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Cover Page Footnote

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I want to thank the members of my faculty who attended my work-in-progress presentation and gave me valuable feedback. Thanks also to those who commented on my presentation at the annual AALS conference in January 2014. Special thanks to Professor Rick Collins for reading and critiquing an earlier draft of this paper, and to Laura Skousen for her editing work. I am also thankful for the financial assistance provided by the S.J. Quinney College of Law's Research Development Fund.

CONSTITUTIONALISM, FEDERAL COMMON LAW, AND THE INHERENT POWERS OF INDIAN TRIBES

Alex Tallchief Skibine[*]

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Introduction

Thirty-five years after the United States Supreme Court held that Indian tribes do not have inherent sovereign power to criminally prosecute non-Indians,[1] the United States Congress "reaffirmed and recognized" the sovereign authority of Indian tribes to prosecute all persons committing certain crimes of domestic violence as part of the re-authorization of the Violence Against Women Act (VAWA).[2] The reaffirmation of tribal authority contained in the VAWA reauthorization follows a similar one made by Congress in 1990 allowing tribes to prosecute non-member Indians.[3] The 1990 legislation became necessary after the Court in *Duro v. Reina* similarly held that tribes do not have any authority to prosecute non-member Indians.[4] In coming to such decisions, the Court developed what is now known as the Implicit Divestiture Doctrine under which upon incorporation into the United States, Indian tribes were implicitly divested of any sovereign power inconsistent with their status as domestic dependent nations.[5] After the power of Congress to pass the 1990 legislation, otherwise known as the *Duro-Fix,* was challenged in many lawsuits, in 2004 the Supreme Court held in *United States v. Lara*[6] that Congress had the constitutional power to reaffirm such tribal power.[7] The main issue in *Lara* was whether the previous decisions of the Court limiting tribal sovereign authority were constitutional in nature, or whether they were decisions of federal common law. If constitutional, Congress could not reaffirm tribal powers which did not constitutionally exist. On the other hand, if the decisions were based on federal common law, then Congress presumably had the power to overturn these decisions. The Court in *Lara* held that decisions, such as *Oliphant* and *Duro*, were decisions of federal

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

2. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

3. 25 U.S.C. § 1301(2) (2012).

4. 495 U.S. 676 (1990).

5. The Court first used that term to describe Indian tribes in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

6. 541 U.S. 193 (2004).

7. The Court's decision did not resolve all potential constitutional issues surrounding such tribal prosecution. Thus, the Court did not decide whether tribal prosecution of non-member Indians without the full protection of the Bill of Rights would be a violation of due process or equal protection. *See* Will Trachman, Comment, *Tribal Criminal Jurisdiction After* U.S. v. Lara*: Answering Constitutional Challenges to the* Duro *Fix*, 93 CAL. L. REV. 847 (2005).

common law. Congress could therefore recognize and affirm the tribes' prosecutorial power over non-member Indians

The reason for the ongoing debate about the constitutionality of the Indian section of VAWA is that while the result the Court reached in *Lara* was correct, its reasoning was deeply perplexing. The *Lara* Court took the position that in *Duro*, the Court simply derived the extent of tribal sovereignty from how the Legislative and Executive branches had treated Indian tribes throughout history. Thus, the *Lara* Court concluded that the *Duro* fix just "relaxes the restrictions, recognized in *Duro*, that the political branches had imposed on the tribes' . . . criminal jurisdiction over non-member Indians . . . ."[8] The problem here is that this interpretation of the Court's previous cases was as novel as it was surprising. In effect, none of the other implicit divestiture cases was decided pursuant to Justice Breyer's reformulation of the doctrine. Nevertheless, under *Lara*, pursuant to congressional plenary power, Congress could overturn the decision and allow Indian tribes to once again exercise criminal jurisdiction over non-member Indians as an attribute of their inherent authority

Now, with the enactment of the Indian provisions of VAWA, similar challenges are virtually certain to arise. In fact, one of the main objections of House Republicans during the debate surrounding the reauthorization of VAWA was that such congressional reaffirmation of tribal authority was unconstitutional.[9] The time is ripe, therefore, to re-examine the *Lara* decision as well as the Court's implicit divestiture jurisprudence.[10] In this

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8. 541 U.S. 193, 200 (2004).

9. In 2012 the Republican controlled House passed a VAWA reauthorization Bill without the tribal jurisdiction provisions because some Republicans believed it to be unconstitutional. After explaining that the House legislation did not include the unconstitutional provisions reaffirming tribal authority to criminally prosecute non-Indians, the House Legislative Report stated, "It is an unsettled question of constitutional law whether Congress has the authority under the Indian Commerce Clause to recognize inherent tribal sovereignty over non-Indians." H.R. REP. NO. 112-480 pt. 1, at 57-60 (2012). In 2013, the House Republican leadership finally but reluctantly agreed to the Senate-passed bill containing the tribal jurisdictional provisions. As enacted, VAWA contains severe restrictions on the exercise of tribal criminal jurisdiction over non-members. *See infra* note 277. For instance, the defendant must reside in the Indian Country of the prosecuting tribe, be employed in that Country, or have a "spouse, intimate partner, or dating partner who is an Indian residing in such Indian Country." 25 U.S.C. § 1304(b)(4)(B) (2012). For a summary of VAWA's Indian section, see Recent Legislation, 127 HARV. L. REV. 1509 (2014).

10. For recent scholarship analyzing the issues that will surface following enactment of the Tribal jurisdiction provision contained in the VAWA Reauthorization, see Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657 (2013) (arguing that the Court should not gauge the constitutionality of such

Article, I argue that because Indian tribes have been incorporated into our constitutional system, the federal common law analysis under which the Court determines the extent of sovereign authority still possessed by Indian tribes is faulty. Instead of using federal common law, the Court should adopt a constitutional mode of analysis in determining such issues.

Although the sovereignty of Indian tribes may not be guaranteed or defined in the Constitution, this does not mean that tribes have no constitutional status. The extent of their sovereignty should, therefore, be somewhat tied to a constitutional mode of analysis. The biggest threat to the future of Indian Nations is the Court's refusal to integrate or incorporate Indian tribes under a third sphere of sovereignty within our constitutional system.[11] Without such constitutional incorporation, the tribes exist at the "whim of the sovereign," be it the United States Congress or the Supreme Court.[12] Not only is this inconsistent with the emerging norms of international law on the rights of Indigenous Peoples,[13] but it has also resulted in confusion, incoherence, and a Court determined to usurp the role the Constitution vested in Congress, which is to regulate the relations between the tribes and the United States.

While some scholars have taken the position that Federal Indian law should remain *sui generis*, and that the major problem with the Court's jurisprudence is that it is abandoning the "exceptionalism" of federal Indian

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federal legislation based on whether it amounts to a reaffirmation or delegation of authority to the tribes and instead resolve the issue according to a system of divided sovereignty similar to how it resolves similar issues in the context of state/federal relations), and Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759 (2014) (borrowing from the Court's federalism jurisprudence affecting state sovereignty to argue that the Court should defer to Congress when it comes to determining the scope of tribal sovereignty). For a pre-VAWA reauthorization article examining the issues likely to arise in legislatively re-establishing tribal inherent powers, see Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J. L. REFORM 651 (2009).

11. *See* Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667 (2006) [hereinafter Skibine, *Redefining*].

12. I borrowed this expression from Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980).

13. On the evolving norms of international law concerning the rights of Indigenous Peoples, see Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173 (2014).

common law,[14] the time has come to integrate federal Indian law into constitutional law. From being "exceptional," federal common law relating to the status of Indian tribes as sovereign governments has just become "exceptionally" bad. The Supreme Court is slowly, but surely, dismantling the idea that Indian tribes can continue to thrive as sovereigns outside our constitutional structure. It is time, therefore, to look elsewhere and propose arguments for the incorporation of Indian tribes under a third sphere of sovereignty within our constitutional system.[15] There is no need to place federal Indian law in "deconstitutionalized zones,"[16] or "walling off Federal Indian Law from mainstream constitutional discourse."[17]

This incorporation, however, carries some consequences concerning the proper mode of analysis the Court should use in finding limits on the inherent powers of Indian tribes. The correct mode of analysis the Court should use in limiting the powers of Indian tribes is not general common law, but what some have called constitutional common law.[18] In this case, this means a dormant Indian Commerce Clause analysis. In other words, the Court should prevent tribes from exercising some forms of regulations over non-members not through the Implicit Divestiture Doctrine,[19] by arbitrarily and subjectively deciding it is not necessary to tribal self-government, but

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14. *See* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999) [hereinafter Frickey, *A Common Law*]; Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433 (2005).

15. For a similar argument, see Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775 (2014) (arguing that because Indian tribes have been incorporated as sovereign entities in our Federalist system, they should benefit from federalist doctrines supporting the existence of multiple sovereigns).

16. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 25, 230 (2002); *see also* Kyle S. Conway, *Inherently or Exclusively Federal: Constitutional Preemption and the Relationship Between Public Law 280 and Federalism*, 15 U. PA. J. CONST. L. 1323, 1326 (2013) ("Indian-law jurisprudence needs to be reconciled with our basic constitutional principles.").

17. Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of* Marbury v. Madison *to Tribal Courts' Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77, 83 (2004) [hereinafter Resnik, *Tribes, Wars, and the Federal Courts*]; *see also* Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CAL. L. REV. 1499, 1506-07 (2013) (arguing that the Court has used the "uniqueness" of Indian tribes to devise special doctrines that it has then manipulated against tribal interests).

18. *See* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

19. *See* discussion *infra* Part I.

by reference to the power of Congress over Indian tribes. While others have noted some similarities between the Court's decisions regarding the Implicit Divestiture Doctrine and the dormant Commerce Clause,[20] no one has endorsed a dormant commerce clause analysis as a method to control tribal power. In fact, one noted scholar has vehemently opposed it.[21] Yet, the use of a dormant Commerce Clause methodology seems especially appropriate here since one of the major reasons for the traditional dormant Commerce Clause doctrine is to protect out-of-state interests that, like non-members in a tribal context, do not participate in the state political process.[22] As the Court once stated, legislative action affecting such out-of-state interests "is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the State."[23] The dormant Indian Commerce clause test should be based on the underlying purpose of the Indian Commerce Clause. The dormant Commerce Clause doctrine aims at controlling state power imposing restrictions on the free flow of commerce from an economic perspective,[24] but the purpose of the Indian Commerce Clause is different. Its purpose is to control not only trade and intercourse between Indian tribes and non-Indians, but also all relations with the non-tribal world, including the political relations between the United States and the tribes. Therefore, the test should balance the federal interest in regulating trade, intercourse, and relations, with tribal interest in exercising authority over non-members.

There are several advantages to adopting this mode of analysis, besides the fact that court decisions using that test would still be able to be overturned or rectified by Congress. First, the analysis does not unnecessarily demean tribal sovereignty by arbitrarily and progressively adopting continuously narrower judicial definitions of tribal self-government using unprincipled federal common law. Second, because the analysis prevents tribal jurisdiction by focusing on congressional authority,

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20. *See* Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians*, 38 FED. BAR NEWS & J. 70, 74 (1991) ("As in the dormant commerce clause cases, the Court is influenced by its impression of congressional expectations, which expectations, if incorrect, can be clarified.").

21. *See* Frickey, *A Common Law*, *supra* note 14, at 68–73. "[T]hat approach would be a particularly inapt one to embrace in Indian law." *Id.* at 68–69.

22. *See, e.g.*, S. Pac. Co. v. Arizona, 325 U.S. 761 (1945).

23. S.C. Highway Dep't v. Barnwell Bros., 303 U.S. 177, 196 n.2 (1938).

24. On the purpose of the Commerce Clause, see Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988). On the economic purpose of the Dormant Commerce Clause, see Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785 (2001).

the power of Congress over Indian tribes should first be redefined and limited to be within constitutional bounds. Finally, using a dormant Indian Commerce Clause analysis would resolve the confusion generated by the Supreme Court's current implicit divestiture jurisprudence.[25]

Part I, after describing the holding and rationale of *Lara*, explains the evolution of the implicit divestiture doctrine and shows why *Lara's* formulation of the doctrine has further exacerbated the confusion surrounding the doctrine. This Part, however, also argues that Justice Breyer's reformulation of the implicit divestiture doctrine in *Lara* was in fact sound and is, in many ways, consistent with the proposed dormant Indian Commerce Clause analysis. Part II sets forth the case for the incorporation of Indian tribes as sovereign entities within our constitutional system. Finally, Part III explains the consequences of incorporation for the Court, the Congress, and the Indian nations. It ends by discussing whether the incorporation of Indian tribes into the constitutional order also means that some constitutional provisions, such as the Due Process Clause, should be applicable to tribal adjudicatory proceedings.

I. The Evolution of the Implicit Divestiture Doctrine

A. United States v. Lara[26]

The issue in *Lara* was whether the United States could proceed with the federal prosecution of Billy Jo Lara, an enrolled member of the Turtle Mountain Band of Chippewa Indians, after the Spirit Lake Indian Tribe had already prosecuted him for the same crime. *Lara* argued that because the United States could not "reaffirm" the inherent power of the tribe to prosecute him after *Duro*, which held such tribal power was lost upon tribal incorporation into the United States, the tribal prosecution in *Lara* was conducted pursuant to a delegation of federal authority to the tribe. Therefore, the Double Jeopardy Clause of the United States Constitution prevented a subsequent federal prosecution. The Court disagreed, and held that Congress could reaffirm such tribal power. In its 7–2 ruling, the Court stated, "Congress does possess the constitutional power to lift the restrictions on the tribe's criminal jurisdiction over nonmember Indians."[27] According to the Court, the legislation reaffirming such tribal power -

25. On such confusion, see Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553 (2009).

26. 541 U.S. 193 (2004).

27. *Id.* at 200.

known as the *Duro*-Fix - just "relaxes the restrictions, recognized in *Duro*, that the political branches had imposed on the tribes' exercise of inherent prosecutorial power."[28] The Court found that *Oliphant* and *Duro*

> reflect the Court's view of the tribes' retained sovereign status *as of the time* the Court made them. They did not set forth constitutional limits that prohibit Congress from changing the relevant circumstances, i.e. from taking actions that modify or adjust the tribes' status. To the contrary, *Oliphant* and *Duro* make clear that the Constitution does not dictate the metes and bounds of tribal autonomy.[29]

In large part, Justice Breyer's majority opinion in *Lara* relied on the plenary power of Congress over Indian affairs. Thus, he stated, "The Constitution grants Congress broad general powers to legislate in respect to Indians tribes, powers that that we have consistently described as 'plenary and exclusive.'"[30] Furthermore, Justice Breyer found nothing in the Constitution "suggesting a limitation on Congress' institutional authority to relax restrictions on tribal sovereignty."[31] In the process of reaching its result, the Court made two related findings. First, it held that the extent of tribal sovereignty is not a constitutional question.[32] Second, the Court based its holding on the notion that because Congress has plenary power over Indian tribes, it can re-calibrate the metes and bounds of tribal sovereignty.[33] Implicit in these two findings is a third: the reason that the extent of tribal sovereignty is not a constitutional question is that Congress has plenary power to increase (perhaps within limits) or reduce (apparently without limits) the extent of tribal sovereignty.

