American Indian Law Review

Volume 42 | Number 1

2017

Tribal Sovereignty and the Recognition Power

Lance F. Sorenson

Follow this and additional works at: https://digitalcommons.law.ou.edu/ailr

 Part of the Indigenous, Indian, and Aboriginal Law Commons

Recommended Citation

Lance F. Sorenson, *Tribal Sovereignty and the Recognition Power*, 42 AM. INDIAN L. REV. 69 (2017), https://digitalcommons.law.ou.edu/ailr/vol42/iss1/2

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact Law-LibraryDigitalCommons@ou.edu.

TRIBAL SOVEREIGNTY AND THE RECOGNITION POWER

Lance F. Sorenson[*]

Abstract

Scholars who criticize the Supreme Court's doctrine regarding Native American tribal sovereignty have not yet addressed a fundamental constitutional concern. The Supreme Court has appropriated the recognition power through the judicially created doctrine of implicit divestiture, by which the Court presumes that Indian tribes and nations have lost all aspects of tribal sovereignty the Court deems "inconsistent" with the tribes' "dependent status." This practice of "judicial de-Recognition" violates the separation of powers. Implicit divestiture has resulted in a presumption that "All sovereignty is lost except that which is specifically retained." Through implicit divestiture, the Court has gone far beyond its normal judicial duties of regulating boundaries among sovereigns, constructing appropriate federal common law or implementing federal policy.

In light of the Supreme Court's recent pronouncements regarding the recognition power, now is a good time for the Court to re-evaluate its own role in tribal recognition. Rather than appropriating the authority to de-recognize tribal sovereignty, the Supreme Court should adopt a rule of "explicit divestiture." That is, "All sovereignty is retained except that which is specifically and constitutionally surrendered." Under this doctrine, the Court would give greater deference to the political branches to determine tribal sovereignty while simultaneously encouraging them to adopt clear statements of federal policy regarding the same, relieving the judiciary of the burden of sifting through the vast historical record to determine ambiguous federal policy and losses or retentions of sovereignty. The Court would also avoid violating the separation of powers.

Such judicial deference to the political branches on the issue of recognition would not preclude the Court from fulfilling its judicial role of

---

* Olin-Darling Fellow in Constitutional Law, Stanford Law School; J.D., Pepperdine University; Ph.D., University of Nevada Las Vegas. Special thanks to David Tanenhaus, Greg Ablavsky, Lawrence Friedman, Raquel Casas, William Bauer, Michael McConnell, Will Baude, Michalyn Steele, Jason Iuliano, Mark Storslee, and Geoffrey Sigalet. I am also grateful to the J. Reuben Clark Law School at Brigham Young University for giving me the opportunity to present a (very) early version of this paper at a faculty workshop and to the fine editorial team at *American Indian Law Review*.

Published by University of Oklahoma College of Law Digital Commons, 2017

considering the constitutional limits of congressional, executive, or state power to infringe upon traditional aspects of tribal sovereignty, and it would not preclude the Court from considering the possible constitutional status of tribes. The Court could still employ a "judicial shield" to protect tribal sovereignty from unconstitutional encroachments by the national or state governments, but it would lay down its "judicial sword" to intrude upon sovereignty itself.

Table of Contents

https://digitalcommons.law.ou.edu/ailr/vol42/iss1/2

I. Introduction

Native American tribal sovereignty is a constitutional puzzle constantly worked upon, but never quite solved. Many of the questions that faced the framers and early interpreters of the Constitution continue to perplex modern judges, policy makers, and scholars.[1] Indeed, the Court in its 2015 term dealt with the question of tribal sovereignty in three cases[2] and at least once in its 2016 and 2017 terms.[3] Given the sharp division of the Court and the many "grey areas" of tribal jurisdiction,[4] it is likely that issues of Native

1. Professor Frank Pommersheim, in anticipation of the Court's ruling in *United States v. Lara*, 541 U.S. 193 (2004), suggested that the "heart" of the issue was, "[W]hat exactly should be the position of tribal sovereignty in a constitutional republic as we head into the twenty-first century?" Frank Pommersheim, Lara*: A Constitutional Crisis in Indian Law*? 28 AM. INDIAN L. REV. 299, 305 (2003-2004).

2. In *Dollar General Corporation v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016), the Court split 4-4 and thus affirmed the decision of the Fifth Circuit, which held in favor of tribal jurisdiction over a civil tort claim filed by a member against a non-member corporation for a tort alleged to have taken place on reservation land. In *United States v. Bryant*, 136 S. Ct. 1954 (2016), a unanimous Court affirmed that uncounseled tribal convictions may be used as predicate offenses in a federal criminal sentencing, even if analogous predicates in state courts could not be used due to Sixth Amendment violations. Finally, in *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016), tribal sovereignty was not directly at issue, but the majority, concurring, and dissenting opinions all engaged the question of tribal sovereignty, revealing continued disagreement, with Justice Thomas renewing his call for judicial re-examination and overhaul of the entirety of federal Indian law jurisprudence. *Id.* at 1877. Two other cases from the 2015 term involving tribes, *Menominee Indian Tribe of Wisconsin* v. *United States*, 136 S. Ct. 750 (2016), and *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), did not directly touch upon sovereignty issues, but might be useful in tribal sovereign recognition cases.

3. *See* Lewis v. Clarke, 137 S. Ct. 1285 (2017) (finding tribal sovereign immunity was not implicated in an action against a tribal employee for a tort committed in his individual capacity); *see also* United States v. Washington, No. 17-269 (U.S. argued Apr. 18, 2018).

4. *See* Addie C. Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 U.C.L.A. L. REV. 1638 (2016) (discussing five "grey areas" of tribal criminal jurisdiction); *see also* Alex Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77, 79 (2014-2015) (suggesting that the recently enacted Indian provisions of the Violence Against Women Act reauthorization are likely to spark further litigation).

Published by University of Oklahoma College of Law Digital Commons, 2017

American sovereignty will continue to find their way to the highest tribunal for some time to come.[5]

Some of the perennial issues are: Where do Indian tribes and nations fit, if at all, within the United States' constitutional framework? Do tribes retain aboriginal sovereignty and, if so, how much? Does Congress have plenary power to legislate on behalf of tribes and, if so, what is the source of this power? Can we ask these questions without first addressing threshold questions—can tribes, who did not consent to the Constitution, be neatly placed within it, and should they? To what extent may United States constitutional values, such as those found within the Establishment and Equal Protection Clauses, be imposed on tribes? And, perhaps most importantly, who gets to decide all these issues?

