

In *Strate*, the Court weakened the force of two of its previous opinions, which had held that a presumption in favor of tribal jurisdiction inhered in the civil adjudicatory context and that this presumption required federal courts not to intervene until exhaustion of tribal court remedies had occurred. It held that *Montana* applied to the civil adjudicatory context and disingenuously declared the two prior cases to be entirely consistent with *Montana*.[89]

On the contrary, the presumption in favor of tribal jurisdiction mandated by *National Farmers Union v. Crow Tribe of Indians* and *Iowa Mutual Co. v. LaPlante* would be an empty gesture if *Montana* applied to such cases, making civil adjudicatory jurisdiction over nonmembers (at least when the suit arose on fee land in the reservation) the exception rather than the rule. Moreover, the exhaustion of tribal remedies, which those cases required, would be highly inefficient if, in a majority of cases, it was expected that the federal courts would later find that the tribes had lacked jurisdiction in the first place. Finally, the *National Farmers Union* Court specifically rejected the petitioner's contention that the *Oliphant* presumption of lack of tribal sovereignty over criminal matters applied in the civil adjudicatory context, even when the suit arose on land within reservation boundaries owned in fee by the state.[90] Given that *Montana* itself extended the *Oliphant* presumption to the civil regulatory context when nonmember fee land was at issue, the *Strate* Court's averment that *Montana* and *National Farmers Union* are wholly consistent is misleading at best.

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[89] *Id.* at 1413 (discussing National Farmers Union v. Crow Tribe of Indians, 471 U.S. 845 (1985), and Iowa Mutual Insurance Company v. LaPlante, 480 U.S. 9 (1987)).

[90] National Farmers Union v. Crow Tribe of Indians, 471 U.S. 845, 847, 854 (1985).

b. Narrowing the Scope of the First *Montana* Exception

After determining that *Montana* applied in the civil adjudicatory context when the suit arose on reservation land which was not under tribal control, the Supreme Court proceeded to hold that the case at bar fit into neither of the two *Montana* exceptions.[91] Since the defendant, A-1 Contractors, had entered into a consensual business relationship with the tribe, it would seem that the first *Montana* exception clearly applied.[92] Rather than applying the exception according to its plain meaning, however, the Court narrowed it considerably. After noting the existence of the consensual relationship, the Court dismissed its relevance, pointing out that the plaintiff was not a party to the contract and that the tribe itself was not involved in the accident.[93]

The *Strate* Court thus read the exception as allowing tribal regulation adjudication (and presumably regulation) only as to issues directly related to the consensual business relationship. Under the *Strate* Court's reading then (at least where non-tribally controlled land is at issue), the first exception apparently does nothing more than subject the business entity to suits based on the contract itself since it is hard to imagine that the *Strate* Court would see the validity of any additional regulations imposed by the tribe—even those touching on the contractual obligations—as being sufficiently bound up with the consensual relationship to fall

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[91] *Strate*, 117 S. Ct. at 1415-16. Note that both the *Montana* and *Strate* cases arose within reservation boundaries but not on tribally controlled trust lands. *See Montana*, 450 U.S. at 547; *Strate*, 117 S. Ct. at 1407. Both decisions are properly limited to these circumstances.

[92] The exception reads as follows: "[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." *See Montana*, 450 U.S. at 565 (citations omitted).

[93] *Strate*, 117 S. Ct. at 1415. How the tribe might be involved in an accident is mysterious. Would all the members have to be on a bus that was struck by the subcontractor?

under the first *Montana* exception.[94] Finally, the Court's suggestion that the torts committed by the agents of a subcontractor, on the reservation, have no nexus to the consensual relationship is puzzling (i.e., why would the agent have been present on the reservation if it were not for the consensual relationship?).[95]

The Court's reading of the first *Montana* exception is distinctively liberal as it limits the scope of tribal authority only to what the nonmember actually consented to. By entering into business relationships with a tribe, such as the one at issue here, the Court sees the nonmember as expressing only a very limited consent to tribal government. The Court's reluctance to find a broader consent may be due to its assumption that one who cannot vote in tribal elections or serve on tribal juries can never provide sufficient indicia of consent when tribal control is at issue. Again, the Court imposes a more vigorous conception of Western justice on tribes than it is willing to impose on our own national and state governments. This is problematic because the Court has more authority to impose its conception of justice internally, on the federal and state governments, than it does to impose such a conception on tribes, which never consented to be part of the United States.

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[94] Moreover, if the exception is strictly limited by the scope of the actual consensual relationship, it would seem that the issue of the validity of tribal taxation (one of the activities enumerated as permissible in *Montana*) could be viewed , after *Strate*, as beyond the civil adjudicatory power of the tribe. Indeed, such an argument could theoretically be based on Stevens' argument against tribal taxation power itself. *See Merrion*, 455 U.S. at 190 (Stevens, J., dissenting). However, it is important to emphasize *Strate* involved two nonmember litigants, and it is properly limited to cases between nonmembers. Although its language is broad, it does not technically call *Merrion* into question.

[95] One possible reason why the *Strate* Court has difficulty applying the first *Montana* exception is that it was not meant to apply in the adjudicatory context It only makes sense when applied to regulatory authority, which is always exercised by the tribe, unlike civil adjudicatory authority, which is usually exercised by individuals.

c. Finding the Second *Montana* Exception Similarly Inapplicable

The Court then examined the second *Montana* exception, which asks whether the conduct threatens or as a direct effect on specified areas such as the tribe's health or welfare. In spite of conceding that "those who drive carelessly on a public highway running through a reservation endanger all in the vicinity," including tribal members, the Court held that the exception did not apply because such a broad reading "would severely shrink the rule."[96] In essence, the Court conceded that both exceptions applied here if read literally yet nonetheless elected to apply neither for its own amorphous policy reasons. While the Court focused on the fact that the plaintiff was not herself a tribal member (i.e., it relied on a consent-based view of tribal sovereignty), the Court's phrasing of its holding clearly indicates that it will apply to all cases where one nonmember brings suit against another nonmember and the cause of action arose on fee land within the reservation—or as here, on a federally granted state right-of-way located on trust land.[97] As did White's plurality in *Brendale*, the *Strate* Court narrowed *Montana* by holding that the exceptions do not apply when they seem to, but only under certain elusive circumstances that are, curiously, never present in the cases at hand.

In summary, the cases from *Oliphant* to *Strate* demonstrate that the Court has gradually been divesting tribal sovereignty over the past three decades with little regard for the intent of Congress. Much of the language in these cases suggests that the Court is motivated to divest tribal sovereignty by its own social contract ideals.

A. The Court's Debasement of Tribal Sovereignty

This section discusses the Supreme Court's recent trend of debasing tribal sovereignty. This trend began in 1998 with *Alaska*

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96 *Strate*, 117 S. Ct. at 1415.

97 *Id.* at 1408.

v. Native Village of Venetie[98] and is evident in at least one other case.[99] The Court's debasement of tribal sovereignty consists in its characterization of tribal sovereignty as a special right to which only a weak and defenseless tribe may lay claim. This characterization is similar to the way the Court currently views affirmative action programs; this similarity in turn suggests that the Court is distrustful of tribal sovereignty because it views it as a racial entitlement, which violates liberal equality theory. However, this characterization of tribal sovereignty sharply contrasts with the Court's view of state sovereignty as necessary to maintain states' integrity and as a central requirement of federalism.

1. Narrowing the Scope of the Statutory Definition of Indian Country to Cover only Tribes under the Active Control of Congress: *Alaska v. Native Village of Venetie*

In *Alaska v. Native Village of Venetie*, the Supreme Court narrowed the definition of Indian Country in order to hold that Alaska Native Villages did not have sovereign power to tax contractors and other commercial entities working within Village boundaries. The decision was ostensibly based on a statutory definition of Indian Country,[100] but the Court's interpretation of the definition broke with the prior decisions of federal circuit courts (which had been largely in agreement on the matter),[101] as well as with previous decisions of the United States Supreme Court, which

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[98] Alaska v. Native Village of Venetie, 118 S. Ct. 948, 1998 WL 75038 (Feb. 25, 1998).

[99] *See* Kiowa Tribe of Oklahoma v. Manufacturing Technologies, 118 S. Ct. 1700, 1998 U.S. LEXIS 3406 (May 26, 1998).

[100] *Venetie*, 1998 WL 75038, at *5 (discussing the statutory definition of Indian Country found in 18 U.S.C. § 1151).

[101] *See* Warren Denetsosie, Alaska v. Native Village of Venetie Tribal Government: Redefining Indian Country 28-29 (Sept. 24, 1998) (unpublished manuscript on file with author); *see also* Brief of the Navajo Nation et al., at part II.A-B; Alaska v. Native Village of Venetie, 101 F.3d 1286 (9th Cir. 1996) (No. 96-1577).

Congress had sought to codify in the statutory provision.[102] In doing so, the Court transmuted the widely utilized multi-factor test as to when a dependent Indian community (not located on a reservation) would be considered Indian Country into a rigid, significantly narrower two-part test.[103] The decision seemingly overruled several circuit court cases[104] and possibly the Supreme Court's canonized opinion in *United States v. Sandoval*.[105]

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[102] *See* Denetsosie, *supra* note 102, at 13-22; Brief of the Navajo Nation et al., *supra* note 102, at part II.B.

[103] *See* Denetsosie, *supra* note 102, at 17. The two-part test requires that the lands both "have been set aside by the Federal Government for use of the Indians as Indian land" and that they be "under federal superintendence." *Venetie*, 1998 WL 75038, at *5.

[104] *See* Denetsosie, *supra* note 102, at 32; Brief of the Navajo Nation et al., *supra* note 102, at "Interest of the Amici Curiae."

[105] United States v. Sandoval, 231 U.S. 28 (1913). The *Venetie* Court purported to rely on *Sandoval* and to distinguish it. *See Venetie*, 1998 WL 75038, at *5. Due to the *Venetie* Court's apparent misreading of *Sandoval*, its definition of Indian Country would actually exclude *Sandoval*—as had been recognized. *See* Brief of the Navajo Nation et al., *supra* note 102, at "Interest of the Amici Curiae." (In the Navajo Nation Brief, the Pueblo, whose land was at issue in *Sandoval*, argued that the view of Indian Country ultimately adopted by the *Venetie* Court would abrogate the Pueblo's sovereignty over their own land.)

Sandoval is arguably overruled by *Venetie* because the Pueblo land in *Sandoval* was not "set aside by the Federal Government for the use of Indians as Indian land," as the *Venetie* decision required. *Venetie*, 1998 WL 75038, at *5. Rather, it was granted to the Indians in fee by the Spanish government before the territory of New Mexico was acquired by the United States. *See Sandoval*, 231 U.S. at 39. The *Venetie* Court also stated that the federal government—in the *Sandoval* case—had enacted laws governing the Pueblo land pursuant to its guardianship of the land. *Venetie*, 1998 WL 75038, at *5. In a footnote, however, the Court admits that the statute itself was not deemed applicable to the Pueblo lands until after the *Sandoval* decision had been issued. *Id.* at *5, n.4.

Interestingly, in the years leading up to *Sandoval*, the territory of New Mexico apparently argued that the Pueblo were not Indians in order to gain control of the Indian lands—just as the State of Alaska had argued that the Natives were not Indians in the years leading up to *Venetie*—also in the hopes of gaining control of the Native land. *See* DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW: CASES AND MATERIALS 189-90 (3rd ed. 1993) (discussing the situation in New Mexico prior to *Sandoval*). *See also* Valencia-Weber, *supra* note 30, at 1300-12 (discussing Alaska's campaign to destroy the sovereignty of Alaskan Natives).

