Indiana Law Journal

Volume 95 | Issue 1 Article 3

Winter 2020

# Redefining Tribal Sovereignty for the Era of Fundamental Rights

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# Redefining Tribal Sovereignty for the Era of Fundamental Rights

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*This Article explains a longstanding problem in federal Indian law. For two centuries, the U.S. Supreme Court has repeatedly acknowledged the retained, inherent sovereignty of American Indian tribes. But more recently, the Court has developed the implicit-divestiture theory to deny tribal governments criminal and civil jurisdiction over nonmembers, even with respect to activities on tribal lands. Legal scholars have puzzled over this move from a territorial-based definition of tribal sovereignty to a membership-based definition; they have variously explained it as the Court's abandonment of the foundational principles of Indian law, the product of the Court's indifference or even racist hostility to Indians, or a simple lack of doctrinal coherence in the Court's decisions. This Article provides a different explanation. The implicit-divestiture cases represent the Court's effort to address a trilemma among three incompatible objectives: preservation of the traditional, territorial-based definition of tribal sovereignty, preservation of tribal governments' placement outside the federalist structure of the constitutional order, and preservation of fundamental rights. The Court has chosen to resolve the trilemma by redefining tribal sovereignty to deny tribal jurisdiction over nonmembers. Whether right or wrong, the implicit-divestiture theory is the Court's good-faith attempt to preserve as much tribal sovereignty as possible without infringing on fundamental rights or forcing tribal governments into the federalist structure.*

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* Professor, University of Virginia School of Law. For comments and criticisms, many thanks to Matthew L.M. Fletcher, John Harrison, Caleb Nelson, and Cynthia Nicoletti. *Ma soprattutto grazie a* Diana Finzi.

## INTRODUCTION

Jones murders Smith. What government has jurisdiction to prosecute Jones? The answer usually includes, at a minimum, the government in whose territory the crime occurred. If Jones murders Smith in the District of Columbia, the U.S. government has criminal jurisdiction; the citizenship and even residence of Jones and Smith are irrelevant. Either or both might be citizens or residents of the United States; either or both might be citizens or residents of Canada or France or the Republic of South Africa. Their physical presence in the District of Columbia at the time of the murder is dispositive for the U.S. government's criminal jurisdiction (setting aside the complication that Jones might leave the District of Columbia or even the United States after the murder but before the trial). The same is true if Jones murders Smith in Massachusetts or California. In that case, Massachusetts or California has jurisdiction to prosecute Jones. Again, the citizenship and residence of Jones and Smith are beside the point; all that matters is that Jones murdered Smith within the borders of Massachusetts or California (and, again, that Jones remains in or can be forced to return to Massachusetts or California). Ordinarily, the reasoning behind this is as straightforward as the result. Ordinarily, a government has sovereignty over everyone and everything within its territory, and ordinarily, that sovereignty includes the general power to exercise criminal and civil jurisdiction. But there is an entirely different set of rules for Indian tribal governments.

Beginning in 1978 and continuing to the present, the U.S. Supreme Court has steadily narrowed tribal criminal and civil jurisdiction over individuals who are not tribal members and entities that are not owned or controlled by tribal members.[1]

1. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 226–42 (Nell Jessup Newton et al. eds.,

Under current law, an American Indian tribe generally may not assert criminal jurisdiction over a non-Indian, and it may assert civil jurisdiction over a nonmember only in limited circumstances. Increasingly, these restrictions do not turn on whether the underlying activity takes place within Indian country. In other words, the trajectory of the Supreme Court's case law is to define tribal governmental authority not in terms of *territory* but in terms of *membership*.[2] This development troubles legal scholars.[3] If Indian tribal governments are sovereign—a point made repeatedly by the Supreme Court[4]—why should tribal governments not have full criminal and civil jurisdiction over their territories, as is true for other sovereigns? Why should tribal sovereignty be defined differently?

For a very long time the Supreme Court *did* define tribal sovereignty and tribal jurisdiction in terms of territory. In its 1832 decision in *Worcester v. Georgia*, the Supreme Court ruled that state law stops at the border of Indian country[5] and that, within that border, tribal sovereignty prevails, subject only to whatever authority might be given up by treaty with the federal government or taken away by federal statute.[6] That baseline rule of retained, inherent tribal sovereignty and tribal jurisdiction over everyone and everything within Indian country generally endured for a century and a half.[7] As a member of the Supreme Court put the point during

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2012); *see also* CONG. RESEARCH SERV., RL43324, TRIBAL JURISDICTION OVER NONMEMBERS: A LEGAL OVERVIEW (2013). An important note: The Supreme Court's cases on tribal jurisdiction do not always distinguish clearly between adjudicative and prescriptive jurisdiction, particularly on the civil side. Where feasible, I distinguish between "civil-adjudicative jurisdiction" and "civil-regulatory jurisdiction." But often, I simply elide the two with the admittedly ambiguous word "jurisdiction."

2. *See infra* Section I.A.

3. *See infra* Part II.

4. As recently as 2016, the Supreme Court reaffirmed, in dicta, the "pre-existing sovereignty" of the Indian tribes. Puerto Rico v. Valle, 136 S. Ct. 1863, 1872 (2016).

5. Federal Indian law does not provide a comprehensive definition of "Indian country." For purposes of federal criminal jurisdiction, "Indian country" currently is defined as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2012). Thus, Indian country includes all lands within the boundaries of a reservation, even lands that are owned in fee simple by non-Indians, and all lands outside the boundaries of a reservation that are owned in fee simple by an Indian tribe or by members of an Indian tribe. By common practice, the definition in the federal criminal code is used in civil matters as well. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 184. In this Article, I use the terms "Indian country" and "reservation" interchangeably, and I use the term "tribal lands" to refer to land within a reservation (Indian country) that is owned by the tribe, by tribal members, or by the United States in trust for the benefit of the tribe or tribal members.

6. 31 U.S. (6 Pet.) 515, 561 (1832).

7. *See, e.g.*, Transcript of Oral Argument at 36, United States v. Lara, 531 U.S. 193 (2004).

oral argument just fifteen years ago: "[I]f you go back a couple hundred years, they [the tribes] clearly had their own inherent power to try nonmembers."[8] But in 1978, the Supreme Court, with no forewarning, held in *Oliphant v. Suquamish Indian Tribe* that a tribal government cannot assert criminal jurisdiction over a non-Indian, even for a crime committed within Indian country.[9]

Over the following two decades, the Supreme Court extended the *Oliphant* reasoning to deny tribes criminal, civil-regulatory, and civil-adjudicative jurisdiction over nonmember Indians.[10] Congress has enacted limited reversals of those decisions on the criminal side but otherwise has given the Court a wide berth.[11] As recently as 2016, the Supreme Court came within a single vote of denying tribes all civil-adjudicative jurisdiction over nonmembers.[12] This change from the traditional, territorial-based definition of tribal sovereignty to the contemporary, membership-based definition presents a vexing question for federal Indian law—and, in the view of advocates for tribal interests, it amounts to a very serious assault on tribal sovereignty.[13] The Supreme Court itself has not settled on a single explanation for why tribal sovereignty should be so different from nontribal sovereignty.[14] The Court often treats the point as though it were self-evident; other times, the Court offers shifting or contradictory explanations for it.[15]

Legal scholars have spent considerable time and effort on the puzzle.[16] Several analyses argue that the Supreme Court has abandoned the foundational principles of

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8. *Id.*

9. 435 U.S. 191, 195 (1978).

10. Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (civil-adjudicative jurisdiction); Duro v. Reina, 495 U.S. 676, 679 (1990) (criminal jurisdiction); Montana v. United States, 450 U.S. 544, 565–67 (1981) (civil-regulatory jurisdiction).

11. *See* 25 U.S.C. § 1301(2) (2012) (amendment to the Indian Civil Rights Act of 1968, made in 1991, restoring tribal criminal jurisdiction over nonmember Indians); 25 U.S.C. § 1304 (2013) (amendment made by the Violence Against Women Reauthorization Act of 2013, restoring tribal criminal jurisdiction over non-Indians for certain domestic-violence and dating-violence offenses).

12. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (per curiam) (upholding tribal civil-adjudicative jurisdiction over nonmember defendant), *aff'g by an equally divided court sub nom.* Dolgencorp v. Miss. Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014).

13. *See infra* Part II.

14. *See infra* Section I.A.

15. *See infra* Section I.A.

16. *See, e.g.*, DEWI IOAN BALL, THE EROSION OF TRIBAL POWER: THE SUPREME COURT'S SILENT REVOLUTION (2016); DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT (1997); CHARLES WILKINSON, BLOOD STRUGGLE (2005); ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005); Russell Lawrence Barsh and James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979); Bethany R. Berger, *Hope for Indian Tribes in the U.S. Supreme Court?:* Menominee*,* Nebraska v. Parker*,* Bryant*,* Dollar General *. . . and Beyond*, 2017 U. ILL. L. REV. 1901; Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005); Bethany R. Berger, *Liberalism and Republicanism in Federal Indian Law*, 38 CONN. L. REV. 813 (2006); Robert N. Clinton, *Peyote and Judicial Political Activism: Neo-Colonialism and the Supreme Court's*

*New Indian Law*, 38 FED. B. NEWS & J. 92 (1991); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002); Richard B. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479 (1979); 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); N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994); N. Bruce Duthu, *The Thurgood Marshall Papers and the Quest for a Principled Theory of Tribal Sovereignty: Fueling the Fires of Tribal/State Conflict*, 21 VT. L. REV. 47 (1996); Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779 (2014); Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121 (2006); Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499 (2013); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L.J. 1 (1999); Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137 (1990); Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of* Lone Wolf, 38 TULSA L. REV. 5 (2002); Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433 (2005); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573 (1996); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996); L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty After* Atkinson *and* Hicks, 37 NEW ENG. L. REV. 669 (2003); Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187 (2010); John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the* Cohen's Handbook *Cutting-Room Floor*, 38 CONN. L. REV. 731 (2006); Jacob T. Levy, *Three Perversities of Indian Law*, 12 TEX. REV. L. & POL. 329 (2008); Peter C. Maxfield, Oliphant v. Suquamish Tribe*: The Whole is Greater than the Sum of Its Parts*, 19 J. CONTEMP. L. 391 (1993); Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48 (2010); Judith V. Royster, Montana *at the Crossroads*, 38 CONN. L. REV. 631 (2006); Thomas P. Schlosser, *Tribal Civil Jurisdiction over Nonmembers*, 37 TULSA L. REV. 573 (2001); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003); Alex Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77 (2014); Alex Tallchief Skibine, Duro v. Reina *and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CALIF. L. REV. 767 (1993); Alex Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV'T L. REV. 49 (2017); Alex Tallchief Skibine, *Making Sense out of* Nevada v. Hicks*: A Reinterpretation*, 14 ST. THOMAS L. REV. 347 (2001); Alex Tallchief Skibine, *Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination*, 1995 UTAH L. REV. 1105; Alex Tallchief Skibine, *Redefining the Status of Indian Tribes within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667 (2006); Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267 (2000); Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1 (2003); Catherine T. Struve, *How Bad Law Made a Hard Case Easy:*

federal Indian law, including the concept of retained, inherent tribal sovereignty.[17] On these accounts, towering figures from the past—primarily Chief Justice John Marshall, who wrote the seminal opinions on the relationship of Indian tribes to the federal and state governments, and Felix Cohen, who first restated federal Indian law as a coherent whole in the twentieth century—had developed a compelling legal model of tribal sovereignty under which tribal governments are subordinate only to the express will of Congress. But, these accounts continue, the contemporary Supreme Court's unwillingness or inability to grasp the necessary implications of those foundational principles has led the Court to the membership-based definition of tribal sovereignty.

More pointed analyses argue that the Supreme Court is affirmatively hostile to tribes and tribal sovereignty.[18] Whether because they generally discount the rights and the interests of all racial and ethnic minorities, because they consider Indian tribes to be an anomaly within the federalist system, or because the justices are unapologetic racists, the Burger, Rehnquist, and Roberts Courts, these accounts maintain, have actively undermined tribal sovereignty through what historian Ned Blackhawk calls "common law colonialism."[19] Other analyses conclude that the whole corpus of the Supreme Court's Indian law is simply incoherent.[20] There is no point, these accounts argue, in trying to find any conceptual order in the decisional chaos.

Perhaps these explanations are correct in part, but none is correct in whole. To a greater or lesser extent, these analyses overlook or minimize two important points. First, the Supreme Court has not categorically abandoned or repudiated tribal sovereignty. During the same term that it denied tribal criminal jurisdiction over non-Indians in *Oliphant*, the Supreme Court affirmed the longstanding concept of retained, inherent tribal sovereignty in two leading cases—*Santa Clara Pueblo v. Martinez*, which held that federal courts generally may not review tribal-court interpretations of the federal Indian Civil Rights Act of 1968,[21] and *United States v. Wheeler*, which held that a tribal government and the federal government are separate sovereigns for purposes of the Fifth Amendment prohibition on double jeopardy.[22] Subsequent Supreme Court opinions, most notably in the area of tribal sovereign immunity, have stated repeatedly that Indian tribes have retained, inherent

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Nevada v. Hicks *and the Subject Matter Jurisdiction of Tribal Courts*, 5 U. PA. J. CONST. L. 288 (2003); Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147 (1999–2000); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

17. *See infra* Section II.A.

18. *See infra* Section II.B.

19. Ned Blackhawk, *A New History of Native Americans Responds to 'Bury My Heart at Wounded Knee'*, N.Y. TIMES (Jan. 20, 2019), https://www.nytimes.com/2019/01/20/books/review/david-treuer-heartbeat-wounded-knee.html?searchResultPosition=1 [https://perma.cc/XYB2-E5R4].

20. *See infra* Section II.C.

21. 436 U.S. 49, 52 (1978).

22. 435 U.S. 313, 328–30 (1978).

sovereignty.[23] Against those authorities, arguments that the Supreme Court has rejected tribal sovereignty are misplaced.

Second, in the years since World War II, the Supreme Court's decisions outside Indian law have turned toward the wholesale expansion of fundamental rights. This is the rights revolution largely associated with the Warren Court—but with roots in the Stone and Vinson Courts and with continuing vitality through the Burger, Rehnquist, and Roberts Courts.[24] From criminal procedure and civil liberties to private property and the free exercise of religion, the contemporary Supreme Court has reorganized large tracts of public law around fundamental rights. Long gone are the days when Justice Holmes and Justice Frankfurter maintained a posture of judicial deference to the political branches, and long gone are the days when few provisions in the Bill of Rights applied to state and local governments. Today, an overriding concern of the Supreme Court is with the rights of individuals against the government, from the federal level all the way down to the lowest level of local government. But the Indian tribes have no formal place within this framework; the Constitution places tribal governments entirely outside the federalist structure. No less importantly for these purposes, the rights provisions of the Constitution—including the Bill of Rights and the Fourteenth Amendment—do not apply to tribal governments. The rights revolution and tribal sovereignty simply do not intersect.

That is where the trouble starts. I argue that the Supreme Court fully understands retained, inherent tribal sovereignty; more controversially, I argue that the Supreme Court wants to preserve retained, inherent tribal sovereignty. But the Supreme Court also wants to preserve and, in many cases, enlarge the fundamental rights that it has recognized, created, expanded, and incorporated in the postwar period.[25] And it wants to preserve the placement of tribal governments outside the federalist structure. Those objectives are incompatible; the Court cannot achieve all three simultaneously. This presents the Supreme Court with a classic trilemma. The Court can pursue any two of the objectives, but it necessarily must compromise the third. If tribal governments exercise full territorial sovereignty over Indian country but remain outside the federalist structure, nonmembers must lose their fundamental rights with respect to tribal governmental action. If tribal governments exercise full territorial sovereignty over Indian country but nonmembers can assert their fundamental rights against tribal governmental action, tribal governments must be forced into the federalist structure and treated as though they were state or local governments. And if tribal governments remain outside the federalist structure but nonmembers retain their fundamental rights, tribal governments must lose their territorial jurisdiction. Forced to choose among these outcomes, the Supreme Court has moved from the traditional, territorial-based definition of tribal sovereignty to the contemporary, membership-based definition. For the Court, this approach best accommodates the competing claims of tribal sovereignty, fundamental rights, and the constitutional limits of federalism.

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23. *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 787–88 (2014); Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 754–58 (1998); Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 136–52 (1982).

24. *See infra* Section I.B.

25. *See infra* Section I.C.

My thesis is straightforward. The line of Supreme Court cases restricting tribal jurisdiction over nonmembers redefines tribal sovereignty for the era of fundamental rights. In the view of the Supreme Court, the traditional, territorial-based definition of tribal sovereignty worked tolerably well before the rights revolution. Contact between tribal governments and nonmembers was infrequent; and in any event, critical provisions of the Bill of Rights lay dormant or unincorporated even against the states. From the Court's perspective, no great harm came from allowing tribal governments to assert jurisdiction over nonmembers and non-Indians in Indian country. But once it began to view its constitutional role as including the protection of fundamental rights, the Supreme Court became increasingly troubled by the territorial-based definition of tribal sovereignty. What sense did it make, the Court asked, to force Arizona or Wyoming to respect the fundamental rights of its citizens if those citizens lost their rights as soon as they entered the Navajo Nation or the Wind River Indian Reservation? The resolution that the Supreme Court has pursued since *Oliphant* is to cast tribal sovereignty in terms of membership rather than territory. That, in my view, is the best explanation for this challenging line of cases.

My argument should not be misunderstood. For the most part, my objective is to offer an interpretive account, not a normative one. I am not arguing that the Supreme Court's redefinition of tribal sovereignty is the right answer to the tribal-sovereignty trilemma. Because of the longstanding scholarly questions about those cases, I am interested primarily in understanding what the Supreme Court *has been doing*, not what the Supreme Court *should be doing*. In general, my sympathies lie with those who favor a more robust form of tribal sovereignty, but I try to set those sympathies aside for the sake of a clearer analysis of the Court's decisions. Even if I conclude that the Supreme Court is normatively mistaken, I must also conclude that these cases represent an intelligent, good-faith attempt to preserve tribal sovereignty. For that reason, I cannot agree with the scholarly views that the Court's contemporary Indian-law cases are uninformed, incoherent, hostile, or racist.

The argument is set out as follows. Part I analyzes the Supreme Court's new definition of tribal sovereignty as the Court's resolution of the tribal-sovereignty trilemma. This part examines the traditional, territorial-based definition of tribal sovereignty dating back to the Marshall Court, explains the historical developments during the nineteenth and twentieth centuries that brought Indians and non-Indians into more frequent contact, recounts the rights revolution of the postwar decades, and explains more fully how the contemporary, membership-based definition of tribal sovereignty represents a choice among incompatible objectives. Part II reviews competing explanations in the scholarly literature and identifies their shortcomings, limitations, and (in some cases) errors. Part III moves beyond the interpretive approach of Part I and the critical approach of Part II to consider possible paths forward. In that part, I argue that what may be the most desirable outcome—revitalizing the traditional, territorial-based definition of tribal sovereignty—may also be the least attainable. Similarly, I argue that what may be the easiest outcome—full incorporation of tribal governments into the constitutional order—may also be the least desirable. Instead, the law seems likely to continue down the Supreme Court's chosen path until it reaches the end point of tribal sovereignty based entirely (or very nearly entirely) on tribal membership.