This Article argues that the judiciary has often waded into difficult and contentious issues related to tribal sovereignty—such as tribal criminal and civil jurisdiction over non-Indians[6]—without first explicitly engaging with fundamental separation of powers questions: What is the role of the recognition power with respect to tribes, and what constitutes tribal recognition, de-recognition and non-recognition? A lack of attention to the recognition power has led to questionable judicial practices—specifically, the creation of a de facto judicial de-recognition power as well as the misreading of congressional and executive actions, such as the discontinuance of treaty making with tribes.[7]

---

5. The even split in *Dollar General*, 136 S. Ct. 2159, masks further divisions that were on display in earlier cases such as *Lara*, 541 U.S. 193 (three concurrences and one dissent) and *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (two concurrences and two dissents).

6. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (holding that tribes lacked jurisdiction to try non-members in tribal courts for crimes occurring on Indian land); *see also* Montana v. United States, 450 U.S. 544 (1981) (limiting a tribe's civil authority over non-Indians within reservations). Most scholars trace the modern articulation of the implicit divestiture doctrine to *Oliphant*. *See, e.g.*, Skibine, *supra* note 4, at 85-87. *Montana* extended the Court's implicit divestiture framework to apply in the civil arena as well.

7. Justice Thomas has indicated, as part of his repeated calls for an overhaul of the jurisprudence of Native American sovereignty, that he would "ascribe much more significance to legislation such as the Act" that terminated treaty making with the tribes. *Lara*, 541 U.S. at 215 (Thomas, J., concurring) (citing Act of Mar. 3, 1871, ch. 120, 16 Stat. 566). In *County of Yakima v. Confederate Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992), the Court cited the same Act as part of federal efforts to subject tribes to substantial federal and state criminal and civil regulatory regimes, stating that notions of Indian sovereignty have, "over time, lost their independent sway."

Closer attention to the recognition power—the power to recognize or not recognize sovereign states and ruling governments—suggests a more limited role for the judiciary. The judicially created doctrine of "implicit divestiture" has served as a mask for the unconstitutional practice of judicial de-recognition. Implicit divestiture is the doctrine that Indian tribes and nations lose sovereign powers not only by express treaty provisions or through statute, but also by implication where the attempted exercise of sovereignty is "inconsistent" with their "dependent status."[8] This third category has been the source of judicial mischief. According to the Court, the question of whether a sovereign power is "inconsistent" with a tribe's status may be decided by the Court itself in the absence of a statement from the political branches. While the Court often grapples with the source of *congressional* or *executive* authority to exercise governmental power, the Court has never asked, let alone answered, the question of where it, as a *judicial* institution, derives the authority to de-recognize the sovereign powers of tribes. The recognition power, which includes the powers of de-recognition and non-recognition, is an executive, not a judicial, power. In short, the Court has misappropriated a constitutional power belonging to the political branches in federal Indian law.

For example, the Court has held through judicial de-recognition/implicit divestiture that tribes: do not have criminal jurisdiction over non-Indians;[9] do not have criminal jurisdiction over non-member Indians;[10] do not have regulatory authority over non-members on fee lands within a reservation (absent very narrowly-drawn exceptions);[11] do not have jurisdiction over a members' tort and civil rights claims against state officers for acts alleged to have occurred on tribal lands;[12] do not have civil jurisdiction over a tort claim between two non-members occurring on a state highway running across reservation land;[13] do not have the power to tax non-members on non-Indian land within a reservation;[14] and do not have jurisdiction to

8. United States v. Wheeler, 435 U.S. 313, 323 (1978) ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."); *see also Oliphant*, 435 U.S. at 208 ("Indian tribes are prohibited from exercising . . . those powers '*inconsistent with their status*.'").

9. *Oliphant*, 435 U.S. at 195.

10. Duro v. Reina, 495 U.S. 676, 693 (1990) (overturned by congressional statute); *see* Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077b, 104 Stat. 1856, 1892-93), *recognized by Lara*, 541 U.S. at 193-94).

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

12. *See* Nevada v. Hicks, 533 U.S. 353, 364 (2001).

13. Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997).

14. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001).

Published by University of Oklahoma College of Law Digital Commons, 2017

review the sale of non-Indian land within a reservation.[15] In all of these cases, the Court used an implicit divestiture framework to find that the tribes had been divested of various sovereign powers which autonomous states normally exercise, on the basis that such powers were inconsistent with the tribes' "status" and were not essential to the health, safety and welfare of the tribes.[16] And in all of these cases, Congress and the executive branch were silent on the specific issue before the Court, except for scattered and contradictory statements made anytime between the founding and the present. In the absence of a clear statement from the political branches affirming or de-recognizing these aspects of tribal sovereignty, the Court proceeded to de-recognize them though judicial fiat. The Court engaged in judicial conquest. The Court's holdings under its implicit divestiture doctrine go much further than merely regulating boundaries between sovereigns; they de-recognize sovereign authority altogether—a power constitutionally vested in, and traditionally left to, the political branches.[17]

Implicit divestiture has critics already. Matthew L.M. Fletcher uses several pages of his hornbook, *Federal Indian Law*, to critique the "shabby" historical work of the Court in *Oliphant*, the genesis of the modern implicit divestiture doctrine.[18] In addition, Bethany Berger asserts that the line of implicit divestiture cases rest upon two faulty assumptions: that tribal courts treat non-Indians unfairly and that criminal jurisdiction over non-Indians is not crucial to tribal self-government.[19] Two other critics, Michalyn Steele and Addie Rolnick, raise functional and practical concerns with implicit

---

15. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 332(2008).

16. Andrew Fletcher calls *Oliphant*, *Montana* and *Nevada v. Hicks* the "colonial trilogy," drawing a comparison with the Marshall Trilogy, discussed herein. According to Fletcher, the "colonial trilogy" continues the work of nineteenth century conquest. Andrew K. Fletcher, *Suffocating Sovereignty: Implicit Divestiture and the Violation of First Principles*, 5 DARTMOUTH L.J. 31, 48 (2007).

17. This Article argues that the judiciary is not empowered under our constitutional system to de-recognize Native American tribes or aspects of their sovereignty. One might wonder whether the judiciary may recognize tribes in instances where the political branches have not done so through the BIA's Federal Recognition process. Although the judiciary may not appropriate the recognition power to recognize a newly formed tribe, it may "recognize," or take judicial notice of, a tribe that has always existed and whose status as such in the eyes of the United States has never been altered. In such a case, the judiciary would only maintain the status quo, which is not an act of recognition.

18. MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 345-58 (2016).

19. Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005).

divestiture and propose alternative approaches discussed herein.[20] Others attack implicit divestiture from additional angles.[21]

These criticisms are important, but remain largely in the realm of policy or practicality. I write separately to raise an important and fundamental constitutional concern yet to be discussed. The Court, by making judicial determinations that various tribal actions are "inconsistent with their status" has appropriated for itself a constitutional power that is vested in the political branches, not the Article III judiciary. Implicit divestiture is more than just a bad idea: it violates the separation of powers. The Constitution contemplates the political branches' better institutional competency in foreign relations and addresses it through the vesting of the Recognition Power. Even absent this constitutional issue, the Court is not well-situated to ascertain historical losses of sovereignty. The Court's black-and-white, all-or-nothing legal approach to sovereignty lacks the more adaptive and creative approaches that the political branches often employ when dealing with sovereign entities, both foreign and domestic.

Rather than exercising an unconstitutional and unwieldy judicial recognition power through implicit divestiture, the Court should adopt a rule of explicit divestiture. Under this doctrine, the Court would continue to "recognize" divestiture of sovereignty through treaty, reviewing those agreements in accordance with well-established principles for the interpretation of treaties between the United States and Native peoples.[22] The Court would also analyze divestiture of sovereignty by statute to ensure that such statutes comport with the constitutional limitations on Congress and the executive branch.[23] The Court should abandon the implicit

---

20. *See* Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 U.C.L.A. L. REV. 666 (2016); *see also* Rolnick, *supra* note 4. Given the similarities of the approaches suggested in this Article to those proposed by Steele and Rolnick, I highlight some key differences between them in Part III.

21. Robert Clinton helpfully created a long, but non-exhaustive list of articles critical of implicit divestiture up to 2002. Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 207-08 n.282 (2002). For criticism since 2002, see, for example, Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55. S.D. L. REV. 48 (2010); Samuel Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623 (2011).

22. Longstanding rules of Indian treaty construction state that courts are to construe treaties in "the sense in which they would naturally be understood by the Indians" and not to their prejudice. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979) (internal quotation omitted); *see also* Antoine v. Washington, 420 U.S. 194, 199 (1975).

23. Adjusting tribal sovereignty through statute, rather than treaty, raises its own set of constitutional concerns that are beyond the scope of this paper. For an argument that the

Published by University of Oklahoma College of Law Digital Commons, 2017

divestiture framework—the third prong of divestiture—set forth in its *Oliphant* and *Montana* cases and adopt a position that all sovereignty is retained, except that which has been explicitly and constitutionally divested.[24] In cases where statutes and executive policies regarding the exercise of a particular sovereign power by the tribes is ambiguous, the Court should presume continued aboriginal sovereignty, consistent with the tribes' ancient status. The Court should do no more than maintain the status quo, leaving space for the political branches to act. The Court could, however, police the established jurisdictional boundaries among the tribes, states, and federal government, reserving for itself a judicial role to investigate the sources of congressional and state sovereign powers when they abut tribal ones. This approach not only frees the Court from ascertaining divestiture by implication (which by its nature is difficult to determine), but it also provides a better framework for addressing the sovereignty of a large and diverse number of tribes.

This Article is divided into three parts. Part I gives an overview of both the recognition power and implicit divestiture, and explains how implicit divestiture misappropriates the political branches' power. Potential defenses of implicit divestiture and why they fail to rescue this unconstitutional doctrine are examined in Part II. Finally, Part III discusses why an explicit divestiture doctrine is a better approach to tribal sovereignty, and how it would apply in cases past and present, comparing and contrasting it with other proposals. This analysis includes a discussion of how the Supreme Court may preserve a role for itself to engage in appropriate constitutional analysis regarding tribal sovereignty, thereby maintaining a process by which tribal sovereignty may be protected by a judicial shield from intrusion by the national or state governments, even as the Court lays down its judicial sword.

This Article is consistent with the goal articulated by Alex Tallchief Skibine to "constitutionalize" tribal sovereignty[25] by (1) demonstrating that

---

United States should interact through tribes exclusively by treaty, see VINE DELORIA JR. & DAVID E. WILKINS, TRIBES, TREATIES AND CONSTITUTIONAL TRIBULATIONS 161 (1999).

24. This approach would be consistent with that proposed by Justice Thurgood Marshall, in his *Oliphant* dissent, who suggests that tribes retain "necessary aspect[s]" of their sovereignty that are not withdrawn by treaty or statute. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (Marshall, J., dissenting).

25. Skibine, *supra* note 4, at 81 ("[T]he 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 government has just become 'exceptionally' bad. . . . There is no need to place federal Indian law in 'de-constitutionalized zones,' or 'walling of Federal Indian law from mainstream constitutional discourse.'").

the Court has misappropriated the recognition power; and (2) demonstrating that the Constitution is capable of resolving the puzzling questions of tribal sovereignty, both in its own acknowledgement of tribal sovereignty as well as its vesting of the recognition power. The Constitution vests the executive, in the least, or the political branches together, at most, with the power to recognize and de-recognize tribal sovereignty.[26]

II. Implicit Divestiture and the Misappropriation of the Recognition Power

A. The Recognition Power – An Overview

Recognition is the "formal acknowledgement that a particular entity possesses the qualifications of statehood or that a particular regime is the effective government of a state."[27] Despite the fact that the power to recognize sovereign entities and their governments is a fundamental function of the federal government, the words "recognize," "recognition," and their cognates do not appear in the Constitution.[28] Robert Reinstein suggests that while the Framers were anxious for foreign recognition of their new Republic, "the idea that the United States would need to recognize foreign states and governments was simply not a pressing issue or even something that would predictably occur."[29] No matter the reason for the omission, the recognition power is derived from other explicitly mentioned powers related to foreign affairs.

Article II, Section 1 of the Constitution vests executive power in the President. Sections 2 and 3 describe the powers and duties of the President.[30] Some executive powers related to foreign affairs, such as the

---

26. Whether the Recognition Power in Indian Affairs belongs exclusively to the Executive, as the Court says it does in foreign affairs, or is a shared power between Congress and the President, is an open question. This author is of the view that it is a shared power. One thing it is not—a judicial power. Ennis, *supra* note 21.

27. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2084 (2015) (internal quotation marks and citation omitted); *see also* Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. RICH. L. REV. 801 (2011) (discussing the history of the Recognition Power).

28. *See Zivotofsky*, 135 S. Ct. at 2084 ("Despite the importance of the recognition power in foreign relations, the Constitution does not use the term 'recognition,' either in Article II or elsewhere.")