In deciding that the Netsa'ii Gwich'in, who inhabit the Village of Venetie, were not a dependent Indian community, the Court dismissed the fact that the Netsa'ii Gwich'in were a recognized tribe,[106] a fact which itself indicates that the community was under some form of federal superintendence as required by the Court.[107] Moreover, the State of Alaska did not contest the Village's averment that the Netsa'ii Gwich'in had occupied Indian Country prior to the passage of the Alaska Native Claims Settlement Act (ANCSA).[108] Thus, absent a *sua sponte* finding that no Indian Country had ever existed in Alaska, which it did not make, the Court could only find that Indian Country did not presently exist because it had been abrogated by the ANCSA. However, the ANCSA's provisions merely changed the nature of the land title held by Natives; it did not purport to extinguish, or even limit, tribal sovereignty.[109] The Court nonetheless found the

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106 *Venetie*, 1998 WL 75038 at *7 n.5. *See also* Donald Craig Mitchell, Alaska v. Native Village of Venetie: *Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353, 409 (1997) (acknowledging that Alaskan Native Villages have been officially recognized as tribes by the Secretary of the Interior).

107 *See* Brief of the Navaho Nation et al., *supra* note 102, at part III (arguing that official federal recognition of a tribe is sufficient evidence of the political dependency required to establish the existence of a dependent Indian community).

108 *See* Brief of Amici Curiae Indian Law Professors in Support of Affirmance, at part III.1, Alaska v. Native Village of Venetie, 101 F.3d 1286 (9th Cir. 1996) (No. 96-1577). ANCSA can be found at 43 U.S.C.A. §§ 1601-29.

109 *See Venetie*, 98 WL75038, at *7-8; 43 U.S.C.A. § 1603 (West 1998) (providing that, in exchange for the money received pursuant to ANCSA, Alaskan Natives must agree to extinguishment of their aboriginal title to most of the rest of Alaska); 43 U.S.C.A. § 1613 (West 1998) (providing for conveyance of lands to Village Corporations composed of Native Village residents); 43 U.S.C.A. § 1618 (West 1998) (revoking existing reservations, with one exception, but providing that a Village Corporation could convey the former reservation land to the Tribe if it agreed to opt out of the other provisions of ANCSA); *see also* THOMAS R. BERGER, VILLAGE JOURNEY 137 (1995) (stating that "ANCSA did not address the issue of Native sovereignty"). Note that the Village of Venetie elected to take title to its former reservation as allowed by 43 U.S.C.A. § 1618. BERGER, *supra*, at 141; *Venetie*, 1998 WL 7508, at *3. With respect to its land, then, the Village was thus in much the same position it had been prior to the passage of ANCSA.

ANCSA's provisions to be inconsistent with tribal sovereignty,[110] thus violating the "fundamental" principle of Indian law "that tribal powers of self-government may be extinguished only by a clear and specific expression of Congress."[111]

Finally, the *Venetie* Court's view that federal superintendence of the Indian land was sufficient to create a dependent Indian community would entail "active . . . control . . . [of] the lands in question" is diametrically opposed to Congress' policy of self-determination.[112] If the federal government undertook active control of Indian land, it would be powerless to implement its self-determination goals that promote Indian control of the land. In effect, the *Venetie* Court foreclosed Congress' announced policy of self-determination by forcing tribes (at least those who lack a traditional reservation) and Congress to choose between Indian assimilation into white culture, which would result from a finding of divestment of tribal sovereignty, on the one hand, and complete federal control of tribal land on the other.

Once again, the Supreme Court in *Venetie* seemed eager to diminish tribal sovereignty regardless of whether it could find a principled basis for doing so. A hint as to the reasons for the Court's motives can be found in Justice Thomas' statement that the ANCSA was designed to avoid "'any permanent racially defined institutions, rights, privileges, or obligations.'" [113] This statement of the ANCSA's policy is misleading because, as will be discussed in more detail in part III, the ANCSA was significantly amended to allow for the indefinite continuation of the so-called "racially defined institutions" at the Native shareholders' option.[114] Moreover, a tribe is not considered a racially defined institution

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110 *Venetie*, 98 WL 75038, at *7-8.

111 *See* Brief of Amici Curiae Law Professors in Support of Affirmance, *supra* note 108, at part I (citing FELIX COHEN'S TREATISE ON INDIAN LAW, 1982). The Court also failed to address the significance of the various amendments to ANCSA, which made the Native Villages more akin to Indian reservations than they had been under the original version of ANCSA. *See* Part III, *supra.*

112 *Venetie*, 98 WL 75038, at *8. *See also* Brief of the Navajo Nation et al., *supra* note 102, at part III (describing Congress' current self-determination policy).

113 *Venetie*, 98 WL 75038, at *7 (quoting 43 U.S.C.A. § 1601(b)).

114 *See* Publ. L. 100-241, § 2 (1988).

under the Court's own precedent.[115] Thus, not only does the current version of the ANCSA approve of permanent racially defined institutions (insofar as the continuation of Native government can be described as such), but it is inaccurate to divest tribal sovereignty on the premise that divestment is necessary in order to avoid sanctioning the existence of racially defined institutions. This is because the Court has held that tribes are not racially defined and the Alaskan Natives have been recognized as tribal entities.

The fact that the Supreme Court invoked this effectively disavowed portion of the ANCSA to justify its holding suggests that it is again using liberal ideals in the Indian law context to which they are especially unsuited. This time the liberal premises invoked include a formal notion of race that is abstracted from its relevant social context. The effect is that every instance in which race is taken into account, even for remedial purposes, comes to be seen as the moral equivalent of white supremacy.[116] This conception is irrational when applied to Alaskan Natives as well as to other subordinated groups. Alaskan Natives are a conquered people who eke out their living from "one of the harshest environments in the world."[117] By no stretch of the imagination

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115 *See* Morton v. Mancari, 417 U.S. 535 (1974). Note that there has been some indication that *Mancari* is beginning to be interpreted more narrowly, or even will be viewed as overruled, in light of the Court's recent decision in Adarand Construction v. Pena, 515 U.S. 500 (1995). *See, e.g.,* Williams v. Babbitt, 115 F.3d 657, 665 (9th Cir. 1997) (reading *Mancari* to protect only those statutes which "affect uniquely Indian interests" and further suggesting, based on Justice Stevens' dissent in *Adarand,* that *Adarand* may have overruled *Mancari*).

116 *See, e.g.,* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind," in* CRITICAL RACE THEORY 257 (Kimberlé Crenshaw et al. eds., 1995); Owen M. Fiss, *Groups and the Equal Protection Clause,* 5 PHIL. & PUB. AFF. 107, 129 (1976).

117 Brief of Alaska Federation of Natives et al., at part I.A., Alaska v. Native Village of Venetie, 101 F.3d 1286 (9th Cir. 1996) (No. 96-1577) (citations omitted). Some Alaskan Natives have objected to the term "conquered" on the basis that they never formally surrendered their sovereignty. *See* Edward Thomas, President of Tlingit and Haida Central Council, Lecture at University of California, Los Angeles School of Law (Feb. 5, 1998). Despite the validity of this criticism, Alaskan Natives are treated by the United States government as a

can their invocation of sovereign taxing powers be rendered the moral equivalent of a discriminatory act by the Klu Klux Klan or a neo-Nazi movement.

2. A Reluctant Adherence to Precedent: *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*,[118] the Supreme Court took the now unusual tack of adhering to precedent to find in favor of a tribe. It held that the Kiowa Tribe enjoyed sovereign immunity from suit whether the suit arose on or off the reservation or involved governmental or commercial activity.[119] As a result, Manufacturing Technologies was unable to sue the Kiowa Industrial Development Commission, a tribal entity, for default on a promissory note in state court.[120] In coming to this conclusion, however, Justice Kennedy disparaged the precedent, which constrained him and then proceeded to list several policy reasons why sovereign immunity for Indian tribes should be abolished or limited.[121] He ended by inviting Congress to "abrogate tribal immunity, at least as an overarching rule."[122] Justice Stevens, dissenting, argued that the court was extending sovereign immunity and that the decision whether to accord sovereign immunity to the tribes should be left to the states.[123]

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conquered people in the sense that they are required to abide by federal (and some state) laws and may only exercise sovereignty to the extent permitted by federal law.

118 Kiowa Tribe of Oklahoma v. Manufacturing Technologies, 118 S. Ct. 1700, 1998 U.S. LEXIS 3406 (May 26, 1998).

119 *Kiowa Tribe*, 118 S. Ct. 1700, 1998 U.S. LEXIS 3406, at *7.

120 *Id.*

121 *Id.* at *9-16.

122 *Id.* at *13.

123 *Id.* at *16 (Stevens, J., dissenting).

a. The Court's Policy Reasons for Abrogating Tribal Immunity

While noting "Congress had failed to abrogate [tribal immunity] in order to promote economic development and tribal self-sufficiency," the Supreme Court nevertheless found this rationale to be "inapposite to modern wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities."[124] Moreover, while the doctrine at one time "might have been thought necessary to protect tribal governments from encroachment by States[,] . . . tribal immunity [now] extends beyond what is necessary to protect tribal self-governance."[125] Finally, the Court noted "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter."[126]

The Court's discomfort with tribal immunity is telling. First, it is illogical that the Court found the self-determination rationale for tribal sovereign immunity to be inconsistent with actual self-determination. The purported inconsistency appears to be a logical impossibility, for how can a hope for self-determination be inconsistent with its realization? Second, the Court appears to deny that tribes still need protection from politically more powerful states. One need only consider the hostility that many states express towards tribes and recall that Congress is comprised of all states and no tribal representatives to perceive the continuing inequity of power between the two entities.[127] A comparison of the populations on reservations to those of surrounding states yields the same conclusion. The Court also appears to disapprove of the fact that tribes are no longer

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124 *Id.* at *12.

125 *Id.*

126 *Id.* at *13.

127 *See generally* Valencia-Weber, *supra* note 30 (documenting state hostility toward tribes). By suggesting a comparison between state power within the federal system and tribal power, I do not mean to suggest that tribes should be absorbed into the federal system. On the contrary, as separate sovereigns, tribes should be able, ideally, to define their own status. But the small size of most tribes and the fact that the states to some extent control the federal government do place tribes in a vulnerable position.

solely engaged in traditional tribal customs and activities, as though Indians' refusal to conform to white stereotypes justifies a demand for complete assimilation. Moreover, the Court's statement that immunity exceeds what is necessary for tribal self-governance is particularly ironic: the statement is only true because the Court has increasingly divested tribal sovereignty on its own initiative during the past decades. Finally, the Court invokes liberal notions of fairness when it notes that a tribe could use sovereign immunity to snag the unwitting, who, apparently in the Court's opinion, neither actually consented to participation in such an unequal bargain nor would knowingly consent.

b. The Court's Conception of Tribal Sovereign Immunity is Based on Liberal Equality Theory

The Supreme Court's conception of tribal sovereign immunity and, by extension tribal sovereignty itself, as a special right which should be accorded only to the weak and defenseless stands in sharp contrast to its usual conception of sovereign immunity as an esteemed and necessary component of governmental status.[128] As Alexander Hamilton said in the Eighty-First Federalist Paper: "[i]t is inherent in the nature of sovereignty not to be amenable to suit by an individual without its consent."[129] Thus, it is not as though we expect other quasi-sovereigns, such as states, to outgrow sovereign immunity once they have a sufficient tax base. On the contrary, state sovereign immunity is an important talisman of state power.[130] The Court's discomfort with

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128 *See, e.g.,* Alden v. Maine, __ U.S. __, 119 S. Ct. 2240 (1999); Hans v. Louisiana, 134 U.S. 1 (1890).

129 *Hans*, 134 U.S. at 13 (quoting the Eighty-First Federalist Paper).