## I. THE TRIBAL-SOVEREIGNTY TRILEMMA

The Supreme Court has long recognized the retained, inherent sovereignty of American Indian tribes—a sovereignty that predates contact with the European colonizing powers and that, accordingly, does not derive from the U.S. Constitution, from acts of Congress, or from decisions of the Supreme Court.[26] And the Court long defined this sovereignty in terms of territory—so that each tribe was sovereign with respect to that tribe's lands. But in 1978, the Court changed course and began to define tribal sovereignty in terms of membership.[27] Although the doctrinal shift was abrupt, the legal, political, and demographic developments underlying it had unfolded over the previous century.[28] To the Court, the redefinition of tribal sovereignty in terms of membership rather than territory appeared to provide the best resolution of an intractable conflict among competing positions in federal Indian and constitutional law.[29]

The underlying problem is a classic trilemma. The assertion of tribal criminal and civil jurisdiction over nonmembers implicates three incompatible legal objectives. First is the preservation of the traditional definition of tribal sovereignty—that is, the sovereignty of tribal governments over all persons and all activities on tribal lands. Second is the preservation of tribal governments' placement outside the federalist structure—that is, the exemption of tribal governments from the constraints imposed on the federal and state governments by the individual-rights provisions of the Constitution, particularly the Bill of Rights and the Fourteenth Amendment. Third is the preservation of those fundamental rights—that is, the assurance to all persons that, under the Constitution, the exercise of governmental power cannot violate

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26. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 206–11; *see also* Talton v. Mayes, 163 U.S. 376, 384 (1896). A 1934 opinion of the solicitor of the Interior Department summarized the law on this point in the following terms:

> Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.* Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation.

Opinion of the Solicitor of the United States Department of the Interior, 55 I.D. 14, 1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917–1974, 445, 447 (Oct. 25, 1934) [hereinafter Department of the Interior] (emphasis in original).

27. *E.g.*, 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, 17–78 (1993); Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 609–13 (2010). L. Scott Gould describes the membership-based definition of tribal sovereignty as organized under a "consent paradigm." *See generally* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996). Dewi Ioan Ball refers to this development as a "silent revolution." DEWI IOAN BALL, THE EROSION OF TRIBAL POWER: THE SUPREME COURT'S SILENT REVOLUTION 67–138 (2016).

28. *See infra* Section I.B.

29. *See infra* Section I.C.

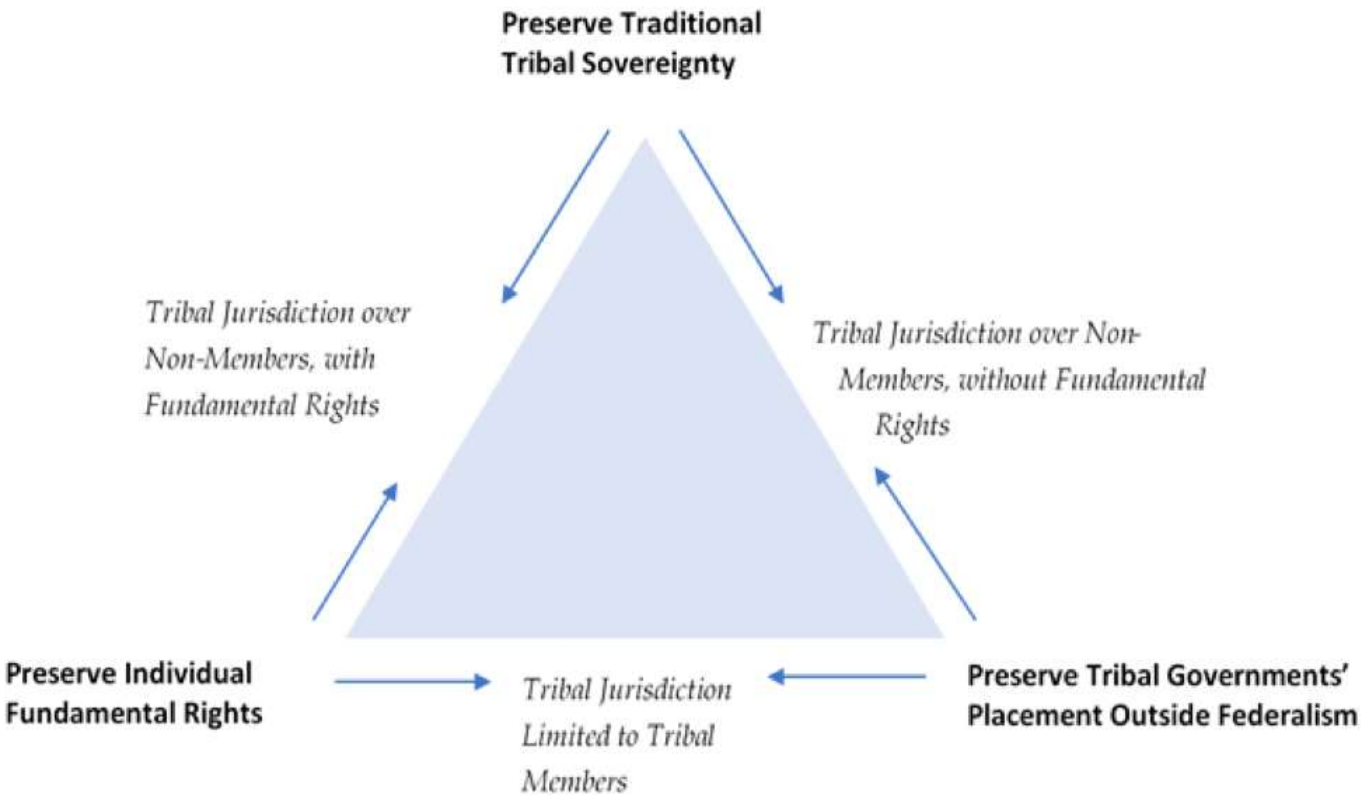
certain basic rights such as the free exercise of religion and the right against self-incrimination. These three objectives present a trilemma; any rule concerning tribal jurisdiction over nonmembers can realize two—but not all three—of the objectives simultaneously.

The problem is directly analogous to what economists know as the "Mundell-Fleming Trilemma" (also called the "Impossible Trinity").[30] The Mundell-Fleming Trilemma holds that the policy objectives of fixed currencies, monetary autonomy, and capital mobility cannot all be realized at the same time.[31] A simple depiction of that trilemma places the three incompatible objectives at the vertices of a triangle and locates the policy outcomes, which are determined by choosing any two of the three objectives, along the sides of the triangle.[32] Following that approach, the tribal-sovereignty trilemma may be depicted as follows, with the three competing objectives indicated in boldface at the vertices of the triangle and the three possible outcomes indicated in italics along the sides of the triangle.

30. Joshua Aizenman, The Impossible Trinity (a.k.a. The Policy Trilemma) 3–5 (May 15, 2010) (unpublished manuscript) (on file with *Indiana Law Journal*).

31. *Id.* at 3–4.

32. *Id.* at 17 fig.1.


Preserve Traditional Tribal Sovereignty
Tribal Jurisdiction over Non-Members, with Fundamental Rights
Tribal Jurisdiction over Non-Members, without Fundamental Rights
Preserve Individual Fundamental Rights
Tribal Jurisdiction Limited to Tribal Members
Preserve Tribal Governments' Placement Outside Federalism

Consider now the options for resolving the trilemma. The Supreme Court might decide to realize the two objectives located at the upper and lower right vertices of the triangle—the preservation of the traditional, territorial-based definition of tribal sovereignty and the preservation of tribal governments' placement outside the federalist structure. Selection of those two objectives would lead the Court to the outcome on the right side of the triangle, allowing tribal governments to assert full jurisdiction over all persons and all activities within tribal lands but not allowing individuals to assert fundamental rights as trumps over tribal governmental power. Under this approach, the Court would have to sacrifice the objective at the lower left vertex—that is, the objective directly opposite the chosen outcome; it would not be able to preserve fundamental rights in the context of tribal sovereignty. Thus, a tribal court, for example, would not be required to observe the limitations of the Fourth or Fifth Amendment in a criminal trial.

The Supreme Court might decide instead to realize the objectives located at the upper and lower left vertices—the preservation of the traditional, territorial-based definition of tribal sovereignty and the preservation of fundamental rights. Selection of those two objectives would lead the Court to the outcome on the left side of the triangle, allowing tribal governments to assert full jurisdiction over all persons and all activities within tribal lands and allowing individuals to assert their fundamental rights as trumps over tribal-governmental power. But the Court would have to sacrifice the objective directly opposite the policy outcome—in this case, the preservation of the tribal governments' placement outside the federalist structure. In effect, tribal governments would be forced into the federalist structure and treated as state and local governments under the Incorporation Doctrine.

The Court instead has pursued the third approach. The Court effectively has decided to realize the objectives located at the lower right and the lower left vertices—the preservation of tribal governments' placement outside the federalist structure and the preservation of fundamental rights.[33] That has led the Court to the outcome on the bottom side of the triangle, denying tribal sovereignty over nonmembers. Correspondingly, the Court's approach has sacrificed the objective at the top vertex—the preservation of the traditional, territorial-based definition of tribal sovereignty. In deciding not to incorporate constitutional rights protections against tribal governments but to preserve fundamental rights as trumps on governmental power, the Court left itself with no choice but to redefine tribal sovereignty.

The Supreme Court has not articulated its decisions in these terms, and there have been fits and starts along the way as the Court has worked through the specific implications of the doctrinal turn initiated by *Oliphant*.[34] Additionally, Congress at times has intervened to overturn particular decisions denying tribal jurisdiction over nonmembers and non-Indians.[35] But all the same, this trilemma framework best explains how and why the Court has undertaken to redefine tribal sovereignty. A fuller understanding of the trilemma requires an appreciation of how it arose during the last quarter of the twentieth century. That, in turn, requires a closer examination

33. *See infra* Section I.C.
34. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); *see infra* Section I.A.
35. *See supra* note 11.

of the Court's tribal-sovereignty cases, the substantial legal and demographic developments within Indian country since the nineteenth century, and the emergence of the fundamental-rights era during the decades after the Second World War.

### *A. Tribal Sovereignty Redefined*

Law normally defines sovereignty in territorial terms. The government of the United States claims sovereignty over all lands within its borders and over certain overseas territories and possessions. So too does the Hellenic Republic; so too does the United Kingdom of Great Britain and Northern Ireland. And consistent with that, the government of the United States, along with the governments of the fifty constituent states, generally asserts criminal and civil jurisdiction over all persons and activities within its lands, as do the governments of Greece and the United Kingdom with respect to their lands. The relationship between sovereignty and territorial-based jurisdiction is so close that it almost seems tautological: to claim sovereignty is very nearly the same as asserting jurisdiction over everyone and everything within the claimant's territory, and to assert jurisdiction over everyone and everything within the claimant's territory is very nearly the same as claiming sovereignty. "A basic attribute of full territorial sovereignty," says the U.S. Supreme Court, "is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens."[36]

But the relationship is so close only because it is so familiar, not because it is strictly necessary. Jurisdiction can be defined in other terms. The Germanic barbarian kingdoms of the early Middle Ages, for example, divided jurisdiction by ethnicity and tribe, not by geography.[37] A Salic Frank was entitled to the benefits of Salic law no matter where he or she happened to be; similarly, a Burgundian was entitled to Burgundian law, and a Visigoth was entitled to Visigothic law.[38] And for centuries after overrunning the western empire, the Germanic barbarians generally continued to apply Roman law to the Romans.[39] Jurisdiction was personal rather than territorial, even if sovereignty was territorial rather than personal.

For nearly 150 years, the Supreme Court defined tribal sovereignty in territorial terms. The touchstone decision is the 1832 opinion by Chief Justice Marshall in *Worcester v. Georgia*.[40] The Georgia legislature, as part of a broader effort to destroy the government of the Cherokee Nation and to open Cherokee lands for non-Indian

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36. Duro v. Reina, 495 U.S. 676, 685 (1990).

37. ANTONIO PADOA-SCHIOPPA, A HISTORY OF LAW IN EUROPE: FROM THE EARLY MIDDLE AGES TO THE TWENTIETH CENTURY 27 (Cambridge Univ. Press 2017).

38. LAWS OF THE ALAMANS AND BAVARIANS 17–18 (Theodore John Rivers trans., 1977); THE LAWS OF THE SALIAN FRANKS 8 (Katherine Fischer Drew trans., 1991). *But see* PATRICK WORMALD, THE MAKING OF ENGLISH LAW: KING ALFRED TO THE TWELFTH CENTURY, LEGISLATION AND ITS LIMITS 31 (1999).

39. LAWS OF THE ALAMANS AND BAVARIANS, *supra* note 38, at 17; THE BURGUNDIAN CODE 4 (Katherine Fischer Drew trans., 1972). Barbarian law normally applied only to relations between barbarians and, possibly, to relations between barbarians and Romans; Roman law continued to apply to relations exclusively between Romans. There were, however, exceptions to this principle. THE LAWS OF THE SALIAN FRANKS, *supra* note 38, at 8.

40. 31 U.S. (6 Pet.) 515 (1832).

settlement, passed a statute that, inter alia, proscribed "white persons" from residing in Cherokee lands without first pledging loyalty to the constitution and the laws of Georgia and obtaining a license from the Georgia governor.[41] Samuel Worcester, a non-Indian Congregationalist minister who lived and worked among the Cherokees and who ignored the pledge and license requirements, was convicted under the Georgia statute and sentenced to four years of hard labor.[42] Over one dissenting vote, the Supreme Court held the Georgia statute unconstitutional and reversed Worcester's conviction.[43] In the majority opinion, Marshall reasoned that the Indian Commerce Clause of Article I, Section 8 of the U.S. Constitution gave the federal government—rather than the individual states—the exclusive power to regulate commerce with the Indian tribes.[44]

No less importantly, Marshall articulated a vision of tribal sovereignty as territorial and subordinate only to the power of the U.S. government. Marshall wrote that various statutes passed by Congress, including the Trade and Intercourse Act of 1802,[45] "manifestly consider the several Indian nations as distinct political communities, *having territorial boundaries within which their authority is exclusive*."[46] He added:

> The Cherokee nation . . . is a distinct community occupying its own territory, with boundaries accurately described, *in which the laws of Georgia can have no force*, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.[47]

Marshall, then, plainly stated that the reach of state law ends at the border of Indian country and that Indian law, subject only to overriding federal law, controls within Indian country. In the words of Judge Canby, one of the leading scholars of federal Indian law: "*Worcester* leaves little question that in Marshall's view, the tribes were inherently empowered to govern everything that happened within their territories. The boundaries of tribal power were essentially geographical . . . ."[48]

This territorial-based definition of tribal sovereignty generally remained in effect until 1978, although federal Indian law occasionally strayed from *Worcester*. In 1817 (fifteen years before *Worcester*), Congress had passed the Indian Country Crimes Act, which confers federal jurisdiction over mixed-race crimes within Indian country—that is, crimes involving an Indian victim and a non-Indian offender or an

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41. *Id.* at 542.

42. *Id.* at 540.

43. *Id.* at 562–63. The Court also reversed the conviction of Worcester's codefendant, Elizur Butler. *Id*. at 597.

44. *Id.* at 557–62.

45. Trade and Intercourse Act of 1802, Pub. L. No. 7-13, 2 Stat. 139 (1802).

46. *Worcester*, 31 U.S. (6 Pet.) at 557 (emphasis added).

47. *Id.* at 561 (emphasis added).

48. William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 4 (1987). *Cf.* Philip. P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 14–15 (1999) (arguing that principles supporting "tribal geographical sovereignty" were unstable).

Indian offender and a non-Indian victim.[49] But the Indian Country Crimes Act simply introduces federal criminal jurisdiction into Indian country; it does not displace tribal criminal jurisdiction.[50] In fact, the Indian Country Crimes Act permits a tribe to preempt federal criminal jurisdiction by punishing an Indian offender before the offender is subjected to federal prosecution.[51] In 1885, Congress passed the Major Crimes Act, which confers federal jurisdiction over certain felonies within Indian country involving an Indian offender and an Indian victim.[52] Again, however, the Major Crimes Act apparently does not preempt concurrent tribal criminal jurisdiction, although the question remains unsettled.[53] Between those two statutes, the Fourteenth Amendment, ratified in 1868, provides that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[54] The proviso ("subject to the jurisdiction thereof") excluded tribal members, implying that tribal jurisdiction over tribal members was not limited to tribal lands—a point later confirmed by the Supreme Court.[55] It does not, however, imply that tribal governments lack jurisdiction over non-Indians on tribal lands.

More difficult to reconcile with *Worcester* are the Supreme Court's 1881 decision in *United States v. McBratney*[56] and its 1896 decision in *Draper v. United States*.[57] In each of those cases, the Court ruled that the state government, rather than the federal government, had criminal jurisdiction over a crime committed within Indian country by a non-Indian offender against a non-Indian victim.[58] *McBratney* and *Draper* do not specifically say that tribal governments lack jurisdiction over such crimes, but the flat inconsistency of those decisions with the *Worcester* language about state laws having "no force" within Indian country suggests as much. *McBratney* and *Draper* effectively hold that Indian country is not Indian country when a non-Indian commits a crime against a non-Indian. If the non-Indian status of

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49. 18 U.S.C. § 1152 (2012).

50. *Id.*

51. *Id.*

52. 18 U.S.C. § 1153 (2012).

53. Duro v. Reina, 495 U.S. 676, 680 n.1 (1990). *See also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 767–69. A federal statute enacted in 1953 and known generally as "Public Law 280" confers criminal and civil jurisdiction on state governments for certain matters within Indian country. *Id.* at 537–78. The grant of state jurisdiction under Public Law 280 is not inconsistent with the territorial-based definition of sovereignty in *Worcester* because, where it applies, Public Law 280 simply delegates to the states all or part of the federal jurisdiction recognized by *Worcester*.

54. U.S. CONST. amend. XIV, § 1.

55. Elk v. Wilkins, 112 U.S. 94 (1884). In *Elk*, the Supreme Court held that a tribal member who had been born on tribal lands, who had moved to non-tribal lands, who had renounced his tribal membership, but who had not been naturalized was not a U.S. citizen under the Fourteenth Amendment. *Id*. at 94. Later, the Indian Citizenship Act of 1924 conferred U.S. citizenship on all Indians. Act of June 2, 1924, ch. 233, 43 Stat. 253.

56. 104 U.S. 621 (1881).

57. 164 U.S. 240 (1896).