Although *Lara* was officially a 7–2 decision, Justice Kennedy only concurred in the result because he believed that any challenge to congressional power reaffirming tribal power to prosecute non-member Indians should have been raised during the tribal prosecution, and not the subsequent federal one. In addition, the *Lara* majority opinion generated an interesting concurring opinion by Justice Thomas. While agreeing that the

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28. *Id.*

29. *Id.* at 205.

30. *Id.* at 200.

31. *Id.* at 204.

32. *Id.* at 205 (stating that "the Constitution does not dictate the metes and bounds of tribal autonomy").

33. *Id.* at 202 (stating that Congress has enacted many statutes which "inevitably involve major changes in the metes and bounds of tribal sovereignty").

Tribes did not have constitutional status as sovereigns,[34] Thomas opined that it was inconsistent for the Court to take the position that the tribes are sovereign in any meaningful sense, while at the same time concluding that Congress has plenary authority over them. Thus, after stating, "I cannot agree with the Court, for instance, that the Constitution grants to Congress plenary power to calibrate the 'metes and bounds of tribal sovereignty,'"[35] he asserted that it "is quite arguably the essence of sovereignty not to exist merely at the whim of an external government."[36] Because Justice Thomas seriously questioned whether the Court could hold that Congress had plenary authority over Indian tribes-while at the same time taking the position that Indian tribes were still sovereign in any meaningful sense-his concurrence raises substantial doubts that he would rubber stamp a congressional recognition of tribal sovereignty to prosecute non-Indians as was done in VAWA. *Lara* then looks more like a 5–4 decision. Furthermore, three members of *Lara's* majority of five no longer sit on the Court, which casts serious doubts on the strength of the case as precedent for upholding the constitutionality of the new Indian section of VAWA. Moreover, as set forth below, the evolution of the Implicit Divestiture Doctrine is inconsistent with some of Justice Breyer's assertions in *Lara.*

B. Justice Rehnquist's Oliphant *Opinion*

The issue in *Oliphant v. Suquamish Indian Tribe* was whether the tribe could prosecute a non-Indian who had punched the tribal police chief while on the tribe's reservation.[37] The Court, through Justice Rehnquist, held that the tribe did not have such criminal jurisdiction. At the time, the widely accepted paradigm defining the powers of Indian tribes was laid out in Felix Cohen's *Handbook of Federal Indian Law*, first published in 1942.[38] There, he wrote:

> The whole course of judicial decisions on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses . . . all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance,

34. *Id.* at 219 ("The tribes, by contrast, are not part of this constitutional order, and their sovereignty is not guaranteed by it.").

35. *Id.* at 215.

36. *Id.* at 218.

37. 435 U.S. 191, 195 (1978).

38. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Univ. of N.M. photo. reprint 1971) (1942) [hereinafter COHEN].

> terminates the external powers of sovereignty of the tribe . . . but does not by itself affect the internal sovereignty of the tribe, i.e. its powers of local self-government. (3) These powers are subject to quantification by treaties and by express legislation of Congress.[39]

Instead of following Cohen's principles, Justice Rehnquist first engaged in a lengthy historical analysis showing that the three branches of the United States government shared an assumption that Indian tribes did not possess criminal jurisdiction over non-Indians. Thus, the Court concluded "while Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implied conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions."[40] However, the Court did not rest its holding solely on this congressional belief. The Court also stated that Indian tribes are "prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers inconsistent with their status."[41] Attempting to further delineate what kind of powers were inconsistent with tribal status, the Court stated, "Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty."[42] Tribal criminal prosecutorial powers were in conflict with the overriding sovereign interests of the United States because, since the Bill of Rights was inapplicable to tribal prosecution, "unwarranted intrusions" on the personal liberty of non-Indians could result.[43]

Oliphant seems like a mix of federal common law arguments loosely based on congressional treatment of tribes upon which the Court added a patina of constitutionally derived policies. Justice Rehnquist first relied upon the "shared assumptions" of the three branches concerning tribal jurisdiction over non-Indians and the historical treatment of tribal jurisdiction by Congress and the Executive. Then he abruptly declared that, even ignoring this treatment and history, upon incorporation into the United

39. *Id.* at 132 (internal citations omitted).

40. *Oliphant*, 435 U.S. at 204.

41. *Id.* at 208.

42. *Id.* at 209.

43. *Id.* at 210. In *Talton v. Mayes*, 163 U.S. 376, 384-85 (1896), the Court had held that Indian tribes were not bound by the federal Bill of Rights when exercising their inherent governmental authority.

States, Indian tribes lost the ability to exercise inherent powers in conflict with the overriding sovereign interests of the United States. Furthermore, the Court based its conclusion that the exercise of tribal criminal jurisdiction over non-Indians conflicts with the overriding sovereign interests of the United States on the fact that tribal prosecution could amount to an unwarranted intrusion on the personal liberty of non-Indian citizens since tribes are not bound by the Constitution. In effect, Justice Rehnquist modified Cohen's second fundamental principle to read that "[c]onquest . . . terminates the external powers or sovereignty of tribes *and also those internal sovereign powers when the exercise of these powers conflict with an overriding sovereign interest of the United States as determined by the Court*." This analysis can be reconciled with and is not that different from what the analysis would have looked like had it rested on the dormant Commerce Clause.[44]

C. Justice Stewart's Modification

A few weeks after *Oliphant*, the Court issued its decision in *United States v. Wheeler*.[45] At stake was whether the federal government could prosecute a Navajo tribal member for statutory rape when a tribal court had already convicted him of contributing to the delinquency of a minor under a charge arising out of the same set of facts or whether the double jeopardy clause of the United States Constitution barred the subsequent federal prosecution. The answer depended on whether the tribe had prosecuted Wheeler pursuant to delegated federal authority or pursuant to its own inherent sovereign power. Writing for a unanimous Court, Justice Stewart held that the tribe had prosecuted Wheeler pursuant to its own inherent sovereign power. Although the result in *Wheeler* supports tribal sovereignty, Justice Stewart was no pro-tribal advocate.[46] In dictum in Part II.B of the decision, he expounded generally on the limits of inherent tribal sovereignty. After stating that "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving relations between an Indian tribe and nonmembers of the tribe,"[47] he concluded that

44. *See* discussion *infra* notes 175-89 .

45. 435 U.S. 313 (1978).

46. For instance, he was one of the few dissenters a year later in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), the landmark case which upheld the treaty fishing rights of the tribes in the state of Washington.

47. *Wheeler*, 435 U.S. at 326.

> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.[48]

Justice Stewart failed to cite any precedent for this narrow definition of powers of self-government. As it turned out though, this paragraph would become the foundation of the Court's new common law concerning the inherent powers of Indian tribes in *United States v. Montana*,[49] not surprisingly another of Stewart's opinions. This is the decision which transformed the *Oliphant* doctrine from one based on Federal assumptions about inherent tribal powers, and whether a tribal power was inconsistent with overriding federal sovereign interests to one based on nothing but the Court's own political views on whether non-members should be subjected to tribal jurisdiction.

The main issue in *Montana* was whether the tribe had the authority to regulate hunting and fishing by non-members of the tribe on land determined by the Court to be non-Indian fee land located within the Crow Indian reservation. Writing for the Court, Justice Stewart started his analysis by quoting this same passage from his *Wheeler* opinion, and quickly announced his new principle that the "exercise 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."[50] Having stated this principle, Justice Stewart modified the *Oliphant* doctrine as follows: "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that *the inherent powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.*"[51] Having stated the rule, the Court immediately recognized two exceptions. The first exception allows tribes "to regulate through taxation, licensing, or other means, the activities of non-members who enter into consensual relationships with the tribe or its members through commercial dealings, contracts, leases, or other

48. *Id.*
49. 450 U.S. 544 (1981).
50. *Id.* at 564.
51. *Id.* at 565 (emphasis added).

arrangements."[52] The second exception, known as the tribal self-government exception, allows tribal civil authority over the conduct of non-members (even on fee lands within the reservation) "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."[53]

Although at first it seemed that these two exceptions to the general rule would allow certain tribal authority over non-members, this has not proved true.[54] Even though the Court early on recognized some tribal jurisdiction over non-members in some, albeit narrow, circumstances,[55] the Court since 1989 has never upheld any tribal authority over non-members, and has issued a string of opinions severely restricting the scope of both exceptions. Furthermore, absent from the *Montana* approach is any reference to the actual understanding and assumptions of Congress concerning tribal authority or the historical treatment of tribal civil jurisdiction by the political branches of the government. Also missing are any references to whether the assumption of tribal civil authority could be in conflict with any overriding sovereign federal interests. In other words, the *Montana* case based its general rule on a completely subjective and arbitrary definition of what amounts to external relations, and followed up with some exceptions focusing on either the existence of consensual relations or a subjective analysis of what is necessary for tribal self-government. It is an analysis divorced from any constitutional or statutory moorings.[56]

D. Duro v. Reina*: Justice Kennedy's Quasi-Constitutional Approach*

Duro v. Reina asked whether the *Oliphant* rationale applied to the tribal prosecution of an Indian that was not a member of the prosecuting tribe (in other words, a non-member Indian).[57] *Oliphant* only spoke in terms of

52. *Id.*

53. *Id.*

54. For contrasting views on the application of the two exceptions, see Sarah Krakoff, *Tribal Civil Jurisdiction over Non-Members: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187 (2010), and Neil G. Westesen & Crowley Fleck, From *Montana* to *Plains Commerce Bank* and Beyond: The Supreme Court's View of Tribal Jurisdiction over Non-Members (Mar. 4, 2011) (paper no. 9 presented at the Special Institute on Natural Resources Development on Indian Lands, Rocky Mountain Mineral Foundation).

55. *See* Brendale v. Confederated Tribes, 492 U.S. 408 (1989); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

56. *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573 (1996) [hereinafter Getches, *Conquering*].

57. 495 U.S. 676 (1990).

Indians and non-Indians, and relied on the historical treatment of tribal jurisdiction over non-Indians as well as the assumptions of Congress and the Executive that Indian tribes did not have criminal jurisdiction over non-Indians. Speaking for the Court, Justice Kennedy concluded that even though the historical record in this case was not as clear as it was with tribal jurisdiction over non-Indians,[58] *Oliphant's* rationale applied to non-member Indians, because they were also United States citizens.[59] Justice Kennedy's opinion relied on the analysis used in *Wheeler* for the proposition that prosecuting non-member Indians was an exercise of external relations[60] and on *Oliphant* to argue tribal criminal prosecution constituted an unwarranted intrusion on the personal liberty of non-member Indians.[61] However, what stands out is Justice Kennedy's willingness to enunciate the policy rationales for restricting tribal jurisdiction over non-members. Thus, after "hesitat[ing] to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them,"[62] Justice Kennedy expressed concern that tribal courts were "influenced by unique customs . . . unspoken practices and norms," and are often "subordinated to the political branches of the tribal governments."[63] In addition, since the Bill of Rights is not applicable to Indian tribes, Kennedy argued that "[t]his is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system."[64]

While *Duro*'s reliance on both *Oliphant* and *Wheeler* may qualify the decision as another federal common law decision, parts of Justice Kennedy's opinion indicate a potential constitutional basis for his decision.[65] Thus, Kennedy concluded, "The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over

58. *Id.* at 688 ("The historical record in this case is somewhat less illuminating than in *Oliphant* . . . .").

59. *Id.* at 692 ("Whatever might be said of the historical record, we must view it in light of petitioner's status as a citizen of the United States.").

60. *Id.* at 686.

61. *Id.* at 692.

62. *Id.* at 693.

63. *Id.* (quoting COHEN, *supra* note 38, at 334-35).

64. *Id.* at 694.

65. *See* Alex Tallchief Skibine, Duro v. Reina *and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767, 782-84 (1993) [hereinafter Skibine, *Power Play*].

Indians who consent to be tribal members."[66] Professor Bruce Duthu notes that the constitutional underpinnings of Justice Kennedy's *Duro* opinion became clearer in his concurring opinion in *United States v. Lara*, where he stated:

> Lara, after all, is a citizen of the United States. To hold that Congress can subject him, within our domestic borders, to a sovereignty outside the basic structure of the Constitution is a serious step. The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure which grants the citizen the protection of two governments, the Nation and the State . . . . Here, contrary to this design, the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity.[67]

Duthu, who described Kennedy's constitutional interpretive approach as "structuralist," concluded that,

> For Kennedy, the structural guarantees of personal and political liberty are as fully enforceable against the federal government as the textually based freedoms embodied in the Bill of Rights. Therefore, even if Congress were inclined to affirm a broader scope of inherent tribal sovereignty to include authority over non-members, Kennedy locates constraints on that federal power emanating from the constitutional structure.[68]

In other words, there are constitutional reasons why Congress cannot allow Indian tribes operating outside the structure of the Constitution to have criminal jurisdiction over non-member Indians who are citizens of the United States.[69]

The bottom line is that, contrary to Justice Breyer's assertion in *Lara*, Justice Kennedy's *Duro* analysis relies only marginally on the policies of the political branches of the government. Kennedy's main argument is that as citizens of the United States, the non-tribal members have not consented

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66. *Duro*, 495 U.S. at 693.

67. N. BRUCE DUTHU, SHADOW NATIONS 153 (2013) (quoting United States v. Lara, 541 U.S. 193, 212 (2004)).

68. *Id.* at 155–56.

69. *See* Tweedy, *supra* note 10, at 700 (stating that because of Kennedy's *Lara* opinion, "any restoration statute should, to the extent possible, provide for protection of individual constitutional rights").

to be governed by tribal entities outside the structure of the Constitution.[70] This argument seems to be anchored in the Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, *deriving their just powers from the consent of the governed* . . . ."[71]

The Declaration, of course, is only aspirational. It neither binds the Court, nor is part of constitutional text.

E. Nevada v. Hicks*: Justice Scalia's Balancing Approach*

In *Nevada v. Hicks*,[72] a tribal member sued state game wardens in tribal court arguing that, when these state officials searched his house while investigating whether he violated the state gaming laws while hunting outside the reservation, they damaged some of his property and violated his civil rights. The major issue in the case was whether the *Montana* rule applied even though the conduct of the state officials occurred on Indian-owned land within the reservation. While the Court was unanimous that *Montana* was applicable, the Justices disagreed on the relative weight given to the fact that the incident occurred on Indian-owned land. Writing for a plurality of four, Justice Scalia acknowledged that the status of the land played a central role in previous cases, but asserted that Indian ownership of the land could not suspend the "'general proposition' derived from *Oliphant* that 'the inherent powers of an Indian tribe do not extend to the activities of nonmembers . . .' except to the extent 'necessary to protect tribal self-government or to control internal relations.'"[73] Instead, according to Justice Scalia, land ownership was just one factor in determining whether tribal jurisdiction was necessary to tribal self-government. Justice Scalia broke new ground, however, when, after stating that "[s]tate sovereignty does not end at a reservation's border,"[74] he asserted that evaluating the

70. This point was not lost on Justice Brennan in his *Duro* dissent when he stated, "[T]he Court concludes that regardless of whether tribes were assumed to retain power over nonmembers as a historical matter, the tribes were implicitly divested of this power in 1924 when Indians became full citizens." *Duro*, 495 U.S. at 706.

71. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

72. 533 U.S. 353 (2001).

73. *Id.* at 359 (quoting Montana v. United States, 450 U.S. 544, 564-65 (1981)).