130 While it may be argued that state and federal sovereign immunity are inconsistent with democratic ideals, *see* Chisholm v. Georgia, 2 U.S. (Dall.) 419, 454-55 (1793) (Blair, J., concurring); HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1002 (Richard H. Fallon, Jr., et al. eds., 4th ed. 1996), such immunity nonetheless remains well-established. *See, e.g.,* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (strengthening state sovereign immunity by diminishing the federal government's power to abrogate it). Again, my comparison between states and tribes here is not meant to suggest that they are functionally equivalent and should always be treated

tribal immunity appears to extend not from its discomfort with the doctrine of sovereign immunity in general, but rather from the continued recognition of tribal sovereign immunity. That the Court actually entreated Congress to abrogate tribal immunity indicates the extent of its interest in effecting a wholesale divestment of tribal sovereignty.

The Court's starkly diverging views of sovereignty suggest that the Court views tribal sovereignty as a temporary measure which the tribes should only be able to take advantage of until they become self-sufficient enough to participate in the larger white society on equal terms with everyone else. In this sense, the Court seems to see tribal sovereignty as a need-based welfare program or an affirmative action plan. Indeed, the *Kiowa Tribe* Court's view of tribal sovereignty as inherently suspect is markedly similar to its view of governmental affirmative actions plans.[131] One can only assume that the Court is viewing tribal sovereignty in this way because it sees tribal power as a type of race-based power and thus disapproves of it. Similarly, the Court's view of tribal sovereignty as a temporary measure, which should be abandoned once the playing field has been sufficiently leveled, corresponds with the Court's insistence that affirmative action programs must be designed to attain, rather than to maintain, racial balance.[132] Indeed, one can almost hear echoes in the *Kiowa Tribe* opinion of Justice Bradley's exhortation that African-Americans, having "'emerged from slavery, and by the aid of beneficent legislation . . . shaken off the inseparable concomitants of that state, . . . take the rank of mere citizen, and cease to be the special favorite of the laws.'"[133]

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similarly. Instead, my point is that the Court is taking a very uncharacteristic view of the doctrine of sovereign immunity when it evaluates tribal sovereign immunity, whereas it employs its more typical view in evaluating state sovereign immunity.

131 *See, e.g,* Adarand Construction v. Pena, 515 U.S. 500 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

132 *See, e.g.,* United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

133 Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction,* 32 WM. & MARY L. REV. 1, 13 (1990) (quoting The Civil Rights Cases,109 U.S. 3, 25 (1883)).

The Court's implicit comparison between tribal sovereignty and other race-based legislation is invalid in two major respects. First, tribal rights are properly considered political rather than racial.[134] Second, the Court's view of affirmative action plans as the moral equivalent of Jim Crow laws is itself wrongheaded.[135] Because the Court's treatment of affirmative action programs is misguided, its parallel treatment of tribal sovereignty on the basis of the similarity between the two is also mistaken. Both *Venetie* and *Kiowa Tribe* evince a view of tribal sovereignty as a special need-based right, which should only be accorded temporarily, if at all. The Court's distrust of tribal sovereignty appears to extend from its conception of it as an inherently suspect racial entitlement, which threatens to violate liberal equality theory.

In summary, over the past two decades, the Supreme Court has increasingly diminished tribal sovereignty without regard to Congressional wishes. It facilitated the process in *Oliphant* by reversing the presumption in favor of tribal sovereignty to a presumption against tribal sovereignty. While *Oliphant* ostensibly involved only the area of criminal jurisdiction over non-Indians, the Court subsequently extended the *Oliphant* presumption to all situations involving criminal jurisdiction over nonmembers through *Duro*, and to all situations involving civil jurisdiction over nonmembers, when the suit arose within reservation boundaries but on land which was not under tribal control, and both parties are nonmembers through such cases as *Strate* and *Montana*. The Court has also evinced an increasing unwillingness to defer to Congressional intent even in cases like *Venetie*, where statutes evidencing such intent clearly should govern the case. Finally, in those rare cases where the Court views precedent as too unequivocal to depart from, it has resorted to adjuring Congress to abrogate tribal sovereignty. All of these cases indicate that the Court's own biases against tribal sovereignty are driving the

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134 *See* Morton v. Mancari, 417 U.S. 535 (1974). *See also* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 611 (1996) (emphasizing that only preferences for members of Indian tribes are exempt from strict scrutiny under *Mancari*; racial preferences, regardless of tribal membership, are not).

135 *See* Fiss, *supra* note 117, at 129-30.

decisions rather than well-established doctrine and precedent. Moreover, the cases from *Oliphant* to *Strate* evidence a trend of shrinking tribal sovereignty which is driven by liberal social contract notions of government. *Venetie* and *Kiowa Tribe*, in contrast, evince a new trend: that of equating tribal sovereignty with race-based preferences and invalidating it, or adjuring Congress to abrogate it, on that basis. Both activist trends do a severe disservice to Indian tribes and to our judicial ideals of fairness of outcomes and predictability.

III. TWO SUSPECT DEVICES USED TO DIVEST AND DEBASE TRIBAL SOVEREIGNTY: IGNORING THE CANONS OF CONSTRUCTION AND CONSTRUING STATUTES WITH REFERENCE TO SUBSEQUENT LEGISLATIVE HISTORY

This part focuses on two of the suspect devices used to abrogate tribal sovereignty in some of the foregoing cases. The tack of ignoring or weakening the canons of construction in order to reach a result which disfavors Indian tribes has been used in *Oliphant*, *Montana*, and *Venetie*. The device of construing acts of Congress without reference to subsequent legislative history or changes in legislative policy is pursued in *Montana*, *Brendale*, and *Venetie*. These two devices are not the only, or even the primary means, the Court has used to divest and debase tribal sovereignty.[136] Nonetheless, because they are fairly widespread, thwart settled expectations, and often run directly contrary to

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[136] Other suspect methods used by the Court include the novel approach of denying sovereignty in a specific area because the area had previously been subject to federal control, *see* Rice v. Rehner, 463 U. S. 713 (1983); allowing states to tax on-reservation sales by Indian tribes to nonmembers thus effectively defeating the tribal power to tax, *see* Cotton Petroleum Corp. v. New Mexico (1989); Washington v. Confederated Tribes of the Colville Indian Nation, 447 U.S. 134 (1980); and conditioning tribes' right to self-determination on their willingness to engage only in traditional activities which conform to white notions of what Indians are and how they should act, *see Kiowa Tribe*, 1998 LEXIS 3406 at *12 (suggesting that sovereign immunity no longer makes sense because tribal enterprises extend "well beyond traditional tribal enterprises and activities"); *Montana*, 450 U.S. at 556 (finding that the Crow Tribe could not regulate nonmember fishing and noting that the Tribe traditionally had survived by buffalo hunting rather than fishing).

congressional intent, these two devices are among the most pernicious of those used by the Court to divest and debase tribal sovereignty.

A. Ignoring or Weakening the Canons of Construction to Find against Indian Tribes

Briefly stated, 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."[137] The canons of construction were originally limited to treaty construction but were subsequently expanded to statutory construction as well.[138] As to statutes, "'the general rule [is] that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'"[139] The statutory canon has been extended to cover statutes, such as Public Law 280, which do not seem to have been enacted for the benefit of Indian tribes,[140] as well as to acts of Congress, which clearly were not meant to benefit Indian tribes, including those abrogating tribal sovereignty.[141] The statutory canon can thus be stated as a general rule "that tribal powers of self-government may be extinguished only by a clear and specific expression of Congress."[142] Neither *Oliphant*, *Montana*, nor *Venetie* take proper account of the canons.

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137 WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 88 (1988) (citations omitted). *See also* GETCHES, *supra* note 106, at 157.

138 *See* CANBY, *supra* note 138, at 89-90 (citations omitted); GETCHES, *supra* note 106, at 345.

139 CANBY, *supra*, note 138, at 90 (quoting Alaska Pacific Fisheries Co. v. United States 78, 89 (1918)).

140 *See id.* (citing Bryan v. Itasca County, 426 U.S. 373, 392-93 (1976)).

141 *See* Brief of Amici Curiae Law Professors in Support of Affirmance, *supra* note 102, at part I (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) and Solem v. Bartlett, 465 U.S. 463 (1984)).

142 *Id.* (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 224-25, 242 (1998)).

In each case, the Supreme Court's failure to give appropriate force to the canons made it analytically less difficult for the Court to find against Indian tribes in those decisions.

1. Ignoring and Weakening the Canons of Treaty Construction in *Oliphant v. Suquamish Indian Tribe*

There are two places in the *Oliphant* opinion where the Court fails to take proper account of the canons in its interpretation of treaties. The first place where the Court ignores the canons is when it states:

> [N]one of the treaties signed by Washington Indians in the 1850's explicitly proscribed criminal prosecution and punishment of non-Indians by the Indian tribes. As discussed below, however, several of the treaty provisions *can be read as* recognizing that criminal jurisdiction over non-Indians would be in the United States rather than in the tribes.[143]

In the absence of an explicit proscription of an exercise of tribal power, the canons clearly mandate that the Court find that tribal power in this area has not been abridged. However, without mentioning the canons, the Court contents itself with the conclusion that the treaties "can be read" to prohibit tribal criminal jurisdiction over non-Indians. This conclusion clearly conflicts with the canons. The phrase "can be read" evinces ambiguity, yet the canons militate that all ambiguities be resolved in favor of Indians. The Court would have had a considerable amount of explaining to do if it mentioned the canons here and acknowledged that it was finding against the tribe in spite of them. Instead, the Court declined to mention them, probably in the hope that readers of the opinion would not notice or would consider the failure to be merely an oversight.

Later in the opinion, the Court acknowledged the existence of the canons but noted "treaty and statutory provisions which are not clear on their face may 'be clear from surrounding

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[143] *Oliphant*, 435 U.S. at 199 n.8 (emphasis added).

circumstances and legislative history.'"[144] The Court's quotation of this phrase is misleading because surrounding circumstances and legislative history had previously been used to find in favor of a tribe despite a statute, which seemed clearly to indicate Congressional intent to abrogate tribal sovereignty.[145] Moreover, *DeCoteau v. District County Court*,[146] the case cited by the *Oliphant* Court for the proposition, is clearly distinguishable in that, in *DeCoteau*, all of the relevant sources pointed squarely toward termination. *DeCoteau* was thus very different from *Oliphant*, where the Court used surrounding circumstances and legislative history to override ambiguous treaty provisions.[147]

On balance, the *Oliphant* Court did rely on other factors besides the Suquamish treaty and surrounding circumstances in finding tribal jurisdiction to have been divested. As discussed in part II.A.1, however, all four factors were questionable. For example, the factor relied upon most heavily by the Court (i.e., the alleged inconsistency between the tribe's exercise of criminal jurisdiction over nonmembers and its dependent status)[148] had not been invoked by the Court since the 1830s[149] and had thus, arguably, fallen into disuse—thereby rendering it a questionable rationale.

2. Failing to Acknowledge the Canons of Treaty Construction in *Montana v. United States*

Although the Court in *Montana v. United States* spends several pages analyzing the treaty that created the Crow reservation,[150] it fails to mention the canons of construction, which mandate that all ambiguities in treaties be resolved in favor of the tribe. Instead, the opinion merely applies the canon of construction

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144 *Id.* at 208 n.17 (quoting DeCoteau v. District County Court, 420 U.S. 425, 444 (1975)).

145 *See* Mattz v. Arnett, 412 U.S. 481, 504 (1973).

146 DeCoteau v. District County Court, 420 U.S. 425 (1975).

147 *DeCoteau*, 420 U.S. at 444.

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

149 *See Brendale*, 492 U.S. at 453 (Blackmun, J., concurring and dissenting).