58. *Id.*. at 247; 104 U.S. at 624.

the offender and the victim displaces federal jurisdiction, it presumably displaces tribal jurisdiction as well.[59]

Nonetheless, the territorial-based definition of tribal sovereignty generally remained in place well into the twentieth century. In 1934, the solicitor of the Department of the Interior described the criminal and civil jurisdiction of tribal courts in territorial terms:

> So long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. It might punish its subjects for offenses against each other or against aliens and for public offenses against the peace and dignity of the tribe. *Similarly, it might punish aliens within its jurisdiction according to its own laws and customs*. Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government.[60]

In the opinion of the solicitor, then, the original criminal and civil jurisdiction of the Indian tribes "was that of any sovereign power." This included power over a tribe's own "subjects" *and* over "aliens." That jurisdiction persists, the solicitor argued, "save as it has been expressly limited by the acts of a superior government"—which, of course, includes federal statutes and decisions such as *McBratney* and *Draper*.[61]

The Supreme Court reaffirmed the territorial-based definition of tribal sovereignty in 1959, when it decided *Williams v. Lee*.[62] In that case, the Court held that the Arizona state courts had no jurisdiction to hear a civil suit brought by a non-Indian plaintiff against an Indian defendant for collection of a debt arising from a

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59. Between *McBratney* and *Draper*, the Supreme Court's ruling in *Ex parte Crow Dog* effectively relied on the territorial-based definition of tribal sovereignty from *Worcester*. 109 U.S. 556 (1883). In that case, the Court reversed the federal conviction of Crow Dog, a member of the Sioux Tribe, who had murdered Spotted Tail, also a member of the Sioux Tribe, on a Sioux reservation within the Dakota Territory. The Court determined that no statute or treaty conferred federal jurisdiction over a crime committed within Indian country by one tribal member against another tribal member, thereby recognizing exclusive jurisdiction for the Sioux. *Id.* at 567–72. As with the Cherokee in *Worcester*, the Sioux were sovereign within Sioux lands, unless and until the Sioux surrendered their sovereignty by treaty or Congress took it from them by statute. To the contrary, however, was an 1878 decision of the Circuit Court in the Western District of Arkansas, which held that the Cherokee Nation lacked criminal jurisdiction over a non-Indian. *Ex parte* Kenyon, 14 F. Cas. 353, 355 (W.D. Ark. 1878).

60. Department of the Interior, *supra* note 26, at 472. Subsequent memoranda from the solicitor, however, are in tension with that opinion or even contradict it. *See, e.g.*, *id.* at 699, 736, 849, 872.

61. *Id.* at 472. As recently as 2001, one member of the Supreme Court referred to the 1934 solicitor's opinion as stating that "the tribes under [the] Acts passed by Congress had the basic sovereignty that they had for generations, unless it was taken away." Transcript of Oral Argument at 5, Nevada v. Hicks, 533 U.S. 353 (2001).

62. 358 U.S. 217 (1959).

transaction within Indian country.[63] After reviewing *Worcester*,[64] Justice Black's majority opinion stated that "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation."[65] In upholding exclusive tribal-court jurisdiction, Black argued: "[T]o allow the exercise of state jurisdiction here . . . would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation, and the transaction with an Indian took place there."[66] The Supreme Court, Black concluded, has "consistently guarded the authority of Indian governments over their reservations . . . . If this power is to be taken away from them, it is for Congress to do it."[67]

The Court followed *Williams* in its 1975 decision *United States v. Mazurie*.[68] In that case, two non-Indians had been convicted in federal court of "introducing spirituous beverages into Indian country" in violation of a federal statute that allowed Indian tribes to control the sale of alcohol on their lands.[69] In a unanimous decision, Justice Rehnquist held that the non-delegation doctrine did not invalidate the federal statute.[70] Citing *Worcester*, Rehnquist wrote that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."[71] The Court held it irrelevant that the non-Indian defendants "could not become members of the tribe, and therefore could not participate in tribal government."[72] *Williams*, the Court said, had already established "that the authority of tribal courts could extend over non-Indians, insofar as concerned their transactions on a reservation with Indians."[73] Thus, allowing for the important but limited *McBratney* and *Draper* exception of a crime committed by a non-Indian against a non-Indian within Indian country, the Supreme Court from *Worcester* through *Mazurie* consistently defined tribal sovereignty in territorial terms.

That changed abruptly in 1978 when the Supreme Court decided *Oliphant v. Suquamish Indian Tribe*.[74] The Court in *Oliphant* held that an Indian tribe has no criminal jurisdiction over a non-Indian, even for an offense committed against an Indian within Indian country.[75] In a 6-2 decision, the Court reversed the convictions of two non-Indians who, in separate incidents on the Port Madison Indian Reservation, had been arrested by tribal police and charged with resisting arrest,

63. *Id.*
64. *Id.* at 218–19.
65. *Id.* at 220.
66. *Id.* at 223.
67. *Id.*
68. 419 U.S. 544 (1975).
69. *Id.* at 545.
70. *Id.* at 557.
71. *Id.*
72. *Id.*
73. *Id.* at 548. Sarah Krakoff notes that "*Mazurie* thus affirmed the *Williams* approach to questions of tribal authority over nonmembers: absent acts of Congress, tribes retain their inherent authority to regulate their internal affairs, including when such regulation affects non-Indians." Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1203 (2010).
74. 435 U.S. 191 (1978).
75. *Id.* at 195.

assaulting a tribal officer, reckless endangerment, and damaging tribal property.[76] Justice Rehnquist's majority opinion comprised two distinct arguments. Rehnquist argued first that, although "[t]he effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians . . . is a relatively new phenomenon,"[77] Indian tribes had *never* been understood by Congress, the executive, or the lower federal courts to have criminal jurisdiction over non-Indian offenders.[78] Academic commentators generally have criticized this part of the opinion as historically inaccurate.[79]

Of much greater significance is the second argument, setting out what is now known as the "implicit-divestiture theory."[80] In that part of the opinion, Rehnquist said that, by submitting to the authority of the U.S. government, Indian tribes necessarily lost certain attributes of sovereignty—that the tribes have been implicitly divested of particular sovereign powers by reason of their dependent status.[81] Among these lost attributes of sovereignty, Rehnquist wrote, are the legal capacity to alienate tribal lands to any transferee other than the U.S. government[82]—that had been the holding of the Marshall Court's 1823 decision in *Johnson v. McIntosh*[83]—and the legal capacity to treat directly with foreign governments[84]—that had been part of the reasoning of the Marshall Court's 1831 decision in *Cherokee Nation v. Georgia*.[85] The *Oliphant* opinion thus reached back a century and a half to *Johnson* and *Cherokee Nation*, devised the implicit-divestiture theory to explain them, and turned that implicit-divestiture theory directly against tribal criminal jurisdiction over non-Indians. "By submitting to the overriding sovereignty of the United States," Rehnquist concluded, "Indian tribes . . . necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[86]

The decision was a major blow to advocates of tribal sovereignty. By 1978, it had long been understood that, apart from the two exceptions recognized by *Johnson* and *Cherokee Nation*, Indian tribes retain all attributes of sovereignty other than those specifically surrendered by treaty or agreement with the United States and those specifically taken away by act of Congress. Now *Oliphant* indicated that the judiciary would place further limits on tribal sovereignty, subject only to the possibility of legislative override. To compound matters, the opinion did not establish how far the implicit-divesture theory might reach. On the criminal side, the Court ultimately determined that the theory reaches very far. In its 1990 decision *Duro v. Reina*, the Supreme Court, relying on the implicit-divestiture theory, held by a 7-2 vote that an

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76. *Id.* at 194.

77. *Id.* at 196–97.

78. *Id.* at 196–206. Rehnquist conceded that the Supreme Court had never before addressed the question. *Id.* at 197. Instead, he pointed to *Ex parte* Kenyon, 14 F. Cas. 353 (W.D. Ark. 1878), as the only prior federal court decision denying (or even considering) whether tribes may exercise criminal jurisdiction over non-Indians. *Id.* at 199–200.

79. *See*, *e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 228.

80. *Oliphant*, 435 U.S. at 206–12.

81. *Id.* at 208–11.

82. *Id.* at 209.

83. 21 U.S. (8 Wheat.) 543 (1823).

84. *Oliphant*, 435 U.S. at 209.

85. 30 U.S. (5 Pet.) 1 (1831).

86. *Oliphant*, 435 U.S. at 210.

Indian tribe cannot exercise criminal jurisdiction for a crime committed within Indian country by an Indian who is not a member of the tribe.[87] The decision actually created a jurisdictional gap such that no government—federal, state, or tribal—had jurisdiction for certain offenses committed by nonmember Indians.[88] Congress quickly addressed that, overturning *Duro* by statute,[89] and the Supreme Court upheld the constitutionality of the remedial legislation in *United States v. Lara*.[90] As a result, an Indian tribe today may exercise criminal jurisdiction over any Indian, whether or not a member of the tribe, but it may not exercise criminal jurisdiction over a non-Indian, except with respect to certain offenses specified in the federal Indian Civil Rights Act of 1968.[91]

In the meantime, the Supreme Court turned the implicit-divestiture theory against tribal civil-regulatory and civil-adjudicative jurisdiction. In its 1981 decision *Montana v. United States*, the Court, relying on *Oliphant*, unanimously held that an Indian tribe cannot regulate hunting and fishing by nonmembers on lands within Indian country that are owned in fee simple by nonmembers.[92] Writing for the Court, Justice Stewart said that tribal authority is confined primarily to matters affecting the tribe and its members to the exclusion of matters affecting nonmembers: "[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[93]

But Stewart also wrote that the prohibition on tribal civil-regulatory jurisdiction is not absolute. Under what are known as the "two *Montana* exceptions," Stewart said that a tribe may exercise civil-regulatory jurisdiction over nonmembers for activities on nonmember lands if the nonmembers enter into "consensual relationships" with the tribe or its members or if the nonmembers' "conduct threatens

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87. 495 U.S. 676, 684–96 (1990). The majority opinion in *Duro*, citing *Reid v. Covert*, 354 U.S. 1 (1957), offered an analogy between the trial of a nonmember by a tribal court and the trial of a civilian by a military court: "Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right." 495 U.S. at 693–94.

88. *Id.* at 696–98.

89. 25 U.S.C. § 1301(2) (2012) (amendment to the Indian Civil Rights Act of 1968, made in 1991, restoring tribal criminal jurisdiction over nonmember Indians).

90. 541 U.S. 193 (2004).

91. 25 U.S.C.A. § 1304 (2013) (amendment made by the Violence Against Women Reauthorization Act of 2013, restoring tribal criminal jurisdiction over non-Indians for certain domestic-violence and dating-violence offenses).

92. 450 U.S. 544, 557–67 (1981). Although Justices Blackmun, Brennan, and Marshall dissented in part from the Court's opinion, they disagreed only with a portion of the Court's opinion concerning ownership of the bed of the Big Horn River. The dissent specifically "agree[d] with the Court's resolution of the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe"—that is, the implicit-divestiture portion of the opinion. *Id.* at 581 n.18 (Blackmun, J., dissenting). After *Oliphant* but before *Montana*, the Court had held that the implicit-divestiture rationale of *Oliphant* did not prevent a tribe from taxing cigarette sales made by the tribe to nonmembers on tribal lands. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152–54 (1980).

93. 450 U.S. at 564.

or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[94] Furthermore, Stewart said unequivocally that a tribe may exercise civil-regulatory jurisdiction over a nonmember for activities on tribal lands.[95] Under *Montana*, then, the implicit-divestiture theory restricts a tribe's civil jurisdiction less than it does a tribe's criminal jurisdiction. *Oliphant* categorically denies criminal jurisdiction over non-Indians even on tribal lands within the reservation; *Montana* preserves civil jurisdiction over nonmembers on tribal lands and recognizes two exceptions to the general rule denying civil jurisdiction over nonmembers on nonmember lands.

Subsequent cases further restricted tribal civil authority over nonmembers. In a messy 4-2-3 decision from 1989, *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, the Supreme Court held that the second *Montana* exception allows an Indian tribe to exercise zoning authority over some (but not all) of the lands owned by nonmembers within the tribe's reservation.[96] In 2001, the Court in *Atkinson Trading Co. v. Shirley*, finding neither *Montana* exception applicable, unanimously held that a tribe may not impose an occupancy tax on a hotel operated on nonmember land within the tribe's reservation.[97] Along the way, the Court inserted a remarkable footnote into its 1993 decision in *South Dakota v. Bourland*.[98] Holding that two federal statutes had abrogated the treaty rights of the Cheyenne River Sioux to regulate nonmember hunting and fishing within the tribe's reservation, Justice Thomas's opinion for the Court read *Montana* as a categorical denial of inherent tribal sovereignty over nonmembers: "[A]fter *Montana*," Thomas wrote, "tribal sovereignty over nonmembers 'cannot survive without express congressional delegation' . . . and is therefore *not* inherent."[99] Subsequent decisions of the Court generally have ignored that sweeping statement—although it may yet prove a prescient summary of the implicit-divestiture cases.

The implicit-divestiture theory has had similar limiting effects on tribal civil-adjudicative authority. In 1997, the Supreme Court unanimously held in *Strate v. A-1 Contractors* that a tribal court may not exercise jurisdiction over a civil action involving nonmember parties on non-tribal land within the tribe's reservation unless one of the two *Montana* exceptions applies.[100] Justice Ginsburg, writing for the

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94. *Id.* at 565–66.

95. *Id.* at 557 ("The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe . . . and with this holding we can readily agree."). Consistent with that principle, the Supreme Court in 1982 held by a 6–3 vote that an Indian tribe may impose a severance tax on oil and gas extracted by a nonmember from tribal land. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

96. 492 U.S. 408 (1989).

97. 532 U.S. 645 (2001).

98. 508 U.S. 679, 695 n.15 (1993).

99. *Id.* (emphasis in original).

100. 520 U.S. 438 (1997). In a unanimous decision after *Montana* but before *Strate*, the Supreme Court had strongly implied that a tribal court has civil-adjudicative jurisdiction over nonmembers for activities taking place on nonmember land within the tribe's reservation. *See* National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985); *cf.* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987). For criticism of the federal-court actions to challenge tribal civil-adjudicative jurisdiction, see Matthew L.M. Fletcher, *Resisting Federal Courts on*

Court, said that "[a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."[101] In other words, the implicit-divestiture theory, as articulated in *Montana*, applies to both civil regulation and civil adjudication. Then, stating that the *Montana* exceptions are "limited" and should not "swallow the rule" or "shrink it," the Court in 2008 held by a 5-4 vote in *Plains Commerce Bank v. Long Family Land and Cattle Co.* that, notwithstanding a commercial relationship between tribal members and a nonmember bank, a tribal court lacked jurisdiction over litigation involving a claim against the bank arising from its sale of nonmember reservation land.[102]

*Montana* at least preserved tribal civil jurisdiction over nonmembers for activities on tribal lands.[103] But two subsequent cases have weakened the significance of the distinction between tribal lands and nonmember lands. In 2001, the Supreme Court unanimously held in *Nevada v. Hicks* that a tribal court may not exercise jurisdiction over a civil suit brought by a tribal member against a state law-enforcement officer for conduct that occurred on tribal land.[104] In his opinion for the Court, Justice Scalia cautioned that the holding was "limited to the question of tribal-court jurisdiction over state officers enforcing state law" and that the decision left "open the question of tribal-court jurisdiction over nonmember defendants in general."[105] But Scalia also said that land ownership is only one factor in determining tribal jurisdiction and that "tribal ownership is not alone enough to support . . . jurisdiction over nonmembers."[106] Contrary to *Montana*, then, *Hicks* indicates that the distinction between tribal lands and nonmember lands is not necessarily controlling.[107] More recently, *Dollar General Corp. v. Mississippi Band of Choctaw Indians* squarely presented the question of tribal-court jurisdiction over a nonmember for conduct on tribal lands (without the complication of state law enforcement present in *Hicks*).[108] The case was argued in December of 2015; after Justice Scalia's death in February of 2016, the Court split 4-4 and issued no opinion.[109] Four justices, apparently, were

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*Tribal Jurisdiction*, 81 U. COLO. L. REV. 973 (2010).

101. 520 U.S. at 453.

102. 554 U.S. 316, 330 (2008). *See generally* Dale Beck Furnish, *Sorting Out Civil Jurisdiction in Indian Country after Plains Commerce Bank: State Courts and the Judicial Sovereignty of the Navajo Nation*, 33 AM. INDIAN L. REV. 385 (2009).

103. Similarly, the Court in *Strate* had left open the question of tribal civil-adjudicative jurisdiction over nonmembers for activity taking place on tribal land, noting that "tribes retain considerable control over nonmember conduct on tribal land." 520 U.S. at 442, 454.

104. 533 U.S. 353 (2001) (unanimous holding, with several justices concurring in judgment only).

105. *Id.* at 358 n.2.

106. *Id.* at 360.

107. *Id.* at 375–76 (Souter, J., concurring) ("[L]and status within a reservation is not a primary jurisdictional fact, but is relevant only insofar as it bears on the application of one of *Montana*'s exceptions to a particular case.").

108. Dolgencorp v. Miss. Band of Choctaw Indians, 746 F.3d 167, 173 (5th Cir. 2014), *aff'd by an equally divided court sub nom.* Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (per curiam).

109. *Dollar Gen. Corp.*, 136 S. Ct. at 2159.

prepared to hold that a tribe may not exercise civil-adjudicative jurisdiction over a nonmember even for activity on tribal lands.[110]

Thus, the transformation of tribal sovereignty from traditional, territorial-based sovereignty to contemporary, membership-based sovereignty is still unfolding. Until 1978, tribal sovereignty worked much like the sovereignty of every other nation and every other government. With the exception of crimes committed by a non-Indian offender against a non-Indian victim, tribes had criminal and civil jurisdiction over all persons, whether Indian or non-Indian, for all activities within Indian country (although the extent to which any tribe actually exercised criminal or civil jurisdiction over nonmembers during that period is, of course, a separate question). But under the implicit-divestiture theory, first announced in 1978, tribes have no criminal jurisdiction over non-Indian offenders, even for crimes occurring on tribal lands within Indian country, and tribes have very limited civil jurisdiction over nonmembers for activities on nonmember lands within Indian country. It seems likely that the Supreme Court eventually will deny all tribal-civil jurisdiction over nonmembers, even for activities on tribal lands within Indian country. *Hicks* opened that door; in *Dollar General*, four Justices were willing to walk through it. The guiding principle of the Supreme Court's opinions is perfectly clear. Tribal sovereignty is not territorial; unless Congress provides otherwise, a tribe is sovereign only as to its own members.

### *B. Tribal Governments and the Rights Revolution*

The Supreme Court's shift from the traditional, territorial-based definition of tribal sovereignty to the contemporary, membership-based definition has played out against the background of two broader developments in federal Indian law and U.S. constitutional law. First, legislative and executive policy during the century preceding *Oliphant* abandoned the longstanding practice of separating Indians from non-Indians and eventually encouraged the development of tribal political institutions and tribal economic enterprises.[111] An important consequence of those changes was an increase in contacts between tribal governments and nonmembers unmediated by the federal government.[112] Second, during the decades after World War II, the Supreme Court abandoned the policy of judicial deference to the political branches observed by Justices Holmes, Brandeis, and Frankfurter in the twilight of the *Lochner* era.[113] After tentative first steps by the Stone and Vinson Courts, the Court under Chief Justice Warren undertook to reshape constitutional law by aggressively recognizing, creating, expanding, and incorporating fundamental rights.[114] When tribal governments then asserted sovereign powers over nonmembers in criminal and civil proceedings during the second half of the twentieth century, the latent tension between these two developments became apparent.[115]

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110. *See id.*
111. *See infra* Section I.B.1.
112. *See infra* Section I.B.1.
113. *See infra* Section I.B.2.
114. *See infra* Section I.B.2.
115. *See infra* Section I.B.3.