74. *Id.* at 361.

tribal right of self-government requires "an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other."[75] In other words, Justice Scalia imported into the *Montana* analysis the test usually performed in determining whether a state has jurisdiction over non-members on Indian reservations. Derived from the Indian Preemption Doctrine, this test consists of determining whether state jurisdiction is preempted on an Indian reservation by the operation of federal law. This is a balancing test of sorts, because it balances the interest of the federal and tribal governments against the state interests.

> This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.[76]

Since Justice Scalia wrote for a plurality, it is hard to determine the precedential value of his opinion. Justice Souter's opinion, joined by Justices Kennedy and Thomas, stated that the status of the land was not a "primary jurisdictional fact."[77] Furthermore, Justice Souter would have applied the two *Montana* exceptions without balancing the interests of the tribe with those of the states. Justice O'Connor, joined by Justices Stevens and Breyer, took the opposite position. She believed that the status of the land should always be a prominent factor when applying the two *Montana* exceptions.[78] Perhaps *Hicks* and the balancing methodology should be limited to instances where the tribe attempts to assert jurisdiction over state officials.[79] Some courts limit *Hicks* in this way,[80] but others have not.[81]

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75. *Id.* at 362 (quoting Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 156 (1980)).

76. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980).

77. *Hicks*, 533 U.S. at 375-76.

78. *Id.* at 395-96 (Justice O'Connor, concurring and dissenting).

79. *See* Alex Tallchief Skibine, *Making Sense out of* Nevada v. Hicks*: A Reinterpretation*, 14 ST. THOMAS L. REV. 347 (2001) [hereinafter Skibine, *Making Sense*].

80. *See* McDonald v. Means, 309 F.3d 530 (9th Cir. 2002). "Even if *Hicks* could be interpreted as suggesting that the *Montana* rule is more generally applicable than either *Montana* or *Strate* have allowed, *Hicks* makes no claim that it modifies or overrules *Montana*." *Id.* at 540 n.9; *see also* South Dakota v. Cummings, 679 N.W. 2d 484 (S.D. 2004) (distinguishing the case at hand on the ground that it involved state officials trying to

Hicks may not even apply when the tribe has retained the power to exclude,[82] as the Ninth Circuit recently found.[83]

F. Chief Justice Roberts' Approach: Merging the Two Montana *Exceptions?*

The latest case applying the *Montana* analysis at the Supreme Court was *Plains Commerce Bank v. Long Family Ranch*.[84] The issue was whether the tribal court had jurisdiction over a lawsuit brought by tribal members against a non-Indian bank alleging that the bank discriminated against the tribal members by offering land within the reservation for sale at terms more favorable to non-Indians than to the tribal members.[85] The tribal court asserted jurisdiction over the dispute, and ruled in favor of the tribal members. In addition to awarding damages, it ordered the bank to sell the land, which the bank owned in fee simple, to the tribal plaintiffs. The Supreme Court held that the tribal court lacked jurisdiction over the plaintiffs' discrimination claim because "the Tribe lacks the civil authority to regulate the Bank's sale of its fee land."[86] After stating that "*Montana* and its progeny permit tribal regulation of non-member *conduct* inside the reservation that implicates the tribe's sovereign interests,"[87] Justice Roberts held that the sale of land was not "conduct" for the purposes of allowing tribal regulations under *Montana*'s consensual relation exception. The Court also declared, without citing any authority, that "[t]he distinction between sale of the land and conduct on it is well established . . . and entirely logical given the . . . liberty interest of nonmembers."[88]

In focusing on the sale of land as not being "conduct" for the purpose of *Montana*'s first exception, the court ignored that the "conduct" at issue was

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prosecute a tribal member in state courts while *Hicks* involved a tribal member trying to sue state officials in tribal court).

81. *See* MacArthur v. San Juan County, 497 F.3d 1057 (10th Cir. 2007).

82. *See* Skibine, *Making Sense*, *supra* note 79, at 356–59.

83. *See* Water Wheel v. LaRance, 642 F.3d 902 (9th Cir. 2011). *But see* Rolling Frito Lay-Sales v. Stover, No. CV 11–1361–PHX–FJM, 2012 WL 252938 (D. Ariz. Jan. 26, 2012) (disagreeing with the Ninth Circuit even though the district court is located within that circuit).

84. 554 U.S. 316 (2008).

85. For a more extensive discussion of this case, see Frank Pommersheim, *Amicus Briefs in Indian Law: The Case of* Plains Commerce Bank v. Long Family Land & Cattle Co., 56 S. DAK. L. REV. 86 (2011).

86. *Plains Commerce Bank*, 554 U.S. at 330.

87. *Id.* at 332.

88. *Id.* at 334.

not simply the sale of land. It was, instead, the "discrimination" that occurred in selling the land. Following the Court's position to its logical, but normatively very unattractive, conclusion, a tribe could never forbid a non-member merchant selling anything on reservation fee land from engaging in discriminatory practices against tribal Indians. As pointed out by Justice Ginsburg's dissent, if the majority believed that the tribal court was without power to order the sale of the land as a remedy, it should have disallowed this particular remedy while still allowing the tribal court to award damages for discrimination.[89]

One of the major issues generated by the *Plains Commerce Bank* majority is the statement made in connection with discussing *Montana's* consensual relation exception. "The logic of *Montana* is that certain activities on non-Indian fee land . . . or certain uses . . . may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities or land uses may be regulated."[90] Similarly, in responding to Justice Ginsburg's concurring and dissenting opinion, which questioned how tribal regulation of land sales could be distinguished from previous judicially condoned tribal regulations, the Court stated "regulation of the sale of non-Indian fee land, unlike the above, cannot be justified by reference to the tribe's sovereign interests. By definition, fee land owned by nonmembers has already been removed from the tribe's immediate control."[91] These statements could be construed as an effort to merge the two *Montana* exceptions. This became even clearer later in the opinion when the Court added that tribal "laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations."[92] A non-Indian corporation utilized this argument in a later case to challenge the jurisdiction of a tribal court.[93] The Fifth Circuit Court of Appeals rightly refused to go along, stating, "We do not interpret *Plains Commerce* to

89. *Id.* at 342–43 (Ginsburg, J., dissenting). The damages awarded by the tribal court in the case were about $750,000.

90. *Id.* at 334–35.

91. *Id.* at 335-36.

92. *Id.* at 337.

93. *See* Dolgencorp v. Mississippi Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014).

require an additional showing that one specific relationship, in itself, 'intrude[s] on the internal relations of the tribe or threaten[s] self-rule.'"[94]

Analysis of the various theories adopted in these cases reveals that at the Supreme Court, confusion reigns supreme when interpreting and applying the implicit divestiture doctrine. The doctrine was first invoked by Justice Rehnquist in *Oliphant*, severely modified by Justice Stewart in *Wheeler* and *Montana*, quasi-constitutionalized by Justice Kennedy in *Duro*, re-interpreted by Justice Scalia in *Hicks*, before being re-conceptualized by Justice Breyer in *Lara*. Finally, Justice Roberts in *Plains Commercial Bank* seems to condone discrimination against tribal members, by arguing that discrimination in the sale of real estate is not conduct that the tribe may regulate.

G. The Problem with Federal Common Law

Although the federal courts' use of federal common law raises issues of both separation of power and federalism, the overwhelming weight of the debate among scholars has focused on federalism and the power of federal courts to displace state law.[95] When it comes to separation of power concerns, meaning the use of federal common law by the courts to unduly trample on the role of Congress to make laws, it seems that there are few (if any) limits if the area is one where the courts can make rules based on common law.[96] As Professor Louise Weinberg stated, "I take it that there are no fundamental constraints on the fashioning of federal rules of decision."[97] Although this position is not universally shared,[98] it seems to be

94. *Id.* at 175. The Fifth Circuit also stated that it agreed with the district court that under *Montana* "the ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the tribe's power of self-government." *Id.* It has to be noted, however, that the case involved especially bad facts for the non-Indian corporation. The case involved an Indian child who alleged that he had been sexually abused by the non-Indian employee of a non-Indian corporation while being an intern at a store owned by the corporation and located on Indian land.

95. *See generally* Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895 (1996).

96. *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 947 (1986) (arguing that out of concern for judicial legitimacy and deference to Congress, courts should nevertheless point to some kind of authority for the making of federal common law, whether it be a treaty, a statute, or the Constitution)

97. Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 805 (1989).

98. Another noted scholar once stated, "[T]here can be no such thing as 'federal common law,' at least to the extent it is used to provide a 'rule of decision' and to the extent the phrase 'common law' is construed as a category of lawmaking distinct from

the majority view, which is unfortunate. The fashioning of rules of decision should be, however loosely, tied either to congressional policies as reflected in federal statutes, or to values emanating from the constitutional text.[99] As the Court previously noted,

> The legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law. . . .
>
> . . .
>
> This appreciation of the broader role played by legislation in the development of the law reflects the practices of common-law courts from the most ancient times. As Professor Landis has said, "much of what is ordinarily regarded as 'common law' finds its source in legislative enactment."[100]

Yet, as many scholars have observed, the Court's decisions in federal Indian law are completely divorced from both current congressional policies and the history of those policies for the last fifty or so years.[101] Instead, when it comes to federal Indian common law, the Court seems to think that there are no constraints because it has given Congress plenary power over Indian Nations. Scholars have noted that in Federal Indian law, the Court has failed to address where its authority to make common law comes from because the existence of such authority is so well established.[102] The problem, of course, is that the Court seems to think that if Congress can potentially act without limits in Indian Affairs, so can the

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constitutional or statutory 'interpretation.'" Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 792 (1989).

99. *See, e.g.*, Bradford R Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996) (arguing that courts should only be able to make rules of federal common law if they are directly implied from the constitutional structure or if they are necessary to further a basic structure of the constitutional scheme); *see also* Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585 (2006).

100. Moragne v. State Marine Lines, 398 U.S. 375, 390-91, 392 (1970) (quoting James Landis, *Statutes and the Sources of Law*, *in* HARVARD LEGAL ESSAYS 213-14 (Roscoe Pound ed., 1934)).

101. *See, e.g.*, Frickey, *A Common Law*, *supra* note 14.

102. *See* Field, *supra* note 96, at 948–49.

Court. As a result, any debate concerning what kind of inherent sovereign powers the tribes possess becomes wide open. The Court may be influenced by its current subjective notion of what Indian tribes are or have become.[103] Perhaps some Justices think the tribes should only be cultural organizations, while others may conceptualize them as uniquely business enterprises or casino owners. Just about anything goes. The Court is free to develop its own "Common Law for Our Age of Colonialism."[104]

At the time Congress enacted the *Duro Fix,* as well as when the Court issued its *Lara* decision, pro-tribal scholars and advocates were all in favor of describing these cases as federal common law decisions, because this meant the decisions could be overturned by Congress.[105] Yet these scholars also severely criticized these past decisions, even stating such decisions were incoherent and unprincipled.[106] Others have acknowledged the dilemma.

> I think a number of us writing and talking say: well, those are federal common law decisions. . . .
>
> But now, I'm not so sure that we should actually say that they are federal common law decisions, because I would argue it gives them a legitimacy that they're not entitled to. Because if you say they're federal common law decisions you're saying basically they're okay. And I would argue in a constitutional sense those decisions are essentially improper.[107]

Professor Pommersheim later expounded on the issue, stating:

> The Court has developed a most robust activist posture to deal with nettlesome challenges of modern Indian law. It is an approach almost completely shorn of any concern for constitutional and historical doctrine, the role of a limited judiciary, and respect for those who were here first. . . .
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> . . .
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> . . . In a sense, the Court has become the ultimate organ for formulating Indian policy in contemporary Indian law. This

103. *See* Getches, *Conquering*, *supra* note 56.

104. *See* Frickey, *A Common Law*, *supra* note 14.

105. See, for instance, Deloria & Newton, *supra* note 20.

106. *See* Frickey, *A Common Law*, *supra* note 14.

107. Frank Pommersheim, *Constitutional Shadows: The Missing Narrative in Indian Law*, 80 N.D. L. REV. 743, 751 (2004).

> raises a quintessential separation of powers issue, with the Court usurping the constitutional role of Congress to make law and formulate policy.[108]

Some have argued that the use of federal common law by the Court to limit the sovereignty of Indian tribes "appear[s] to be nothing more than lawmaking by fiat, despite their grounding in federal common law."[109] However, if the Court bases its determinations about tribal jurisdiction not on general common law, but on constitutional common law (such as the dormant Indian Commerce Clause), the constraints should be much narrower. Thus, the Court should have to explain why tribal jurisdiction in a given area is in conflict with federal interests reflected either in the Constitution or in congressional statutes.

II. Towards a Constitutional Mode of Analysis

A constitutional mode of analysis is required because even though tribal sovereignty is not guaranteed by the Constitution, tribes still have a constitutional status in that their sovereignty is acknowledged in the Constitution. The normative reason for using a version of the dormant Commerce Clause as a constitutionally based common law mode of analysis to limit tribal powers is that Indian tribes have been incorporated as third sovereigns within our constitutional order.

A. The Original Quasi-Constitutional Status of Indian Tribes

In a recent oral argument before the United States Supreme Court the following exchange took place between Justice Scalia and the lawyer arguing for the United States:

> JUSTICE SCALIA: Who made these Indian tribes sovereign? Was it Congress?
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> MR. KNEEDLER: The Constitution.
>
> . . .
>
> JUSTICE SCALIA: Who pronounced them to be sovereign?

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108. FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 229 (2009) [hereinafter POMMERSHEIM, BROKEN LANDSCAPE].

109. Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 96 (2012) [hereinafter Fletcher, *Tribal Consent*].

MR. KNEEDLER: This -- this Court.[110]

Both answers are correct, although the sovereignty of Indian tribes was first acknowledged and recognized by the United States neither by the Constitution nor by the Court. It was probably first recognized when the United States Senate ratified the first treaty with an Indian Nation.[111] The Court "pronounced" the tribes sovereign as early as 1831, and the Constitution did, implicitly at least, "decide" that the tribes were sovereign.

In an influential article, Professor Philip Frickey once expressed the view that if *Johnson v. M'Intosh*[112] was a concession to colonialism, Chief Justice Marshall's two Cherokee decisions, *Cherokee Nation v. Georgia*[113] and *Worcester v. Georgia*,[114] were an attempt "to mediate the tension between colonialism and constitutionalism."[115] According to Professor Frickey, although the Constitution did not guarantee tribal sovereignty, Justice Marshall considered the treaties made with Indian tribes to be quasi-constitutional documents, and the interpretive methodology he used was very similar to the one the Court has used to protect state sovereignty and federalism. Professor Frickey further argued that in *Cherokee Nation v. Georgia*, Chief Justice Marshall tied the sovereignty of Indian tribes directly to the Constitution by quoting the entire Commerce Clause "not merely to demonstrate that tribes are different from 'foreign nations,' but also to confirm the sovereign status of tribes."[116] In Article I, the Constitution gives Congress the power to regulate "Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[117] Thus, Marshall stated, "We perceive plainly that the constitution in this article does not comprehend Indian tribes in the general term 'foreign nations;' not we presume because a tribe may not be a nation, but because it is not foreign to the United States."[118]

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110. Transcript of Oral Argument at 55-56, Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014) (No. 12-515).