29. Robert J. Reinstein, *Is the President's Recognition Power Exclusive?* 86 TEMPLE L. REV. 1, 6 (2013).

30. U.S. CONST. art. II. Ascertaining the limits of those powers, and their interplay with the legislative branch, is usually governed by Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952). Interestingly, Article II's vesting clause vests the "executive power" in the President, U.S. CONST. art. II, § 1, while Article I's

Published by University of Oklahoma College of Law Digital Commons, 2017

treaty-making power and the appointments of ambassadors, are subject to the advice and consent of the Senate.[31] Others, like the reception of foreign ambassadors, may be exercised without Senate approval.[32] Recognition is not only a fundamental aspect of foreign diplomacy, but has domestic legal consequences. Recognized sovereigns "may sue in United States courts and may benefit from sovereign immunity when they are sued."[33] The Supreme Court's most recent investigation of the recognition power yielded an opinion holding that the power is exclusive to the executive, whose determinations may not be overruled by Congress.[34]

There is no constitutionally prescribed method for exercising the recognition power. Recognition is often explicit by formal declaration,[35] but may also be implied.[36] For example, when President George Washington received Citizen Genet as the ambassador of France, he impliedly recognized the legitimacy of the new French revolutionary government.[37] More recently, although the United States did not formally recognize the sovereignty of the People's Republic of China (PRC) between 1949 and 1979, it nevertheless impliedly recognized its de facto authority over mainland China by conducting high level ambassadorial talks, including President Nixon's visit to mainland China and his meetings with Mao Zedong in 1972. President Carter issued a formal declaration of recognition of the PRC in 1979.[38]

Encompassed within the recognition power is the power to decline to recognize a state or government (non-recognition) and the power to withdraw recognition from a previously existing state or government

---

vesting clause vests only those legislative powers "herein granted," U.S. CONST. art. I, § 1. For possible implications of this difference, see Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

31. U.S. CONST. art. II, § 2, cl. 2.

32. U.S. CONST. art. II, § 3.

33. *Zivotofsky*, 135 S. Ct. at 2084 (citation omitted).

34. *Id.* at 2076.

35. *See, e.g.*, Press Release, Exec. Office of the President, U.S. Recognition of the Provisional Government of the State of Israel (May 14, 1948), https://www.archives.gov/files/education/lessons/us-israel/images/recognition-press-release-l.jpg.

36. *Zivotofsky*, 135 S. Ct. at 2084 ("[Recognition] may also be implied—for example, by concluding a bilateral treaty or by sending or receiving diplomatic [guests].").

37. *See* Reinstein, *supra* note 27, at 840; *see also Zivotofsky*, 135 S. Ct. at 2091-92.

38. President Jimmy Carter, *Diplomatic Relations Between the United States and the People's Republic of China: United States Statement* (Dec. 15, 1978), AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/index.php?pid=30309&st=China&st1=.

deemed no longer existing or otherwise not legitimate (de-recognition).[39] The United States, through the executive, has invoked non-recognition in a variety of foreign affairs contexts. President Woodrow Wilson chose not to recognize Victoriano Huerta and his administration as the ruling authority of Mexico in 1913, despite the earlier activities of the United States' ambassador to bring Huerta into power.[40] Presidents Wilson, Harding, Coolidge, and Hoover did not recognize the Bolshevik government as the ruling authority in Russia, nor did they recognize the USSR as a sovereign entity.[41] And President Hoover chose not to recognize Manchukuo in 1931.[42] The exercise of the de-recognition power usually follows internal regime change or war. For example, thirty years following the Chinese Civil War, President Carter de-recognized the Republic of China (ROC) as the sovereign government of China.[43]

As with the exercise of the recognition power, there is no constitutionally prescribed method for exercising the non-recognition or de-recognition power. President Carter, for example, unilaterally nullified the Sino-American Mutual Defense Treaty, by which the United States had pledged support to the ROC in the defense of Taiwan if it was invaded.[44] The nullification was, according to Carter, a necessary step to formal recognition of the PRC's sovereignty over China, and effectively de-recognized any claim to sovereignty over mainland China by the ROC.[45] As with recognition, de-recognition may be accomplished explicitly or through implication.

Importantly, the United States has often adopted a nuanced, even ambiguous, approach to the sovereign status of various foreign entities for a variety of reasons, prominent among them a desire to avoid the precipitation of hostilities.[46] Even as President Carter de-recognized the

---

39. *Zivotofsky*, 135 S. Ct. at 2091-92 (citing 2 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 1, at 1 (1963)).

40. Peter V. N. Henderson, *Woodrow Wilson, Victoriano Huerta and the Recognition Issue in Mexico*, 41 THE AMERICAS 151 (1984).

41. J.H. Wilson, *American Business and the Recognition of the Soviet Union*, 52 SOC. SCI. Q. 349, 368 (1971).

42. Richard N. Current, *The Stimson Doctrine and the Hoover Doctrine*, 59 AM. HIST. REV. 513, 542 (1954).

43. *See* Jonathan M. Kayes, *The Republic of China and Derecognition*, 34 J. INT'L AFF. 191, 194 (1980).

44. *Id.* at 191.

45. *Id.* at 194.

46. *See* Lin v. United States, 561 F.3d 502, 505 (D.C. Ct. App. 2009) (characterizing the United States' relationship with Taiwan as one of "strategic ambiguity").

Published by University of Oklahoma College of Law Digital Commons, 2017

ROC's authority over mainland China, Congress passed the Taiwan Relations Act, and the United States continues to maintain quasi-diplomatic relations with the ROC in Taiwan.[47] It has been the policy of several administrations to avoid adopting an "all-or-nothing" approach to the sovereignty of Taiwan. The United States studiously avoids asserting PRC or ROC control of the island, only "acknowledging" the PRC's position that it has complete sovereignty there.[48] Similarly, the United States walks a diplomatic tightrope with Israel, Palestine, and Jerusalem,[49] as well as a host of other "hotspots" around the globe.

Because of the complex nature of foreign affairs, and because foreign relations necessarily reflect foreign policy, the political branches are much better suited than the judiciary to make determinations about recognition, non-recognition, and de-recognition. Indeed, whenever the issue of the appropriateness of foreign sovereign recognition has come before the United States Supreme Court, the Court has shown extreme deference to the political branches, particularly the executive. In *Goldwater v. Carter*,[50] when Senator Barry Goldwater and several other senators alleged that President Carter lacked authority to nullify the Sino-American Defense Treaty without Senate approval, the Court refused to review President Carter's action, and directed the Complaint be dismissed.[51] Although they disagreed on the reasons for the dismissal, none of the justices indicated that the Court itself should have any say in determining the sovereign status of Taiwan; they only disagreed on the question of whether the Court could decide *who*, between the political branches, makes the substantive decision.[52] More recently, the Court found a recognition question to be

47. *See* Pasha L. Hsieh, *An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan*, 28 MICH. J. INT'L LAW 765, 779-80 (2007) ("U.S. courts have consistently held that on the basis of the TRA, the ROC-US Treaty of Friendship, Commerce and Navigation continues to be effective. They observed that the United States maintains 'de facto' recognition of Taiwan and U.S.-Taiwan relations are 'quasi-governmental relations.'").