### 1. The Decline of Separation and the Rise of Tribal Governments

For much of its first century, the U.S. government's general policy toward American Indians was to separate them—physically, culturally, and politically—from non-Indians. Although there had been early efforts aimed at assimilation, federal policy under President Madison swung hard toward removal—the forced migration of Indian tribes from lands east of the Mississippi River to lands west of the Mississippi River.[116] Policy makers could reasonably assume that, because colonial and early republican settlement had needed two centuries to fill in the region between the Atlantic seaboard and the Appalachian Mountains, further settlement would need another two centuries to fill in the region between the Appalachians and the Mississippi River. Western removal of the eastern tribes thus seemed to offer a long-term solution to what was known as the "Indian problem."[117] Tribal members, for the most part, were not U.S. citizens, and the tribes themselves were regarded as separate nations.[118] Forced migration from their lands would permit the tribes to preserve their political independence and, of course, open the lands for non-Indian settlement.[119]

The removal policy quickly fell apart. Non-Indian settlement took only a few years—not decades and certainly not centuries—to cross the Mississippi River, and conflicts arose between non-Indian settlers and both the western tribes and the removed eastern tribes.[120] By 1858, the legislative and executive branches had turned to reservations as the new long-term policy.[121] Tribes would be confined to reservations, the lands of which would be held by the United States for the exclusive use and benefit of the tribes.[122] The reservation system thus would continue the separation of tribes from non-Indians. It would allow Indians a measure of independence—and, again, it would free up most of their lands for non-Indian settlement. As the nineteenth century wore on, policy makers increasingly looked on the reservation system as a mechanism to prepare Indians for ultimate assimilation.[123] Many tribal political, cultural, and social practices were discouraged or simply prohibited.[124] But Indians largely remained peoples apart within the United States.

That changed after Congress passed the General Allotment Act of 1887 (also known as the "Dawes Act").[125] Under the new policy of allotment, federal officials surveyed reservation lands, assigned parcels between 40 and 160 acres to individual Indians and their families, held back certain parcels for continued tribal use, and opened up the "surplus" reservation lands for purchase by non-Indian settlers.[126] The

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116. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 41–51.
117. *See id.*
118. *See id.*
119. *See id.*
120. *See id.*
121. *Id.* at 60.
122. *Id.* at 60–61.
123. *See id.*; *see also* JOHN R. WUNDER, "RETAINED BY THE PEOPLE": A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 32–33 (Oxford Univ. Press 1994).
124. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 60–61.
125. *See id.* at 72.
126. *Id.* at 72–74.

motives underlying allotment were mixed.[127] Some policy makers reasoned that Indian economic development on the reservations was held back by communal landownership; it would be better, they thought, if individual Indians could be turned into yeomen with family farms (like their non-Indian counterparts).[128] Other policy makers simply wanted to make reservation lands available for non-Indian settlement.[129] In any event, the effect was that federal policy now affirmatively discouraged the separation of Indians and non-Indians. U.S. citizenship was first held out as an incentive for cooperation with the allotment policy and then simply granted to all Indians en masse in 1924.[130]

The allotment policy—just like the earlier removal and reservation policies—proved a monumental failure, and Congress formally renounced it with the Indian Reorganization Act of 1934.[131] But allotment had two substantial and lasting effects. First, tribal landholdings fell substantially, from 138 million acres at the beginning of the allotment period to 48 million acres at the end of it.[132] Second, reservations became "checkerboards" of tribal and non-tribal lands.[133] Although many reservations still have a majority of Indian landownership and Indian residency, others are primarily non-Indian by land or by population. The Port Madison Indian Reservation, where the criminal activity underlying *Oliphant* took place, offers an extreme example. At the time of the *Oliphant* decision in 1978, more than sixty percent of the reservation land was owned by non-Indians, and more than ninety-eight percent of the reservation population was non-Indian.[134] For many places within Indian country, allotment meant that Indians and non-Indians were now living and working cheek by jowl.

Congress replaced the allotment policy first with the Indian New Deal—a federal effort begun in the 1930s to rebuild tribal institutions and tribal culture, which met with mixed success[135]—and then with a policy of termination—a federal effort begun in the 1950s to destroy tribal institutions and tribal culture, which was largely reversed once it also proved a failure.[136] The current approach is a federal policy of tribal self-determination,[137] variously attributed to President Kennedy, President Johnson, or President Nixon. In 1970, President Nixon delivered a special message to Congress in which he called for greater tribal autonomy without loss of federal

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127. *See id.*

128. *See id.*

129. *Id.*

130. *See id.* at 78–79. The Indian Citizenship Act of 1924 conferred U.S. citizenship on all Indians. Pub. L. 68–175, 43 Stat. 253.

131. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 81–82.

132. *Id.* at 73.

133. *Id.*; *see* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 193 (1978).

134. *Oliphant*, 343 U.S. at 193 n.1.

135. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 179–84; WUNDER, *supra* note 123, at 63–71.

136. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 184–93; WUNDER, *supra* note 123, at 63–71.

137. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 193–108; WUNDER, *supra* note 123, at 159–63.

support—a policy, he said, of "self-determination without termination."[138] The Indian Self-Determination and Education Assistance Act of 1975, along with other legislation that followed the special message, encourages tribal self-government and allows tribes to administer many federal health, education, and welfare programs on their reservations.[139]

Since the start of the self-determination era, many tribes have experienced significant political and economic advances.[140] Tribal governments have grown increasingly complex, often (but not always) involving representative legislative bodies and the separation of legislative, executive, and judicial powers.[141] Many tribes have well-developed judicial systems, including distinct trial and appellate courts.[142] Tribes determine their own membership; they maintain police, fire, and rescue services; they impose taxes; they maintain hospitals, health departments, and school systems; they regulate the natural resources of their reservations; they legislate for the health, safety, welfare, and morals of their members; and they operate business enterprises—some of which (particularly in the gaming and tourist industries) have been very successful.[143] In many respects, a reservation resident, whether Indian or non-Indian, might be hard pressed to distinguish the functions and the operations of a tribal government from the functions and the operations of a nearby city, county, or state government. But there is an important difference. A tribal government remains a *tribal* government. It is neither the federal government nor a state government; as such, it stands outside the federalist structure of the U.S. constitutional order.

### 2. The Rights Revolution

The placement of tribal governments outside the federalist structure took on new significance during the post-war years as the Supreme Court turned to the energetic recognition, creation, expansion, and incorporation of fundamental rights.[144] For both civil and criminal matters, the Court during the 1950s and the 1960s abandoned the

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138. Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564 (July 8, 1970).

139. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 99–105; Michael P. Gross, *Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy*, 56 TEX. L. REV. 1195, 1199–1200 (1978).

140. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 98–100; Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L. J. 779, 814–820 (2014); Joseph William Singer, *Indian Nations and the Constitution*, 70 ME. L. REV. 200, 205 (2018) ("[T]ribal governments have revived, they have rewritten their constitutions and tribal codes, they have drafted laws to protect the environment and natural resources, they have created or revitalized tribal courts and government agencies, they have embarked on tribal business enterprises, they have established tribal colleges, they have restored and taught tribal languages, and they have reinvigorated tribal cultural and religious practices.").

141. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 98–100.

142. *See* AM. INDIAN LAW CTR., INC., SURVEY OF TRIBAL JUSTICE SYSTEMS & COURTS ON INDIAN OFFENSES: FINAL REPORT 21–23 (2000).

143. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 99–100, 1320–24.

144. *See* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 1–2, 26–27 (1998).

posture of deference that had defined its constitutional decisions since 1937, and it began aggressively pursuing a rights-oriented agenda. Although this rights revolution was most frenetic during the Warren and Burger Courts, it continues even now. But under the Supreme Court's long-standing decisions, the Bill of Rights and the Fourteenth Amendment do not constrain tribal governments.[145] That sets up a conflict between tribal sovereignty and fundamental rights.

Apart from disingenuous rhetoric at Senate confirmation hearings, the idea of judicial restraint has largely disappeared from contemporary constitutional adjudication. The extraordinary deference to the legislative and executive branches urged by Holmes, Brandeis, Frankfurter, and others near and after the end of the *Lochner* era now seems distant and foreign.[146] But even after the turn toward selective incorporation of constitutional rights against the states during the first half of the twentieth century, judicial deference—genuine judicial deference—normally commanded majority respect through the years of the Stone Court (1941–1946) and the Vinson Court (1946–1953).[147] Still, the Court occasionally invalidated legislative acts trenching on civil liberties and civil rights. In 1943, for example, the Stone Court in *West Virginia Board of Education v. Barnette* struck down a statute that compelled school children to salute the American flag.[148] And in 1950, the Vinson Court in *Sweatt v. Painter* ruled that the Equal Protection Clause required that black applicants be admitted to the University of Texas Law School.[149] For the most part, however, the commitment to judicial deference prevailed under Chief Justice Stone and Chief Justice Vinson.[150]

That changed markedly with the Warren Court (1953–1969). Under Chief Justice Warren, the Supreme Court shifted hard to an energetic exercise of the judicial power.[151] Express constitutional rights—such as freedom of the press, equal protection of the laws, and the rights of criminal suspects and criminal defendants—were greatly expanded; other rights, such as the right of privacy, were created or recognized for the first time; and many rights, whether new or old, were incorporated against state and local governments.[152] The work of the Warren Court was in large part to lead a rights revolution, and the idea of judicial deference to the political branches as a safeguard of individuals against the government fell decidedly out of favor.

It began, of course, in 1954 with the Court's unanimous decision in *Brown v. Board of Education*,[153] striking down segregation in the public schools and initiating the gradual abandonment of *Plessy v. Ferguson*[154] and the desegregation of other

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145. *See infra* Section I.B.3.

146. *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 244–45 (1993).

147. *See id.* at 246–62.

148. 319 U.S. 624 (1943); *see also* PETER CHARLES HOFFER, WILLIAMJAMES HULL HOFFER & N.E.H. HULL, THE SUPREME COURT: AN ESSENTIAL HISTORY 296 (2d. ed. 2007); SCHWARTZ, *supra* note 146, at 259–60.

149. 339 U.S. 629 (1950); *see also* HOFFER ET AL., *supra* note 148, at 331.

150. *See* SCHWARTZ, *supra* note 146, at 246–62.

151. *Id.* at 275–76.

152. *Id.* at 276–85.

153. 347 U.S. 483 (1954); *see also* SCHWARTZ, *supra* note 146, at 286–310.

154. 163 U.S. 537 (1896).

public facilities. During the 1960s, the Warren Court validated federal civil rights legislation. In *Heart of Atlanta Motel v. United States*, the Court upheld the constitutionality of the Civil Rights Act of 1964,[155] and in *South Carolina v. Katzenbach*, the Court upheld the constitutionality of the Voting Rights Act of 1965.[156] As the Court found its footing on the rights of black Americans, it also took on the malapportionment of legislative districts, holding first in its 1962 decision, *Baker v. Carr*, that apportionment controversies are justiciable[157] and then in its 1964 decision, *Reynolds v. Sims*, that those controversies should be decided on the principle of "one person, one vote."[158]

The Warren Court expanded the First Amendment's guarantees of freedom of speech and freedom of the press and applied those expanded guarantees vigorously against federal, state, and local governments.[159] In 1964, *New York Times v. Sullivan* largely insulated journalists from state-law liability for libel;[160] between 1957 and 1966, *Roth v. United States*,[161] *Jacobellis v. Ohio*,[162] and *Memoirs v. Massachusetts*[163] narrowed the scope of obscenity subject to criminal prosecution; and in 1969, *Tinker v. Des Moines Independent Community School District* upheld the right of public-school children to protest the Vietnam War.[164] In 1965, the Court in *Griswold v. Connecticut* located a right of marital privacy amid the "penumbras" and "emanations" of various constitutional rights,[165] and the Court extended that right of privacy further in its 1969 decision, *Stanley v. Georgia*, to protect the possession and viewing of pornography.[166]

The Warren Court was particularly aggressive in expanding the rights of criminal suspects and criminal defendants.[167] In 1956, *Griffin v. Illinois* held that indigent defendants have a right to a free trial transcript,[168] and, in 1963, *Gideon v. Wainwright* held that indigent defendants have a right to a court-appointed attorney.[169] In 1961, the Court in *Mapp v. Ohio* applied the exclusionary rule to the states for violations of the Fourth Amendment,[170] and, in 1963, *Brady v. Maryland* imposed a duty on the prosecution to turn over exculpatory evidence to the accused.[171] In 1964, the Court held in *Escobedo v. Illinois*, that the Sixth Amendment allows a criminal defendant to have a lawyer present during police interrogation,[172]

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155. 379 U.S. 241 (1964).
156. 383 U.S. 301 (1966).
157. 369 U.S. 186 (1962).
158. 377 U.S. 533 (1964).
159. *See* SCHWARTZ, *supra* note 146, at 281–84.
160. *See* 376 U.S. 254 (1964).
161. 354 U.S. 476 (1957).
162. 378 U.S. 184 (1964).
163. 383 U.S. 413 (1966).
164. 393 U.S. 503 (1969).
165. 381 U.S. 479 (1965).
166. 394 U.S. 557 (1969).
167. HOFFER ET AL., *supra* note 148, at 364–68; SCHWARTZ, *supra* note 146, at 279–81.
168. 351 U.S. 12 (1956).
169. 372 U.S. 335 (1963).
170. 367 U.S. 643 (1961).
171. 373 U.S. 83 (1963).
172. 378 U.S. 478 (1964).

and, in 1966, *Miranda v. Arizona* held that the Fifth Amendment requires police to give warnings against self-incrimination upon taking a suspect into custody.[173]

The Supreme Court's aggressive agenda under Chief Justice Warren produced a political backlash, and it was hoped or feared (depending on one's leanings) with each succeeding chief justice that the Court would reverse course and unravel the rights revolution.[174] Both the hopes and the fears proved misplaced. In the last half century, the Supreme Court has never pursued a wholesale rollback of the rights created and expanded in the years between *Brown v. Board of Education* and Chief Justice Warren's retirement. Most of the signal decisions from the early and energetic years of the rights revolution remain in place. Instead, the Burger Court (1969–1986), the Rehnquist Court (1986–2005), and the Roberts Court (2005–present) each continued the creation and expansion of fundamental rights, although at a slower pace and with a shift of focus. To this day, the Supreme Court continues to define its constitutional work in no small part as the protection of such rights. Perhaps most notably, the Court has continued to expand the right of privacy. In 1972, the Court held in *Eisenstadt v. Baird* that the right of married persons to possess contraception, which had been recognized in *Griswold v. Connecticut*, applies as well to unmarried persons.[175] The next year, the Court held in *Roe v. Wade* that women have a constitutional right to elective abortions[176]—a decision modified but not overruled in 1992 by the Rehnquist Court in *Planned Parenthood v. Casey*.[177] In 2003, the Supreme Court in *Lawrence v. Texas* used the right of privacy to strike down state criminal sodomy laws.[178] In 2013 and 2015, the Roberts Court built on the substantive-due-process theories developed under the Warren and Burger Courts to require federal and state recognition of same-sex marriage in *United States v. Windsor*[179] and *Obergefell v. Hodges*.[180]

The Burger Court expanded the freedom of the press in its 1971 *New York Times v. United States* opinion (known as the "Pentagon Papers Case").[181] The Rehnquist Court expanded freedom of speech in its 1989 *Texas v. Johnson* opinion (the "Flag-Burning Case").[182] And the Roberts Court further expanded freedom of speech in its 2010 *Citizens United v. Federal Election Commission* opinion,[183] its 2018 *Janus v. American Federation of State, County, and Municipal Employees, Council 31*

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173. 384 U.S. 436 (1966).

174. *See* MICHAEL LES BENEDICT, THE BLESSINGS OF LIBERTY: A CONCISE HISTORY OF THE CONSTITUTION OF THE UNITED STATES 362–66 (3d ed. 2016).

175. 405 U.S. 438 (1972).

176. 410 U.S. 113 (1973).

177. 505 U.S. 833 (1992) (replacing strict-scrutiny standard of review with undue-burden standard)

178. 539 U.S. 558 (2003).

179. 570 U.S. 744 (2013).

180. 135 S. Ct. 2584 (2015).

181. 403 U.S. 713 (1971).

182. 491 U.S. 397 (1989).

183. 558 U.S. 310 (2010).

opinion,[184] and its 2018 *National Institute of Family and Life Advocates v. Becerra* opinion.[185]

Finally, the Supreme Court, after Chief Justice Warren, enlarged fundamental rights that had long been dormant in constitutional law. The Rehnquist Court "reinvigorated" private-property rights under the Takings Clause of the Fifth Amendment.[186] After decades of neglecting regulatory takings, the Court created new categories of protected property interests for exactions (*Nollan v. California Coastal Commission* in 1987[187] and *Dolan v. City of Tigard* in 1994[188]) and use restrictions that deprive a property owner of all economically beneficial use of her property (*Lucas v. South Carolina Coastal Council* in 1992[189]). Then, the Roberts Court, in 2008, held in *District of Columbia v. Heller* that the Second Amendment protects an individual right to bear arms.[190] Two years later, the Court in *McDonald v. Chicago* held that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment against the states.[191] Although its pace and its focal points have changed since the days of the Warren Court, the rights revolution rolls on.

### 3. Tribal Sovereignty and Fundamental Rights

The rights revolution, however, never really crossed the boundary into Indian country. Under Supreme Court case law reaching back to the late nineteenth century, tribal governments are not subject to the Bill of Rights or the Fourteenth Amendment. And although Congress, in the second half of the twentieth century, imposed select constitutional provisions on tribal governments by statute, the Supreme Court maintains that claims arising under that statute generally are unreviewable in the federal courts. Those points complete the construction of the tribal-sovereignty trilemma. Federal law cannot simultaneously maintain the traditional, territorial-based definition of tribal sovereignty, the robust constitutional protection of fundamental rights against governmental power, and the unqualified placement of tribal governments outside the federalist structure. One of those three must give way.

The starting point for understanding the relationship between tribal governments and the rights revolution is the 1896 decision of the Supreme Court in *Talton v. Mayes*, which upheld the conviction and death sentence in Cherokee court of Bob Talton, a member of the Cherokee Nation who had murdered a fellow Cherokee.[192] Talton argued that the composition of the grand jury that indicted him did not satisfy the Fifth Amendment.[193] The Supreme Court, by an 8–1 vote (with Justice Harlan in dissent), held that the Bill of Rights, including the Fifth Amendment, does not apply

184. 138 S. Ct. 2448 (2018).
185. 138 S. Ct. 2361 (2018).
186. HOFFER ET AL., *supra* note 148, at 428.
187. 483 U.S. 825 (1987).
188. 512 U.S. 374 (1994).
189. 505 U.S. 1003 (1992).
190. 554 U.S. 570 (2008).
191. 561 U.S. 742 (2010).
192. 163 U.S. 376, 385 (1896).
193. *Id.* at 379.

to the Cherokee Nation.[194] The sovereignty of the Cherokee Nation, the Court said, is inherent; it does not derive from the Constitution, and it cannot be limited by the Constitution.[195] Even when the Court later began the process of selectively incorporating the Bill of Rights against the states, it left *Talton* undisturbed. To this day, the individual-rights provisions of the Constitution remain inapplicable to tribal governments.[196] To use Justice Kennedy's somewhat artless term, tribal governments are "nonconstitutional entities."[197]

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194. *Id.* at 384.

195. *Id.* Even assuming that the Court in *Talton* correctly held that the Constitution generally does not limit the powers of Indian tribal governments, it is not clear that the Court correctly applied that principle to the Cherokee Nation because both a treaty and a federal statute purported to subject the Cherokee government to the terms of the Constitution. An 1835 treaty between the Cherokee Nation and the United States recognized:

> [T]o the Cherokee [N]ation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: *provided always that they shall not be inconsistent with the Constitution of the United States* and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians . . . .

*Id.* at 380 (emphasis added). And an 1890 act of Congress providing a temporary government for the Territory of Oklahoma stated that:

> [N]othing in this act shall be so construed as to deprive any of the courts of the civilized nations [which included the Cherokee Nation] of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood or adoption, are the sole parties, nor so as to interfere with the right and powers of said civilized nations to punish said members for violation of the statutes and laws enacted by their national councils *where such laws are not contrary to the treaties and laws of the United States*.

*Id.* at 381 (emphasis added). The *Talton* Court quoted but did not address those provisions.

196. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 213–14; PETRA T. SHATTUCK & JILL NORGREN, PARTIAL JUSTICE: FEDERAL INDIAN LAW IN A LIBERAL CONSTITUTIONAL SYSTEM 166–67 (1991); Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 658 (2006); Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 464 (2005). In a badly reasoned article, James A. Poore III argues that Congress abolished tribal sovereignty through the allotment policy, the wholesale grant of U.S. citizenship to Indians, and other measures; any sovereignty exercised by tribal governments today, Poore maintains, derives from congressional action and, as such, is necessarily subject to the restraints of the Constitution. *See* James A. Poore III, *The Constitution of the United States Applies to Indian Tribes*, 59 MONT. L. REV. 51 (1998). Erik M. Jensen corrects many of Poore's errors. *See* Erik M. Jensen, *The Continuing Vitality of Tribal Sovereignty under the Constitution*, 60 MONT. L. REV. 3, 4–11 (1999); *see also* Erik M. Jensen, *The End (of this Discussion) of Tribal Sovereignty*, 60 MONT. L. REV. 35, 36–37 (1999); James A. Poore III, *The Constitution of the United States Applies to Indian Tribes: A Reply to Professor Jensen*, 60 MONT. L. REV. 17 (1999).

197. Transcript of Oral Argument at 43, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016).

That result disturbed members of Congress, particularly as the rights revolution gained momentum under the Warren Court.[198] Over the objections of the Indian lobby,[199] Congress passed the Indian Civil Rights Act of 1968,[200] which applies most of the provisions of the Bill of Rights to tribal governments as a matter of federal statutory law. For example, the Indian Civil Rights Act requires tribal governments to recognize the free exercise of religion, the freedom of speech, and the freedom of the press;[201] it prohibits tribal governments from conducting unreasonable searches and seizures[202] and from subjecting criminal defendants to double jeopardy;[203] it requires tribal governments to respect the right against self-incrimination[204] and to provide just compensation for takings of property;[205] and it subjects tribal governments to the limitations of due process of law and the equal protection of tribal laws.[206]

Whatever the intentions of Congress, the Indian Civil Rights Act does not bring tribal governments within the mainstream of the rights revolution. First, the Indian Civil Rights Act specifically omits certain fundamental rights.[207] For example, it does not prohibit tribal governments from establishing a religion or from restricting the right to bear arms, and it does not require tribal governments to provide jury trials for civil cases or to provide counsel to indigent criminal defendants.[208] Second, in 1978 the Supreme Court held in *Santa Clara Pueblo v. Martinez* that the federal courts have limited jurisdiction under the statute to review claims against tribal governments or tribal officials.[209] The plaintiff in *Martinez* sued Santa Clara Pueblo and its executive officers in federal court, arguing that the pueblo's rules for determining membership eligibility for the children of pueblo members discriminated against women who married outside the pueblo.[210] The Supreme Court held that the claim against the pueblo was barred by sovereign immunity[211] and that the claim against the pueblo's executive officers was barred by the failure of Congress to provide federal-court remedies for violations of the Indian Civil Rights Act.[212] With the sole exception of federal habeas corpus review following a criminal conviction in tribal court,[213] the Court said, the only remedies for violations of the

198. SHATTUCK & NORGREN, *supra* note 196, at 169–70.
199. *Id.*
200. 25 U.S.C. §§ 1301–04 (2012); *see generally* WUNDER, *supra* note 123, at 132–40.
201. 25 U.S.C. § 1302(a)(1) (2012).
202. 25 U.S.C. § 1302(a)(2) (2012).
203. 25 U.S.C. § 1302(a)(3) (2012).
204. 25 U.S.C. § 1302(a)(4) (2012).
205. 25 U.S.C. § 1302(a)(5) (2012).
206. 25 U.S.C. § 1302(a)(8) (2012).
207. Santa Clara Pueblo vs. Martinez, 436 U.S. 49, 62–63 (1978).
208. 25 U.S.C. § 1302 (2012); *see also* Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians: An Examination of the Basic Framework of Inherent Tribal Sovereignty Before and After* Duro v. Reina, 38 FED. B. NEWS & J. 70, 73 (1991).
209. *Martinez*, 436 U.S. at 69–70.
210. *Id.* at 51.
211. *Id.* at 58–59.
212. *Id.* at 59–70.
213. 25 U.S.C. § 1303 (2012).

Indian Civil Rights Act are those provided by the tribe itself.[214] Consequently, a tribal court's application of the rights provisions in the Indian Civil Rights Act need not correspond to the Supreme Court's interpretations of the corresponding rights provisions in the Constitution.[215]

In short, several major developments that came together in the late twentieth century pushed the Supreme Court into a fundamental reexamination of tribal sovereignty. First, the demographic changes effected by the old federal allotment policy broke down the longstanding physical separation of Indians and non-Indians. By the late twentieth century, substantial numbers of non-Indians lived and worked on Indian reservations. Second, the new federal self-determination policy encouraged tribal governments to be more assertive in the development of their political and economic institutions. For the first time, as contacts between tribal governments and non-Indians were increasing, tribal governments exercised jurisdiction over civil-regulatory, civil-adjudicative, and criminal matters without substantial intermediation or interference by the federal government.[216] Third, the Supreme Court shifted the focus of constitutional adjudication to the recognition, expansion, creation, and incorporation of fundamental rights. From the federal level down to the state and local levels, government in the United States found itself more constrained by fundamental rights than ever before. Fourth, the Court reaffirmed its longstanding position that the rights secured by the Constitution do not bind tribal governments and, for good measure, added that the rights secured by the Indian Civil Rights Act of 1968 are very nearly the exclusive province of tribal courts.

The result is the tribal-sovereignty trilemma. When it decided *Oliphant* in 1978, the Court finally confronted the stubborn fact that it could not simultaneously maintain, without qualification: (1) the traditional, territorial-based definition of tribal sovereignty; (2) the protection of fundamental rights against every exercise of governmental power within the United States; and (3) the wholesale placement of tribal governments outside the federalist structure of the constitutional order. The Court understood, however imperfectly, that federal law may provide for any two of these but not all three, and the Court determined that the traditional, territorial-based definition of tribal sovereignty would have to yield in favor of a membership-based definition. Since *Oliphant*, the Court's many implicit-divestiture cases have played this idea out—slowly and fitfully working the idea consistent, if not pure.

### *C. Resolving the Tribal-Sovereignty Trilemma*

Addressing the tribal-sovereignty trilemma forces a hard choice among these three incompatible objectives. Many advocates of tribal interests of course prefer that the Supreme Court stand firm with the traditional, territorial-based definition of tribal

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214. *Martinez*, 436 U.S. at 65–66; *see generally* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

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

216. Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1193 (2010); *see also* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law,* 84 CALIF. L. REV. 1573, 1593 (1996).

sovereignty.[217] That resolution would recognize tribal criminal and civil jurisdiction over all persons and all activities within Indian country; the nature and the extent of a tribe's governmental power would be little different from that of any other sovereign. But this would require the Court either to bring tribal governments into the federalist structure or to surrender its stewardship of fundamental rights with respect to Indian country. Neither option is attractive to the Court.

Bringing tribal governments into the federalist structure could be achieved by overruling *Talton* and treating tribal governments like state and local governments for purposes of the Bill of Rights and the Fourteenth Amendment. This would present significant problems. Most obviously, it has no clear basis in the Constitution. The sole constitutional reference to tribes—the Indian Commerce Clause of Article I, Section 8—implies that tribes are distinct from state governments, just as they are distinct from foreign governments.[218] Of course, the Supreme Court has often ruled without a clear basis in the Constitution, and a decision to overrule *Talton* would be binding, even if wrong. A less ambitious approach would be to overrule *Martinez* and to allow federal-court review of all claims under the Indian Civil Rights Act of 1968. That would achieve much the same effect as applying the Constitution directly to tribal governments.[219] But the Indian Civil Rights Act omits certain constitutional rights, such as the right to a jury trial in a civil action and the right to bear arms.[220] Unless Congress were to amend the act to pick up the omitted rights, there would still be gaps between the fundamental rights outside Indian country and the fundamental rights inside Indian country.

More importantly, bringing tribal governments into the federalist structure, whether directly by overruling *Talton* or indirectly by overruling *Martinez*, would constitute a serious affront to the political independence and integrity of the tribes. The point of self-determination, after all, is *self-determination*; it is, as the Supreme Court said in *Williams v. Lee*, "the right of reservation Indians to make their own laws and be ruled by them."[221] Subjecting tribal governments to the same constraints that the Constitution imposes on state and local governments would deny tribal members the full capacity to constitute their governments in the manner they deem best, to define their civil and criminal laws in accordance with their cultural traditions and practices, and to use law and government for the perpetuation of tribal religious beliefs.[222] In short, it would bring about the assimilation of tribes into a legal system defined by non-Indians.

If the tribes were not forced into the federalist structure, adherence to the traditional, territorial-based definition of tribal sovereignty would require the Court to surrender its oversight of fundamental rights with respect to Indian country.

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217. *See infra* Part II.

218. The only other two references in the Constitution to Indians are to individual Indians, not Indian tribes. *See* U.S. CONST. art. I, § 2; U.S. CONST. amend. XIV, § 2.

219. This assumes that the federal courts would interpret the rights provisions of the Indian Civil Rights Act in the same way that the federal courts interpret the corresponding rights provisions of the Constitution.

220. *See* 25 U.S.C. §§ 1301–04 (2012).

221. 358 U.S. 217, 220 (1959).

222. *Cf.* Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 122–24.

Outside Indian country, all the landmark legal developments of the rights revolution would remain in effect; within Indian country, a tribe could require loyalty oaths, forbid the private ownership of firearms, compel adherence to an established religion, prohibit same-sex marriage, maintain racially segregated schools, and deprive individuals of liberty and property without the due process of law (at least to the extent permitted by a tribal court's interpretation of the Indian Civil Rights Act). Whether a tribal government actually would commit any of those constitutional sins is beside the point.[223] What matters is that the traditional, territorial-based definition of tribal sovereignty would permit a tribal government to violate the fundamental rights of both Indians and non-Indians (again, within the limits of a tribal court's interpretation of the Indian Civil Rights Act).[224] That result is intolerable to the Supreme Court.

And so the Court, starting with *Oliphant* in 1978, has pursued the third available resolution of the trilemma. Rather than compromise the wholesale placement of tribal governments outside the federalist structure or the protections of fundamental rights within Indian country, the Court has sacrificed the traditional, territorial-based definition of tribal sovereignty. Although it does not frame the implicit-divestiture theory as a choice among incompatible objectives *expressis verbis*, the Court at times has invoked the language of fundamental rights and political participation to justify its restrictions on tribal jurisdiction over nonmembers. In *Oliphant*, Justice Rehnquist's majority opinion argued that "from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested . . . great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty."[225] He acknowledged that, under the Indian Civil Rights Act, defendants in tribal-court criminal proceedings "are entitled to many of the due process protections accorded to defendants in federal or state criminal proceedings," but he correctly noted that "the guarantees are not identical."[226] Four years later, Justice Stevens located these concerns about fundamental rights within the general framework of political participation. Dissenting from a decision that allowed a tribe to tax a nonmember's extraction of oil and gas from tribal lands, Stevens argued that

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223. Matthew L.M. Fletcher makes a very good argument that this is highly unlikely. Fletcher, *supra* note 140, at 822–23.

224. As noted above, the Indian Civil Rights Act of 1968 does provide for federal habeas corpus review of a conviction in tribal court. 25 U.S.C. § 1303 (2012).

225. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

226. *Id.* at 194. Rehnquist observed, as an example, that non-Indians were excluded from Suquamish tribal-court juries. *Id.*; *see also* Transcript of Oral Argument at 38–39, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). Similarly, in *Duro*, the Court found it "significant that the Bill of Rights does not apply to Indian tribal governments." Duro v. Reina, 495 U.S. 676, 693 (1990). In a concurring opinion in *Hicks* (which denied tribal-court jurisdiction over a nonmember), Justice Souter noted that "the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes" and that, when applying the Indian Civil Rights Act of 1986, tribal courts need not follow the Supreme Court's interpretations of the corresponding provisions in the Constitution. Nevada v. Hicks, 533 U.S. 353, 383–84 (2001) (Souter, J., concurring). Souter also emphasized that "[t]ribal courts . . . differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges." *Id.* at 384.

"[t]ribal powers over nonmembers are appropriately limited because nonmembers are foreclosed from participation in tribal government."[227]

The Court developed Stevens' idea further in subsequent implicit-divestiture cases. Justice Kennedy's majority opinion in *Duro* grounded the limits of tribal jurisdiction in the Lockean notion that governmental power is justified by the consent of the governed. Kennedy's opinion emphasized that the Indian prosecuted in that case by a tribe to which he did not belong was "not entitled to vote in [tribal] elections, to hold tribal office, or to serve on tribal juries."[228] The key consideration, said Kennedy, is consent: "The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians *who consent to be tribal members*. . . . A tribe's additional authority comes from the consent of its members, and so in the criminal sphere *membership marks the bounds of tribal authority*."[229] And most recently, Chief Justice Roberts's majority opinion in *Plains Commerce Bank* recapitulated the consent-based rationale for limiting tribal jurisdiction to tribal members. In holding that a tribal court did not have jurisdiction over a challenge to a nonmember's sale of non-tribal land to a nonmember buyer, Roberts argued:

> Not only is regulation of fee land sale beyond the tribe's sovereign powers, it runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent. Tribal sovereignty, it should be remembered, is "a sovereignty outside the basic structure of the Constitution." The Bill of Rights does not apply to Indian tribes. Indian courts "differ from traditional American courts in a number of significant respects." And nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions.[230]

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227. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 183 (1982) (Stevens, J., dissenting); *see also* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 446–47 (1989) ("[I]t is unlikely that Congress intended to give the Tribe the power to determine the character of an area that is predominantly owned and populated by nonmembers, who represent 80% of the population yet lack a voice in tribal governance.") (Stevens, J., concurring).

228. 495 U.S. at 679.

229. *Id.* at 693 (emphasis added); *see also id.* at 694 ("Retained criminal jurisdiction over members is accepted by our precedents and justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent."). In dissent, Justice Brennan challenged Kennedy's consent-based theory of sovereignty: "Nor have we ever held that participation in the political process is a prerequisite to the exercise of criminal jurisdiction by a sovereign. If such were the case, a State could not prosecute nonresidents, and this country could not prosecute aliens who violate our laws." *Id.* at 707 (Brennan, J., dissenting). *See also* Robert N. Clinton, *Peyote and Judicial Political Activism: Neo-Colonialism and the Supreme Court's New Indian Law*, 38 FED. B. News & J. 92, 99 (1991). But Kennedy re-emphasized his consent-based theory when he concurred in the *Lara* outcome. United States v. Lara, 541 U.S. 193, 212–14 (2004).

230. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008)

Different members of the Supreme Court have articulated similar concerns at various times during oral argument of the implicit-divestiture cases.[231]

Importantly, however, the Court's resolution of the tribal-sovereignty trilemma consists not in abandoning the longstanding commitment to tribal sovereignty but in redefining it. This redefinition of tribal sovereignty has been particularly difficult to understand because it has proceeded fitfully and has produced doctrinally messy results. But the Court's unarticulated aim in the implicit-divestiture cases seems tolerably clear. The Court wants to preserve as much of retained, inherent tribal sovereignty as possible without either assimilating tribal governments to state and local governments or leaving fundamental rights unprotected against tribal-governmental power. Strange as it may seem (particularly to advocates of tribal interests), the implicit-divestiture cases represent a reasoned attempt to address an intractable problem.[232]

The Court's new definition of tribal sovereignty incorporates two organizing principles, both of which are straightforward, even if their implementation has been needlessly confused. The first principle is that a tribal government lacks sovereign authority over anyone, Indian or non-Indian, who is not a member of the tribe. The

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(internal citations omitted). For criticism of the consent rationale for limiting tribal jurisdiction, see Jacob T. Levy, *Three Perversities of Indian Law*, 12 TEX. REV. L. & POL. 329, 355–61 (2008). *See also* Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J.C.R. & C.L. 45, 94–114 (2012).

231. *See* Transcript of Oral Argument at 17–18, 34–35, 42–43, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016); Transcript of Oral Argument at 41–44, 56–57, Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008); Transcript of Oral Argument at 6–7, 21, 37–38, United States v. Lara, 541 U.S. 193 (2004); Transcript of Oral Argument at 32, Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); Transcript of Oral Argument at 28–29, 33–34, 36–37, 42–43, Strate v. A-1 Contractors, 520 U.S. 438 (1997); Transcript of Oral Argument at 22–24, Duro v. Reina, 495 U.S. 676 (1990); Transcript of Oral Argument at 33–34, Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989); Transcript of Oral Argument at 38–39, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

232. There is (at least arguably) a constitutional basis for the implicit-divestiture cases. In the *Slaughter-House Cases*, Justice Miller's majority opinion identified certain "privileges and immunities" that, he said, "owe their existence to the Federal government, its National character, its Constitution, or its laws." 83 U.S. (16 Wall.) 36, 79 (1872). Among these, Miller wrote, is the "privilege of a citizen of the United States . . . to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government." *Id.* Perhaps, then, the privileges and immunities of U.S. citizenship include the federal government's "care and protection" of a citizen's "life, liberty, and property" within the jurisdiction of tribal governments? And perhaps the implicit-divestiture cases, which generally deny tribal-governmental jurisdiction over nonmembers, represent the federal judiciary's attempt to ensure such "care and protection" in default of legislative action? One obvious shortcoming of this possibility, however, is that tribal members are themselves U.S. citizens and, thus, would be entitled the same "care and protection" from the federal government. But, unsettlingly, that would imply that the implicit-divestiture cases have not gone far enough and that tribal courts should be divested of jurisdiction over nonmembers and members alike. Such a move, of course, would be a very serious intrusion on tribal sovereignty. In any event, I am grateful to my colleague John Harrison for pointing me to the *Slaughter-House Cases* as another piece of the puzzle.

justification for this principle, in the view of the Court, is that a nonmember does not have a political voice in tribal government and cannot have consented to the potential loss of his or her fundamental rights. That is the idea, at least. It implies that a tribal government should have no criminal or civil jurisdiction over a nonmember for any activity, either within or outside Indian country unless the nonmember specifically agrees to that jurisdiction.

In practice, current law strays from this result in several respects. On the criminal side, the Supreme Court in *Oliphant* and *Duro* originally denied tribal jurisdiction over all nonmembers.[233] But in 1991, Congress restored tribal criminal jurisdiction over nonmember Indians, and in 2013 Congress restored tribal criminal jurisdiction over certain non-Indians accused of domestic or dating violence.[234] On the civil side, the Supreme Court itself still recognizes tribal jurisdiction over nonmembers in limited circumstances—specifically, for activities on tribal lands,[235] for activities pursuant to a consensual relationship with the tribe or its members, and for activities that directly affect or threaten the political integrity, economic security, or health and welfare of the tribe.[236] That said, the trajectory of the Supreme Court's cases on the civil side has been to narrow these exceptions, suggesting that, eventually, the Court will restrict tribal civil jurisdiction to members (and, possibly, to nonmembers who affirmatively consent to tribal jurisdiction).