150 *Montana*, 450 U.S. at 550-59.

regarding river beds, which creates a presumption against the United States' having conveyed a river bed to a party other than a state, without even acknowledging or discussing the conflict between the two sets of canons.[151] As Barsh and Henderson have pointed out, the Supreme Court was able to conclude that the river bed did not pass to the tribe through the treaty only by erroneously relying on *United States v. Holt State Bank*[152] and by construing the treaty as a land grant to the tribe rather than as a representation of what the tribe retained of its aboriginal holdings.[153] If the treaty were properly read as a description of the property rights retained by the tribe, the canon as to the United States' conveyance of river beds would not apply and the canon regarding resolving ambiguities in favor of tribes would mandate a finding for the tribe on this issue. Only Justice Stevens' concurrence in *Montana* mentioned the canons of construction favoring Indian tribes.[154] However, even Stevens quickly dispensed with the canons by treating the inapplicable holding in *Holt State Bank* as controlling.[155]

3. *Alaska v. Native Village of Venetie*: Ignoring the Canons of Statutory Construction

The underlying question in *Venetie* was whether the ANCSA had abrogated the Netsa'ii Gwich'in's tribal sovereignty.[156] The issue of whether the statutory definition of Indian Country included Alaskan Native lands as they were held

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151 *Id.* at 549.

152 United States v. Holt State Bank, 270 U.S. 49 (1926). Barsh and Henderson argue that *Holt State Bank* is inapplicable because it involved the issue of whether, upon the tribe's cession of its reservation, the bed of a lake vested automatically in the state or vested instead in the United States. The issue was not whether the tribe originally had title to the lake-bed under its treaty with the United States. Barsh and Henderson, *supra* note 26, at 677.

153 Barsh and Henderson, *supra* note 26, at 675, 677.

154 *Montana*, 450 U.S. at 567 (Stevens, J., concurring).

155 *Id.* at 568.

156 *See Venetie*, 1998 WL 75038 at *3; Brief of Amici Curiae Law Professors in Support of Affirmance, *supra* note 102, at part III (noting that it was "uncontroverted that Indian country existed in Alaska before ANCSA").

under the ANCSA, on which the Court focused, should not have been reached absent a finding that the ANCSA had abrogated the tribe's prior, uncontroverted sovereignty over the land.[157] To answer this underlying question, the Court should have used the statutory canon of construction and analyzed whether the preexisting "tribal powers of self-government [were] . . . extinguished by a *clear and specific expression* of Congress."[158] In doing so, all ambiguities should have been resolved in favor of the Alaskan Natives and the statute should have been construed the way that the Natives understood it.[159] Thus, the Court would have been constrained to find, had it properly employed the canons of construction, that the ANCSA contained no such expression of a clear and specific intent to extinguish tribal sovereignty.[160] Instead the statute merely dealt with the character of land title held by the

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157 Brief of Amici Curiae Law Professors in Support of Affirmance, *supra* note 102, at "Summary of Argument" and part III.

158 *Id.* at part I (emphasis added). The *Montana* and *Brendale* Courts also failed to employ the statutory canons in finding that the allotment acts had divested tribal regulatory power over non-Indian fee land. *See* Part II.B.1 *supra.* Had the Court carefully considered the allotment acts in those cases, it would have found that they evinced no clear Congressional intent to abrogate regulatory authority over the fee land if the reservations were ultimately to continue. *See id.*

159 This aspect of the canons is also very important in the context of ANCSA because the Natives argued against a permanent trust relationship with the United States government in order to secure a greater right to self-determination (with less federal interference). *See* Brief of Alaska Federation of Natives et al., *supra* note 116, at part II.A.. It is quite ironic that the measure that Natives supported to further their own self-determination was ultimately used to force their assimilation. It is difficult not to be reminded of the days of treaty making where United States' representatives would tell the Indian tribes that the treaties said whatever the representative thought the tribe wanted to hear in order to get the tribe to sign onto an utterly different treaty which was much less favorable to the tribe. *See, e.g.,* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (upholding a treaty modification in spite of the evidence that the United States agents lied to the Tribe about the effects of the modification and failed to get the necessary number of signatures to put the modification into effect).

160 Brief of Amici Curiae Law Professors in Support of Affirmance, *supra* note 102, at part III.2. *See also* Mitchell, *supra* note 107, at 430 (arguing that ANCSA did not explicitly abrogate tribal sovereignty and that the State therefore should not have conceded that Alaskan Natives occupied Indian country prior to ANCSA).

Native Alaskans.[161] The Court's failure to apply the canons to the ANCSA was particularly problematic in this instance because the unique situation of the Native Village of Venetie was not conducive to a finding of abrogation (i.e., the Village had elected to opt out of most of the provisions of the ANCSA in exchange for having the land comprising Venetie's former reservation transferred back to the tribe).[162] Thus, the village was in a situation similar to that prior to the enactment of the ANCSA.

In sum, the Court has elected to ignore or weaken the canons of construction in Indian law whenever it becomes expedient for it to do so.[163] This discretionary use of the canons of construction is dangerous because the canons were meant to protect tribes against manipulation and coercion by the United States government that often results from political pressures. If the canons are to be effective, they must be employed consistently, in spite of political pressures felt by the Court or the personal policy views of the Justices. Ironically, however, the canons are now being selectively employed by the Court to enforce its own policy considerations. They are no longer an independent check on the legislature; instead, selective application of the canons has become a means of thwarting legislative intent when that intent may benefit tribes in a way that the Court disapproves of.

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161 *See* Brief of Amici Curiae Law Professors in Support of Affirmance, *supra* note 102, at "Summary of Argument" and part III.2.

162 *See id.* at part III.1. *See also* BERGER, *supra* note 110, at 141; *Venetie*, 1998 WL 7508 at *3.

163 This is not to say that the canons have been completely abandoned by the Court. In fact they were applied quite recently, to assist the Court in reaching a positive result for tribal sovereignty, in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), and were mentioned in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S. Ct. 789, 800 (1998). Moreover, Professor Goldberg has suggested that the canons have not been discarded but instead weakened, so that the Court may be employing them only when two competing interpretations of a statute or treaty are in complete equipoise. *See* Carole Goldberg, Federal Indian Law Lecture at the University of California, Los Angeles School of Law (Mar. 24, 1998). My point is that the Court has neglected them altogether in some analytically difficult cases which were also of immense importance to tribal sovereignty and that it has generally not employed them in recent cases with the frequency and analytical force which it used to accord them.

B. Construing Statutes Without Reference to Subsequent History as Means of Enforcing Abandoned and Repudiated Assimilationist Policies

The device of ignoring subsequent legislative history and policy changes in construing statutes was used in *Montana* and *Brendale* in order to give effect to the repudiated assimilationist policies of the allotment acts.[164] It was used in *Venetie* to give effect to the assimilationist component of the ANCSA, which had since been abandoned—as evidenced by the various amendments to the ANCSA. The widespread use of this device is relatively new to the Court. Indeed, in some previous Indian law cases, the Court gave effect to Congress' current Indian policy in construing statutes enacted under vastly different policy frameworks.[165] The device of ignoring subsequent legislative history and Congressional policy changes allows the Court to appear to be deferring to Congressional intent while concomitantly thwarting contemporary Congressional intent.

1. The Abandoned and Repudiated Allotment Policy

The allotment period began in the 1880s and extended until 1928.[166] During that period, Congress passed several different allotment acts, which ended communal tribal ownership of Indian reservations and mandated that the reservations be divided up into individual tracts and allotted to tribal members.[167] The purpose of allotment was to force Indians to assimilate into mainstream white

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[164] Another case in which this device is used to continue to enforce allotment policies is *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 253-55 (1992). This case does not involve the reach of tribal sovereignty per se but rather the state's ability to tax reservation land owned in fee by tribal members and to impose a tax on sales of such land.

[165] *See, e.g.*, Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).

[166] *See* GETCHES, *supra* note 106, at 190-91, 215.

[167] *See id.* at 191.

culture.[168] The allotment policy and its underlying goal of assimilation were specifically repudiated in 1934 by the Indian Reorganization Act,[169] which forbade further allotment of reservations[170] and created a framework for the reestablishment of tribal governments.[171] Although Congress propounded self-determination as its official policy towards Native Americans after 1934, as it does today,[172] the Court continues to give effect to the abandoned and repudiated allotment policy in cases such as *Montana* and *Brendale*.

In *Montana*, the Supreme Court relied in part on the repudiated allotment acts in deciding that Congress did not intend for the Crow Indians to have ability to regulate hunting and fishing on non-Indian owned fee land within reservation boundaries.[173] The Court first acknowledged that the treaty between the Crow Indian Tribe and the United States granted the tribe the "'absolute and undisturbed use and occupation'" of the reservation land—and therefore arguably conferred regulatory authority on the tribe.[174] However, the Court then went on to rule that this authority had been divested by the allotment acts—at least with respect to reservation lands now owned in fee by non-Indians—because the very alienation of the land prevented the Indians from exercising their treaty-based right to absolute and undisturbed use and occupation of the land.[175] Thus, according to the *Montana* Court's reasoning, once the right to undisturbed use and occupation of the land was abrogated, any derivative rights (such as the right to regulate hunting and fishing) were also abrogated for "[i]t defies common sense to suppose that Congress would intend that non-

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168 *See id.* at 190.

169 25 U.S.C.A. §§ 461-479 (West 1998).

170 25 U.S.C.A. § 461 (West 1998).

171 25 U.S.C.A. § 476 (West 1998).

172 *See* Barsh and Henderson, *supra* note 26, at 685. The self-determination policy was itself briefly repudiated, during the period from 1945 to 1961, after which the self-determination policy was put back into effect. *See* GETCHES, *supra* note 106, at 229-233.

173 *Montana*, 450 U.S. at 559 & 559 n.9.

174 *Id.* at 558 (quoting the Fort Laramie Treaty, 15 Stat. 649).

175 *Id.* at 558-59.

Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government."[176]

This reasoning would make sense if the allotment policy were still in place—or at least had not been specifically repudiated; however, as the Court later points out, the policy was officially repudiated and allotment was stopped.[177] The Court does not make an effort to explain why it continues to enforce the obsolete policy and to further "the ultimate destruction of tribal government": one has to wonder if the reason is not simply that Court is more sympathetic to the allotment policy than to the current policy of self-determination. Instead of explaining its reasoning in more detail, the Court simply affirms that the treaty language must be read in light of the subsequent allotment policy, which resulted in alienation of much reservation land to non-Indians. Why this alienation should not in turn be considered in light of the current self-determination policy (which is more in accord with the rejected treaty language) remains a mystery. All that can be said is that the Court apparently defers to Congress more readily when it contracts tribal rights than when it seeks to expand them—although Congress' plenary power clearly gives it the authority to do either.[178] By following this course, the Court puts the United States in a situation in which its many mistakes with respect to Indian tribes and the multitude of wrongs it has inflicted upon them will linger on indeterminately, in spite of the fact that even many of the perpetrators of the misguided policies have realized their mistakes. Moreover, both the White and Stevens pluralities in *Brendale* relied on the *Montana* Court's interpretation of the allotment acts in determining that the tribe lacked zoning authority

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176 *Id.* at 559 n.9.