111. The first official treaty was the Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13.

112. 21 U.S. (8 Wheat.) 543 (1823).

113. 30 U.S. (5 Pet.) 1 (1831).

114. 31 U.S. (6 Pet.) 515 (1832). STOPPED HERE

115. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 385 (1993) [hereinafter Frickey, *Marshalling Past and Present*].

116. *Id.* at 392.

117. U.S. CONST. art. I, § 8, cl. 3.

118. *Cherokee Nation*, 30 U.S. at 19.

If *Cherokee Nation* laid the foundation, *Worcester* confirmed Justice Marshall's understanding that tribal sovereignty is constitutionally based. There, Marshall wrote

> The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.[119]

In *Worcester*, Georgia argued it could impose its laws over the Cherokees because the Cherokee Nation had relinquished its right to self-government in the treaties it signed with the United States. Accordingly, the Cherokee Nation should no longer be described as an Indian tribe in the constitutional sense, and therefore the Commerce clause could no longer be used to preempt state jurisdiction. The Court disagreed; it held that the Cherokee Nation had not relinquished its power of self-government in the treaties. The Constitution's exclusive grant to regulate Indian affairs to Congress, therefore, still applied and Georgia was preempted.[120] Implicit in this holding was that in order to qualify as an Indian tribe under the Constitution's Commerce Clause, a tribe has to be a self-governing entity possessing a certain amount of inherent sovereignty.

Although other scholars have argued that Indian Nations have a constitutional status,[121] the extent of tribal sovereignty is not guaranteed and protected in the Constitution.[122] As stated in Justice Thomas's *Lara* concurrence: "The Tribes, by contrast, are not part of this constitutional order, and their sovereignty is not guaranteed by it."[123] What the drafters of the Constitution thought about the future of Indian tribes as sovereign

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119. *Worcester*, 31 U.S. (6 Pet.) at 559.

120. For a convincing argument that *Worcester v. Georgia* was a classic use of the dormant commerce clause doctrine to preempt state jurisdiction, see generally Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055 (1995).

121. *E.g.,* Carol Tebben, *An American Trifederalism Based upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318 (2003).

122. This is why some scholars, such as Frank Pommersheim, have made a cogent argument for the need of a constitutional amendment. *See* POMMERSHEIM, BROKEN LANDSCAPE, *supra* note 108.

123. United States v. Lara, 541 U.S. 193, 219 (2004); *see also* Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53, 60–68 (2006).

nations is debatable.[124] It is true that the Constitution does not define the sovereignty of Indian Nations any more that it defines the sovereignty of foreign nations. This does not mean, however, that the Constitution does not at least acknowledge the sovereign status of tribal governments.[125] Instead, the most likely explanation is that, "[t]aken together, the three explicit constitutional references to Indians and the Treaty Clause embody a view that tribes are sovereign, and permanently so, but that their sovereignty operates largely outside of the constitutional framework."[126]

B. The Progressive Incorporation of Indian Tribes into the Constitutional Order

Although Indian tribes started outside of the United States, they were incorporated into the physical territory of the United States under the Doctrine of Discovery.[127] Their tribal members were incorporated within the political system of the United States under the Indian Citizenship Act of 1924.[128] Indian tribes, as political sovereigns, eventually also became incorporated (albeit without their full consent) into the United States constitutional system.[129]

1. Court Decisions Reflecting Incorporation

There is no question that Indian nations started outside the political system of the United States even though the geographic limits of the United States fully surround their territories.[130] Thus, in *Worcester v. Georgia*, the Supreme Court stated that Indian nations had "territorial boundaries, within which their authority is exclusive."[131] Furthermore, the Court held that the

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124. *See* Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014) [hereinafter Ablavsky, *Savage Constitution*] (showing that many states voted for the ratification of the Constitution with the understanding that a strong central federal government would help them fight the Indian tribes militarily or would at least persuade the Indian tribes to move west, thus removing themselves from the border of existing states).

125. *See* Tweedy, *supra* note 10, at 655–64. "[A]s a textual matter the Constitution does recognize tribal sovereignty in the Indian Commerce Clause and the Treaty Clause." *Id.* at 662–63; *see also* Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 657–58 (2003).

126. *See* Tweedy, *supra* note 10, at 658.

127. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); *see also* Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1 (2005).

128. Pub. L. No. 68-175, 43 Stat. 253 (codified as 8 U.S.C. § 1401).

129. *See* Fletcher, *Tribal Consent*, *supra* note 109, at 55–73 (discussing the "non-consensual incorporation of Indian tribes into the American polity").

130. *See Johnson*, 21 U.S. (8 Wheat.) 543; *see also* Miller, *supra* note 127.

131. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832).

"treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states,"[132] even though some Indian tribes' territories were in fact within the geographical limits of some states.[133]

Things had not changed much by the time *Elk v. Wilkins* was decided in 1884.[134] In that case, the Court, relying mostly on the "excluding Indians not taxed" provision of the Fourteenth Amendment,[135] held that the Amendment had not granted U.S. citizenship to members of Indian tribes. The Court also stated that Indians born within Indian reservations were not subject to the jurisdiction of the United States.[136] *Elk* was followed by *In re Heff*, where the Court took the position that one could not be both a United States Citizen and an *Indian* in the constitutional sense.[137] The status of Indian tribes as political outsiders was re-confirmed in *Lonewolf v. Hitchcock*.[138] Drawing an analogy with treaties signed with foreign nations, the Court held that the political question doctrine prevented Lonewolf, a Kiowa tribal leader, from questioning the validity of a statute unilaterally abrogating a treaty made with the Kiowa Tribe.[139]

None of the opinions listed above, which treated Indian tribes as truly outside the constitutional and political structure of the United States, are still the law. As recognized in *Nevada v. Hicks*, "State sovereignty does not end at a reservation's border. . . . [I]t was 'long ago' that 'the Court departed from Chief Justice Marshall's view that "the laws of [a State] can

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132. *Id.*

133. *Id.* at 560 ("[T]heir territory was separated from that of any state within whose chartered limits they may reside, by a boundary line, established by treaties . . . .").

134. 112 U.S. 94 (1884).

135. The first sentence of Section 2 of the Fourteenth Amendment reads, "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. CONST. amend. XIV, § 2. Article 1 also contains an "Indians not taxed" provision. U.S. CONST. art. I, § 2, cl. 3.

136. For a more comprehensive discussion of the case, see POMMERSHEIM, BROKEN LANDSCAPE, *supra* note 108, at 164-68.

137. 197 U.S. 488 (1905) (holding that Indians who had been granted U.S. citizenship could no longer be considered Indians under the Constitution).

138. 187 U.S. 553 (1903).

139. Treaty of Medicine Lodge, Oct. 21, 1867, art. 12, 15 Stat 581. The treaty specifically provided that it could not be amended without the consent of the Indians

have no force" within reservation boundaries.'"[140] *In re Heff* was overruled just a few years later in *United States v. Celestine*.[141]

Congress overruled *Elk v. Wilkins* in 1924, when it enacted legislation making all Indians citizens of the United States.[142] Furthermore, much of the statements made in the case to support its holding are no longer good law. The statement that reservation-born Indians were not "born in the United States and subject to the jurisdiction thereof" was implicitly repudiated just two years later in *United States v. Kagama*,[143] The *Kagama* Court held that Congress had the power to enact legislation subjecting Indians committing major crime against other Indians on Indian reservations to federal criminal jurisdiction. Moreover, the statement in *Elk* that "[u]nder the Constitution of the United States, as originally established . . . General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them,"[144] was specifically disagreed with in *Federal Power Commission v. Tuscarora Indian Nation*,[145] which adopted exactly the opposite position, albeit in dicta, and stated that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary."[146] As to the "Indians not taxed" provisions contained in the Constitution, the tax status of Indians began to change shortly after the Fourteenth Amendment was passed when the Court held in 1870 that the federal government could tax tobacco sold inside Indian reservations.[147] Following some Supreme Court decisions further extending federal taxation in Indian Country,[148] the Solicitor for the Department of the Interior issued a decision in 1940 proclaiming that there were no longer any "Indians not taxed" within the confines of the United States.[149]

In addition, *Lonewolf's* reliance on the Political Question Doctrine to avoid ruling on the legality of Acts of Congress was expressly overruled in

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140. 533 U.S. 353, 361 (2001) (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980)).

141. 215 U.S. 278 (1909).

142. *See* Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253.

143. 118 U.S. 375 (1886).

144. Elk v. Wilkins, 112 U.S. 94, 99-100 (1884).

145. 362 U.S. 99, 116 (1960).

146. *Id.* at 120.

147. The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870).

148. *See* Five Civilized Tribes v. Commissioner, 295 U.S. 418 (1935); Choteau v. Burnett, 283 U.S. 691 (1931).

149. 'Indians Not Taxed'—Interpretation of Constitutional Provision, 57 Interior Dec. 195 (1940).

Delaware Tribal Business Committee v. Weeks,[150] where the Court analyzed whether a statute violated the Equal Protection Clause, and *United States v. Sioux Nation*,[151] where the Court reviewed an Act of Congress for taking property without just compensation under the Fifth Amendment.[152]

2. Congressional Policies and Statutes

Over the past few hundred years, Congress has acted to incorporate tribes into the United States governmental system. Perhaps the Act starting the incorporation process was the 1871 statute that stated, "[N]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . ."[153] Even more meaningful was the 1924 Act that granted all Indians United States citizenship.[154] Another key piece of legislation was the 1934 Indian Reorganization Act (IRA) that, aside from putting an end to the Allotment policy, authorized tribes to reorganize their governments by adopting tribal constitutions which became valid under federal law upon approval by the Secretary of the Interior.[155] The Indian Self-Determination and Education Assistance Act of 1975 further expanded the policies undergirding the IRA.[156] Under the Act as originally passed, tribes could enter into contracts with the federal government to take over management of programs previously administered by federal Bureau of Indian Affairs and the Indian Health Service for the benefit of Indians. That initial Act was substantially amended, first in 1988[157] and again in 1994, with the enactment of the Tribal Self-Governance Act, which allowed tribes to enter into compacts or

150. 430 U.S. 73, 85 (1977).

151. 448 U.S. 371, 413 (1980).

152. *Id.*; *see also* Morton v. Mancari, 417 U.S. 535 (1974).

153. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2012)).

154. Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as 8 U.S.C. § 1401 (2012)).

155. Indian Reorganization Act (Wheeler-Howard Act), ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (2012)); *see also* Singel, *supra* note 15, at 808 ("In federalism terms, the Indian reorganization era produced greater standing for tribes as functional constituent sovereigns within the United States.").

156. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450-450n, 455-458e, 458aa-458hh, 458aaa-458aaa-18 (2012)).

157. Indian Self–Determination Amendments of 1987, Pub. L. No. 100-472, 102 Stat. 2285 (1988) (codified as amended at 25 U.S.C. § 450-450n (2012)).

funding agreements with federal agencies.[158] This mechanism allowed tribes to use federal funds to pay for tribally designed and implemented programs pursuant to their own tribal priorities.[159] As stated by Professor Singel, "The congressional policy of tribal self-determination has bolstered the role of tribes as integral participants in the nation's federal system."[160]

Other congressional legislation incorporating tribes as third sovereigns within the federal system includes a series of amendments to many national environmental laws, such as the Clean Air Act[161] and the Clean Water Act,[162] allowing tribes to be treated as States in order to achieve primacy in the implementation of such federal statutes.[163] Another recent statute continuing this trend is the Dodd-Frank Act,[164] which defines "State" as including "any federally recognized Tribe."[165] Also important was the Indian Gaming Regulatory Act of 1988, which authorized tribes to enter into gaming compacts with the states,[166] thus promoting sovereign-to-sovereign relations between tribes and states. Finally, there are a slew of statutes providing that full faith and credit be given by federal and state courts to the decisions of tribal courts. Such statutes include the Indian Child Welfare Act,[167] the Child Support Orders Act,[168] the Violence Against Women Act,[169] the Indian Land Consolidation Act,[170] the National

158. Pub. L. No. 103-413, 108 Stat. 4250 (1994) (codified at 25 U.S.C. § 458aa-hh (2012)).

159. On the evolution of the Indian Self Determination Act, see Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251 (1995).

160. Singel, *supra* note 15, at 816.

161. Clean Air Act Amendments, Pub. L. No. 101-549, § 107, 104 Stat. 2399, 2464-65 (1990) (codified at 42 U.S.C. § 7601(d)(2) (2012)).

162. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (codified at 33 U.S.C. § 1377(e) (2012)).

163. *See* Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (codified at 42 U.S.C. §§ 300f, 300j (2012)).

164. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, 15, 18, 22, 31, and 42 U.S.C.).

165. 12 U.S.C. § 5481(27) (2012).

166. Pub. L. No. 100-487, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701–2721 (2012)).

167. 25 U.S.C. § 1911(d) (2012).

168. 28 U.S.C. § 1738B (2012).

169. 18 U.S.C. § 2265 (Supp. I 2013).

170. 15 U.S.C. § 2207 (2012).

Forest Management Act,[171] and the American Indian Agricultural Management Act.[172]

III. The Consequences of Tribal Incorporation

This Part analyzes the legal ramifications that should follow from the incorporation of tribes into the federal system. After describing the implications tribal incorporation should have on legal doctrines used to measure tribal sovereignty and congressional power over Indian tribes, this article focuses on whether constitutional norms should be applied to tribal adjudicative processes.

A. Applying Constitutional Norms to the Court: Using an Indian Dormant Commerce Clause Analysis to Limit Tribal Powers

The application of the implicit divestiture doctrine by the Court has been inconsistent, unprincipled, and confusing.[173] To bring order to this incoherent doctrine, the best solution would be to turn the clock backward, and return to what the law was before the *Oliphant* decision. In other words, it would be best to re-instate the Cohen paradigm.[174] However, because the Court is not about to do this, a more coherent doctrine to control the inherent powers of Indian tribes within our constitutional order is to apply an analysis akin to the dormant Commerce Clause doctrine. Such doctrine would be consistent with Justice Breyer's re-conceptualization of the implicit divestiture doctrine in *Lara* since the Court there believed that the lack of tribal jurisdiction found in previous cases was based on the policies of the political branches.[175] It could also arguably be reconciled with the Implicit Divestiture Doctrine as initially conceived in *Oliphant,* which relied partly on the assumptions and policies of the Congress.[176]

Under traditional dormant Commerce Clause analysis, a state law is unconstitutional if it places an undue burden on interstate commerce, even though the Congress has not passed any law conflicting with the state

171. 25 U.S.C. § 3106 (2012).
172. 25 U.S.C. § 3713 (2012).
173. *See* discussion *supra* Part I.
174. *See supra* note 39.
175. *See* discussion *supra* notes 26-33.
176. *See* discussion *supra* notes 37-44.

law.[177] Under current methodology, if a state law discriminates against out-of-state interests, the state law is subject to the strictest scrutiny, and is upheld only if the law is necessary to achieve an important governmental purpose.[178] There is a presumption that such discriminatory laws are unconstitutional and the Court has almost never upheld any state laws under this doctrine.[179] If the state law does not discriminate, but nevertheless burdens interstate commerce, the Court uses the *Pike* balancing test.