The second principle is that a tribe has full sovereign authority with respect to anyone who is a member of the tribe. The justification for this principle, again in the view of the Court, is that tribal members participate in tribal political processes, that they consent to be subject to the decisions and the actions of tribal government, and that this consent includes the surrender of fundamental rights as trumps against tribal-governmental actions. Here, federal Indian law corresponds reasonably well to the principle. On both the criminal and the civil side, a tribe has extensive jurisdiction and authority over its members. Subject only to supervening federal power over the tribe, including possible limitations on the reach of the tribe's personal jurisdiction under the due-process requirement of the Indian Civil Rights Act,[237] the reach of tribal-governmental power over tribal members is generally as broad as the reach of any state government over its citizens and residents.[238]

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233. Duro v. Reina, 495 U.S. 676 (1990); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

234. *See* 25 U.S.C. § 1301(2) (2012) (amendment to the Indian Civil Rights Act of 1968, made in 1991, restoring tribal criminal jurisdiction over nonmember Indians); 25 U.S.C. § 1304 (2013) (amendment made by the Violence Against Women Reauthorization Act of 2013, restoring tribal criminal jurisdiction over non-Indians for certain domestic-violence and dating-violence offenses).

235. Again, that was what the Court said in *Montana*. Later cases, including *Hicks*, have pared this back; in *Dollar General*, four members of the Court apparently were willing to abandon it entirely.

236. *See* Montana v. United States, 450 U.S. 544, 565–66 (1981).

237. For example, a tribe may lack personal jurisdiction over a member who does not live within Indian country. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 606. Additionally, the Indian Civil Rights Act limits the criminal penalties that a tribe may impose, even on a tribal member, and subjects tribal criminal detentions to habeas corpus review in the federal courts. *See* 25 U.S.C. §§ 1302(a)–(b), 1303 (2012).

238. Note that the Court's treatment of tribal members as consenting to tribal-

My explanation of the implicit-divestiture cases as a resolution of the tribal-sovereignty trilemma implies several corollary points that existing scholarship generally has missed or misinterpreted. First, despite claims to the contrary by academic writers,[239] the Supreme Court remains committed to the idea of retained, inherent tribal sovereignty. Admittedly, the Court's contemporary, membership-based definition is not the same as the traditional, territorial-based definition advanced by the Marshall Court in *Worcester*; and, admittedly, the Court's contemporary definition is not the same as the definition articulated by Felix Cohen, the father of federal Indian law. The Court's contemporary definition is markedly narrower, and it understandably troubles advocates of tribal interests deeply. But it is simply not correct to argue that the implicit-divestiture cases represent the abandonment[240] or the abrogation[241] of tribal sovereignty. Instead, within the limits of the contemporary, membership-based definition, the Court's commitment to tribal sovereignty remains robust.

This commitment is evident in cases that the Court decided soon after *Oliphant*. The Court issued the *Oliphant* decision—and first announced the implicit-divestiture theory—on March 6, 1978. Just sixteen days later, the Court decided *United States v. Wheeler*, rejecting the double-jeopardy claim of a Navajo who was convicted for the same offense in both federal court and Navajo tribal court.[242] Justice Stewart's unanimous opinion in *Wheeler* held that tribal governments and the federal government constitute separate sovereigns for double-jeopardy purposes,[243] and it emphasized that the criminal prosecution of tribal members by tribal governments is part of the tribes' retained, inherent sovereignty:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.[244]

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governmental power without the check of fundamental rights is anomalous. Outside the tribal context, a person's eligibility to participate in a political community—such as a state or a subdivision of a state—cannot alone justify that political community's denial of that person's fundamental rights. Another, perhaps more provocative, way of putting the point is that the Supreme Court appears to be less concerned about the fundamental rights of members with respect to tribal governments than of nonmembers with respect to tribal governments. This merits closer scrutiny by Indian-law scholars.

239. *See, e.g.*, Frickey, *(Native) American Exceptionalism in Federal Public Law*, *supra* note 196, at 479.

240. *Contra* Gould, *supra* note 27, at 853.

241. *Contra* Peter C. Maxfield, Oliphant v. Suquamish Tribe*: The Whole Is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 393–96, 440 (1993).

242. 435 U.S. 313 (1978).

243. *Id.* at 322–30.

244. *Id.* at 323.

And just two months after *Wheeler*, the Supreme Court decided *Martinez* by a 7-1 vote.[245] *Martinez* held that tribal governments may not be sued under the Indian Civil Rights Act of 1968 because tribal governments have "the common-law immunity from suit traditionally enjoyed by sovereign powers."[246] Subsequent Supreme Court decisions have generally expanded the scope of tribal-sovereign immunity.[247]

Second, the Supreme Court's contemporary, membership-based definition of tribal sovereignty does not reduce tribes to the status of private, voluntary organizations. Arguments to the contrary by several academic writers are not accurate. Certainly, critics of the implicit-divestiture theory are correct that the membership-based definition creates a superficial resemblance between tribes and private, voluntary organizations. Under those cases, the authority of a tribal government generally extends no further than the members of that tribe—just as the authority of a private, voluntary organization, such as the Elks Lodge or the Daughters of the American Revolution, generally extends no further than the members of that organization. But the nature of that authority is very different in the case of a tribal government.[248] Unlike the Elks Lodge or the Daughters of the American Revolution, a tribal government has the power to convict its members of criminal offenses and to incarcerate them. A tribal government has the power to marry and to divorce its members, the power to make decisions about the custody of its members' children, the power to determine the ownership of its members' property by testate and intestate succession, and the power to compel its members to pay damages or to comply with injunctive or other equitable relief in civil actions.[249] Private, voluntary organizations have no such authority, nor should they.[250]

Third, the implicit-divestiture theory does not treat the relationship between tribal governments and nonmembers as "constitutional" or even "quasi-constitutional." Philip Frickey, one of the great scholars of Indian law, uncharacteristically misreads the implicit-divestiture cases on this point. Frickey argues that "what the Court has done [in those cases]—without any conscious reflection in its opinions—is to use federal common law to 'quasi-constitutionalize' the relationship between tribes and

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245. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

246. *Id.* at 58.

247. *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014); Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751 (1998).

248. Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1075–76 (2004); *see also* Felix S. Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145, 147 (1940); Frickey, *(Native) American Exceptionalism in Federal Public Law*, *supra* note 196, at 479; Getches, *supra* note 216, at 1588; Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 196–97 (1984). *But see* Philip P. Frickey, *The Status and Rights of Indigenous Peoples in the United States*, 59 HEIDELBERG J. INT'L L. 383, 385–86 (1999).

249. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 216–20.

250. Robert Laurence's assertion that "[a]n entity that has jurisdiction only over its own lands and its own members is more accurately denominated a 'club' than a 'government'" is therefore not correct. Robert Laurence, *The Unseemly Nature of Reservation Diminishment by Judicial, as Opposed to Legislative, Fiat and the Ironic Role of the Indian Civil Rights Act in Limiting Both*, 71 N.D. L. REV. 393, 394 (1995). *But see* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 116 (2002); Dussias, *supra* note 27, at 93–94.

nonmembers."[251] He suggests that the implicit-divestiture cases work as an Indian-law analogue to the dormant Commerce Clause,[252] and he argues that this quasi-constitutionalization "explains why the Court can pick and choose between members and nonmembers with respect to immunity from tribal regulation, rather than impose uniform limitations upon tribal action benefiting members and nonmembers alike."[253] But this gets the matter backwards. The Court has not distinguished between members and nonmembers in order to force constitutional (or even "quasi-constitutional") limitations on the relationship between tribal governments and nonmembers. Instead, the Court has distinguished between members and nonmembers in order to impose a firm jurisdictional separation between tribal governments and nonmembers—precisely because the relationship between tribal governments and nonmembers is *not* subject to constitutional limitations.

Again, it bears emphasis that my purpose thus far has been neither to defend nor to challenge the Supreme Court's redefinition of tribal sovereignty. Instead, my purpose has been *to explain* what the Court is doing in the implicit-divestiture cases and to show why, in the Court's view, the shift from the traditional, territorial-based definition to the contemporary, membership-based definition is a proper resolution of the tribal-sovereignty trilemma. Whether the Court's position is normatively right is a legitimate question, and I will turn to that, in a limited way, in the final part of this paper. But one cannot evaluate the Court's decisions without first understanding what the Court is doing and why the Court is doing it. For the most part, the academic writing on the implicit-divestiture cases has jumped straight to the normative question without first laying an appropriate foundation.

## II. COMPETING EXPLANATIONS

Legal scholars working in federal Indian law have offered various explanations of the implicit-divestiture cases. Among these have been occasional suggestions that the cases address a tension between tribal sovereignty and fundamental rights, but these suggestions remain largely undeveloped and skeptical. In particular, they do not capture the stubborn incompatibility of the three objectives underlying the tribal-sovereignty trilemma—the preservation of traditional, territorial-based tribal sovereignty; the preservation of the tribal governments' placement outside the federalist structure; and the preservation of fundamental rights. They perceive that tribal jurisdiction over nonmembers may present a conflict between tribal interests and the interests of nonmembers, and they criticize the Supreme Court for preferring the latter over the former. But they generally fail to see that the Court *must* compromise one of the underlying objectives, and they generally fail to evaluate the merits of the other available options.

Frickey, for example, in an article that otherwise finds incoherence in the Supreme Court's Indian-law decisions, describes *Oliphant* as recognizing both "a concern for the practical realities of political community" and a "civil rights concern," and he

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251. Frickey, *supra* note 48, at 65 (emphasis omitted). Frickey makes this argument in a section of his article labeled "Bringing the Constitution to Indian Country." *Id.* at 64.

252. *Id.* at 68–73.

253. *Id.* at 65.

argues that "[t]he dual notion of political community and civil rights is the strongest rationale for the Court's decision."[254] In a separate article, Frickey suggests that the implicit-divestiture cases "flatten[] federal Indian law into the broader American public law by importing general constitutional and subconstitutional values into the field."[255] L. Scott Gould argues that the "root cause of the Court's unwillingness to vest tribes with regulatory or adjudicatory jurisdiction over non-Indians and nonmembers is its inability to reconcile the constitutional protection of individual rights with the tribal conception of group rights."[256] He says that "[t]here is virtually no textual basis in the Constitution" for tribal jurisdiction over nonmembers but that "the rights of individuals to due process and equal protection are hallmarks of the Constitution and the Court's modern jurisprudence."[257]

Robert A. Williams, Jr., analyzing *Hicks*, argues that the Supreme Court should have considered legitimate questions about due process for nonmember civil defendants in tribal courts,[258] and David E. Wilkins, analyzing *Oliphant*, says that the majority opinion "was, in effect, elevating the rights of non-Indian American citizens above those of the extraconstitutional sovereign tribal governments which are governed and populated by individuals who are also American citizens."[259] Joseph William Singer argues that the "Court appears to view tribal governments as racially exclusive and undemocratic, and thus, inherently suspect, particularly

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254. Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1198 (1990); *see also id.* at 1219–21. In an earlier article, Frickey writes that "tribal power to regulate the activities of nonmembers in Indian country seems to turn on an elusive balancing of the intrusiveness of the regulation upon the autonomy of the nonmember, the extent to which the tribe has historically exercised such authority, the importance of the regulation to tribal self-government, and perhaps even whether the nonmember is a Native American." Philip P. Frickey, *Scholarship, Pedagogy, and Federal Indian Law*, 87 MICH. L. REV. 1199, 1202 (1989). And Frickey argues that the Court in *Oliphant* "was mostly moved by concerns about civil liberties." Frickey, *(Native) American Exceptionalism in Federal Public Law*, *supra* note 196, at 457; *see also* Frickey, *supra* note 48, at 38; Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1770, 1775 (1997); Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, *supra* note 196, at 658.

255. Frickey, *supra* note 48, at 7.

256. L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty After* Atkinson *and* Hicks, 37 NEW ENG. L. REV. 669, 674 (2003).

257. *Id.* In an earlier article, Gould argues that the *Duro* decision "seems, if anything, to be an unspoken struggle by the Court to construe tribal rights over nonmembers in the context of the Constitution" and that, more generally, the Court in its implicit-divestiture cases "is simply abandoning the doctrine of inherent sovereignty because it finds the doctrine unsuited to address constitutional issues that arise when tribal members, nonmembers, and non-Indians reside in the same territory." Gould, *supra* note 27, at 853. "Surely part of the reason" for the implicit-divestiture cases, he suggests, "lies in the Court's deference to the rights of individuals, at least when they are not Indians asserting their rights against their tribes." *Id.* at 900.

258. ROBERT A. WILLIAMS, LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 145 (2005).

259. DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 211 (1997).

because existing laws do not allow federal court review of tribal court judgments."[260] David H. Getches suggests that, across its Indian-law docket, the Court "may, in fact, be more concerned with correcting the perceived injustices of applying Indian law principles to the rights or conduct of non-Indians," although he finds that explanation to be inadequate for "fully half [the Rehnquist Court's] Indian law cases, where justice for non-Indian interests is not a significant factor."[261] And in an essay about the implicit-divestiture cases, Bethany Berger argues that "[t]he liberal objection to tribal interests is even stronger when the vindication of those interests appears to conflict with individual rights."[262]

But much of the scholarship on the implicit-divestiture cases favors other explanations. Most prominent have been arguments that the contemporary Supreme Court has abandoned the foundational principles of federal Indian law, that the Court is indifferent and even hostile to the rights of racial minorities in general and of Indians in particular, and that the Court is simply not able to produce a coherent body of federal Indian law. These competing explanations are not mutually inconsistent, and they generally treat the implicit-divestiture theory as an indefensible intrusion on retained, inherent tribal sovereignty. In my view, the explanation put forth in Part I offers a better account of the cases. But even if I cannot agree that the competing explanations are entirely right, I cannot argue that they are entirely wrong either.

### *A. Abandonment of Foundational Principles*

One explanation holds that, beginning sometime during the 1970s, the Supreme Court lost its way in federal Indian law. Following the work of Felix Cohen in his definitive 1941 treatise,[263] this explanation looks to the three decisions known as the "Marshall trilogy"—*Johnson*, *Cherokee Nation*, and *Worcester*—as establishing the

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260. Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 645 (2003).

261. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 297–98 (2001).

262. Bethany R. Berger, *Liberalism and Republicanism in Federal Indian Law*, 38 CONN. L. REV. 813, 814–16 (2006); *see also* Julia M. Bedell, *The Fairness of Tribal Court Juries and Non-Indian Defendants*, 41 AM. INDIAN L. REV. 253 (2017); Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1054 (2005); N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353, 375–77 (1994); Frickey, *(Native) American Exceptionalism in Federal Public Law*, *supra* note 196, at 459; Getches, *supra* note 216, at 1575, 1599; Karl J. Kramer, *The Most Dangerous Branch: An Institutional Approach to Understanding the Role of the Judiciary in American Indian Jurisdictional Determinations*, 1986 WIS. L. REV. 989, 997–1000, 1005–15; Laurence, *supra* note 250, at 412; E. Andrew Long, *The New Frontier of Federal Indian Law: The United States Supreme Court's Active Divestiture of Tribal Sovereignty*, 23 BUFF. PUB. INT. L.J. 1, 43 (2004); Max Minzner, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L.J. 89, 100–03 (2005); Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. J. ON C.L. & C.R. 1, 15–16, 19 (2003).

263. *See* Getches, *supra* note 216, at 1574; Gould, *supra* note 27, at 815–16.

foundational principles of retained, inherent tribal sovereignty.[264] Before contact with non-Indians, Cohen had reasoned, Indian tribes held all the attributes of sovereignty; he argued that contact, colonialism, and the expansion of the United States restricted tribal sovereignty but did not eliminate it.[265] Cohen maintained that, under the Marshall trilogy, tribes retain all attributes of sovereignty except those surrendered by treaty or other agreement with the United States and those taken away by act of Congress.[266]

This explanation argues that the implicit-divestiture theory is inconsistent with the foundational principles established by the Marshall trilogy. Under Chief Justices Stone, Vinson, and Warren, the Supreme Court generally followed those principles closely. The unanimous 1959 decision in *Williams*, requiring that a civil suit brought by a non-Indian against an Indian concerning a transaction on tribal land be brought in tribal court, represents perhaps the highpoint of the Court's fidelity to those principles. But during the 1970s, this account maintains, the Supreme Court's decisions increasingly drifted away from the foundational principles, to the detriment of tribal sovereignty. Although a few members of the Court (such as Justices Marshall, Brennan, and Blackmun) still generally followed the foundational principles, the Court as a whole supposedly lost interest in federal Indian law, did not really understand federal Indian law, and did not fully subscribe to the idea that Indian tribes are sovereign.

Instead, this explanation argues, the contemporary Court decides Indian-law cases on normative grounds, setting the law to match the Court's idea of what the status of tribal governments should be. The result has been the implicit-divestiture theory and the erosion of the traditional, territorial-based sovereignty championed by Chief Justice Marshall and Cohen. This explanation argues, no doubt correctly, that the implicit-divestiture cases cannot be reconciled with the doctrinal implications of the foundational principles. And so, treating the implicit-divestiture cases as an erroneous line of decisions, it generally advocates a return to the foundational principles and the restoration of full tribal criminal and civil jurisdiction over nonmembers and non-Indians within Indian country.

Getches, a leading proponent of this account, argues that the Supreme Court has "abandon[ed] entrenched principles of Indian law in favor of an approach that bends tribal sovereignty to fit the Court's perceptions of non-Indian interests."[267] In his view, "Indian rights are losing the limited protection they had as the Court forsakes foundation principles and expands the ambit of control over Indian tribes to include not just congressional but also judicial power to redefine and restrict tribal

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264. Getches, *supra* note 216, at 1577–83; *cf.* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 385, 408 (1993).

265. *See* Getches, *supra* note 216, at 1574.

266. *See id.*; *see also* Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law through the Lens of* Lone Wolf, 38 TULSA L. REV. 5, 20 (2002); Frickey, *supra* note 264, at 397.

267. Getches, *supra* note 216, at 1574; *see also* Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623, 627 (2011); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 829–30 (2007).

sovereignty."[268] *Oliphant* represents a "sharp departure from foundation principles" of federal Indian law,[269] and *Montana* "announce[s] remarkable departures from established Indian law principles."[270] In large measure, Getches argues, the Court's implicit-divestiture decisions aim to mitigate "cultural conflict" between Indians and non-Indians.[271] In his view, the Court generally has replaced its adherence to the foundational principles with "subjective, case-by-case determinations of whether a tribe retain[s] its inherent sovereignty in particular circumstances."[272] Thus, "the Court has assumed the prerogative of balancing various non-Indian interests in order to prune tribal sovereignty to the Court's own notion of what it ought to look like."[273]

The central claim of this explanation is obviously accurate. The implicit-divestiture cases certainly deviate from the foundational principles established by the Marshall trilogy. But the explanation is incomplete; it requires more. The explanation describes what the Court has done in doctrinal terms, but it provides no account of why the Court has done it. It is not plausible to suppose that the contemporary Supreme Court is just too lazy or too badly informed to grasp the foundational principles of federal Indian law. Admittedly, *Oliphant* was a decision of notoriously poor quality. Justice Rehnquist's majority opinion, whether deliberately or not, misconstrues the historical record on tribal criminal jurisdiction over non-Indians, and its interpretation of the Marshall trilogy is perplexing.[274] But any suggestion that the implicit-divestiture cases might be corrected by the Court's close reading of a few law review articles explaining the foundational principles seems badly misguided.