177 *Id.*

178 *Cf.* Clinton, *supra* note 47, at 98 (suggesting that the Court will act to protect minority rights only when non-Indians are in the minority, as on an Indian reservation, and that it will not offer similar protection when Indians are in the minority and their rights are being infringed by non-Indians, and further arguing that the Court exercises a "hands off approach" in federal Indian law only when Indian rights are in danger).

over at least part of its reservation.[179] The White plurality would have found the alienation of the land pursuant to the General Allotment Act (i.e., the Dawes Act)[180] to divest the tribe of all regulatory authority over the land owned in fee by non-Indians.[181] It deemed Congress' repudiation of the allotment policy "irrelevant" based on the facts that the lands remained alienated after the allotment policy was repudiated and that the Indians were not restored exclusive and undisturbed use of them.[182]

Stevens took a more moderate—but similarly misguided—view of the effects of the General Allotment Act. While acknowledging that the General Allotment Act "did not itself transfer any regulatory power from the tribe to any state or local government authority," Stevens argued that, "by providing for the allotment and ultimate alienation of reservation land, the Act in some respects diminished tribal authority."[183] He also noted that:

> [a]lthough it is inconceivable that Congress would have intended that the sale of a few lots would divest the Tribe of the power to determine the character of the tribal community, it is equally improbable that Congress envisioned that the Tribe would retain its interest in regulating the use of vast ranges of land sold in fee to nonmembers who lack any voice in setting tribal policy.[184]

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179 *Brendale*, 492 U.S. at 422-425, 436-40.

180 25 U.S.C.A. §§ 331-34, 341-42, 348-49, 354, 381 (West 1998).

181 *Brendale*, 492 U.S. at 423, 425 (White, J., concurring and dissenting).

182 *Id.* at 423. How Congress could have undone the alienation without infringing on the non-Indian land owners' rights is an interesting question. The Court has repeatedly found Congressional attempts to restore ownership of allotted lands to tribes to be unconstitutional because of infringement on the individual landowners' rights. *See* Babbitt v. Youpee, 117 U.S. 727 (1997); Hodel v. Irving, 481 U.S. 704 (1987). Because the Court has repeatedly invalidated such attempts, it is odd for the Court to use the fact that Congress has not restored the lands to the Indians for their undisturbed use as a reason for finding that the Indians lack any power over the lands whatsoever.

183 *Brendale*, 492 U.S. at 436 (Stevens, J., concurring and dissenting).

184 *Id.* at 437.

Like White, however, Stevens does not give effect to the fact that the General Allotment Act was ultimately repudiated, nor does he consider the alienation caused by the General Allotment Act in light of this subsequent repudiation.

Stevens' analysis of the continuing effect of the General Allotment Act illustrates the problems with trying to construe the intent behind a repudiated policy. He notes that it is "inconceivable that Congress would have intended the sale of a few lots to divest the Tribe of its power to determine the character of the tribal community."[185] As a strict construal of Congressional intent, this statement is neither true nor false, because the Congress that passed the General Allotment Act did not intend the sale of only a few lots but rather the destruction of the entire reservation. Indeed, one could argue that White's opinion is more true to the Congressional intent behind the General Allotment Act because White attempted to facilitate, albeit in a small way, the destruction of the reservation envisioned by the Congress that passed the General Allotment Act in 1887. However, Justice White's approach is more problematic than Justice Stevens' approach in that it resurrects a policy that that is contrary to the Congressional policy in effect today.

The conflict between White and Stevens in *Brendale* demonstrates that Congressional intent behind repudiated policies should not be given any effect—especially in the Indian law context where Congressional intent is very influential to the Court's ultimate decision. If the intent behind the repudiated policy is given full effect, the repudiated policy is resurrected in direct contravention of contemporary Congressional intent and policy. On the other hand, if the policy is given effect in light of subsequent developments, such as the halting of allotment, the result is nonsensical because we cannot know what the Congress that passed the repudiated policy would have wanted had it known that the policy would be repudiated. Moreover, the repudiation of a policy itself casts doubt on the salience of the intent behind the policy. Thus, when a policy has been repudiated, no effect should be given to the intent of the Congress that passed the repudiated policy. Instead, the Congress that repudiated the policy or, in the

185 *Id.*

Indian law context, the intent and policies of the current Congress should be given effect. Taking the statutory canons into account in analyzing such policies also proves helpful. Perhaps in choosing between the intent of the Congress that repudiated the policy and that of the contemporary Congress, the Court should simply look to which policy consideration would be more favorable to the tribe in question and resolve any ambiguities in the tribe's favor.

2. The ANCSA and Alaskan Native Sovereignty

The ANCSA[186] was enacted in 1971. It was subsequently amended in 1976,[187] 1988,[188] 1990,[189] 1992,[190] and 1995.[191] The ANCSA extinguished Alaskan Natives' aboriginal title over the majority of Alaska. In exchange for the aboriginal title, the ANCSA organized Alaskan Native Villages as corporations and allowed the corporations to choose land bases to which they would then take surface title in fee simple.[192] Originally, the corporate stock could be alienated to anyone, including non-Natives, after 1991. Additionally, it could be lost through corporate bankruptcy.[193] Thus, the goals of the ANCSA, as it was originally formulated, were assimilationist.[194] It was designed to turn Native tribes into the equivalent of white America's municipalities, with public land being used for profit-making purposes. Subsistence living, which Alaskan Natives relied on for their livelihood, was to become secondary or forsaken completely.

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186 16 U.S.C.A. §§ 1601-1628 (West 1998).

187 *See* Pub. L. 94-204, 89 Stat. 1147 (1976).

188 *See* Pub. L. 100-241, 101 Stat. 1788 (1988).

189 *See* Pub. L. 101-378, 104 Stat. 468 (1990).

190 *See* Pub. L. 102-415, 106 Stat. 2112 (1992).

191 *See* Pub. L. 104-42, 109 Stat. 353 (1995) and Pub. L. 104-10, 109 Stat. 155 (1995).

192 *See* Marilyn J. Ward Ford, *Twenty Five Years of the Alaska Native Claims Settlement Act: Self-Determination or Destruction of the Heritage, Culture, and Way of Life of Alaska's Native Americans?*, 12 ENVTL. L. & LITIG. 305, 325 (1997).

193 *See* BERGER, *supra* note 110, at 99.

194 *See id.* at 88.

However, the numerous amendments to the ANCSA significantly modified its capitalist and assimilationist agenda in order to "guarantee Natives continued participation in decisions affecting their rights and property" and to "enable the shareholders of each Native Corporation to structure the further implementation of the settlement in light of their particular circumstances and needs."[195] The so-called "1991 Amendments," actually enacted in 1988, provided that corporate stock could be restricted from alienation indefinitely at the option of Native shareholders.[196] The 1991 Amendments also provided that land owned by Village corporations would not be taxable as long as it remained undeveloped and the Village Corporation did not borrow money against it.[197] These Amendments also added a provision stating that "[n]otwithstanding any other provision of law, Alaska Natives shall remain eligible for all Federal Indian programs on the same basis as other Native Americans."[198] As part of the Congressional Findings and Declarations, the 1991 Amendments provided that they did not, "unless specifically provided, constitute a repeal or modification . . . of any provision of the Alaska Native Claims Settlement Act; or . . . confer on, or deny to, any Native organization any degree of sovereign governmental authority over lands . . . or persons in Alaska."[199]

In spite of the above disclaimer, the 1991 Amendments to the ANCSA drastically modified the assumptions underlying the statute. Looking at the entire amended version of the statute, it is no longer possible to contend that the authors contemplate assimilation of the Natives into white culture after a brief transition period. Rather, the provisions prohibiting taxation of undeveloped Native land, allowing for indefinite restraints on alienation of corporate stock, and providing that Alaskan Natives have the same rights as other Native Americans all help facilitate the continuation

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195 Pub. L. 100-241, § 2(5), 101 Stat. 1788 (1988).

196 *See* BERGER, *supra* note 110, at xiii; *see also* 43 U.S.C.A. § 1629(c) (West 1998).

197 *See* BERGER, *supra* note 110, at xiii; *see also* 43 U.S.C.A. § 1636(d) (West 1998).

198 43 U.S.C.A. § 1626(d) (West 1998).

199 Pub. L. 100-241, § 2(8), 101 Stat. 1788 (1988).

of Alaskan Native culture in its current form. The prohibition on taxation allows Natives to continue to use their land for subsistence activities, such as hunting and fishing, that do not generate revenue. The provision allowing indefinite restraints on alienation permits Alaskan Natives to stave off outside influences that may threaten their subsistence activities. Similarly, the provision that Alaskan Natives are entitled to the same federal protections as other Native Americans should be read to entitle Alaskan Natives to a baseline protection of their sovereignty and cultural activities. Moreover, as previously noted, the new self-determination goals of the ANCSA, which are hinted at in these new provisions, are specifically articulated in the Congressional findings preceding the 1991 Amendments.[200]

At the time *Venetie* was decided, the portion of the ANCSA's Congressional findings on which Justice Thomas relied upon in finding against Venetie's attempted assertion of its sovereign taxing power remained in place—i.e., 43 U.S.C.A. § 1601 still stated that the ANCSA was intended to accomplish the settlement of Native Alaskan land claims without creating any "permanent racially defined institutions."[201] However, the ANCSA's formerly assimilationist agenda, as embodied in this provision, had nonetheless been gutted by the amendments. While the Congressional finding technically remained in place, the 1991

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200 *See* Pub. L. 100-241, § 2(5), 101 Stat. 1788 (1988).

201 43 U.S.C.A. § 1601(b) (West 1998). *See also Venetie*, 1998 WL 75038 at *3. The practice of leaving in original provisions even after adding in apparently conflicting provisions is not unique to the Congressional findings portions of ANCSA and its amendments. For instance, 43 U.S.C.A. § 1620(d) (part of the original ANCSA) states that land owned by Alaskan Native Corporations will be exempt for property taxes for 20 years, provided that it is not developed or leased. 43 U.S.C.A. § 1620(d)(1) (West 1998). Section 1636(d), however, (which is part of the 1991 Amendments) provides that, "[n]otwithstanding any other provision of law . . . , all land . . . in Alaska conveyed by the Federal government pursuant to the Alaska Native Claims Settlement Act . . . to a Native . . . corporation . . . shall be exempt, so long as such land and interests are not developed or leased or sold . . . from . . . real property taxes . . . ." 43 U.S.C.A. § 1636(d)(1) (West 1998). Given the prevalence of this unusual practice, it is particularly deceptive to quote a provision of the original ANCSA in isolation, without reference to changes wrought by the amendments.

Amendments made the maintenance of permanent, racially defined institutions possible at the Native shareholders' option. Thus, regardless of whether the various amendments repealed any part of the original ANCSA, it is misleading to use ANCSA as it is presently constituted to stand for the assimilationist goal of dissolving tribes because of their racial character. To the contrary, the current ANCSA stands for the goals of self-determination and of letting Natives define their own objectives—even when such objectives include the permanent maintenance of tribal governments.

Justice Thomas later in the opinion, again indicated that the ANCSA stands for an assimilationist Congressional agenda when he stated that:

> ANCSA transferred reservation land to state-chartered corporations without any significant use restrictions, and 'with the goal of avoiding 'any permanent racially defined institutions, rights, privileges, or obligations.' . . . Because Congress contemplated that non-Natives could own the Venetie Reservation, and because the Tribe is free to use it for non-Indian purposes, we must conclude that the federal set-aside requirement is not met.[202]

Again, this description is misleading in light of the latest amendments to the ANCSA. While ANCSA originally contemplated that non-Indians could, and probably would, own stock in the Native corporations after 1991, the amendments contemplate that the corporations may be permanently limited to Native ownership. Moreover, the Court's focus on the Village's ability to use the land for non-Indian purposes reveals an attempt to force Indians to adopt quaint, archaic customs as the price for their sovereignty. Contrary to the Court's stereotypical view of Indians, an "Indian purpose" is nothing more than a purpose an Indian tribe has decided to employ. Thus, Indian tribes have engaged in cigarette sales, gambling, and oil, gas, and mineral mining on their reservations, as well as a myriad of other

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[202] *Venetie*, 1998 WL 75038 at *7.

activities.[203] Indian tribes have also leased portions of their reservations to non-Indians to enable them to engage in such activities.[204] Such activities have never been used to foreclose their right to exercise sovereign governmental powers on their reservations. On the contrary, having tribes decide for themselves what uses they will put their land to is a hallmark of self-determination, not a reason for foreclosing it. As previously noted, the 1991 Amendments specifically cite self-determination goals as a primary reason for their adoption.[205] It is thus incredibly ironic to use the increased options afforded tribes under the ANCSA and its amendments as a reason for foreclosing the exercise of tribal sovereignty.