48. *See* Joint Communique on the Establishment of Diplomatic Relations Between the United States of America and the People's Republic of China: January 1, 1979 (Dec. 15, 1978), https://photos.state.gov/libraries/ait-taiwan/171414/ait-pages/prc_e.pdf.

49. The subject of the Court's most recent pronouncement of the Recognition Power involved assertions of sovereignty over Jerusalem. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015).

50. 444 U.S. 996 (1979).

51. *Id.* at 997.

52. *Id.* at 1007 (Brennan, J., dissenting) ("Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and to withdraw recognition from, foreign regimes.").

justiciable and resolved a constitutional dispute between the political branches in *Zivotofsky ex rel. Zivotofsky v. Kerry*.[53] Given the Court's extensive investigation of the recognition power in *Zivotofsky*, a closer examination of that case is informative for thinking about recognition in the context of Native American sovereignty.

Longstanding federal executive policy has been to decline to recognize any entity as having sovereignty over Jerusalem.[54] The State Department, in issuing passports to United States citizens born in Jerusalem, refuses to list "Jerusalem, Israel" as the place of birth on passports.[55] Rather, it lists the place of birth simply as "Jerusalem."[56] Congress, however, passed the Foreign Relations Authorization Act in 2002, which includes a provision requiring the Secretary of State to list Israel as the place of birth for United States citizens born in Jerusalem who make such a request.[57] President George W. Bush, when signing the bill into law, issued a signing statement to indicate that he interpreted the provision as "advisory," not as a mandate.[58] He declined Congress's "advice," as did his successor in office, President Obama.[59] When petitioners in *Zivotofsky* sought issuance of a passport listing "Jerusalem, Israel" as the place of birth for their newborn and the State Department declined, the constitutionality of the statute was placed before the Supreme Court.[60]

The Court held that the executive holds the exclusive power to recognize foreign sovereigns and that the provision of the statute at issue was an unconstitutional intrusion into the executive's prerogative.[61] The Court's reasoning was based in a textual, structural, and functional reading of the Constitution.[62] The Court found that although the recognition power was not vested explicitly as such, and although some presidential prerogatives in foreign affairs were subject to Senate approval, foreign affairs generally were vested with the executive.[63] Further, the Court stated that it was

53. 135 S. Ct. 2076.
54. *Id.* at 2081.
55. *Id.* at 2082.
56. *Id.*
57. *Id.*
58. President George W. Bush, *Statement on the Signing of the Foreign Relations Authorization Act, Fiscal Year 2003*, AM. PRESIDENCY PROJECT (Sept. 30, 2002), http://www.presidency.ucsb.edu/ws/?pid=63928.
59. Presidential Determination No. 2017-3, 81 Fed. Reg. 88,973 (Dec. 1, 2016).
60. *Zivotofsky*, 135 S. Ct. at 2083.
61. *Id.* at 2096.
62. *See id.* at 2086.
63. *See id.* at 2085-87.

Published by University of Oklahoma College of Law Digital Commons, 2017

important for the United States to "'speak . . . with one voice'" on the issue of recognition.[64]

Given the uniqueness of Native American tribes in the United States constitutional system, the Court in *Zivotofsky* declined to review and apply cases involving tribal sovereignty as precedent.[65] Nevertheless, the opinion is instructive for its acknowledgment of the limited role of the judiciary in "delicate," "difficult," and "complex" affairs of recognition.[66] "In our constitutional system these matters are committed to the Legislature and the Executive, not the Judiciary."[67] In *Zivotofsky*, no one asked for the Court's opinion on the sovereign status of Jerusalem, but only for a ruling on who gets to make the decision.[68] It would have been unconstitutional, according to the Court's own framing of the issue, if the Court had attempted to determine the issue itself by holding that Jerusalem is or is not part of Israel. Similarly, in earlier cases, no one asked for the Court's opinion on the appropriate diplomatic relationship the United States should have with Taiwan, or Palestine, or Israel, or Cuba, or any other country. It would be presumptuous and unconstitutional for the Court to hold forth on such matters. It is plausible to suggest that the Court might precipitate an international crisis if it were to hold, for example, that Taiwan, or Israel, or Ukraine have been divested of various aspects of sovereignty. And yet, in the context of tribal recognition, the Court has done just that, under the guise of implicit divestiture.

B. Implicit Divestiture – An Overview

In 1978, the Court laid the foundation for the modern jurisprudence of tribal sovereignty in three opinions decided within a span of two months. The Court first articulated what came to be known as the implicit divestiture doctrine in 1978 in *Oliphant v. Suquamish Tribe*.[69] In *Oliphant*, the Court confronted the issue of whether the Suquamish Tribe had jurisdiction to arrest and try a non-Indian accused of committing a crime on tribal land.[70] Mark David Oliphant, a non-Indian living on the Port Madison

64. *Id.* at 2086 (quoting American Ins. Ass'n v. Garamendi, 539 U.S. 369, 424 (2003)).

65. *Id.* at 2090-91 ("Other cases describing a shared power address the recognition of Indian tribes—which is, similarly, a distinct issue from the recognition of foreign countries.").

66. *Id.* at 2081.

67. *Id.*

68. *See id.* at 2083.

69. 435 U.S. 191 (1978).

70. *Id.* at 194-95.

Indian Reservation in Washington, had been charged in tribal court with assault and resisting arrest.[71] Oliphant, through the habeas procedures of the Indian Civil Rights Act (ICRA)[72] challenged the exercise of criminal jurisdiction by the Tribe over him by virtue of his not being an Indian.[73] Although the lower courts upheld the right of the Tribe to try Oliphant, the Supreme Court disagreed.[74]

In holding that the Tribe lacked jurisdiction over Oliphant, the Court reviewed the lengthy history of the Suquamish with the United States, searching in vain for an explicit treaty or congressional statute by which the Suquamish relinquished criminal jurisdiction over non-Indians.[75] After finding some treaty provisions that were tangentially related to the matter, the Court stated, "By themselves, these treaty provisions would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction."[76] The Court could have concluded its opinion there and held that the Tribe retained such jurisdiction. However, the Court continued and found that

> [E]ven ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. . . . 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."[77]

This question—whether the Tribe was attempting to exercise a power "inconsistent with [its] status"—was a new kind of judicial inquiry, one not contemplated by previous courts. This framework for ruling on the existence of tribal sovereign powers raised more issues than it resolved. First, what does it mean to exercise a power "inconsistent with their status?" Second, and more importantly, who gets to make that decision? And third, does the loss of sovereign power by historical implication rise to constitutional status? That is, once lost, is it gone forever, or can it be restored? The Court answered the first two questions in *Oliphant* (and its

71. *Id.* at 194.
72. Pub. L. No. 90-284, tit. IV, 82 Stat. 78 (codified at 25 U.S.C. §§ 1301-1303 (2012)).
73. *Oliphant*, 435 U.S. at 194.
74. *Id.* at 194-95.
75. *Id.* at 196-212.
76. *Id.* at 208.
77. *Id.* (emphasis omitted) (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)).