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . [T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and whether it could be promoted as well with lesser impact on interstate activities.[180]

Once a law is found to be non-discriminatory, it is usually upheld.[181] The last time the Court held laws unconstitutional under the *Pike* balancing test was in the 1980s.[182] Although the dormant Commerce Clause doctrine has come under some sustained scholarly criticism,[183] the feeling is not

177. For a comprehensive scholarly treatment of the doctrine, see Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

178. *See* Hughes v. Oklahoma, 441 U.S. 322, 336-37 (1979).

179. There are exceptions. *See, e.g.*, Maine v. Taylor, 477 U.S. 131 (1986) (upholding law prohibiting the importation of baitfish into the state in order to protect Maine's "unique and fragile fisheries" from parasites).

180. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960)).

181. On application of the *Pike* balancing test, see David S. Day, *Revisiting* Pike: *The Origins of the Nondiscrimination Tier of the Dormant Commerce Clause Doctrine*, 27 HAMLINE L. REV. 45 (2004).

182. *See* Bendix Autolite v. Midwesco Enters., 486 U.S. 888 (1988); Edgar v. MITE Corp., 457 U.S. 624 (1982); Kassel v. Consol. Freightways, 450 U.S. 662 (1981).

183. For scholarly criticism of the Dormant Commerce Clause, see Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Martin H. Reddish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569. For more recent criticisms, see Brannon P. Denning, *Reconstructing the Dormant Commerce Clause*, 50 WM. & MARY L. REV. 417 (2008); Sam Kalen, *Dormancy Versus Innovation: A Next Generation Dormant Commerce Clause*, 65 OKLA. L. REV. 381 (2013).

unanimous.[184] In addition, some members of the Court such as Justice Scalia, have severely criticized the *Pike* balancing approach.[185] Justice Thomas stated that he would never overturn any state law that does not discriminate against out-of-state interests.[186] Nevertheless, the majority of the Court still uses the dormant Commerce Clause even if the state law does not discriminate.[187] As recently stated by the Court,

> Our dormant Commerce Clause jurisprudence "significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce." It is driven by a concern about "economic protectionism—that is, regulatory measures designed to benefit in-State economic interest by burdening out of state competitors." . . . .
>
> . . . The "common thread" among those cases in which the Court has found a dormant Commerce Clause violation is that "the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation."[188]

Transposing the elements of the *Pike* balancing test to a tribal context, after first evaluating the "burden" created by tribal regulations on non-members, one would inquire whether such burdens are clearly excessive in relation to the putative benefits to tribal self-government. The analysis would then focus on whether such benefits can be protected by imposing fewer burdens on non-members. "Commerce" should be understood to

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184. *See, e.g.*, Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877 (2011).

185. *See* Bendix Autolite Corp., 486 U.S. 888 (1988) (Scalia, J., concurring); *see also* General Motors v. Tracy, 519 U.S. 278, 312 (1997) (stating that "the so-called 'negative' Commerce Clause is an unjustified judicial intervention, not to be expanded beyond its existing domain"). For scholarly criticism of the balancing test, see Regan, *supra* note 177.

186. *See* Hillside Dairy v. Lyons, 539 U.S. 59, 68 (2003) (Thomas, J., concurring) ("'[T]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application,' and, consequently, cannot serve as a basis for striking down a state statute.") (citation omitted); *see also* McBurney v. Young, 133 S. Ct. 1709, 1721 (2013) (Thomas, J., concurring).

187. For recent scholarship defending the continued validity of the dormant Commerce Clause doctrine, see Garrick B. Pursley, *Dormancy*, 100 GEO. L. J. 497, 500 (2012) (arguing that the overarching unified principle behind all dormant Commerce Clause cases is that "[s]tate governments may not take actions that undermine the constitutionally established structure of government of which they are a part.").

188. *McBurney*, 133 S. Ct. at 1719–20 (citations omitted).

mean any and all intercourse, relations, and interactions, between the tribes and non-members/non-Indians in order to conform to the analysis outlined earlier concerning the meaning of "commerce" within the Indian Commerce Clause.[189] Furthermore, the test should not solely focus on the individual interests of non-members to be free of tribal regulations without relating them to the interests of the federal government. Thus, the inquiry should balance the interests of the tribes in regulating the conduct of non-members against the burden such regulations impose on the general intercourse and relations between the tribes and the United States. Under the test, a tribal regulation would be upheld if it concerned local tribal interests and did not unduly infringe on federal interests in governing the relations between the tribes and non-members. In other words, the issue would be whether the tribal regulations unduly interfered with overriding Federal interests.

An important caveat here is that this only concerns possible pre-emption of direct tribal regulations of non-members. We are not concerned about tribal regulations of tribal members that may indirectly discriminate against non-members or put such non-members at a competitive disadvantage. So for instance, unlike a state, a tribe could enact regulations utilizing subsidies to promote the commercial competitiveness of tribally owned businesses or businesses owned by tribal members. Only when a tribe directly imposes burdens through regulations of non-members that are different than or not imposed on tribal members would a "discriminatory" issue may arise. Examples of such discriminatory regulations would be tribal zoning restrictions imposed only on non-member land use, or a tribal tax only imposed on non-member businesses. This difference stems from the basic purpose of the Indian Commerce Clause as compared with the Interstate Commerce Clause. The Interstate Commerce Clause's major purpose is to ensure the free flow of commerce among or between the states, while the purpose of the Indian Commerce Clause is to regulate the relations with Indian Nations, including all interactions between Indian nations and non-members. Therefore, the voluminous jurisprudence that has evolved concerning whether a state law is discriminatory towards out-of-state interests would have very little, if any, precedential value in determining whether a tribal law is discriminatory.

Would using this approach have made any difference in previous cases decided by the Supreme Court? As previously mentioned, a dormant Indian Commerce Clause approach is not unlike the analysis adopted by Justice

189. *See* discussion *infra* Part III.B.

Rehnquist in *Oliphant,* since he based his holding on congressional assumptions and an overriding federal interest in having United States citizens free of unwarranted intrusions into their personal liberty.[190] Based on his analysis, a Court using a dormant Indian Commerce Clause analysis could have easily found that the burden imposed on such federal interests was clearly excessive in relation to the putative benefits to tribal self-government. Concerning tribal civil jurisdiction over non-members, the outcome of the path-marking *Montana* decision would be the same, since the tribal law at issue was discriminatory by banning fishing by non-members while allowing members to continue fishing on portions of the Big Horn River.[191] As such, it would have had to pass strict scrutiny in order to survive. Was the ban necessary to protect a compelling tribal interest? Did the tribe use the least restricted means to protect its interests? Probably not.

The next decided case was *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*.[192] At issue was the tribal power to zone fee land belonging to non-members. In what seemed like a political or Solomonic compromise, the Court held that the tribe could zone non-member fee land located in the "closed" portion of the reservation where most of the land was owned by the tribe, but not in the "open" section where most of the land was owned in fee by non-members. This peculiar result was the product of an opinion by Justice Stevens joined only by Justice O'Connor. Under a dormant Commerce Clause analysis, the issue would be first whether the tribal zoning regulation was discriminatory against the non-members. If not, the issue then becomes whether the tribal zoning created an undue burden on commerce, trade, intercourse, or relations between the tribes and the non-members and whether the tribal law was preempted by an overriding federal interest in having such land free of tribally imposed regulations. It is hard to see why a simple non-discriminatory zoning ordinance would create such an undue burden and be contrary to an overriding federal interest.

The next case to apply the *Montana* test was *Strate v. A-1 Contractors*.[193] Except for two earlier cases holding that before a non-member could

190. *See* discussion *supra* notes 37-44.

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

192. 492 U.S. 408 (1989).

193. 520 U.S. 438 (1997). Although some may argue that the next case which considered the extent a tribe's regulatory power over non-members under the *Montana* test was *South Dakota v. Bourland*, 508 U.S. 679 (1993), the Court in that case only held that the tribe had lost its power to regulate pursuant to its treaty power to exclude when the land went out of

challenge the jurisdiction of a tribal court in a federal court, that non-member had to exhaust his or her tribal remedies (i.e. use all the tribal appellate procedures available),[194] *Strate* was the first case squarely involving a challenge to a tribal court adjudicatory jurisdiction[195]

In *Strate*, the Court held that a tribal court did not have jurisdiction to hear a tort case involving a traffic accident between two non-Indians on a state highway running through the reservation. The state had acquired a right of way for the highway from the federal government. The case brought two meaningful additions to the law of implicit divestiture. First, it held — without citing any authorities or giving any explanation — that, as to non-members, "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."[196] This meant that the *Montana* test applied to limit both the legislative power of the tribal council and the judicial power of the tribal court. Secondly, it substantially narrowed the reach of the self-government exception to the general *Montana* rule divesting tribes of jurisdiction over non-members. Thus, the Court first stated, "Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule."[197] After remarking that all the cases cited by the *Montana* Court supporting its second exception "raised the question whether a State's . . . exercise of authority would trench unduly on tribal self-government,"[198] the Court summarily concluded that "[n]either regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'"[199]

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tribal ownership. *Id.* at 695. The Court did not decide whether the tribe could possibly have jurisdiction under either of the two *Montana* exceptions and left that question to be decided on remand.

194. Iowa Mut. Ins. v. LaPlante, 480 U.S. 9 (1987); Nat'l Farmers Union v. Crow Tribe, 471 U.S. 845 (1985).

195. The only other two Supreme Court cases that involved challenges to tribal adjudicatory powers are *Nevada v. Hicks*, 533 U.S. 353, 355 (2001), and *Plains Commerce Bank v. Long Family Land & Cattle*, 554 U.S. 316, 320 (2008).

196. *Strate*, 520 U.S. at 453. For an in-depth criticism of this conclusion, see Florey, *supra* note 17, at 1526–32. "[D]espite the purported clarity of the Court's holding, the source of the rule remained unaccounted for." *Id.* at 1526.

197. *Strate*, 520 U.S. at 457–58.

198. *Id.* at 458.

199. *Id.* at 459 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)). Although the case could have been interpreted as limiting tribal court jurisdiction when one non-member tries

Under a dormant Commerce Clause analysis, courts would not make decisions based on the dubious finding that controlling non-Indians who drive recklessly or negligently on a highway running through the reservation was not necessary to tribal self-government (a rather bizarre proposition). Instead, courts would look at whether tribal regulations over non-members driving on reservation highways would unduly interfere with federal interests, the regulation of commerce, or general intercourse between the tribes and the United States. It is hard to believe such tribal regulations would.

As explained earlier, Justice Scalia adopted a test balancing tribal interest in self-government with the state's interest in being free of tribal regulation in *Nevada v. Hicks*.[200] Under the proposed analysis, instead of balancing the tribal interests against the state interests to determine whether a tribal court had jurisdiction over a lawsuit filed by a tribal member against state officers, the court would first ask whether tribal court jurisdiction unduly interfered with an overriding federal interest. The answer here is not free from doubt, but perhaps *Hicks* is an unusual and distinct case that merits its own mode of analysis. Thus, because the case involved suing state officers in tribal court for something these officers did while performing a core governmental function (the investigation of criminal activities committed off the reservation), the decision to deny tribal court jurisdiction over these state officials could be understood as a case where the Court applied a clear statement rule requiring clear congressional intent to allow a tribe to burden or interfere with certain aspects of state sovereignty.[201]

The issue in *Atkinson Trading Post v. Shirley*[202] was whether the Navajo Nation could impose a hotel occupancy tax on the non-Indian owner and operator of a hotel located on non-Indian fee land within the exterior boundaries of the Navajo Indian reservation. The Court held that neither of the two *Montana* exceptions applied, and therefore the tribe could not

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to use the tribal court to sue another non-member, its holding was quickly extended to cover all cases involving tribal plaintiffs suing non-members. *See* Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

200. 533 U.S. 353 (2001); *see* discussion *supra* notes 72-83.

201. *See* Skibine, *Making Sense*, *supra* note 79, at 360–61. The requirement of a clear statement before a federal statute interfering with a core state function could be found applicable to states was first formulated in *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991) (finding that Congress did not clearly express the intent to apply the Age Discrimination and Employment Act to state judges).

202. 532 U.S. 645, 647 (2001).

impose the tax.[203] The Court held that the first *Montana* exception was unavailable because the hotel tax did not have a nexus to the consensual relationship the hotel had with the tribe.[204] Concerning the second *Montana* exception, the Court stated, "[W]e fail to see how petitioner's operation of a hotel on non-Indian fee land 'threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.'"[205]

One could argue that it is not the operation of the hotel that threatened the tribe, but rather the lack of ability to raise governmental revenues from non-members through taxation. However, the Court noted that, although there was language in one other case referring to taxation as necessary to tribal self-government, that case was distinguishable because it did not address taxation on non-Indian fee land.[206] Furthermore, the Court stated that the *Montana* exception "is only triggered by nonmember conduct that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered 'necessary' to self-government."[207] While it is true that the *Montana* Court phrased the self-government exception in terms of "conduct" threatening tribal self-government, none of the four cases listed in *Montana* to support the second exception are limited to conduct. In fact, two of these cases involved taxation.[208] The two other cases cited - *Fisher v. District Court*[209] and *Williams v. Lee*[210] - involved the exclusive jurisdiction of tribal courts. *Fisher* was a domestic relations case involving child adoption, not conduct. *Williams* likewise did not involve conduct; it involved a non-Indian trying to invoke the jurisdiction of state courts to recover a debt owed to him by a tribal member. Moreover, since the consensual relations exception allows

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203. *Id.* at 659.

204. *Id.* at 656.

205. *Id.* at 657 (quoting Montana v. United States, 450 U.S. 544, 566 (1981)).

206. *Id.* at 657 n.12 (referring to Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)). Although the taxation in *Merrion* was directed at activities occurring on Indian-owned land, the Court specifically stated that the tribal power to tax "does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction . . . ." *Merrion*, 455 U.S. at 137.

207. *Shirley*, 532 U.S. at 657 n.12 (emphasis omitted).

208. Although, strangely enough, the issue in *Thomas v. Gay*, 169 U.S. 264 (1898), and *Montana Catholic Mission v. Missoula County*, 200 U.S. 118 (1906), concerned the ability of the *state* and not the tribe to tax livestock owned by non-Indians on Indian reservations.

209. 424 U.S. 382 (1976).

210. 358 U.S. 217 (1959).

tribal regulation through "taxation, licensing or other means,"[211] the wording limiting the second exception to "conduct" may have been inadvertent. It is certainly inconsistent with language located earlier in the opinion where the Court phrased its overarching principle by declaring that the "exercise 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."[212] The Court never mentioned that only regulation of non-member "conduct" may at times be necessary to tribal self-government

Under the proposed analysis, instead of discarding the second *Montana* exception by limiting it to instances involving the "conduct" of non-members, the Court would first assess whether the tax was discriminatory. If it was not, the court would then assess whether such tribal taxation of non-members was against an overriding federal interest or would unduly burden the flow of commerce or the general trade and intercourse between Indians and non-Indians. I do not think it would.

If the last implicit divestiture case decided by the Court, *Plains Commerce Bank v. Long Family Ranch*,[213] was limited to prohibiting tribes from ordering non-members to sell their lands to certain specified individuals, the proposed analysis would probably not impose a different outcome. Such tribal action would probably impose an undue burden under this version of the *Pike* balancing test, and would likely infringe on federal prerogatives even if Congress had not yet acted. However, allowing tribal members to bring actions in tribal court for damages due to discrimination is another matter. The tribal interest would be high and the burden on federal interests low.