Nowhere in the *Venetie* Court's decision does it discuss the significance of the amendments to the ANCSA. For the most part, it construes the ANCSA as an assimilationist piece of legislation—which it was originally enacted to be.[206] Once again, in construing legislation without reference to its amendments, the Court makes itself an obstacle to Congress' attempts to implement its current Indian law policies. It does so at the expense of tribal sovereignty and settled expectations generally.[207] Instead of permitting Congress and the United States as a whole to move beyond its mistakes with respect to its Indian policies, the Supreme Court forces the U.S. to continue to make those mistakes long after Congress has attempted to remedy them.

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203 *See* Washington v. Confederated Tribes of the Colville Indian Nation, 447 U.S. 134 (1980); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1986); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

204 *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

205 *See* Pub. L. 100-241, § 2(5), 101 Stat. 1788 (1988).

206 *See* BERGER, *supra* note 110, at 88.

207 Additionally, by treating tribes merely as components of the United States, with a relatively uncertain status, the Court does them the additional disservice of not recognizing and respecting their separate governmental status.

VI. PROBLEMS WITH THE COURT'S APPLICATION OF SOCIAL CONTRACT THEORY TO INDIAN TRIBES

As discussed in part II, the Supreme Court has routinely used social contract theory to justify its move from a territorially-based to a consent-based conception of tribal sovereignty. Indeed all of the cases discussed in part II.A, including *Oliphant*, *Montana*, *Brendale*, *Duro*, and *Strate*, as well as Stevens' dissent in *Merrion*, relied to some extent upon social contract language in rationalizing the opinions. This part argues that it is inappropriate to apply social contract theory to Indian tribes because social contract theory, as exemplified by John Rawls' *A Theory of Justice*[208] is: (1) a peculiarly Western doctrine that should not be forced upon non-Western peoples; (2) is premised upon the notion of a homogeneous culture which poses special problems for minority cultures;[209] and (3) because social contract theory is misapplied by the Court.

A. An Introduction to Rawls' Social Contract Theory

Rawls bases his theory of justice on two principles:

> First: each person is to have an equal right to the most extensive basic liberty compatible with similar

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[208] *See* RAWLS, *supra* note 21, at 11. I use Rawls' work as the primary example of social contract theory because he is probably the most prominent social contract theorist in America today and because the Court does not purport to be relying on any particular social contract theory. However, it is worth noting that others have suggested that the Court uses Lockean social contract theory to justify its Indian law decisions. *See* Deloria & Newton, *supra* note 11, at 74. Since Rawls merely builds on the work of earlier social contract theorists, it should not be misleading to rely on his work even if the Justices actually have relied upon an earlier social contract theory. *See* RAWLS, *supra* note 21, at 11.

[209] In making this argument, I rely substantially on Will Kymlicka's work. *See generally* WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE (1989). However, my disagreement with Rawls extends beyond Kymlicka's, as I question liberalism's usefulness with respect to minority cultures whereas Kymlicka simply seeks to modify Rawls' theory to accommodate such cultures. Moreover, as others have pointed out, Kymlicka appears to view aboriginal peoples as part of a multicultural United States, rather than as separate entities.

> liberty for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.[210]

The two principles are serially ordered such that the first is always given primacy and the second may never be used to justify compromising the first.[211] Moreover, the principles "distinguish between those aspects of the social system that define and secure the equal liberties of citizenship and those that specify and establish social and economic inequalities."[212]

Rawls arrives at these principles by imagining a hypothetical "initial situation" in which people would rationally choose these principles without knowing anything about their social situation in life, their talents, or their personal goals and beliefs.[213] Such a theory of justice is termed a social contract theory because it conceives of a just society as one that operates according to principles to which people would hypothetically have

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210 RAWLS, *supra* note 21, at 60. According to the second principle, "it must be reasonable for each relevant representative man [or woman] . . . to prefer his [or her] prospects with the inequality to his [or her] prospects without it." *Id.* at 64. Moreover, Rawls sees inequalities in terms of differences in allotment of primary social goods, which include, "rights and liberties, opportunities and powers, income and wealth... [and] a sense of one's own worth." *Id.* at 92. This conception of primary goods is in turn based on the liberal idea "that a person's good is determined by what is for him the most rational long-term plan of life given reasonably favorable circumstances [and that] [A] man is happy when he is more or less successful in the way of carrying out this plan." *Id.* at 92-93. Each person, moreover, is presumed to be rational and therefore able to personally choose the life plan which will give her the most happiness. *Id.* at 94, 129. Because the two principles are ultimately based on this idea that happiness stems from personal choices, all of which are entitled to equal deference, Rawls notes that "the principles of justice do not permit subsidizing universities and institutes, or opera and the theater, on the grounds that these institutions are intrinsically valuable." *Id.* at 332.

211 *See id.* at 61, 63.

212 *Id.* at 61.

213 *See id.* at 11-12, 137.

agreed in the initial situation.[214] Rawls imagines the parties in the initial situation to be "mutually disinterested"; in other words, no one in this position "has a reason to acquiesce in an enduring loss for himself in order to bring about a greater net balance of satisfaction."[215] Moreover, "the only particular facts which the parties [in the initial situation] know is that their society is subject to the circumstances of justice...[i]t is taken for granted, however, that they know the general facts about human society... [such as those regarding] political affairs and the principles of economic theory... [and] the basis of social organization and the laws of human psychology."[216] Rawls further sees race and sex discrimination as irrational from the point of view of those in the initial situation because they do not know what race or sex they will be and therefore do not know whether they will "hold a favored place in the social system which they [would be] willing to exploit to their advantage."[217] Furthermore, Rawls acknowledges that contemporary societies are not just in the sense in which he uses the term because the principles of justice are in substantial dispute. Nonetheless, Rawls sees such societies as conforming generally to some conception of justice.[218]

B. Why Rawls' Theory Should Not Be Applied to Indian Tribes

1. Some General Observations about the Rawlsian Framework That Suggest that It Is Peculiarly Applicable to Western Societies

The application of Rawlsian social contract theory to a non-Western society such as an Indian tribe, or to a multicultural society such as our own, is problematic for several reasons. First, Rawls' social contract theory is a Westernized white construct in that it is only feasible for whites to believe that they can abstract

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214 *See id.* at 13.

215 *Id.* at 13-14.

216 *Id.* at 137.

217 *Id.* at 149.

218 *Id.* at 5.

themselves beyond race as is necessary to imagine oneself in the initial situation. As Ian Haney López has pointed out, the identities of people of color tend to be inextricably linked to their race or ethnicity.[219] Thus, it is likely that only white Americans have the ability to imagine what it would be like in the initial situation. This suggests that an Indian, or another person from a close-knit ethnic group, would not be able to abide by Rawls' directive (i.e., that people imagine that they are not from whatever ethnic group they belong to) to extrapolate what principles of justice they would adopt. Indeed, people of color might well feel that, without their ethnicity, they lack the necessary reference point to make such a decision in the initial situation. This circumstance suggests that the principles of justice propounded by Rawls are in effect Western or white—although Rawls and fellow white readers are unlikely to realize this fact.[220]

Many of Rawls' presumptions about the initial situation support the hypothesis that it primarily serves white, or at least Western, interests. For example, he assumes that people in the original position will be mutually disinterested, though he acknowledges that a few of them may indeed be interested, perhaps for religious reasons.[221] This assumption is clearly based on the Western idea that happiness results from individual choice-making which helps to implement one's personal long-term plan.[222] This assumption, however, probably does not apply to those Indian tribes whose members are heavily interdependent for survival. For example, it is difficult to imagine that the Netsa'ii Gwich'in, who inhabit Venetie, a Native Village located in "one of the harshest environments in the world,"[223] would adhere to Rawls'

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219 *See* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 157, 179 (1996).

220 *See* STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 13 (1996) (noting that "the characteristics of the privileged group define the societal norm" and that white privilege remains largely invisible to whites).

221 RAWLS, *supra* note 21, at 129, 142.

222 *Id.* at 92-93.

223 Brief of Alaska Federation of Natives et al., *supra* note 102, at part I.A. (citations omitted).

assumption that people in the initial situation would be mutually disinterested if they were asked to imagine what the initial situation might look like. A system of justice built on such an assumption might ultimately result in the destruction of their entire tribe. Moreover, many non-Western cultures do not value individual choicemaking to the extent assumed in the Rawlsian framework.[224] Thus, assuming Rawls' theory is meant to facilitate individual happiness to the greatest extent possible, it will be useless to cultures with an entirely different conception of happiness. Similarly, Rawls' assumption that a system of justice should be built around a fair distribution of primary social goods—such as income and wealth, opportunities, and rights and liberties—in order to promote happiness (i.e., that people will want the largest share of these goods possible) is a Western notion.[225] If the primary goal of Indian tribal members was to maximize their individual access to goods, services, and power, they would probably cease to be tribal members and instead assimilate into white culture. Finally, Rawls' idea that aspects of society can be dichotomized into those that secure equal liberty and those that protect against economic and social inequality and his prioritization of these principles are particularly Western—even American.[226] As has been repeatedly pointed out in the international human rights context, it is impossible to take advantage of personal liberties without some minimum measure of economic security.[227] Only those who have become accustomed to a certain level of luxury will fail to see this; in the United States, this group is predominantly white.

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224 *Cf.* KYMLICKA, *supra* note 210, at 56-57 (describing communitarianism as a philosophy that defines individuals' happiness according to the achievements within their social roles but rejecting this philosophy for liberal reasons). *See also* Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1340-41 (1993) (describing critiques of liberal values which argue that they are peculiarly Western).

225 RAWLS, *supra* note 21, at 92.

226 *Id.* at 61.

227 *See, e.g.*, FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 61 (2nd ed. 1996) (citations omitted).

These general observations about Rawls' social contract theory suggest that it is less applicable, or not applicable at all, to Indian tribes. To the extent that Indian tribes have a different conception of happiness than mainstream American culture, have a different value system, and value interdependence over individualism, social contract theory—as currently construed—will fail them. Additionally, these observations indicate that Rawls' theory is problematic when applied to any pluralistic culture because some members will not adhere to the underlying assumptions of Rawls' theory.

2. Kymlicka's Criticisms of Rawls and His Assumption of Homogeneity

In *Liberalism, Community, and Culture*, the philosopher Will Kymlicka criticizes Rawls and liberalism for failing to give proper weight to the primary good of cultural membership.[228] He argues that liberalism and Rawls' social contract theory can and should be modified to include cultural membership as a primary social good. Kymlicka suggests that Rawls' theory implicitly permits such a modification because it places a central importance on individualized choicemaking and because cultural membership provides the necessary context for such individualized choicemaking.[229] Additionally, Kymlicka sees the value of cultural membership to be implicit in Rawls' emphasis on the primary good of self-respect.[230] According to Kymlicka, Rawls fails to recognize the importance of cultural membership because he operates on the assumption that society is homogeneous. In a homogeneous society, cultural membership would not need special protection because no one's cultural membership would be in jeopardy.[231]

Furthermore, Kymlicka believes that, under Rawls' view, special protections for tribal culture would be justified (once cultural membership was recognized as a primary good) because

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228 *See* KYMLICKA, *supra* note 210, at 152, 164.