The Court must have reasons for straying from the foundational principles. Getches suggests that the point of the decisions is to mitigate "cultural conflict" between Indians and non-Indians; others might impute darker motivations to the Court, such as indifference or hostility to the claims of racial minorities.[275] From the Court's perspective, what made sense in the first half of the nineteenth century (when *Johnson*, *Cherokee Nation*, and *Worcester* were decided) or even in the middle of the twentieth century (when Cohen first restated federal Indian law) does not necessarily make sense at the end of the twentieth century or the start of the twenty-first century.

There has been an awful lot of water over the dam since the Marshall trilogy. Allotment has rendered much of Indian country a demographic admixture of Indians and non-Indians, tribal members and nonmembers.[276] The tribes, against all odds,

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268. Getches, *supra* note 216, at 1582.

269. *Id.* at 1595; *see also* John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the* Cohen's Handbook *Cutting-Room Floor*, 38 CONN. L. REV. 731, 737–38 (2006).

270. Getches, *supra* note 216, at 1610.

271. *Id.* at 1594.

272. *Id.* at 1612.

273. *Id.* at 1620.

274. *See* Frickey, *(Native) American Exceptionalism in Federal Public Law*, *supra* note 196, at 457; Maxfield, *supra* note 241, at 402–39; *see generally* Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979).

275. *See infra* Section II.B.

276. *See supra* Section I.B.

have risen up in the last half century, asserting themselves politically and economically in a manner not seen for decades (or, depending on the tribe, for centuries).[277] The greater physical proximity of Indians and non-Indians and the greater political and economic reach of the tribes has substantially increased the number and the extent of interactions between tribal governments and nonmembers without the intermediation of the federal government.[278] Understandably, legal scholars who advocate tribal interests do not necessarily agree that these developments justify the abandonment of the traditional, territorial-based definition of tribal sovereignty. But surely it is legitimate for the Supreme Court, which, after all, has been the prime mover of the rights revolution, to revisit its nineteenth-century precedents on tribal sovereignty in light of these demographic, political, economic, and legal changes.

In the end, it must be more plausible that the Supreme Court, in producing the implicit-divestiture cases, has been actively reinterpreting and adjusting its precedents rather than simply not understanding them or ignoring them without reason. It is a fair criticism that the implicit-divestiture cases deviate from the foundational principles of the Marshall trilogy. But the deviation has been intentional rather than accidental and active rather than passive. The better explanation is that the Court, whether consciously or not, has redefined tribal sovereignty in order to resolve the tribal-sovereignty trilemma.

### *B. Indifference or Hostility to Racial Minorities*

A second explanation of the implicit-divestiture cases maintains that the Burger, Rehnquist, and Roberts Courts have been indifferent and even hostile to the rights of racial minorities. On this account, shifting from the traditional, territorial-based definition of tribal sovereignty to the contemporary, membership-based definition fits within a larger pattern. Although the Burger, Rehnquist, and Roberts Courts have continued the rights revolution, they have changed its focus.[279] Where the Warren Court aggressively protected the rights of racial minorities, today's Court instead aggressively protects other rights, such as those involving religious liberties, political speech, and firearms.[280] On this account, tribal sovereignty has been a casualty of different judicial priorities in the years since Chief Justice Warren's retirement.

Scholars present this explanation in two versions—one moderate and the other more pointed. The moderate version argues that the Supreme Court has lost interest in the rights of racial minorities over the past half century; in this version, the cases cutting back on tribal sovereignty are incidental to the Court's general apathy about racial inequality. Charles Wilkinson suggests that decisions such as *Oliphant*, *Montana*, *Atkinson Trading Co.*, and *Hicks* may be a function, in part, of particular members of the Court "look[ing] skeptically on assertions of minority rights."[281]

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277. Getches notes this as a likely factor in the development of the implicit-divestiture doctrine. *See* Getches, *supra* note 216, at 1574–75.

278. *See supra* Section I.B.

279. *See supra* Section I.B.2.

280. *See supra* Section I.B.2.

281. CHARLES F. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 253–57 (2005).

Similarly, Getches thinks that the Indian-law decisions of the Rehnquist Court can be explained in part by the Court's tendency "to disfavor claims of racial minorities."[282] And N. Bruce Duthu argues that the implicit-divestiture doctrine "is overly burdened with historical and ethnocentric biases."[283]

Frank Pommersheim thinks that the contemporary Supreme Court has become "increasingly inimical to tribal sovereignty."[284] He reads the implicit-divestiture cases and other Indian-law decisions as establishing a "new paradigm."[285] Tribal governments generally prevail in the Supreme Court, he argues, when they claim tribal sovereignty "defensively"—that is, to resist the encroachment of state-court jurisdiction over Indians and Indian lands.[286] But tribal governments generally lose in the Supreme Court when they claim their sovereignty "offensively"—that is, to assert jurisdiction over non-Indians.[287] Pommersheim maintains that the Court's approach in the second group of cases "makes no reference to constitutional, statutory, or treaty analysis, but instead appears to rest on mere judicial preference; a preference that often seems to border on fear of, or even hostility to, tribal jurisdiction over non-Indians."[288] Similarly, Berger attributes the contemporary Supreme Court's Indian-law decisions, including the implicit-divestiture cases, to "an inability to see tribal interests as sovereign interests or to understand what tribal sovereignty means to Native people and others."[289]

The more pointed version argues that the Supreme Court is actively hostile to the claims of racial minorities in general and to those of Indians in particular. Ann Tweedy attributes the implicit-divestiture cases to "the Supreme Court's increasing preoccupation with liberal goals in the decades following the Civil Rights Movement."[290] Tweedy sees in the Court's "liberalism" an "assimilationist agenda" and "the racist idea that whiteness connotes neutrality whereas Indianness or color connotes bias or special interest."[291] And the Court's redefinition of tribal sovereignty, she argues, is grounded specifically in social-contract theory—which, she says, is "a peculiarly Western doctrine that should not be forced upon non-Western peoples" and which "is premised upon the notion of a homogeneous culture" to the detriment of "minority cultures."[292] Similarly, Robert N. Clinton argues that

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282. Getches, *supra* note 261, at 317.

283. Duthu, *supra* note 262, at 355.

284. Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48, 50 (2010).

285. *Id.* at 48–49.

286. *Id.* at 54.

287. *Id.* at 54–55.

288. *Id.* at 56.

289. Bethany R. Berger, *Hope for Indian Tribes in the U.S. Supreme Court?:* Menominee*,* Nebraska v. Parker*,* Bryant*,* Dollar General . . . *and Beyond*, 2017 U. ILL. L. REV. 1901, 1911 (2017).

290. Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147, 147 (1999–2000).

291. *Id.* at 147–48.

292. *Id.* at 199; *see also id.* at 208–210.

the implicit-divestiture cases derive from a subtle form of "racism/colonialism."[293] Clinton finds that:

> [The Supreme Court's] preference for political resolution of minority rights questions is unidirectional—it operates only to protect the right of non-Indian political processes to control the rights, destinies, and interests of Indian minorities, but not the right of Indian governments to affect the rights and interests of non-Indians or non-member Indians who reside within their reservation and affect the lives of tribal members.[294]

Williams also offers a harsh condemnation. Surveying the Court's Indian-law cases through the end of the Rehnquist Court, he argues that "the language of racism directed at Indians that was so popular with the justices in the nineteenth century is still being perpetuated by the Supreme Court in many of its most important decisions on Indian rights in the post-*Brown* era."[295] Williams says that the contemporary Court's general abandonment of "racist precedents" and "hostile stereotypes" with respect to African Americans and "the supposed benevolent racial paradigm shift represented by . . . *Brown*" never extended to the Court's treatment of Indians.[296] More specifically, he argues that "a long legacy of hostile, romanticized, and incongruously imagined stereotypes of Indians as incommensurable savages"—which he traces to the foundational decisions of the Marshall trilogy—continues to shape the way the justices view and understand the legal history, and therefore the legal rights, of Indian tribes."[297] Pointing in particular to *Oliphant*, Williams says that "[t]he justices continue to uphold a form of legalized racial dictatorship."[298] He reads *Oliphant* as reasoning that Indian tribes are "far too uncivilized to be allowed to exercise criminal jurisdiction over non-Indians."[299] And, he says, the Court's racism persists through decisions such as *Hicks* and *Lara*. In his view, those cases "show how a long-established language of racism continues to be employed to support a jurispathic, rights-destroying principle of racial discrimination applied to Indians in America."[300]

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293. *See* Clinton, *supra* note 229, at 99.

294. *Id.* at 98.

295. *See* WILLIAMS, *supra* note 258, at xxii.

296. *Id.* at 87.

297. *Id.* at xxv. Williams also notes that he "do[es] not believe that the Court is a hopelessly racist institution that is incapable of fairly adjudicating cases involving the basic human rights to property, self-government, and cultural survival possessed by Indian tribes as indigenous peoples." *Id.* at xxvii.

298. *Id.* at xxiv.

299. *Id.* at 104; *see also* Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 265, 267–74 (1986).

300. *See* WILLIAMS, *supra* note 258, at 136; *see also* Dussias, *supra* note 27, at 88. David E. Wilkins suggests that the *Oliphant* decision can be attributed, at least in part, to Justice Rehnquist's hostility to tribal interests. "Rehnquist's version of federalism," Wilkins argues, "incurs great difficulty when faced with tribal political status, and his political hierarchy places tribes lower than the United States and frequently lower than the states and, in some cases, even county governments." WILKINS, *supra* note 259, at 198.

This explanation, at least in its moderate version, is consistent with the contemporary Court's stated project of pursuing a color-blind reading of the Constitution and generally eliminating race-based distinctions from federal, state, and local law.[301] Such skepticism about differential treatment of racial minorities almost inevitably takes particular exception to federal Indian law. Not only do Indians enjoy certain advantages within the legal system—such as the employment preferences approved by the Court in *Morton v. Mancari*[302] and the adoption-placement preferences questioned by the Court in *Adoptive Couple v. Baby Girl*[303]—but Indian tribes, as sovereigns, stand outside the federalist structure. This explanation thus reads the implicit-divestiture cases as the Court's effort to limit and ultimately destroy tribal sovereignty as a racial preference; in effect, it sees the implicit-divestiture cases as reaching for the final political, legal, and cultural assimilation of Indians into American society.[304]

But there are problems with this explanation. First, it cannot explain why the members of the Court who have voted against the tribal governments in the implicit-divestiture cases often include those who generally are among the most solicitous of minority rights.[305] Justice White and Justice Blackmun voted with the majority in *Oliphant*; Justice White voted with the majority in *Montana*; Justices White and Blackmun voted with the majority in *Duro*; *Strate* was a unanimous opinion, with Justice Ginsburg writing for the Court; Justice Ginsburg joined the majority opinion in *Nevada v. Hicks*; and *Atkinson Trading* also was a unanimous opinion.[306] Why would the usual defenders of racial minorities' civil rights join the implicit-divestiture decisions if the point of those decisions were to undermine the rights of Indians? It seems highly implausible Justices White, Blackmun, Ginsburg, and others have a particular anti-Indian animus.

Second, it does not explain why the Supreme Court has chosen to redefine retained, inherent tribal sovereignty in membership terms but, within that redefinition, to preserve, and in some respects to strengthen, tribal sovereignty. In *Wheeler*, the Supreme Court relied on tribal sovereignty to reject the double-jeopardy challenge of an Indian tried in both tribal and federal court; in *Martinez*, the Court relied on tribal sovereignty to hold that tribal governments may not be sued for violations of the Indian Civil Rights Act of 1968; and in other cases since *Oliphant*, the Court generally has expanded the scope of tribal sovereign immunity.[307] If the Court is truly hostile to tribal sovereignty as an impermissible race-based preference, why has it only redefined—but not abolished—tribal sovereignty?

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301. *See, e.g.*, Berger, *Liberalism and Republicanism in Federal Indian Law*, *supra* note 262, at 816 ("Measured against a liberal framework, tribal interests may be perceived as special interests, inconsistent with the principle of equal treatment.").

302. 417 U.S. 535 (1974).

303. 133 S. Ct. 2552 (2013).

304. *See* Tweedy, *supra* note 290.

305. *See, e.g.*, Berger, *supra* note 289, at 1912–14; Berger, *Liberalism and Republicanism in Federal Indian Law*, *supra* note 262, at 814–15.

306. *See supra* Section I.A.

307. *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014); Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751 (1998).

### *C. Incoherence of Indian-Law Decisions*

A third explanation argues that the contemporary Supreme Court's Indian-law decisions, including its implicit-divestiture cases, are simply incoherent. This explanation argues that the Court's decisions over the past several decades resemble a random walk—they are inconsistent with each other, and they collectively fail to produce a cogent body of law. On this account, the Court has no principled framework—no "organizing method"[308]—to discipline its analysis. In Frickey's words, the Indian-law cases are "largely a collection of ad hoc judicial assessments,"[309] and the implicit-divestiture decisions in particular form "a motley lot"[310] and "lack any sort of coherent core."[311]

Frickey considers and rejects the possibility that the Court's Indian-law cases, including the implicit-divestiture decisions, reflect congressional intent.[312] Instead, he argues that the cases generally are driven by one or more of four values: "enforcing a tradition of protecting Indian rights, avoiding congressional expectations that are obsolescent in the current Indian context, applying manageable judicial standards, and defining civil rights by measuring the appropriate scope of sovereignty within a political community."[313] But Frickey maintains that those values often conflict, and he finds it "impossible" to arrange them in a way that provides a consistent description of the Court's holdings.[314] "Although one or more of the factors" may explain the outcome in an individual case, he says, "collectively the factors are so deeply divisive that they seemingly add up to nothing."[315] In his view, "foundational theory" and "elemental concepts"—such as the notion that a "tribe is fully sovereign except to the extent a federal statute, agreement, or treaty says otherwise"—are "unlikely candidate[s] for resolving particular disputes in federal Indian law."[316] There is, in Frickey's view, a stubborn "incoherence" in the Supreme Court's Indian case law.[317]

Consider how the implicit-divestiture cases, taken as a whole, resist the effort to find underlying cogency. *Oliphant*, which introduced the implicit-divestiture theory

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308. *See* Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, *supra* note 254, at 1175.

309. *Id.* at 1142.

310. *Id.* at 1164 n.158.

311. *See* Frickey, *supra* note 266, at 28; *see also* Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, *supra* note 196, at 659.

312. *See* Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of the Federal Indian Law*, *supra* note 254, at 1160–64, 1184–85.

313. *Id.* at 1174.

314. *Id.* at 1203.

315. *Id.*

316. *Id.* at 1206.

317. *Id.* at 1174; *see also* Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, *supra* note 254, at 1769–76. In the normative portion of his argument, Frickey ultimately favors deciding Indian-law cases through what he calls "practical reason," although that approach promises little, if any, remediation of the adjudicative incoherence that he identifies. *Id.* at 1203, 1231–39. N. Bruce Duthu also finds that the implicit-divestiture theory "lacks coherent structure, definition, or limitations." Duthu, *supra* note 262, at 387.

to hold that Indian tribes may not exercise criminal jurisdiction over non-Indians, definitely departs from the foundational principles of the Marshall trilogy.[318] That makes *Oliphant* an innovation, but it does not necessarily make it nonsensical. And *Duro*, which holds that Indian tribes may not exercise criminal jurisdiction over nonmember Indians, is generally consistent with the reasoning of *Oliphant*.[319] But *Lara*, which holds *both* that *Duro* was correctly decided *and* that the federal statute overturning *Duro* did not constitute a congressional delegation of criminal jurisdiction to the tribes, contradicts itself. Following *Oliphant*, *Duro* specifically said that the tribal-governmental powers "lost" through implicit divestiture[320] are those "necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States."[321] Any exercise of criminal jurisdiction over "outsiders," the *Duro* Court said, would require a delegation of power from Congress.[322] The Court in *Lara*, however, effectively ignores that part of *Duro*, insisting that the legislation overturning *Duro* "recognized and affirmed"[323] the tribes' inherent criminal jurisdiction over nonmember Indians without any congressional delegation of federal power.[324] Whether by accident or design, this misstates *Duro*, which plainly indicated that tribal-governmental powers lost through implicit divestiture could be restored only by such a delegation.[325] Put simply, *Lara* is trying to have it both ways.[326]

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

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

320. *Id.* at 686.

321. *Id.* at 693.

322. *Id.* at 686.

323. *See* United States v. Lara, 541 U.S. 193, 198 (2004) (referring to 25 U.S.C. § 1301(2), an amendment to the Indian Civil Rights Act of 1968, made in 1991, restoring tribal criminal jurisdiction over nonmember Indians).

324. The Court in *Lara* acknowledges that "*Duro*, like several other cases, referred only to the need to obtain a congressional statute that 'delegated' power to the tribes." *Id.* at 207 (emphasis omitted). The Court then tries to cabin that part of *Duro*:

> But in so stating, *Duro* (like the other cases) simply did not consider whether a statute, like the present one, could constitutionally achieve the same end by removing restrictions on the tribes' inherent authority. Consequently we do not read any of these cases as holding that the Constitution forbids Congress to change 'judicially made' federal Indian law through this kind of legislation.

*Id.* But *Duro* drew a clear distinction between tribal power deriving from retained, inherent sovereignty and tribal power deriving from a congressional delegation. In reference to *Wheeler*, the *Duro* Court said: "Had the prosecution been a manifestation of external relations between the Tribe and outsiders, such power would have been inconsistent with the Tribe's dependent status, *and could only have come to the Tribe by delegation from Congress* . . . ." *See Duro*, 495 U.S at 686 (emphasis added).

325. *See, e.g.*, Transcript of Oral Argument at 42, United States v. Lara, 531 U.S. 193 (2004) (One Justice stated during questions, "*Duro* said we'll look at the statute. Congress didn't give this power. End of case. That's all.").

326. It, of course, would have been perfectly sensible for the Court in *Lara* to hold that the legislation overturning *Duro* was a congressional recognition and affirmation that retained, inherent tribal sovereignty includes criminal jurisdiction over nonmember Indians. But that holding would not have been consistent with *Duro*. One possibility is that Justice Breyer, the author of the majority opinion in *Lara*, did not want to lose the votes of those who had been

Matters are still messier on the civil side. *Montana*, holding that tribes generally lack civil-regulatory jurisdiction over nonmember Indians, is not radically inconsistent with *Oliphant* and *Duro*, but it draws distinctions not drawn by those cases.[327] *Montana* says that tribes have civil-regulatory jurisdiction over nonmember Indians with respect to activities on tribal lands—a point with no analog under *Oliphant* and *Duro*.[328] Additionally, *Montana* sets out the two *Montana* exceptions under which tribes have civil-regulatory jurisdiction over nonmembers on non-tribal lands—again, a point foreign to *Oliphant* and *Duro*.[329] *Strate*, which extends the *Montana* framework to civil-adjudicative jurisdiction, is consistent with *Montana*, but *Hicks* is inconsistent with both *Montana* and *Strate*.[330] In *Hicks*, the Court indicated that the status of land as tribal or non-tribal is just "one factor" to consider for purposes of tribal civil jurisdiction over nonmembers.[331] The lack of cogency on the civil side is perhaps best illustrated by *Brendale*, in which the nine members of the Court were unable to articulate a framework for deciding whether an Indian tribe had the authority to apply its zoning ordinance to non-tribal reservation lands.[332]

The problem, on this explanation of the implicit-divestiture cases, is not just that the Supreme Court has strayed from the foundational principles of federal Indian law in general and of retained, inherent tribal sovereignty in particular. Rather, the problem is that the Court, as a collective, simply does not have a clear idea of what it is doing or where it is headed. After first announcing the implicit-divestiture theory in *Oliphant*, the Court has been unsure how far the theory reaches. Does the implicit-divestiture theory limit tribal jurisdiction over nonmember Indians? *Duro*, *Montana*, and *Strate* indicate that it does; *Lara*, which validated the legislation overturning *Duro*, suggests that it does not. Does the implicit-divestiture theory limit tribal jurisdiction over nonmembers (on the civil side) and non-Indians (on the criminal side) throughout Indian country? *Oliphant* and *Hicks* suggest that little or no distinction should be drawn between tribal and non-tribal lands within a reservation; *Montana* strongly indicates otherwise. The Court does appear to be making it all up as it goes along.