Published by University of Oklahoma College of Law Digital Commons, 2017

progeny) and addressed the third question in *United States v. Lara*, discussed herein.

In *Oliphant*, the Court analyzed whether the exercise of criminal jurisdiction over non-Indians was consistent with the Tribe's "status," finding that it was not.[78] The Court justified its finding by reference to various clippings from American history, including the Non-Intercourse Act of 1790, an opinion of the United State Attorney General from 1834, and the opinion of a federal judge from 1878.[79] The Court did not find express statements from the political branches on the issue.[80] Indeed, the Court framed the issue in such a way that it was unlikely to rule in the Tribe's favor.[81] In the beginning of the discussion, the Court stated, "Respondents do not contend that their exercise of criminal jurisdiction over non-Indians stems from affirmative congressional authorization or treaty provision."[82] And why should they have so contended? Prior decisions had acknowledged the domestic nation status of tribes.[83] Although the Court concluded the opinion by inviting Congress to address the issue, the Court took upon itself the role of adjudicating whether aspects of sovereignty were consistent with tribes' status without first addressing whether the judiciary is the branch of government the Constitution vests with such power.[84]

The troubling potential consequences of the *Oliphant* decision may have been obscured partly by two other cases from 1978, both of which affirmed aspects of tribal sovereignty. The second foundational decision in 1978 was *United States v. Wheeler*.[85] There, the Court was asked to determine whether the dual sovereignty doctrine was applicable in a case involving tribal courts.[86] The dual sovereignty doctrine posits that the constitutional prohibition on being tried twice for the same crime (double jeopardy) is not implicated when a defendant is prosecuted by separate sovereigns, even for the same underlying conduct.[87] Thus, a defendant who is tried by a state for

78. *Id.*

79. *Id.* at 199-201 (citing Non-Intercourse Act of 1790, ch. 33, 1 Stat. 137; 2 Op. Att'y Gen. 693 (1834); *Ex parte* Kenyon, 14 Fed. Cas. 353 (W.D. Ark. 1878)).

80. *Id.* at 204.

81. *See id.*

82. *Id.* at 195.

83. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 10 (1831).

84. *Oliphant,* 435 U.S. at 212.

85. 435 U.S. 313 (1978).

86. *Id.* at 314.

87. *See* United States v. Lanza, 260 U.S. 377, 382 (1922); *see also* Abbate v. United States, 359 U.S. 187, 195-96 (1959); Bartkus v. Illinois, 359 U.S. 121, 122-24 (1959).

https://digitalcommons.law.ou.edu/ailr/vol42/iss1/2

criminal conduct cannot invoke the double jeopardy provision of the Fifth Amendment when he is tried by the United States for the same conduct. The underlying theory is that he has committed two offenses, one against the individual state and one against the United States.[88] The question in *Wheeler* was whether an individual who had been tried in a tribal court could invoke double jeopardy to avoid prosecution by the United States for the same underlying conduct, or whether the dual sovereignty doctrine would nullify double jeopardy.[89] The Court held the dual sovereignty doctrine did apply. That is, the involved tribe in this case, the Navajo Nation, had not surrendered its sovereign power to try and punish tribal members for violating tribal law.[90] In doing so, the Navajo Nation acted as an independent sovereign, and not an extension of the federal government. Thus, the defendant was precluded from taking advantage of the double jeopardy clause. The Court in *Wheeler* succinctly formulated the new implicit divestiture doctrine: "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[91] The Court engaged in a brief implicit divestiture analysis, finding that the "powers of self-government, including the power to prescribe and enforce internal criminal laws, . . . [were] not such powers as would necessarily be lost by virtue of a tribe's dependent status."[92]

Similarly, in *Santa Clara Pueblo v. Martinez*,[93] decided a few weeks later, the Court again refused to disturb tribal sovereignty. At issue was whether the ICRA, which applied many provisions of the Bill of Rights to tribal governance, created a civil cause of action against a tribe for an alleged violation of equal protection in its method of regulating membership.[94] The Tribe's membership rules were clearly based on gender, creating different outcomes for female and male members of the Tribe. Yet the Court ruled in favor of the Tribe, refusing to find an implied civil cause of action within the ICRA, which, the majority held, only created a federal

88. *Bartkus*, 359 U.S. at 131-32 ("Every citizen of the United States is also a citizen of a State or territory. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable.") (quoting Moore v. Illinois, 55 U.S. (14 How.) 13, 20 (1852)).

89. *Wheeler*, 435 U.S. at 314.

90. *Id.* at 321-22.

91. *Id.* at 323.

92. *Id.* at 326.

93. 436 U.S. 49 (1978).

94. *Id.* at 63-64.

Published by University of Oklahoma College of Law Digital Commons, 2017

habeas corpus procedure for criminal cases.[95] The case was decided as a matter of textual interpretation; the Court did not engage with the third prong of *Oliphant*. Rather, the Court uncharacteristically decided to "tread lightly in the absence of clear indications of legislative intent."[96] Essentially, the Court ignored implicit divestiture. Justice Thurgood Marshall, who authored the opinion, had dissented in *Oliphant* where he argued against the adoption of implicit divestiture.[97]

Read together, *Oliphant* and *Wheeler* create an analytical framework in which tribes retain an inherent aboriginal sovereignty, derived from a source distinct from that of the United States and the several states. Such sovereignty can be divested through treaty, statute, or by implication.[98] Additionally, *Santa Clara Pueblo* indicated the Court would not second-guess tribal rules regarding membership, even where membership rules might raise constitutional concerns in other governmental contexts.[99] And although *Oliphant* created a new judicial power, *Wheeler* and *Santa Clara Pueblo* suggested the court would "tread lightly" in exercising it.

However, the third prong of Oliphant—divestiture through implication—has been the cause of judicial mischief. For if we value clear, determinate, and predictable rules, the Court in its application of implicit divestiture, has been vague, indeterminate and, at times, schizophrenic.[100] To the extent the Court has been predictable, it has been suspicious of retained sovereignty. Further, as argued herein, implicit divestiture is a mask for the exercise of judicial de-recognition and a violation of the separation of powers.

---

95. *Id.* at 60-62.

96. *Id.* at 60.

97. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (Marshall, J., dissenting).

98. The Court in *Wheeler* states that tribal sovereignty is subject to complete defeasance by Congress, through the exercise of its plenary power. United States v. Wheeler, 435 U.S. 313, 323 (1978). The tension created by simultaneous assertions of inherent aboriginal sovereignty and congressional plenary power is the subject of Justice Thomas's repeated calls for a reexamination of "the premises and logic of [the Court's] tribal sovereignty cases." United States v. Lara, 541 U.S. 193, 214-15 (Thomas, J., concurring) ("[M]uch of the confusion reflected in our precedent arises from two largely incompatible and doubtful assumptions. First, Congress . . . can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity. Second, the Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members.") (citation omitted).

99. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 54-56 (1978).

100. "Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases." *Lara*, 541 U.S. at 219 (Thomas, J., concurring).

The Court expounded and continued to build the implicit divestiture doctrine in *Montana v. United States*.[101] There, the Court was asked to determine whether the Crow Tribe could regulate hunting and fishing on tracts of land located within the reservation but owned in fee simple by non-members of the Tribe.[102] In finding that the Tribe could not, the Court further articulated the implicit divestiture doctrine by expounding upon what it means to say a tribe's exercise of sovereign power is "inconsistent with its status."[103] The Court created a presumption that tribes could not exercise sovereign regulatory powers over non-Indians unless they could point to at least one of two exceptions. First, a tribe may regulate the activities of non-Indians through taxation and licensing where the non-Indian has entered into a consensual relationship with the tribe such as "commercial dealing, contracts, leases or other arrangements."[104] Second, the tribe may exercise civil authority over non-Indians on fee lands when their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[105] In creating these two exceptions, which themselves invite a considerable degree of discretion in their application, the Court severely curtailed tribes' civil sovereign power over non-Indians. The Court did not explain why non-criminal conduct by non-Indians that threatens the health or welfare of the tribe might be subject to tribal authority, while criminal conduct by non-Indians that threatens the health or welfare of the tribe is beyond tribal jurisdiction. *Montana* did in the civil sphere what *Oliphant* did in the criminal sphere—create a presumption that tribal sovereignty has been divested absent a clear affirmation from the political branches. All is lost except that which is specifically retained.

Oliphant de-recognized a tribe's criminal jurisdiction over non-Indians to the point of extinction, and *Montana* and its progeny de-recognized a tribe's civil jurisdiction over non-Indians almost to the point of extinction. In neither case did the Court engage with the recognition power and consider whether it had constitutional authority to hold tribes divested of sovereign powers. The question of the nature of implicit divestiture became the subject of constitutional dialogue between the Court and Congress

101. 450 U.S. 544 (1981).

102. The "checkerboard" nature of land ownership within many reservations is the result of the allotment policy and subsequent repurchase policy of the Indian New Deal. *See infra* text accompanying notes 258-62.

103. *Montana*, 450 U.S. at 564.

104. *Id.* at 565.

105. *Id.* at 566.

Published by University of Oklahoma College of Law Digital Commons, 2017

beginning with *Duro v. Reina*[106] in 1990, Congress's "*Duro*-Fix"[107] in 1990, and *United States v. Lara*[108] in 2004. Because this dialogue is central to discussing a potential (but ultimately faulty) defense of implicit divestiture, I address it in depth in Part II. The Court continued with its implicit divestiture doctrine in its post-*Lara* jurisprudence.

In *Strate v. A-1 Contractors*, the Court held that the tribes lacked jurisdiction over a civil tort claim between two non-Indians for a car accident occurring on a state highway across reservation land.[109] And, in *Nevada v. Hicks*, the Court held that tribal courts do not have jurisdiction over state officials for allegedly tortious acts committed on Indian land.[110] In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, the Court applied the implicit divestiture framework, including the narrow *Montana* exceptions, to hold that the sale of fee simple land on a reservation by a non-Indian entity to another non-Indian entity was not reviewable by tribal courts.[111] The Court found that the seller of the land, a non-Indian owned bank, had not consented to the regulatory authority of the tribe, despite extensive contacts. Further, the Court held, the sale of fee-owned land did not implicate the political integrity, economic security, or health and safety of the tribe.[112] Thus, neither of the two *Montana* exceptions to implicit divestiture applied, and the tribe lacked sovereign power to review a commercial real estate transaction occurring within the reservation.[113] The Court in *Plains Commerce Bank* specifically reinforced the judicially created notions that, in general, the "inherent sovereign powers of an Indian Tribe do not extend to the activities of nonmembers of the Tribe,"[114] efforts by a tribe to regulate non-members are "presumptively invalid," and the burden rests on the tribe to establish one of the limited *Montana* exceptions.[115] *Plains Commerce Bank* reinforces the notion that all sovereignty is lost except that which is specifically affirmed by Congress,

106. 495 U.S. 676 (1990).
107. 25 U.S.C. § 1301(2) (2012).
108. 541 U.S. 193 (2004).
109. 520 U.S. 438 (1997).
110. 533 U.S. 353 (2001).
111. 554 U.S. 316 (2008).
112. *Id.* at 336.
113. *Id.*
114. *Id.* at 328 (quoting Montana v. United States, 450 U.S. 544, 565 (1981)). In making this assertion the Court failed to note the congressional "*Duro*-Fix" in which Congress specifically affirmed a tribe's criminal jurisdiction over Indian non-members.
115. *Id.* at 330 (quoting Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001)).

or that which falls within two very narrowly drawn and very narrowly applied exceptions.[116]

C. Implicit Divestiture Is a Mask for Judicial De-Recognition

Whenever the Court issues a ruling that the tribes have been divested of sovereign powers under implicit divestiture, it adjusts the sovereign powers of the tribes without constitutional authorization or delegated authority from the political branches. In the absence of treaty statements or clear federal policy regarding the exercise of any particular sovereign power, the Court generally presumes such powers are lost. The Court's holdings under implicit divestiture are acts of judicial de-recognition. The reason that the Court's rulings upholding tribal sovereignty in the absence of treaty statements or clear federal policy, such as in *Wheeler* and *Santa Clara Pueblo*, are not acts of judicial recognition is because such holdings do nothing more than acknowledge and maintain an ancient status quo—the particular aspects of the relationship between the tribes and the United States that remain undisturbed, but subject to future adjustment.