229 *See id.* at 164-66.

230 *See id.* at 164.

231 *See id.* at 177-78.

"the very existence of aboriginal cultural communities is vulnerable to the decisions of the non-aboriginal majority around them."[232] As a result of this condition, aboriginal peoples currently "have to spend their resources on securing the cultural membership which makes sense of their lives, something which non-aboriginal people get for free."[233] Having this added expense in turn depletes the resources which Indian tribal members can spend on pursuing their individual life plans and thus reduces their potential to achieve happiness.[234] Finally, Kymlicka believes that it is not appropriate for the mainstream culture to encourage or help facilitate the assimilation of tribal members into white culture in order to eliminate this expense because "cultural membership seems crucial to personal agency and development: when the individual is stripped of her cultural heritage, her development becomes stunted. And so respecting people's own cultural membership and facilitating their transition to another culture are not equally legitimate options."[235]

Kymlicka's critique of Rawls is useful because it has the crucial benefit of justifying the protection of Indian tribes from assimilation. Additionally, because it uses a liberal framework to justify special rights for Indian tribes, Supreme Court Justices and other members of the establishment are likely to perceive it as more legitimate than many of the more radical critiques of Rawls' theory. Another benefit is that it argues against the insistence that Indian tribes retain their original customs as the price for their sovereignty.[236] However, Kymlicka's focus on tribal members' choicemaking is itself problematic, as is his attempt to preserve

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232 *Id.* at 187.

233 *Id.*

234 *See id.* at 188-89.

235 *Id.* at 176.

236 This trend was evident in *Venetie*, *Kiowa Tribe*, and *Montana*; in all three cases the Court used the fact that the tribes' current customs and uses of their sovereignty differed from their original customs and uses as an excuse to abrogate tribal sovereignty. Kymlicka properly points out that such paternalistic judgments violate social contract theory because they thwart tribal members' choicemaking ability. *See id.* at 167.

liberalism generally.[237] In focusing on individualized choicemaking, Kymlicka leaves in place Rawls' adoption of a Western conception of happiness and thereby does not object to the Supreme Court's imposition of it onto tribal cultures. Furthermore, this focus limits the extent to which Kymlicka's theory may be used to promote self-determination.[238] As Kymlicka suggests, once individualized choicemaking is recognized as a primary good, tribal cultures may only be protected to the extent that they facilitate and encourage individual choicemaking; thus, such cultures may not then choose not to accord primary weight to this value. If they do so, they violate the individual's ability to freely chose and in turn forfeit their claim to protection.[239] Moreover, according to Kymlicka, tribal cultures may only temporarily prohibit individual choice when the culture is in danger of disintegration. All other attempts to restrict individualized choicemaking are forbidden and presumably justify the federal government's withdrawal of special protections.[240]

As a person who understands tribal culture and self-determination to be intrinsically valuable, I contend that Kymlicka's view of tribal sovereignty, as embodied in *Liberalism, Community, and Culture*, is inherently problematic. First, Kymlicka's notion that tribal cultures are valuable only as contexts for choicemaking is a Western construct; thus Kymlicka's view is tantamount to saying that tribal culture is only valuable insofar as

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237 *But see* Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 673-74 (1985) (arguing that modern liberals' emphasis on individual pursuit of happiness and their failure to choose between different conceptions of the good is in fact contrary to traditional liberalism); Richard Spaulding, *Peoples as National Minorities: A Review of Will Kymlicka's Arguments for Aboriginal Rights from a Self-Determination Perspective*, 47 U. OF TORONTO L.J. 35, 55-71 (1997) (arguing that Kymlicka subsequently modified his view so that it is now less problematic for Indian tribes).

238 *Cf.* Scott Cummings, *Affirmative Action and the Rhetoric of Individual Rights: Reclaiming Liberalism as a Color-Conscious Theory*, 13 HARV. BLACKLETTER J. 183, 216 (1997) (noting that Kymlicka "sacrifices the richness of culture for an abstract commitment to freedom").

239 KYMLICKA, *supra* note 210, at 170, 196.

240 *See id.* at 169-71.

it serves Western purposes.[241] Such a view can ultimately be used to justify a considerable amount of monitoring of tribal cultures to ensure that they are facilitating choicemaking, which in turn could lead to forced assimilation. Furthermore, even if primary value is placed on choicemaking, it is not clear that this concern justifies interference with tribal cultures because tribal members remain free to leave the reservation and join mainstream American society should they find their personal philosophies more in accord with it. Although such voluntary assimilation undoubtedly has its costs, however, on the whole it seems less costly than deleterious interference with the workings of tribal culture—except perhaps in very extreme circumstances. Thus, although Kymlicka's theory is useful in its attempt to justify governmental support for tribal culture and in its defense of allowing tribes to rule their territories without nonmember input, it fails to ameliorate concerns regarding the imposition of Western values onto Indian tribes.

C. How Social Contract Theory is Being Misapplied by the Court

As noted in part IV.A, the social contract requirement that an individual consent to governmental power is purely hypothetical. Actual consent is not necessary; the relevant question is whether a rational individual would have consented.[242] Moreover, Rawls has acknowledged that contemporary societies are not just by his social contract standards. This is mainly because the principles of justice are in dispute[243] and because, as discussed in part II.A.3, mainstream American society itself has not lived up to the ideals of democratic justice in the past.

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241 Patrick Macklem has pointed out that Kymlicka's view is also problematic for Indian tribes because it incorporates tribes into the nation-state, when many tribes see themselves as separate from the nation-state. Macklem, *supra* note 225, at 1354. Richard Spaulding argues that Kymlicka has since modified his view so that it no longer presents this problem. Spaulding, *supra* note 238, at 55.

242 *See* RAWLS, *supra* note 21, at 11-12.

243 *Id.* at 5.

The first way that the Supreme Court misapplies social contract theory in its Indian law decisions is by looking for actual consent by nonmembers. Such a search for actual consent was evident in *Strate*, where the Court looked to the scope of the contract to determine whether it could be read to include the tort claim at issue.[244] It is also evident—though to a lesser degree—in the Stevens' dissent in *Merrion*,[245] in *Kiowa Tribe*,[246] in *Montana*,[247] in the Stevens plurality in *Brendale*,[248] in *Duro*,[249] and in *Oliphant*.[250] Indeed, every time the Supreme Court equates tribal membership with consent, it is looking for an indication of consent to be bound. Not only is this search for literal consent impossible to square with social contract theory, on which the Court implicitly relies, but such actual consent is a much more stringent requirement than the Court is willing to impose on our own state and federal governments in determining the reach of their jurisdiction.[251] It is unfair for the Court to enforce a more stringent conception of Western justice on Indian tribes than it is willing to enforce upon the rest of the nation.

Also present in the opinions discussed in part II.A is the idea that no rational nonmember would consent to tribal government. We see this trend in cases where the Court notes the extent to which nonmembers are present on the reservation, this suggests that a trial convened by a tribal court would be alien to a nonmember, or points out that tribes are not bound by all the Bill of Rights protections.[252] In these cases, the Supreme Court appears to be making biased judgments about tribal governments based upon racial stereotypes. For example, the court may be concluding that because the tribal governments are run by non-whites, they

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244 Strate v. A-1 Contractors, 520 U.S. 438, 457 (1997).

245 *Merrion*, 455 U.S. at 173 (Stevens, J., dissenting).

246 *Kiowa Tribe*, 1198 U.S. LEXIS 3406, at *13.

247 *Montana*, 450 U.S. at 566.

248 *Brendale*, 492 U.S. at 445.

249 Duro v. Reina, 495 U.S. 676, 679, 688 (1990).

250 Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 193-94 (1978).

251 *See* Part II.A.3 *supra.*

252 Tribes are bound by most Bill of Rights protections under the Indian Civil Rights Act. 25 U.S.C.A. §§ 1301-03 (West 1998).

may not be fair or neutral; therefore, the Court seems to suggest that it would be irrational to consent to tribal jurisdiction. The fact that the Supreme Court does not feel constrained to consider these issues when determining whether an alien can be tried in American courts reinforces the conclusion that the Court is using a racist double standard to evaluate tribal courts. While the question of the rationality of hypothetical consent does accord with Rawlsian social contract theory, Rawls' theory was meant to be used in structuring a just society or in figuring out what justice entails. It was not meant to be enforced as a law by a concededly unjust society against much smaller, vulnerable cultures. Since it would be irrational under Rawls' theory for any poor person or member of a minority group to consent to our federal and state governments, it is unfair to consider Indian tribes to be bound by the rational consent requirement implicit in Rawls social contract theory.[253]

Yet another problem with the Court's application of the hypothetical consent requirement to tribal contexts is that the Court never stops to consider whether Indian tribal members would have rationally consented to the United States government. In fact, as discussed earlier, the Court seems to adopt an irrebuttable presumption that everyone (i.e., within the borders of the U.S., has consented to government by the United States—despite its

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[253] This conclusion is based on both of Rawls' principles of justice, but more so on the second one. Since poor people on welfare and people of color are constantly expected to bear burdens in the United States that benefit those who are better off (in the form of tax breaks or increased monopolization of jobs), Rawls' second principle of justice is constantly violated in the United States by both state and federal governments.

Rawls' first principle is also violated any time an individual is denied a basic liberty such as the right to vote or serve on a jury. *See* Part.II.A.3 *supra.* Such denials were commonplace in the United States in the past and some remain so; since the Court has not traditionally viewed such denials of basic liberties to divest state and federal courts of jurisdiction, it makes little sense to view them as divesting Indian tribes of jurisdiction. While the U.S. Supreme Court has occasionally upheld Equal Protection challenges based on racist exclusion of members of the defendant's race from jury service, *see, e.g.,* Batson v. Kentucky, 476 U.S. 79 (1986), it has never held that a state government or the federal government lacked jurisdiction over an entire class of people because it had systematically denied members of their group basic liberties.

unfairness to minority groups. But suppose those in the initial situation were asked to assume that they might turn out to be non-mainstream members of a culture and subject to severe repression and hostile or indifferent treatment by the culturally dominant mainstream majority. Under Rawls' view, no rational person in the initial situation would consent to such an outcome because of the possibility that she would end up suffering the loss of a primary good. This is why Rawls' statements that race and sex discrimination are irrational and that no one in the initial situation has reason to endure personal sacrifice so that others might benefit.[254] Thus, social contract theory should not be applied to Indian tribes based upon the hypothetical rational consent it mistakenly construes Indian tribes to have given. The Court errs in its application of social contract theory to Indian tribes when it takes the consent requirement literally and when it implicitly concludes that it would be irrational for nonmembers to consent to tribal jurisdiction. Finally, the Court's irrebuttable presumptions that state and federal governments are per se just, and that tribal governments are per se unjust are racist—especially in light of the blatant injustices perpetrated by the United States government against Indian tribes.

In sum, Rawlsian social contract theory should not be applied to Indian tribes because it is a foreign construct to them, it is based on assumptions that are not applicable to their situation, and it is based upon the assumption of a homogeneous society. Even if one remains unconvinced by these arguments, and nonetheless would opt to apply social contract theory to Indian tribes, it remains the case that the Supreme Court has erred in its application of social contract theory to Indian tribes—i.e., it imposes a double standard in its treatment of tribal and nontribal governments.