And yet, that is how adjudicative lawmaking generally works; certainly, that is the approach followed by the common-law courts for centuries. Each new decision may move the law and, in so doing, may introduce inconsistencies and incongruities that require remediation by future decisions or by supervening legislation. In

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in the majority in *Duro* (Justices Rehnquist, Stevens, and O'Connor were in the majority in each case). That said, Justice Breyer would have put *Lara* on a firmer analytical basis if he had simply acknowledged that Congress, by declaring that it was recognizing and affirming the criminal jurisdiction of Indian tribes over nonmember Indians as part of retained, inherent tribal sovereignty, necessarily took the view that *Duro* was wrong.

327. *See* Montana v. United States, 450 U.S. 544 (1981).

328. *Id.* at 557.

329. *Id.* at 565–66.

330. Nevada v. Hicks, 533 U.S. 353 (2001); Strate v. A-1 Contractors, 520 U.S. 438 (1997).

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

332. Frickey calls *Brendale* "an incoherent smorgasbord of concerns about political community and civil rights." Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, *supra* note 254, at 1200.

characterizing the common law, Holmes observed that it "is always approaching, and never reaching, consistency" and that "[i]t will become entirely consistent only when it ceases to grow."[333] As shown in Part I, the implicit-divestiture cases do point, however imperfectly, in a particular direction. There *is* a cogent story to tell about them: they are the Court's attempt to resolve the tribal-sovereignty trilemma. Even if loose ends remain, that explanation fits the implicit-divestiture cases better than does Frickey's frustrated conclusion that the cases make no sense.[334]

## III. RECONSIDERING THE TRIBAL-SOVEREIGNTY TRILEMMA

In Part I, I argued that the implicit-divestiture cases—the judicial change from the traditional, territorial-based definition of tribal sovereignty to the contemporary, membership-based definition—should be understood as the Supreme Court's honest, good-faith resolution of the tribal-sovereignty trilemma. I presented this account as a positive explanation, not as a normative assessment. Although I neither defended nor attacked the implicit-divestiture decisions, I argued that they do not represent the Court's wholesale rejection or abandonment of tribal sovereignty, as some scholars have maintained. In Part II, I argued that the explanation set forth in Part I is a more accurate account than prominent explanations found in the scholarly literature.

In this Part III, I shift my approach from the descriptive and the analytical to the evaluative. Specifically, I compare the Court's resolution of the tribal-sovereignty trilemma to the other possible resolutions that might be implemented through federal common law, federal legislation, or constitutional amendment. Throughout, it is important to bear in mind that the denial of tribal jurisdiction over nonmembers is deeply problematic. It is a serious affront to the dignity of tribal governments as sovereigns. By imposing jurisdictional limitations on tribal governments that do not apply to other governments, the Supreme Court has taken upon itself the authority to diminish the tribes' sovereign status.[335] Additionally, the denial of jurisdiction over nonmembers undermines the capacity of tribal governments to protect the health, safety, welfare, and morals of persons—members and nonmembers alike—living within Indian country.[336] Even if the Court considers its approach the most attractive (or the least unattractive) resolution of the trilemma, one cannot ignore that the implicit-divestiture cases cut very hard and very deep against tribal interests.

What, then, are the other options for resolving the trilemma? Congress or the Supreme Court could reverse course on the implicit-divestiture cases and recognize general tribal criminal and civil jurisdiction over all persons and activities within Indian country. That would both reinstate the traditional, territorial-based definition of tribal sovereignty and preserve the placement of tribal governments outside the

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333. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 36 (1881).

334. In a later article, Frickey modified his views about the incoherence of the implicit-divestiture cases, arguing that the decisions are unified by the "unstated assumption . . . [that] [t]ribal sovereignty over non-Indian areas and tribal sovereignty to regulate significant nonmember interests are inconsistent with what the Supreme Court presumes to be the wishes of Congress." *See* Frickey, *supra* note 48, at 6–7.

335. *See supra* Section I.A.

336. *See supra* Section I.A.

federalist structure, but it would undermine fundamental rights.[337] The trilemma instead could be resolved by treating tribal governments like state governments for purposes of the constitutional-rights provisions. That would both reinstate the traditional, territorial-based definition of tribal sovereignty and preserve fundamental rights, but it also would force tribal governments into the federalist structure.[338] And of course, the Court could continue along its current path until it holds, in the end, that tribal governments have no criminal or civil jurisdiction over nonmembers, subject to whatever ad hoc exceptions Congress may enact.[339]

### *A. Restoring Territorial-Based Tribal Sovereignty*

To date, the Supreme Court has resolved the tribal-sovereignty trilemma by compromising the traditional definition of tribal sovereignty. But the trilemma could be resolved instead by compromising fundamental rights. That is, the law could return to the traditional, territorial-based definition of retained, inherent tribal sovereignty and continue the placement of tribal governments outside the federalist structure, thereby taking the position that nonmembers may not assert fundamental rights as trumps against tribal-governmental action. This approach would not require constitutional amendment; it could be effected through ordinary adjudication or legislation.

On the adjudicative side, the Supreme Court could simply reverse course on the implicit-divestiture cases, overruling *Oliphant*, *Montana*, *Strate*, *Hicks*, and the related decisions. As Justice Thomas observed in his *Lara* concurrence, the implicit-divestiture theory is a creature of federal common law, not of constitutional law.[340] For the same reason, Congress could overturn the implicit-divestiture cases by statute. Because the cases are grounded in federal common law (and, in fact, purport to interpret previous legislative and executive action), there is no constitutional limitation on Congress recognizing tribal criminal or civil jurisdiction over nonmembers. Congress has already done so, although on a very limited basis. The *Duro* fix, passed in 1991, specifically overturned the result in *Duro* and provided that Indian tribes may exercise criminal jurisdiction over nonmember Indians.[341] Amendments to the Indian Civil Rights Act partially overturned the result in *Oliphant* and provided that Indian tribes may exercise criminal jurisdiction over non-Indians for certain domestic-violence and dating-violence offenses against Indians.[342]

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337. *See supra* Section I.C.

338. *See supra* Section I.C.

339. *See supra* Section I.C.

340. United States v. Lara, 541 U.S. 193, 214–23 (2004) (Thomas, J., concurring).

341. 25 U.S.C. § 1301(2) (2012) (amendment to the Indian Civil Rights Act of 1968, made in 1991, restoring tribal criminal jurisdiction over nonmember Indians).

342. 25 U.S.C.A § 1304 (2013) (amendment made by the Violence Against Women Reauthorization Act of 2013, restoring tribal criminal jurisdiction over non-Indians for certain domestic-violence and dating-violence offenses). As a condition for permitting tribal governments to exercise criminal jurisdiction over non-Indians under the amendments to the Indian Civil Rights Act, Congress required tribal governments to observe certain individual rights for criminal defendants. *Id.* at § 1304(d).

Of the possible resolutions to the tribal-sovereignty trilemma, this one would represent the most robust commitment to retained, inherent tribal sovereignty. It would recognize that tribal governments are separate and distinct from both the federal government and the state governments and that tribal governments retain the full territorial jurisdiction normally attributed to sovereigns. In effect, this approach would treat a tribal government as being every much as sovereign over Indian country as the French government is sovereign over the lands of France (although, in the case of a tribal government, subject always to the greater power of the U.S. federal government). That would go a long way to restoring the authority and dignity of tribal governments lost through many years of colonialism, confinement to reservations, allotment, and forced assimilation. Advocates of tribal interests have proposed legislative and adjudicative reform of the implicit-divestiture cases along these lines.[343]

But this approach necessarily would require that fundamental rights give way whenever those rights potentially conflict with tribal-governmental power.[344] That no doubt would generate resistance across the political spectrum. After many decades of the rights revolution, the Supreme Court at one time or another has ruled in favor of rights important to just about every segment of U.S. society—rights concerning free speech, religious liberty, same-sex marriage, abortion, owning and carrying firearms, criminal procedure, equal protection for racial minorities and women, and due process in civil proceedings.[345] Even without a showing that any particular tribal government would provide less protection for fundamental rights than what the Court's decisions require for federal, state, and local governments, many would be troubled by the mere notion that tribal governments would not be constrained by the rights that otherwise can be asserted against government at any level.

For that reason, the prospects for simply overturning the implicit-divestiture cases and returning to the traditional, territorial-based definition of tribal sovereignty seem poor. The political backlash to such an approach could well do more harm to the independence and the integrity of tribal governments than the implicit-divestiture cases themselves have done. For more than a century, the Supreme Court has maintained that Congress has plenary power over the Indian tribes—including the power to terminate the tribes entirely.[346] A perception among legislators and the public that the only available policy choices are the surrender of fundamental rights within Indian country or the broad curtailment of tribal-governmental powers could lead to political consequences that undermine tribal interests generally. At the very least, those who advocate this resolution should consider the possibility of serious unintended consequences for the Indian tribes.

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343. *See, e.g.*, Grant Christensen, *Creating Bright-Line Rules for Tribal Court Jurisdiction over Non-Indians: The Case of Trespass to Real Property*, 35 AM. INDIAN L. REV. 527, 527 (2010); Duthu, *supra* note 262, at 399–401; Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 168–85 (2006).

344. *See supra* Section I.C.

345. *See supra* Section I.B.2.

346. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 1, at 391–96.

### *B. Bringing Tribal Governments into the Federalist Structure*

Another possible resolution of the tribal-sovereignty trilemma is to force tribal governments into the federalist structure. This approach would permit tribal governments to exercise full criminal and civil jurisdiction over all persons and activities within Indian country but would also require tribal governments to respect fundamental rights as those rights have been interpreted by the Supreme Court.[347] Although the analogy is imperfect in several respects, tribal governments under this approach would be treated much like state governments. They would exercise traditional, territorial-based jurisdiction, but claims that their exercise of governmental power violate the Constitution would be subject to general review in the federal courts.

This resolution could be implemented through several different mechanisms. The most straightforward would be a constitutional amendment recognizing tribal governments and specifying their place within the federalist structure.[348] The Constitution currently makes only a single reference to Indian tribes. The Indian Commerce Clause grants Congress the power to regulate "[c]ommerce with foreign Nations, and among the several States, and with the Indian Tribes."[349] Although the Supreme Court has interpreted that clause to give Congress plenary power over Indian tribes (an interpretation that remains controversial), the clause provides no apparent basis for equating tribal governments with state governments. Additionally, tribal governments are not mentioned in the Fourteenth Amendment, which provides the hook for incorporating portions of the Bill of Rights against state governments. A constitutional amendment, therefore, could specifically empower tribal governments to exercise criminal and civil jurisdiction on a territorial basis and require tribal governments to conform to the Fourteenth Amendment and to the constitutional-rights provisions that already bind the states.

A second mechanism would be for the Supreme Court to overrule its 1896 decision in *Talton*.[350] *Talton* held that the tribes do not derive their sovereignty from the Constitution and therefore are not subject to the individual rights protected by the Constitution.[351] But the reasoning in *Talton* is sound, and it is unclear how the Supreme Court could justify a different outcome now. After all, the Indian Commerce Clause includes the only constitutional reference to Indian tribes, and the tribes, unlike the states, had no role in the ratification of the Constitution or its amendments. What, then, would be the grounds for treating tribal governments like state governments without a constitutional amendment?

A third mechanism would be to overrule or to overturn *Martinez*.[352] *Martinez* held that, apart from habeas corpus review of criminal convictions in tribal court, tribal-governmental actions cannot be reviewed in federal court for claimed

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347. *See supra* Section I.C.

348. *See, e.g.*, RUSSELL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 279–82 (1980).

349. U.S. CONST. art. I, § 8.

350. *See supra* Section I.C.

351. *See supra* Section I.B.3.

352. *See supra* Section I.C.

violations of the Indian Civil Rights Act of 1968.[353] The decision presented a statutory issue, not a constitutional issue; thus, it could be undone either by an act of Congress or by a ruling of the Supreme Court. If the Court overruled *Martinez*, the actions of tribal governments would be subject to federal-court review as to the specific fundamental rights set out in the Indian Civil Rights Act, such as the freedom of speech and freedom of the press, but not as to the fundamental rights omitted from the Indian Civil Rights Act, such as the right to bear arms. By contrast, if Congress overturned *Martinez* by statute, Congress could enlarge (or contract) the fundamental rights that would bind tribal governments.[354]

Under each of the three mechanisms, the outcome would be generally the same. With the traditional, territorial-based definition of tribal sovereignty restored, tribal governments would exercise criminal and civil jurisdiction over all persons and activities within Indian country, and the federal courts would have jurisdiction to review the actions of tribal governments for claimed violations of fundamental rights. Such reforms have been proposed.[355] But the return to full jurisdiction would come at a high cost to the tribes. Forcing tribal governments into the federalist structure and, in effect, treating them like state governments, would be a significant intrusion on tribal independence, autonomy, and self-determination. It would represent the ultimate assimilation of tribal governments into the legal system and the political culture of the United States. For any action implicating a fundamental right of an Indian or a non-Indian, tribal councils, tribal executives, and tribal courts would have to conduct themselves like their non-Indian counterparts. Tribal treatment of fundamental rights would have to be at least as protective as federal and state treatment of those rights, even if the result—as with the intermixing of tribal religion and tribal government—would be inimical to tribal culture. One might fairly ask whether this resolution would take more away from the tribes, in terms of legal and political assimilation, than it would restore to them, in terms of jurisdiction over nonmembers.[356]

An intermediate approach could mitigate (but would not eliminate) those concerns. The incorporation of tribal governments into the federalist structure could be made elective, on a tribe-by-tribe basis. For example, Congress could amend the

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353. *See supra* Section I.B.3.

354. *See, e.g.*, Robert Laurence, *Martinez, Oliphant and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 10 CAMPBELL L. REV. 411, 427–38 (1988); Levy *supra* note 230, at 359. *Cf.* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 111–19 (1987).

355. *See, e.g.*, Amy Conners, *The Scalpel and the Ax: Federal Review of Tribal Decisions in the Interest of Tribal Sovereignty,* 44 COLUM. HUM. RTS. L. REV. 199 (2012); Gould, *supra* note 256; Robert Laurence, *The Dominant Society's Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography and the Indian Civil Rights Act*, 30 U. RICH. L. REV. 781, 805-811 (1996); M. Gatsby Miller, *The Shrinking Sovereign: Tribal Adjudicatory Jurisdiction over Nonmembers in Civil Cases*, 114 COLUM. L. REV. 1825 (2014); Alex Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77 (2014).

356. Matthew L.M. Fletcher offers a thoughtful and measured proposal for expanding tribal civil jurisdiction over nonmembers with respect to activities on tribal lands, subject to review by non-tribal courts for "fundamental fairness" in the treatment of nonmembers. *See* Fletcher, *supra* note 140, at 828–42.

Indian Civil Rights Act of 1968 to provide that any tribal government could elect to become subject to all the fundamental rights applicable to federal, state, and local governments, with federal-court review for claimed violations of those rights, in exchange for restoration of the traditional, territorial-based definition of tribal sovereignty. Any nonelecting tribe would remain under the status quo. But it seems cynical to suggest that such a Hobson's choice should be fully satisfactory to advocates of tribal interests. This approach, after all, would require a tribe to sacrifice a good measure of self-determination.[357]

### *C. Conceding the Endgame of Implicit Divestiture*

Finally, the tribal-sovereignty trilemma could be resolved simply by letting the implicit-divestiture theory play itself out to its likely outcome. As matters stand, the most probable end point of the *Oliphant* and *Montana* line of cases is the loss by tribal governments of all criminal and civil jurisdiction over nonmembers, subject only to whatever ad hoc exceptions may be made by Congress. Advocates of tribal interests rightly find nothing attractive about this. In their view, the implicit-divestiture cases represent a very serious, perhaps the most serious, intrusion on tribal sovereignty in contemporary law.[358] Why, they may rightly ask, should the tribes simply give up the fight and accept the loss of territorial-based jurisdiction?

From the perspective of the tribes and their advocates, conceding the endgame of the implicit-divestiture theory makes little sense in the abstract. But perhaps it has more to commend it when evaluated against the other possibilities. The first option—restoring the traditional, territorial-based definition of tribal sovereignty without protecting fundamental rights against tribal-governmental action—seems highly unlikely. When framed as a question whether tribal governments should have criminal and civil jurisdiction over nonmembers without the restraint of fundamental rights, political opposition among the non-Indian majority becomes too easy to marshal and too difficult to overcome. The second option—bringing tribal governments into the federalist structure—would be a hard bargain for tribal governments. It presents a very difficult trade-off: regaining jurisdiction over nonmembers but surrendering legal and political independence, autonomy, and self-determination. To be brought within the federalist structure is necessarily to be assimilated—to become the functional equivalent of a state government (or, at best, an instrumentality of the federal government). Perhaps some tribes might judge the trade-off worth making, but others might reasonably doubt how expanded jurisdiction could justify the heavy price to be paid.

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357. That said, the National Congress of American Indians adopted a resolution in 2016 advocating this approach. *See* The Nat'l Cong. of Am. Indians, *Combating Non-Indian Domestic Violence and Sexual Assault: A Call for a Full Oliphant Fix*, Res. #SPO-16-037 (June 2016), http://www.ncai.org/attachments/Resolution_orvkZwEdbgGeAHMvJqyzAWvdDwRXttpGCTmoRcxCStvLSHnXNGv_SPO-16-037%20final.pdf [https://perma.cc/DL65-QKZS].

358. *See supra* Part II.

## CONCLUSION

There is no good answer here—no resolution of the tribal-sovereignty trilemma that can be wholly satisfactory. From the perspective of the Supreme Court, the implicit-divestiture cases represent a fair resolution, a proper redefinition of tribal sovereignty for the era of fundamental rights. In the Court's view, the redefinition preserves tribal sovereignty, admittedly in a different and more limited form, without compromising the fundamental rights of nonmembers who by definition cannot participate in tribal government. From the perspective of the tribes and their advocates, the implicit-divestiture theory privileges the rights and interests of nonmembers and non-Indians over the rights and interests of tribes. It simply continues by other means the brutal processes of colonialism and subjugation. And yet the hard fact remains that tribes are unlikely to see a full restoration of the traditional, territorial-based definition of tribal sovereignty without being forced into the federalist structure.