As mentioned earlier,[214] Professor Frickey once remarked that what the Court was doing with the implicit divestiture doctrine was similar to a dormant Commerce Clause analysis.[215] However, he was strongly opposed to the idea of the Court using such an analysis to restrict tribal inherent authority. As he stated, the Court's "dormant plenary power impulse is a striking example of judicial activism against the backdrop of wide-ranging

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211. Montana v. United States, 450 U.S. 544, 565 (1981).

212. *Id.* at 564.

213. 554 U.S. 316 (2008); *see* discussion *supra* notes 84-94.

214. *See* discussion *supra* note 21.

215. *See* Frickey, *A Common Law*, *supra* note 14, at 69–73. However, Professor Frickey warned that "[t]he Court has never even recognized that *Oliphant* and its progeny share some similarities with the dormant Commerce Clause approach, much less attempted to legitimate the former by reference to the latter." *Id.* at 68.

congressional power."[216] One of the main reasons for his opposition to the use of a dormant Commerce Clause analysis, however, was that the Court has given Congress plenary power over Indian tribes. Thus, he stated,

> Because congressional power over Indian affairs is plenary, the front-line judicial power to invalidate tribal regulation lacks clearly defined limits as well. Moreover, the opinions do not aggregate into any presumption favoring the validity of tribal regulation of nonmembers so long as such regulation is facially neutral and seems free of improper motivation.[217]

To this end, in order to neutralize such objection, the proposed analysis assigns constitutional boundaries to the power of Congress over Indian nations.

B. Applying Constitutional Norms to Congress: Towards a Limited Congressional Power over Indian Nations

The Court continues on insisting that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." Yet, most scholars agree that the Commerce Clause is insufficient by itself to grant Congress plenary power over the internal affairs of Indian tribes.[218] As once stated by Professor Clinton, the Commerce Clause gave Congress the "power to regulate commerce *with* the tribes, not the commerce *of* the tribes."[219] In order to determine whether Congress has kept its plenary power over Indian tribes, the Court should borrow from the jurisprudence relating to the incorporation of federal territories into the United States as developed in the *Insular Cases*.[220] The *Insular Cases* held that once a territory has been "incorporated" into the

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216. *Id.* at 72.

217. *Id.* at 73.

218. *See, e.g.*, 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, 1137 n.150; Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK L. REV. 77 (1993).

219. Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L. J. 113, 254 (2002) (emphasis added).

220. *See* Alex Tallchief Skibine, United States v. Lara, *Indian Tribes, and the Dialectic of Incorporation*, 40 TULSA L. REV. 47 (2004); *see also* discussion *infra* notes 289-295.

United States, Congress no longer had plenary power in governing such territory, but was bound by constitutional limits.[221]

Absolute congressional plenary power over Indian nations, including the power to abolish tribal sovereignty, is incompatible with the constitutional status of Indian tribes once the tribes have been incorporated or integrated into our constitutional system as third sovereigns. I am not arguing here that Congress never possessed absolute or plenary power to legislate with respect to Indian tribes when the tribes were outside the political system of the United States. In fact, Justice Marshall himself "implicitly endorsed the plenary power of Congress to implement colonization."[222] In *Worcester*, however, Justice Marshall only stated that the Constitution "confers on Congress the powers of war and peace, of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians."[223] Today, however, we no longer make treaties with the tribes nor can we declare war on the tribes since they are internal to the United States. Thus, the Commerce power seems to be the only power left.

It is true that in *Lara*, Justice Breyer stated that the legislative authority of Congress in Indian affairs may rest "not upon affirmative grants of the Constitution but upon the Constitution's adoption of preconstitutional powers necessarily inherent in any federal government, namely powers that this Court has described as 'necessarily concomitants of nationality.'"[224] However, after Indian tribes were politically incorporated into the United States, the notion that Congress still possesses inherent powers over them derived from a pre-constitutional understanding originating from a time when Indian nations were considered outside the political system of the United States seems untenable and normatively unattractive.[225] As argued

221. Downes v. Bidwell, 182 U.S. 244, 267-68 (1901). This is not meant to argue that Indian tribes have been "incorporated" in the same sense as some of the territories, since those territories were incorporated as part of the federal government and not under a third sphere of sovereignty

222. Frickey, *Marshalling Past and Present*, *supra* note 115, at 395.

223. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

224. United States v. Lara, 541 U.S. 193, 201 (2004). Justice Breyer perhaps relied on earlier arguments made by scholars to the effect that the power of Congress over Indian tribes may be "inherent." *See* Cleveland, *supra* note 16; Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 68–69 (1996) [hereinafter Frickey, *Domesticating*]; *see also* Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509 (2007).

225. *See* Skibine, *Redefining*, *supra* note 11, at 692.

by Gregory Ablavsky, a more persuasive argument is that the drafters of the Constitution never understood the Commerce Clause as being a large part of the total power given to Congress over Indian affairs, let alone the exclusive one.[226] Instead, federal authority over Indian Affairs was presumed to rest on a "holistic interpretation of the Constitution,"[227] in which the Indian Commerce Clause was "a minor component of a broad Indian affairs power resting on multiple [constitutional] provisions."[228] Although this theory may suggest that United States' assertion of power over Indian nations had pre- or extra-constitutional origins, "it would be misleading to characterize the concepts of territorial sovereignty underlying claims to authority over Native nations as extra-constitutional."[229] In effect, "although concepts of territoriality and the law of nations predated the Constitution, the document became the touchstone for their meaning, scope, and expression in the post-ratification United States."[230]

Once it is accepted that because of tribal incorporation, Congress no longer has plenary power over Indian tribes, the extent of this redefined congressional power still has to be determined. There are various ways to conceptualize some limits on congressional power over Indian tribes under the Commerce Clause. First, one can equate the Indian Commerce power with the Interstate Commerce power and impose the same kind of limits. Of course, the disagreements that have plagued the interstate commerce power would replicate here, with some taking a very narrow view of Indian Commerce, such as Justice Thomas recently did in his concurrence in *Adoptive Couple v. Baby Girl*.[231] Others would take a much broader view.[232] Alternatively, one could take the view that the clause has a different meaning when it comes to the power to regulate commerce with

226. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015) [hereinafter Ablavsky, *Beyond the Indian Commerce Clause*].

227. *Id.* at 1021.

228. *Id.* at 1050.

229. *Id.* at 1067.

230. *Id.*

231. 133 S. Ct. 2552, 2565 (2013) (Thomas, J., concurring); *see also* Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 ST. JOHN'S L. REV. 789, 811-12 (2006) (arguing that the term "commerce" only had an economic connotation with trade at the time the Constitution was drafted); *see Robert* G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007) (arguing that the Clause only gave Congress the power to regulate the mercantile trade between people under Federal or State jurisdiction and Indian tribes).

232. *See* Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010).

the Indian tribes than it has in the Interstate Commerce Clause.[233] While some have argued that the power is smaller,[234] others argue that using either an original meaning or an original intent mode of analysis the Indian Commerce Clause "should be interpreted broadly to include subject matters beyond the narrow meaning (whatever it may be) of 'commerce.'"[235] According to Professor Fletcher, the reason for giving to the Indian Commerce Clause a broader definition than the Interstate Commerce Clause is that since the Indian Commerce Clause removed all state power from the sphere of Indian Affairs, there are no concerns about the Tenth Amendment of federalism limiting Congress's power in this area.[236] Professor Fletcher concluded, therefore, that the Indian Commerce power was, in fact, conceived as extending to every interaction, social or commercial, between Indians and non-Indians. While some scholars agree, noting that the early Indian Trade and Intercourse Act regulated much more than commercial trade between non-Indians and the Indian tribes,[237] others do not.[238]

The power of Congress under the Indian Commerce Clause is extensive, but that does not mean it is plenary in the sense of being absolute or unlimited. Thus, in later writings, Professor Fletcher drew a distinction between congressional power over the tribe's external affairs, which seems to be acknowledged by almost everyone as being plenary, and power over the tribes' internal affairs, which should not be.[239]

Even though the constitutional power of the United States over Native nations was broad and not solely derived from the Commerce Clause, it was nonetheless not considered plenary by the drafters or other federal officials.[240] Instead, "[a] better reading of history is that the Constitution

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233. *See* Matthew L.M. Fletcher, *ICWA and the Commerce Clause*, *in* THE INDIAN CHILD WELFARE ACT AT 30: FACING THE FUTURE 28, 31 (Matthew L.M. Fletcher et al. eds., 2009) [hereinafter Fletcher, *ICWA and the Commerce Clause*].

234. *See* Steven P. McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. REV. OF L & SOC. CHANGE 217, 257–63 (1993).

235. *See* Fletcher, *ICWA and the Commerce Clause*, *supra* note 233, at 33.

236. *See id.* at 41.

237. *See* Balkin, *supra* note 232, at 24.

238. *See* Robert G. Natelson & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55, 60 (2010) (arguing that the Trade and Intercourse Acts were mostly enacted pursuant to the Treaty power and not the Commerce Power).

239. *See* Fletcher, *Tribal Consent*, *supra* note 109, at 75–78.

240. *See* Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 226, at 1053-58. "The Supreme Court routinely invokes the Clause to justify plenary power, but this assertion

obliquely endorsed a significant and simultaneous shift in Anglo-Americans' thoughts about Natives' status: the repudiation of a theory of Native peoples as conquered in favor of a grudging acknowledgment of Native independence."[241] Moreover, much of the early understanding and practices concerning assertion of United States' power over Native nations relied on the Law of Nations.[242] Several scholars have reached similar conclusions,[243] although one has warned that although "There was widespread agreement, then, that the law of nations should governed relations between the United States and Natives. It was less clear what the content of that law would be… [t]he fundamentals texts of the eighteenth-century law of nations, though universalist in aspiration, were Eurocentric in content; they said very little about Native peoples."[244] However, international norms concerning the rights of Indigenous peoples to self-determination have evolved. Restricting congressional power from interfering with the internal affairs of Indian tribes is more consistent with evolving norms of international law.[245]

On September 13, 2007, the United Nations adopted its "Declaration on the Rights of Indigenous Peoples."[246] Two of its forty-six articles are especially relevant in determining the extent of the right of tribal self-government. Article 3 states that "[i]ndigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[247] Article 4 ties the right of self-government to the right of self-determination and seems to treat it as a sub-part of that greater right. It states, "Indigenous people, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their

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does not find support either in text or in any discussion of tribes' constitutional status in the Clause's sparse drafting and adoption history." *Id.* at 1055.

241. *Id.* at 1058.

242. *Id.* at 1059-61. "There was little doubt to early Americans that international law governed both the United States and Indian nations as well as theor relations." *Id.* at 1060.

243. *See, e.g.*, Frickey, *Domesticating*, *supra* note 224.

244. *See* Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 226, at 1061.

245. For an argument that norms of international law should be considered by federal courts to limit congressional power over Indian tribes, see Frickey, *Domesticating*, *supra* note 224.

246. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, ¶ 12, U.N. Doc. A/RES/61/295 (Sept. 12, 2007).

247. *Id.* at art. 3.

autonomous function."[248] Interestingly, although the Declaration limits the right of self-government to "internal and local affairs," the document does not further define the scope of internal and local affairs.

Defining the extent of the right of tribal self-determination was one of the most controversial and confrontational issue in developing the final draft.[249] Throughout its development, there was no comprehensive definition of "self determination" in the Declaration.[250] However, "[t]he content of the right can to some extent be inferred from many other articles in the Declaration that provide decision-making by indigenous people and control over their own property and affairs."[251] As explained by Robert T. Coulter, under the Declaration, Indigenous Peoples' right to self-determination includes: (1) The right to form their own government; (2) The right to determine the relationship between that government and the greater state; (3) The right to make and enforce laws to govern their own affairs; (4) The right to exist, act as a collective body, and participate in the international community; (5) The right to engage in political and economic relations with others; and (6) The right to control, use, and benefit from their lands and resources.[252]

Other scholars have taken a much more critical or cautious perspective on the Declaration, pointing out that there are many shortcomings in the Declaration, notably in the areas of linguistic rights, shared national symbols, education, participation in political decisions, immigration and citizenship, and redress and reparations.[253] Others have argued that as a result of the many compromises that had to be made in order for the U.N. to adopt the document, the Declaration privileges an individual human right paradigm at the expense of a strong form of Indigenous self-

248. *Id.* at art. 4.

249. *See, e.g.*, Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND J. TRANSNAT'L L. 1141, 1160-66 (2008) (acknowledging that the right to self-determination is left undefined but observing that this was inevitable and perhaps not a bad thing).

250. Robert T. Coulter, *The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples*, 15 UCLA J. INT'L L. & FOREIGN AFF. 1, 13 (2010).

251. *Id.*

252. *Id.* at 16. Coulter also emphasized, "This summary is by no means a comprehensive enumeration of what is included in the right of self-determination." *Id.*

253. *See* Yousef T. Jabareen, *Redefining Minority Rights: Success and Shortcomings of the U.N. Declaration on the Rights of Indigenous Peoples*, 18 U.C. DAVIS J. INT'L L. & POL'Y 119, 145–59 (2011).

determination.[254] For instance, the 1993 draft of the Declaration gave a much more extensive definition of the right of self-determination, which included indigenous control of "culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment, and entry by non-members."[255] Even after the definition was amended by the Human Rights Council, many African states remained opposed to the Declaration until it was amended by the addition of Article 46(1), which states, "Nothing in this Declaration may be interpreted as implying for any State, people, group, or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations."[256] According to Professor Engle, this section was likely included to protect the territorial integrity of existing independent states.[257] In addition, because sections 2 and 3 of article 46 also ensure that the rights guaranteed in the Declaration are subrogated to "international human rights", Professor Engle concluded, "The declaration seals the deal: external forms of self-determination are off the table for indigenous peoples, and human rights will largely provide the model for economic and political justice for indigenous peoples."[258]

One must ask whether it makes more sense to phrase the right of self-determination in terms of what the indigenous tribe/community can do, or in terms of restrictions on what the greater State can do when it comes to interfering with the local autonomy of the indigenous tribe/community. Some scholars have taken the position that such restrictions are implicit in the right to self-determination. For instance, because the general right to self-determination declared in article 3 is considerably more extensive than the autonomy provided for in article 4,[259] Coulter concluded that "the general right of self-determination creates a limit on states' authority to restrict by legislation the right of autonomy or any other of the elements of

254. *See* Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 EUR. J. INT'L L. 141 (2011).

255. *Id.* at 145. Engle also noted that other language (in former articles 8 and 34) was dropped which would have arguably promoted collective over individual rights. *Id.* at 149.

256. Declaration on the Rights of Indigenous Peoples, *supra* note 246, at art. 46(1).

257. *See* Engle, *supra* note 254, at 149-50.

258. *Id.* at 147.

259. Coulter, *supra* note 250, at 17. It should be noted that at least one other scholar has taken the position that the right to autonomy in the Declaration is equal if not superior to the right of self-determination. Jabareen, *supra* note 253, at 139 ("The deliberate inclusion of autonomy clearly shows that calls for autonomy are not extra, additional, or optional rights, but rather fundamental to full and genuine realization of indigenous peoples' rights.").

the right of self-determination, especially those stated in other articles."[260] In other words, the Declaration runs against the notion of congressional plenary power over Indian tribes existing under United States law.