V. THE COURT'S USE OF LIBERAL EQUALITY THEORY TO DEBASE TRIBAL SOVEREIGNTY

As we saw in *Kiowa Tribe* and *Venetie*, the Supreme Court has begun to conceptualize Indian tribal sovereignty as an

254 RAWLS, *supra* note 21, at 13-14, 149.

inherently suspect, race-based right, which will only be preserved in the face of some sort of special justification.[255] Indeed, the Court's emerging analysis of tribal sovereignty appears to be quite similar to the strict scrutiny test the Supreme Court uses to evaluate race-conscious legislation (e.g., affirmative action programs). For example, in *Venetie*, the Court equated a sovereign tribe with a racially-defined institution and expressed discomfort with the tribe's continued ability to exercise sovereign powers because of its racial character, in addition it held that only weak and dependent tribes could take advantage of the special right of sovereignty—at least where Congress has not unequivocally expressed a contrary intent. This analysis mirrors the Equal Protection analysis that the Supreme Court uses to evaluate governmental affirmative action plans; in other words, it implicitly incorporates the notion that tribal sovereignty is race-based and therefore inherently suspect and the idea that tribal sovereignty is a remedial measure which must be accorded only on a temporary basis.[256]

Similarly, in *Kiowa Tribe*, the Supreme Court espoused the view that sovereign immunity should only be accorded to weak and defenseless tribes and that it should be revoked once an Indian tribe has become sophisticated enough in business transactions to no longer require protection from states. In conceiving of tribal sovereign immunity in this manner, the *Kiowa Tribe* Court again expressed a view of tribal sovereignty that is similar to its strict scrutiny Equal Protection Clause analysis (i.e., in that it views tribal sovereignty as a race-based right that is inherently suspect

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[255] Because tribal sovereignty is properly viewed as the rightful exercise of a tribe's governmental power, but has been perverted by the Court into indicia of its helplessness, I have called this trend the "debasement of tribal sovereignty." By using the term "debasement," however, I do not mean to disparage affirmative action programs which are of inestimable importance in their own right. Instead, I wish only to point out that the Court has begun to treat tribal sovereignty with the same disrespect it accords affirmative action programs.

[256] *See, e.g,* Adarand Construction v. Pena, 515 U.S. 500 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). *See also* United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (holding that, in the private sector context, affirmative action plans must be temporary measures).

and therefore requires special justification—such as being immediately necessary to protect an Indian tribe from extinction).

The race-based Equal Protection analysis on which the Supreme Court has begun to draw in the Indian law context is derived from an aspect of liberalism called formal equality theory. Generally, as its applied in the constitutional realm, the doctrine is called color-blind constitutionalism.[257] As some academics have argued that formal equality theory is based on the idea that "[r]acial groups are fungible."[258] As applied to the Equal Protection Clause, formal equality theory:

> does not formally acknowledge social groups, such as blacks; nor does it offer any special dispensation for conduct that benefits a disadvantaged group. It only knows criteria or classifications; and the color black is as much a racial criterion as the color white. The regime it introduces is a symmetrical one of "color blindness," making the criterion of color, any color, presumptively impermissible.[259]

Put simply, formal equality theory equates racial preferences for subordinated groups with racist actions perpetrated by members of the dominant group. Such analysis poses problems for disadvantaged groups because, by abstracting race-based actions from their relevant social context, it effectively prohibits the preferential treatment that subordinated groups need to compete on an equal basis with privileged whites.[260]

Moreover, several commentators have pointed out that the effect of liberal equality doctrine is to preserve the dominant norm

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[257] *See* Gotanda, *supra* note 117, at 262, 264; Fiss, *supra* note 117, at 126-29; Cummings, *supra* note 239, at 190-91; Ann C. Scales, *Emergence of Feminist Jurisprudence: An Essay*, *in* FEMINIST LEGAL THEORY: FOUNDATIONS 40, 40 (D. Kelly Weisberg, ed., 1993). Collectively, I will refer to formal equality theory, color-blind constitutionalism, and the Court's current Equal Protection analysis as "liberal equality doctrine."

[258] Gotanda, *supra* note 117, at 265.

[259] Fiss, *supra* note 117, at 129.

[260] *See* Gotanda, *supra* note 117, at 266, 268. *See also* Fiss, *supra* note 117, at 136.

and leave the status quo unchallenged.[261] This result occurs because liberal equality doctrine views discrimination of any cognizable type as a problem between individuals rather than as a structural problem that requires a large-scale modification of society[262] and because society is currently organized according to white racist constructs.[263] An additional reason that liberal equality theory has the effect of preserving the status quo is that it only requires similar treatment of those who are similarly situated: people in dissimilar circumstances need not be treated alike.[264] Because liberal equality doctrine fails to challenge the underlying norms of society, its end result for subordinated groups is assimilation into the white male norm.[265]

As seen above, the Supreme Court's use of formal equality theory and color-blind constitutionalism unfairly disadvantages subordinated groups. In conceiving of racial preferences as the moral and legal equivalents of state-enforced segregation, liberal equality doctrine sanctions current social inequities and outlaws most attempts to remedy them. Additionally, in abstracting individuals from their relevant social context and from the subordination or privilege they experience on a day-to-day basis, liberal equality doctrine delegitimizes the experiences of people of color and masks the existence of white privilege.[266] Finally, the application of this doctrine to subordinated groups is not only unfair but also contrary to the purposes of the Equal Protection Clause.[267] Since race is socially constructed, a legal analysis of

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[261] *See* Gotanda, *supra* note 117, at 266, 271; Scales, *supra* note 258, at 60; Cummings, *supra* note 239, at 237; HANEY F. LÓPEZ, *supra* note 220, at 177.

[262] *See* Gotanda, *supra* note 117, at 265. *See also* Scales, *supra* note 258, at 48; Linda J. Krieger and Patricia N. Cooney, *The* Miller-Wohl *Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality, in* FEMINIST LEGAL THEORY: FOUNDATIONS 156, 166-67 (D. Kelly Weisberg, ed., 1993).

[263] *See* Cummings, *supra* note 239, at 237.

[264] *See* Lucinda M. Finley, *Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate, in* FEMINIST LEGAL THEORY: FOUNDATIONS 190, 195-202 (D. Kelly Weisberg, ed., 1993).

[265] *See* Gotanda, *supra* note 117, at 269-71.

[266] *See* HANEY LÓPEZ, *supra* note 220, at 159-71, 179.

[267] *See* Fiss, *supra* note 117, at 136 (noting that "it would be one of the cruelest ironies to interpret . . . [the Equal Protection] Clause in a . . . way that linked–in

race-conscious action that is divorced from the social context in which it occurred is illogical.

While the Supreme Court's approach to Equal Protection analysis is problematic for all subordinated groups, it is especially so for Indian tribes which were formerly protected from assimilation by a fairly robust concept of tribal sovereignty. As the Court comes to view tribal sovereignty as a possible violation of the Equal Protection Clause, it sets in place the machinery of assimilation. Without the governmental powers necessary to perpetuate their own cultures, Indian tribes will not be able to resist the pull of assimilation. Some other problems resulting from the application of liberal equality doctrine to Indian tribes include its focus on individual rather than collective rights[268] and the requirement that Indians attempting to invoke the protection of liberal equality theory be similarly situated to whites.[269]

In addition to the reasons mentioned above, there are compelling reasons for not applying the doctrine to Indian tribes at all—irrespective of whether it continues to be applied to other groups. First, as mentioned earlier in this paper, Supreme Court precedent itself maintains that tribes are not racial groups.[270] Additionally, it has been argued that Indian tribes should be understood as peoples under international law and therefore should

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some tight, inextricable fashion–the judgments about the preferential and exclusionary practices"). *See also* KYMLICKA, *supra* note 210, at 215 (arguing that "[m]inority rights prevent rather than create threats to the state").

[268] *See, e.g.,* Vernon Van Dyke, *Justice as Fairness: for Groups?*, 69 AM. POL. SCI. REV. 607, 612 (June 1975).

[269] *See, e.g.,* Lyng v. Northwest Indian Cemetery Protection Association, 485 U.S. 439 (1988) (holding that the Free Exercise Clause does not protect Indians from having their sacred spaces damaged by the United States government because the Clause only protects against governmental coercion of individuals). Thus, in some sense, the reason that the Tribe in *Lyng* could not invoke the protection of the Clause was because it was not similarly situated to whites with respect to its religious practices.

[270] *See* Morton v. Mancari, 417 U.S. 535 (1974). *But see* Deloria and Newton, *supra* note 11, at 72-73 (describing the Supreme Court's recent fixation on whether Indians are a racial group as a "disturbing trend" and noting the disastrous results the trend will likely have on Indians, many of whom do not belong to any tribe and may be even less economically secure than those Indians who can claim the benefits of tribal membership).

be accorded the right to self-determination as a matter of international law.[271] This approach would render the Equal Protection Clause inapplicable to Indian tribes altogether, making tribes both eligible to receive special rights from the United States government based on their status as peoples and free from the constraints of liberal equality doctrine within their own borders.[272]

Similarly, Patrick Macklem has argued that "[b]ecause tribal governments do not derive their authority from federal or state sources, their actions need not conform to constitutional constraints on federal and state authority."[273] In other words, the facts that tribes were present on the North American continent before the establishment of the United States and that they retain some of their preexisting sovereign powers make them exempt from the Equal Protection Clause and other limitations emanating from United States' governmental power.[274] Lastly, others have argued that Indian tribes' prior occupancy, standing alone, justifies their continued exercise of sovereign power and their exemption from federal constitutional requirements.[275]

Whether one focuses on the illegitimacy of liberal equality doctrine or on its inapplicability to Indian tribes, it is clear that the Supreme Court's increasing reliance on liberal equality doctrine in abrogating tribal sovereignty is dangerous to tribal sovereignty and integrity. The continued application of this doctrine to tribal sovereignty issues will lead to the complete abrogation of tribal sovereignty by the Court, in contravention of Congress' announced self-determination goals for tribal governments. Involuntary assimilation into white culture will inevitably follow such a wholesale abrogation of tribal sovereignty.

Forced assimilation has been implemented before with disastrous results. As Gotanda points out, it is another form of

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271 *See* David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 827-30 (1991).

272 *Id.* at 830-50.

273 Macklem, *supra* note 225, at 1318.

274 *Id.*

275 *See id.* at 1327-28 (discussing the prior-occupancy justification as employed by other commentators).

cultural genocide.[276] As such, members of a democracy should be vehemently opposed to it. Furthermore, the U.S. has an obligation to treat Indian tribes—and its peoples—with respect and to stop repeating its previous misguided policies with Indian tribes. After all, if one closely examines United States history, she will find that the federal government—with the help of many of its citizen's—invaded Indian Country, only to ruthlessly massacre Indians, steal their land, and then try to assimilate them into a radically foreign culture. While Congress has taken steps towards reconciling past wrongs and charting a new course, the activist Court seems determined to eradicate the progress made in this area. In sum, the Court has begun a behind-the-scenes debasement of tribal sovereignty. Its debasement is based on a highly questionably conflation of Indian racial status with that of other minority groups. Moreover, liberal equality theory has merely become a tool for prolonging the oppression of subordinated groups, and therefore, should be abandoned or significantly modified.

VI. CONCLUSION

During the passed two decades, the Supreme Court has increasingly divested tribal sovereignty on its own initiative. Recently, the Court has begun debasing tribal sovereignty by construing it as an inherently suspect, race-based entitlement. These trends have been implemented by unusually pernicious means, including selectively ignoring the Indian law canons of construction and construing statutes without reference to subsequent legislative history and changes in legislative policy. Both trends can be traced, in part, to liberal doctrines of questionable applicability in the Indian law context. More specifically, the divestment of tribal sovereignty can be traced, in large part, to the Court's reliance on social contract theory to justify governmental exercises of authority. The debasement of tribal sovereignty can be traced to the Court's espousal of liberal equality doctrine. However, these doctrines have no place in Indian law. Lastly, these doctrines are of dubious legitimacy even outside of the Indian law context, because of the significant

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[276] Gotanda, *supra* note 117, at 270-71.

problems in their application to any subordinated group or multicultural society. They should be forsaken by the Supreme Court.