C. Applying Constitutional Norms to Tribal Adjudicative Proceedings

Because the Court in *Strate* stated that tribal adjudicatory jurisdiction could never be larger than a Tribe's regulatory jurisdiction,[261] it has decided all the cases challenging the jurisdiction of tribal courts by reference to whether the tribal government could regulate the activities of non-members. However, if the Court were to adopt a dormant Indian Commerce Clause methodology for cases involving challenges to a tribe's adjudicatory jurisdiction I have some concerns that if part of the "burden" on the non-members was not only regulatory, but also exposure to tribal adjudicatory procedures not meeting basic constitutional requirements, tribal courts may still end up never having jurisdiction over non-members, even under a dormant Indian Commerce Clause analysis. That is because, in addition to deciding whether regulating non-member defendants being sued in tribal courts unduly burdened the trade and intercourse between the tribes and non-members, cases concerning the extent of a tribal court adjudicative jurisdiction would also have to decide whether tribal adjudicative processes not affording constitutional due process impose an unacceptable burden on non-member defendants. One could argue, however, that if the federal interest here is to make sure that non-tribal members receive a fair trial, the application of the Indian Civil Rights Act (ICRA) which mandates the application of most of the protections of the Bill of Rights to tribal proceedings, should assuage those concerns.[262] The problem with this argument is that federal court review of tribal court decisions can only be invoked in cases of habeas corpus.[263] Thus, even though the ICRA contains

260. Coulter, *supra* note 250, at 17. In defining "self-determination," Coulter relied heavily on the work and views of Erica-Irene Daes, who was the chairperson-Rapporteur of the Working Group on Indigenous Populations, which was responsible for the drafting of the Declarations. *See* Erica-Irene Daes, *Some Considerations on the Right of Indigenous Peoples to Self Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1993).

261. *See* discussion *supra* notes 193-99.

262. Pub. L. No. 90-284, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301-1303 (2012)).

263. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Moreover, under the Indian Civil Rights Act of 1968, Indian tribes do not have to provide counsel for indigent defendants. *Id.* at 63. Defendants also do not have the right to an indictment by a Grand Jury. *Id.* at 63 n.14. Furthermore, when it comes to civil instead of criminal proceedings, even under the ICRA the right to a trial by jury is not provided. *Id.* at 63. In addition, the right to

a due process clause, federal courts cannot review tribal court decisions in civil cases to ascertain whether due process was, in fact, given. At least one commentator argued that because there is a link between the lack of federal court review under the ICRA and the Court's use of the implicit divestiture doctrine to deny tribal courts civil jurisdiction over non-member defendants, it might be beneficial for tribes to consider endorsing legislative proposals extending limited federal court review over some tribal court decisions.[264] Although that author recommended amending the ICRA to provide for limited review of tribal decisions by federal courts,[265] another legislative possibility would be to amend 28 U.S.C. § 1441 to allow removal from tribal to federal court in the same manner that cases filed in state court can be removed to federal court.

The relationship between tribal and federal courts can help explain the interactions between federal and state courts. Professor Judith Resnick once remarked that when issues are important enough to federal courts, they will impose federal rules of decisions on either state or tribal courts.[266] According to Professor Resnick, federal courts have allowed Tribes unrestricted authority in matters such as tribal membership disputes and other intra-tribal issues, such as family relationships, because these "are not decisions of national political importance. Hence, 'letting' tribes have control over these issues is not recognizing them as serious power holders, but only as holding power over that which has little import."[267] Because federal courts are aware that tribal courts operate according to different rules and norms, there is a danger that,

> At some point, from the perspective of the dominant group, the "vast gulf" becomes too vast — differences emerge that the federal government tries to obliterate. At such points, the federal

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an independent judiciary is not guaranteed, although many tribal systems do have an independent judiciary. *See* Kirke Kickingbird, *Striving for the Independence of Native American Tribal Courts*, HUM. RTS., Winter 2009, at 16 (vol. 36, no. 1); Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot from the Field,* 21 VT. L. REV. 7, 15 (1996).

264. *See* Amy Conners, Note, *The Scalpel and the Ax: Federal Review of Tribal Decisions in the Interest of Tribal Sovereignty*, 44 COLUM. HUM. RTS. L. REV. 199 (2012).

265. *Id.* at 246–52.

266. *See* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989) [hereinafter Resnik, *Dependent Sovereigns*]. Resnik's thesis, written over ten years before *Bush v. Gore*, 531 U.S. 98 (2000), was in fact totally predictive of what the United States Supreme Court would do with the Florida Supreme Court decision.

267. Resnik, *Dependent Sovereigns*, *supra* note 266, at 754.

> government attempts to remind the dominated group of its dependence upon the larger collective and works to bring the smaller group into compliance with federal norms.[268]

In other words, if tribal courts are going to adjudicate interests important to non-members, there is high probability that federal courts are going to eventually impose direct federal court review of such decisions to ensure that federal norms protecting these interests are enforced. In the next section, I consider three possible non-legislative solutions to this quandary.

1. Dividing Sovereignty

Under current law, whether the full Bill of Rights is applicable to tribal criminal prosecutions depends on whether such prosecutions were undertaken pursuant to a reaffirmation of tribal inherent sovereignty or a delegation of federal authority to the tribe. One scholar recently argued that, instead of attempting to answer this question, we should acknowledge that such prosecutions are undertaken pursuant to both tribal and federal sovereign authority and resolve the issue pursuant to a "divided sovereignty" approach.[269] From an either/or approach (tribal or federal), this methodology treats the issue as one of mixed government, at times more federal, at others more tribal. Under this approach t whether constitutional rights should apply to tribal prosecutions of non-members would be decided using a balancing of the interests test similar to the ones used in a "reverse Erie" situation (when a court has to decide when federal rather than state procedures should be used in adjudicating federal claims in state courts) or *Matthews v. Eldridge*[270] (when a court has to decide how much procedural due process should be given plaintiffs before their life, liberty, or property interests are taken in administrative proceedings). Here, individual liberty interests would be balanced against the tribal interest in "maintaining traditional procedures, with a particular emphasis on avoiding systematic differences in outcome or the fundamental fairness of proceedings."[271]

Although innovative, there are some potential pitfalls in such a test when it comes to cases involving the civil jurisdiction of tribal courts. First, the "Divided Sovereignty" approach would result in ad hoc determinations that would foster indeterminacy and uncertainty. Secondly, the approach, rather than promoting incorporation of tribes as third sovereigns into the

268. *Id.* at 756.
269. Price, *supra* note 10.
270. 424 U.S. 319 (1976).
271. Price, *supra* note 10, at 711.

federal system, might facilitate the incorporation of tribes into the federal government itself. In other words, many courts might decide that most tribal actions were federal rather than tribal actions.

2. Applying the Due Process Clause to the Tribes

If Indian nations are incorporated into the Constitution, one must ask whether this means that some constitutional constraints, such as the Due Process Clause of the Fifth Amendment, should be applicable to the exercise of tribal governmental power even though this power pre-existed the Constitution.[272] This argument will face strong criticisms from those who argue that Indian Nations never consented to the Constitution,[273] or, for that matter, to be incorporated into the United States.[274] Although I have previously rejected such suggestion,[275] several reasons now compel me to reconsider applying the Fifth Amendment to Indian tribes. First, many scholars have expressed strong doubts that the Court would allow tribes to prosecute non-Indians and non-member Indians without the full protection of the Bill of Rights.[276] Second, legislation like VAWA will result in all constitutional protections or their equivalent applying to such tribal prosecutions.[277] Third, applying parts of the Constitution to Indian nations may remove some of Justice Kennedy's quasi-constitutional "consent of the governed" argument that American citizens have never consented to be subjected to the jurisdiction of a government existing within the United

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272. *See* Talton v. Mayes, 163 U.S. 376 (1896).

273. *See* Fletcher, *Tribal Consent*, *supra* note 109.

274. *See* David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403 (1994). Some scholars have even argued that Indian nations were not, in fact, incorporated into the United States. *See* Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 37.

275. *See generally* Skibine, *Power Play*, *supra* note 65.

276. *See* Tom Gede, *Criminal Jurisdiction of Indian Tribes: Should Non-Indians Be Subject to Tribal Criminal Authority Under VAWA?*, ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS, July 2012, at 40 (vol. 13, no. 2); Price, *supra* note 10, at 722 ("Realistically, even *Lara*'s double jeopardy holding appears fragile."); Trachman, *supra* note 7, at 886 ("[T]he best outcome for retaining tribal sovereignty may be for federal courts simply to construe ICRA broadly and find that Congress has already incorporated the constitutional protections for defendants.").

277. The Indian section of VAWA, section 904, codified at 25 U.S.C. § 1304(d)(4) (Supp. I 2013), requires Indian tribes to provide any "rights whose protection is necessary under the Constitution of the United States," and also guarantees defendants "the right to a trial by an impartial jury that is drawn from sources that (A) reflect a fair cross section of the community; and (B) do not systematically exclude any distinctive group in the community, including non-Indians." *Id.* § 1304(d).

States but not bound by the Constitution.[278] Finally, making the Due Process Clause directly applicable to tribal court proceedings would allow federal court review of tribal court decisions in civil cases under 28 U.S.C. § 1331, where the federal question is whether the Due Process Clause has been violated.[279]

In *Talton v. Mayes*,[280] a case decided before most tribal members became United States citizens, the Court had to decide whether a citizen of the Cherokee Nation was entitled to a grand jury indictment when facing prosecution for murder by the Cherokee Nation, which had sentenced him to death by hanging. The Court held that because the Fifth Amendment "operates solely on the constitution itself by qualifying the powers of the national government which the constitution called into being,"[281] it could not apply to the local legislation of the Cherokee Nation.[282] According to the Court, "as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the constitution, they are not operated upon by the fifth amendment."[283]

One commentator has argued that *Talton* should be overruled and the Constitution made applicable to Indian tribes because the Tribes lost all their inherent sovereignty upon incorporation into the United States.[284] The argument here, however, is that some constitutional provisions should apply to tribal proceedings but for exactly the opposite reason. It is because Indian tribes have retained much of their inherent sovereignty that the

278. *See* discussion *supra* notes 65-71.

279. This would be similar to *National Farmers Union v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (holding that a challenge to the jurisdiction of a tribal court was a federal question for the purpose of 28 U.S.C. § 1331 because whether a tribal court had jurisdiction over non-members was a matter of federal law).

280. 163 U.S. 376 (1896).

281. *Id.* at 382.

282. *Id.* at 384-85 (holding that the Fifth and Fourteenth Amendments to the United States Constitution were not applicable to such tribal prosecution because, when prosecuting their own members, Indian tribes were not exercising powers delegated by the federal government but were acting pursuant to their own inherent sovereign powers).

283. *Id.* at 384. Interestingly enough, the *Talton* court could have ruled that the Fifth Amendment's right to a grand jury applied to the Cherokees because Article V of the Treaty of 1835, signed between the United States and the Cherokee Nation, provided that the United States "shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary . . . provided always that they shall not be inconsistent with the constitution of the United States." Treaty with the Cherokees, Dec. 29, 1835, art. 5, 7 Stat. 478, 481.

284. James A. Poore III, *The Constitution of the United States Applies to Indian Tribes*, 59 MONT. L. REV. 51, 286 (1998).

Constitution should apply to the actions of their governments now that they have been incorporated as quasi-sovereign nations into our legal and political system.[285] This does not suggest that the result reached in *Talton v. Mayes* should have been different at the time it was made. The argument is that the drafters of the original Constitution contemplated the Indian tribes to be outside the political system of the United States so, of course, they did not make any provision for their eventual incorporation into the Constitution.[286] Yet, there has been a progressive incorporation of Indian tribes into the United States. The Court could remedy that oversight by holding that because tribes are sovereign, some of the fundamental liberties of the Bill of Rights should be applicable to the actions of tribal governments. Properly understood, the argument is that Justice Kennedy, in *Duro,* should not have ruled that Indian tribes have been implicitly divested of the power to prosecute non-member Indians. What he should have held was that Indian tribes have been divested of the power to prosecute non-member Indians without affording them the protections of the Fifth Amendment.

Applying some constitutional protections to tribal proceedings as advocated here is also similar, from a practical and pragmatic standpoint (although not from a theoretical one), to a proposal advocated by Professor Matthew Fletcher, who argues that tribal courts should presumptively have civil jurisdiction over non-members for all activities occurring on Indian owned land.[287] This presumption could, however, be rebutted in federal or state courts if the non-member challenging such tribal jurisdiction can show that the tribe did not provide fundamental fairness.

> [A]llowing lower courts to make a collateral evidentiary record for the purpose of determining whether the tribe and/or tribal court provided adequate due process sufficient to guarantee that the exercise of tribal civil jurisdiction over the nonmember was

285. The argument that Indian tribes lost all their inherent sovereignty upon incorporation into the United States is simply not supported by legal precedents, nor can it be derived from congressional policies or statutes. *See* Erik M. Jensen, *The Continuing Vitality of Tribal Sovereignty Under The Constitution*, 60 MONT. L. REV. 3 (1999).

286. *See* Fletcher, *Tribal Consent*, *supra* note 109, at 55–60.

287. *See* Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 785, 828-29 (2014) [hereinafter Fletcher, *A Unifying Theory*] .

> fundamentally fair. This inquiry renders the initial presumption [favoring tribal jurisdiction] rebuttable.[288]

A similar line of reasoning can be derived from the *Insular Cases*, which decided whether the Constitution should be applicable inside newly acquired territories such as Puerto Rico, Hawaii, or Alaska.[289] The answer depended on whether Congress had intended to "incorporate" such territories into the United States.[290] This intent could be either explicit or implicit.[291] However, it is interesting to note that even if a territory was not held to be incorporated, at least parts of the Constitution were still held to be applicable.[292] The Court initially made a distinction between "fundamental rights," which were applicable even within unincorporated territories, and procedural rights, which were not.[293] However, in *Dorr v. United States*, the Court adopted the position that what constitutional limitations were applicable inside unincorporated territories "must depend upon the relation of the particular territory to the United States."[294]

> [T]he imperial era cases have retained vitality, and, when read in combination with *Reid*, have simply modified the analysis of the Constitution's application from whether a particular provision is "fundamental" to free government to a case-by-case analysis regarding whether the application of the right would be "[i]mpractical and anomalous" in any particular country.[295]

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288. *Id.* at 829. Professor Fletcher's proposal would, however, only be applicable for activities occurring on land owned by the tribe or tribal members.

289. The original *Insular Cases* are a series of twenty-three decisions starting with nine cases decided in 1901 and ending with *Balzac v. Porto Rico*, 258 U.S. 298 (1922). The cases delve into the status of territories such as Puerto Rico, Hawaii, the Philippines, and Alaska.

290. Dorr v. United States, 195 U.S. 138, 142-45, 147-48 (1904).

291. *Balzac*, 258 U.S. at 306.

292. *See* Downes v. Bidwell, 182 U.S. 244, 293 (1901).

293. Cleveland, *supra* note 16.

294. 192 U.S. 138, 142 (1904).

295. Cleveland, *supra* note 16, at 246. Professor Cleveland quotes *Reid v. Covert*, where the Court had stated,

> At the beginning we reject the idea that when the United states acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.

354 U.S. 1, 5–6 (1957).

This analysis is similar to the one used by the Court in deciding which provisions of the Bill of Rights should be applicable to the States through the Due Process Clause of the Fourteenth Amendment. Initially, none of the requirements of the Bill of Rights was thought to be applicable to the states after adoption of the Fourteenth Amendment.[296] Yet, by 1897, the Court began to selectively incorporate the Bill of Rights into the Fourteenth Amendment through its Due Process Clause.[297] Eventually, the Court selectively incorporated six of the first eight amendments, the last one being the Second Amendment in 2010.[298] Although the Court has, at various times, used different tests to decide which amendments in the Bill of Rights should be incorporated and made applicable to the states through the Fourteenth Amendment, it summarized the law on this issue in *Duncan v. Louisiana*, stating:

> The question has been asked whether a right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," whether it is "basic in our system of jurisprudence," and whether it is "a fundamental right, essential to a fair trial."[299]

Deciding that at least the Due Process Clause should be applicable to tribal court proceedings as a result of incorporation is not that different from the approaches used in the *Insular Cases* or the selective incorporation approach used in applying some of the provisions of the Bill of Rights to the States.

Legally speaking, applying the Due Process Clause to tribes would not be that different from other instances where the Court had to stretch or re-interpret the Constitution because it found the original document to be lacking a key provision, the addition of which would make the original document more coherent. For instance, there is no Equal Protection Clause directly applicable to the federal government - this clause is only found in the Fourteenth Amendment.[300] Yet, eighty-six years after the adoption of

296. *See generally The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872) (interpreting the Fourteenth Amendment very narrowly, including narrow constructions of the Due Process and the Equal Protection Clauses contained in the amendment), *abrogation recognized by* Estate of Conner by Conner v. Ambrose, 990 F. Supp. 606 (N.D. Ind. 1997).

297. Chicago, Burlington & Quincy RR v. City of Chicago, 166 U.S. 226 (1897).

298. *See generally* McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010).

299. 391 U.S. 145, 148–49 (1968) (citations omitted).

300. U.S. CONST. amend. XIV ("No State shall . . . deny to any person within its jurisdiction the equal protection of the law.").

the Fourteenth Amendment, the Court held that the Due Process Clause of the Fifth Amendment included the requirement not to deny anyone the equal protection of the laws.[301]

Applying the Due Process Clause to the tribes is also consistent with some noted theories of constitutional interpretation, such as "Framework Originalism," which "views the Constitution as an initial framework for governance that sets politics in motion and must be filled out over time through constitutional construction."[302] According to this theory, the drafters did not conceive of the Constitution as a finished product. What the drafters did was to furnish a constitutional framework or structure that could be built upon by subsequent generations of interpreters in order to take care of new and unforeseen challenges and circumstances.[303]

> Framework originalism permits a great deal of contingency in how the Constitution turns out; each of these versions can still be faithful to text and principle. . . . [F]ramework originalism does not assume that the nature of the Constitution is fully contained in its origins in the way that the structure of an oak is contained in an acorn.[304]

However, "[l]ater generations have a lot to do to build up and implement the Constitution, but when they do so they must always remain faithful to the basic framework."[305] In our case, Indian nations were supposed to disappear or be moved out of the way.[306] Fortunately (or unfortunately, depending on one's perspective), things did not turn out that way.[307] Amending the Constitution to clearly define the place of Indian tribes

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301. U.S. CONST. amend. V; Bolling v. Sharp, 347 U.S. 497, 499-500 (1954).

302. Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 550 (2009).

303. *Id.* at 550-51, 553-55. In explaining the meaning of "framework originalism," Balkin juxtaposed it with the theory he termed "skyscraper originalism," according to which the Constitution is "more or less a finished product," that "views amendment as the only method of building the Constitution." *Id.* at 550.

304. *Id.* at 559.

305. *Id.* at 550.

306. *See* Ablavsky, *Savage Constitution*, *supra* note 124, at 1051-67 (discussing how the Federalists argued that ratification was necessary because a strong central government could either vanquish the Indians or removed them from existing states).

307. *See* Kathryn E. Fort, *The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court*, 57 ST. LOUIS U. L.J. 297, 308 (2013) (arguing that today's Court clings to the anachronistic "idea that tribes will eventually disappear and its citizens will fully assimilate").

within our federalism would be the right thing to do,[308] but since this may never happen, the Court is left with the role of finding a way to fit Indian nations into our constitutional structure.

There are huge legal hurdles, however, that would have to be overcome to make some of the provisions of the Bill of Rights applicable to Indian tribes. To start with, in *Barron v. City of Baltimore*,[309] a case decided a year after *Worcester v. Georgia*, Justice Marshall held that the Fifth Amendment was not applicable to the States.[310] While *Barron* could arguably be distinguished since its specific holding was that states are not subject to the Fifth Amendment,[311] *Talton v. Mayes* picked up where *Baron* left off and held that the Fifth Amendment was not applicable to Indian Tribes.[312] It is one thing for the Court to stretch the Constitution and make most of the Bill of Rights applicable to the States through the Due Process Clause of the Fourteenth Amendment;[313] it is another to extend application of parts of the Bill of Rights to Tribes without the help of the Due Process Clause of the Fourteenth Amendment. There is also the problem that, unlike states, Indian tribes never consented to be part of the constitutional bargain.[314] While some Indian tribes, through treaties or adoption of the Indian Reorganization Act of 1934,[315] may have consented to some form of American governance,[316] they have still never agreed to be bound by constitutional restrictions originally meant to apply only to the federal government or the states.[317]

In addition to the obstacles created by *stare decisis*, there are also pragmatic problems in applying parts of the Bill of Rights, like the Due Process Clause, to tribal court proceedings. First, some tribal courts may not be financially capable of providing constitutional protections, such as the right to free legal representation for indigent defendants in criminal cases. Secondly, while some tribal courts have procedures and laws that are very similar to American courts, some do not, and the question would be

308. *See* POMMERSHEIM, BROKEN LANDSCAPE, *supra* note 108, at 306–09.
309. 32 U.S. 243 (1833).
310. Baron v. City of Baltimore, 32 U.S. 243, 247 (1833).
311. *Id.*
312. Talton v. Mayes, 16 S. Ct. 986, 385 (1896)
313. *See* discussion *supra* notes 296-99.
314. *See* Fletcher, *Tribal Consent*, *supra* note 109, at 48-49.
315. 25 U.S.C. §§ 461–479 (2012).
316. *See generally* Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989).
317. While some might respond that Indian tribes never consented to the Indian Civil Rights Act either, two wrongs do not make a right in this case.

whether applying constitutional norms would unduly interfere or even displace traditional Indian cultural norms.[318] In addition, many tribal constitutions contain their own due process clause.[319] Superimposing a federal due process clause may unnecessarily interfere with established tribal concepts of due process and fairness.

Finally, extending constitutional protections to non-members would probably also mean extending them to tribal members, thus substantially magnifying the interference with existing traditional tribal norms. Thus, Justice Brennan dissented in *Duro* from the majority opinion holding tribes were divested of criminal jurisdiction over non-member Indians when these non-members became citizens in 1924 because these citizens did not consent to being subjected to prosecutions by sovereign outside the constitutional system.[320] Brennan argued that if the majority was right, then "the tribes were also implicitly divested of their power to enforce criminal laws over their own members who are now citizens as well."[321] Although under Justice Kennedy's argument, the tribes retained jurisdiction over their own members because of "the voluntary character of tribal membership and the concomitant right of participation in a tribal government,"[322] Justice Brennan retorted, "the Court's argument proves too much . . . participation in tribal government cannot in and of itself constitute a knowing and intelligent waiver of constitutional rights."[323] In addition, there would be serious equal protection issues in extending all the protections of the Constitution to non-members, while not doing the same for tribal members.[324]

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318. *See* Christine Zuni, *Strengthening What Remains*, 7 KANS. J. L. & PUB. POL'Y 17 (1997); *see* Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134 (1995); *see also* Melody L. McCoy, *When Cultures Clash: The Future of Tribal Courts*, HUM. RTS., Summer 1993, at 22 (vol. 20, no. 3).

319. For a good example of the application of tribal constitutional Due Process, see the recent decision of the Osage Nation Supreme Court in *Red Eagle v. Osage Nation Congress*, Case No. SPC-2013-03 (Osage S. Ct. Jan. 2, 2014) (issue was whether the Chief of the tribe had been given due process in the on-going proceedings to remove him from office).

320. Duro v. Reina, 495 U.S. 676, 698 (1990) (Brennan, dissenting).

321. *Id.* at 707 (Brennan, J., dissenting) (emphasis removed).

322. *Id.* (quoting the Court's majority opinion at *Duro*, 495 U.S. at 694).

323. *Id.* at 708 n.4.

324. For a normative argument against treating tribal members and non-members differently in the context of tribal adjudication, see Resnik, *Tribes, Wars, and the Federal Courts*, *supra* note 17, at 129-30. Moreover, extending constitutional protections to tribal members makes sense under the restricted view of congressional power proposed earlier in this Article. Under that analysis, while Congress could have imposed the requirements mandated in the ICRA when the tribal court proceedings involve non-members, it probably

Because of all of these concerns, perhaps an acceptable solution would be to make application of constitutional norms contingent on tribal consent.[325] In other words, a tribe would acquire full civil adjudicatory jurisdiction over non-members upon consenting to be bound by at least the Due Process Clause of the Constitution.[326] Tribes choosing to remain outside the constitutional framework would be subject to the proposed Indian Commerce Clause analysis to determine the extent of tribal court jurisdiction over non-members.

3. Applying Personal Jurisdiction Doctrines

In a recent article, Professor Katherine Florey attempted to avoid the conundrums and confusion created by the Court's implicit divestiture doctrine when it comes to determining the jurisdiction of tribal courts.[327] After stating that "the absence of doctrinal mooring has given the Supreme Court unparalleled freedom to decide cases not according to settled doctrinal principles but according to its own ideas and prejudices about Indian country,"[328] Professor Florey argued that the Court's normative concerns about protecting the right of non-members in tribal courts is not served by restricting a tribal court "adjudicatory" jurisdiction by reference to whether the tribe has regulatory jurisdiction in this area.[329]

Professor Florey further asserted, "[T]here is no good reason why existing personal jurisdiction doctrines could not be adapted to encompass the issues that tribal court jurisdiction presents . . . . [T]ribal jurisdiction can and should be governed by the same jurisdictional doctrines applicable to state, federal, and foreign courts."[330] She noted that this is especially useful here because it is notions of Due Process that restrict personal jurisdiction

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could not impose such requirements when the proceedings do not involve relations between the tribe and or tribal members and non-members.

325. This would be similar to a proposal recently advocated by Professor Fletcher. *See* Fletcher, *A Unifying Theory*, *supra* note 287, at 842-43.

326. Unless such jurisdiction had been explicitly preempted by federal law.

327. Florey, *supra* note 17. Her article does not examine the problems created by the Court's jurisprudence when it comes to limiting the regulatory jurisdiction of tribal governments.

328. *Id.* at 1505. Florey added that "the Supreme Court has more or less invented its tribal jurisdiction doctrine from scratch." *Id.* at 1564.

329. *Id.* at 1548–49.

330. *Id.* at 1506–07; *see also* Sarah Krakoff, *The Renaissance of Tribal Sovereignty, the Negative Doctrinal Feedback Loop, and the Rise of a New Exceptionalism*, 119 HARV. L. REV. F. 47, 52–53 (2005) (arguing minimum contacts should be sufficient to confer tribal jurisdiction on non-member defendants).

in state courts.[331] In *International Shoe v. Washington*, the Court devised a test that gave a court jurisdiction as long as the defendant had "certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[332] In a more recent case, *Asahi Metal Industry v. Superior Court*,[333] the Court spelled out a new test under which "even if minimum contacts were present, a lack of 'reasonableness' could defeat personal jurisdiction."[334] Even though the Court seemed to have mostly applied the *Asahi Metal* standard in international context,[335] Professor Florey argued that this standard could be especially appropriate to safeguard the rights of non-members in a tribal context.[336] Although "reasonable concerns about fairness, bias, and unfair surprise exist when nonmembers, particularly those only marginally connected with the tribe, are haled into tribal courts as defendants,"[337] "[t]hese, however, are the traditional concerns of personal jurisdiction."[338]

Utilizing personal jurisdiction doctrines to determine tribal jurisdiction over non-members is normatively attractive and consistent with the idea that tribes have been incorporated into the constitutional system. It treats tribal courts on par with state courts when it comes to determining jurisdiction. Yet, it leaves non-member defendants still a little short of the goal line, since they would not be afforded the same protections they would have if they were in state courts. Perhaps the better solution for determining the jurisdiction of tribal courts would be to adopt the personal jurisdiction approach and abandon the Implicit Divestiture Doctrine but also require tribal courts to afford defendants some constitutional protections. Pragmatically speaking, there is no doubt that the Court will be much more inclined to adopt the personal jurisdiction proposal if some constitutional norms were applicable in tribal courts.

Conclusion

Indian tribes were sovereign nations at the time of the founding of the United States, and the Federal government treated them as such by signing

331. Florey, *supra* note 17, at 1509.
332. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
333. 480 U.S. 102 (1987).
334. Florey, *supra* note 17, at 1512.
335. *See* J. McIntyre Machinery Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).
336. Florey, *supra* note 17, at 1556.
337. *Id.* at 1557.
338. *Id.*

treaties that are international documents with most tribes. As sovereign entities, however, tribes were considered as being outside the political and legal system of the United States, and the Constitution did not guarantee them any continuing sovereignty. For the longest time, there was consensus that except for tribal external sovereignty, meaning the right to control relations with other foreign nations, the tribes' original sovereignty continued unimpaired except to the extent it was explicitly modified by Congress or in treaties.[339] The consensus broke down starting in 1978 when the Court devised its implicit divestiture doctrine. Under this doctrine, the Court purportedly determines whether Indian tribes have retained inherent civil authority over non-members by reference to whether this governmental power is necessary to tribal self-government or whether people subject to such power have consented to it. However, what is or is not necessary to tribal self-government seems to be determined based on subjective notions of whether it is fair to non-members to allow tribal jurisdiction over them. Left to pursue its own course based on federal common law, it seems that the Court will soon hold that Indian tribes never have jurisdiction over non-members unless specifically authorized by Congress. Even then, whether the Court will continue to allow Congress to reaffirm the exercise of such tribal sovereignty is not a sure thing.

In order to bring order to this jurisprudential confusion and ensure that the original sovereign status of tribes endures, Indian tribes should be considered to have been incorporated as third sovereigns within our constitutional system. Therefore, the determination of whether tribes have certain inherent governmental regulatory powers should be determined under constitutional common law, by reference to constitutional norms and congressional policies. When it comes to the adjudicative jurisdiction of tribal courts, tribal courts should be treated like any other domestic court and established principles of personal jurisdiction should determine the outcome. However, because - in spite of what it claims - the Court is not deciding issues of tribal court jurisdiction over non-members by reference to whether it is necessary to tribal self-government, but rather out of concerns that the rights of non-members will not be respected in tribal courts, applying constitutional norms of due process to tribal court proceedings may convince the Court that this approach is worth adopting.

339. The tribal right to convey a recognized title to land under United States law to others than the United States was also restricted under the Doctrine of Discovery.