Native American tribes have a unique, *sui generis* status in their relationships with the United States, not identical to foreign nations and not identical to states. Indeed, the tri-partite Commerce Clause, by which Congress is vested with authority to regulate commerce among the states, with foreign entities and with Indian tribes suggests this difference in status.[117] Various court decisions have described Native American tribes as "domestic dependent nations,"[118] "ward[s]" of the United States,[119] "quasi-sovereign nations,"[120] and "unique aggregations possessing attributes of sovereignty over both their members and their territory."[121] The political branches themselves, as will be discussed more fully herein, have adopted similar appellations for Indian tribes. The relationship between the United States and its tribal nations is complex, difficult, and sensitive, just as its

116. The majority in *Plains Commerce* even calls attention to the fact that the exceptions are rarely held to apply on non-Indian land—seemingly to suggest how narrow the exceptions really are—a self-fulfilling prophecy. "Tellingly, with only 'one minor exception, we have never upheld under Montana the extension of tribal civil authority over nonmembers on non-Indian land.'" *Id.* at 333 (citation omitted).

117. U.S. CONST. art. I, § 8, cl. 3 ("[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

118. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 13 (1831).

119. *Id.*

120. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978).

121. United States v. Wheeler, 435 U.S. 313, 323 (1978).

Published by University of Oklahoma College of Law Digital Commons, 2017

relationships with any number of foreign sovereigns. The Court is ill suited to make determinations about losses of tribal sovereignty just as it is ill suited to make determinations about the sovereign status of Taiwan or other foreign entities.

The Court's implicit divestiture canon demonstrates that the Court assumes tribal sovereignty has been lost. *Plains Commerce Bank* is an example of the Court interpreting congressional silence as detrimental to tribal sovereignty. In discussing the Dawes Act of 1887,[122] by which tribal lands were allotted and sold to individuals, including non-Indians, the Court found it implausible that Congress wanted to subject non-Indians to tribal jurisdiction even when they purchased land falling within reservations.[123] The Court based this determination on what Congress did not say in the Act, rather than what it did say. "'[T]here is simply no suggestion' in the history of the [General Allotment] Act 'that Congress intended that non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority.'"[124] This is true, yet the Court offers no explanation as to why congressional silence should be interpreted as indicating a loss of tribal sovereignty, rather than a retention.

Plains Commerce Bank illustrates another practice contributing to the problem—the use of the royal "we" when discussing recognition. Consider the following short declarative sentence at the beginning of the opinion's analysis and all that is implied thereby: "For nearly two centuries now, we have recognized Indian tribes as 'distinct independent political communities,' . . . ."[125] This sentence may be meant only to set up the rest of the opinion, yet it starts the Court out on the wrong foot. What is meant by "we" and what is meant by the casual use of the word "recognize?" "We," in this context, does not refer to the United States government as a whole and certainly not to the executive. Rather, "we" refers to the Court. "We, the Court," have recognized Indian tribes as political communities.[126] In one simple and seemingly uncontroversial sentence, the Court asserts a judicial recognition power. What follows? The Court seamlessly moves

122. *General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887).*

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

124. *Id.* (quoting Montana v. United States, 450 U.S. 544, 560 (1981)).

125. *Id.* at 327 (citation omitted).

126. For a critique of judicial supremacy in general, see Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); *see also* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999).

from the assertion of a judicial recognition power to the assertion of a judicial de-recognition power under the guise of implicit divestiture. A better opening to the *Plains Commerce Bank* opinion would read something like, "Except for the periods of allotment and termination, the United States government for nearly two centuries has chosen to recognize Native American sovereignty, albeit curtailed." Such an introduction might cause the Court to take a step back from its own involvement in the recognition process and merely call "balls and strikes."[127]

The careful language of divestiture serves as a mask for judicial de-recognition in other ways. First, note the persistent use of the passive voice when describing divestiture. For example, in *Wheeler*, the Court said, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[128] Although we may reasonably guess who does the "withdrawing" when divestiture occurs through treaty (executive) and statute (legislative), the Court avoids telling us who does the "withdrawing" when divestiture occurs through implication. And even though it may be theoretically possible for the political branches to effectuate a change in tribal status outside the traditional methods of treaties and legislation, it is historically rare. In reality, the entity that "withdraws" aspects of tribal sovereignty through implicit divestiture is the Court itself.

The language of implicit divestiture further masks recognition by suggesting that the Court is engaging in a kind of benign and passive constitutional analysis. To illustrate what the Court is actually doing, it is helpful to make a comparison to foreign affairs. Occasionally, the United States will disallow foreign sovereigns to prosecute United States citizens, especially military personnel and contractors.[129] In those cases, it would not typically be said that the United States has divested the foreign nation of a sovereign power. Rather, it would be more precise to say that the United States refuses to recognize a foreign sovereign's power to prosecute a United States citizen. Even if the linguistic distinction is semantical, the most important lesson from the comparison is that in foreign affairs, one or both of the political branches make the decision to shield United States

---

127. *See Roberts: 'My Job Is to Call Balls and Strikes and Not to Pitch or Bat'*, CNN.COM (Sept. 12, 2005), http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/ (statement of Chief Justice Roberts during his confirmation hearings).

128. United States v. Wheeler, 435 U.S. 313, 323 (1978).

129. *See, e.g.*, Alan F. Williams, *The Case for Overseas Article III Courts: The Blackwater Effect and Criminal Accountability in the Age of Privatization*, 44 U. MICH. J.L. REFORM 45 (2010).

Published by University of Oklahoma College of Law Digital Commons, 2017

citizens from foreign prosecution, not the judiciary. In tribal affairs, it would be more linguistically precise to say that the United States refuses to recognize a tribe's authority to prosecute a non-Indian—especially a United States citizen—rather than saying a tribe is divested or has lost that power through implication. Such precision in language would serve to remind us that the decision is not judicial in nature, but is the prerogative of one or both of the political branches.

D. Problems

There are two main problems with implicit divestiture—one constitutional and one judicial. Implicit divestiture implicates the separation of powers. Further, the Court has not articulated clear, determinate, and predictable rules upon which tribes, law enforcement, lower courts, and the populace in general may reliably operate.

1. Constitutional Problems

A constitution, at its heart, is a system that allocates decision-making power. Under the United States system, the power of interacting with sovereign entities is vested in the federal executive, with Senate input for particular actions like treaty making and the appointment of ambassadors. The constellation of foreign affairs powers includes the authority to recognize and de-recognize sovereign entities and is vested in the executive to provide unity, clarity, and coherence. In the context of foreign affairs, the Court has wisely avoided misappropriating the recognition power from the legislative and executive branches. There, the Court has recognized its own limited role, saying, "In our constitutional system, these matters are committed to the Legislature and the Executive, not the Judiciary. . . . [T]he Court does no more, and must do no more, than note the existence of . . . debate and tensions . . . ."[130]

In the context of tribal sovereignty, the Court has adopted a different approach, and never explained its reasoning. Implicit divestiture runs counter to the constitutionally created process of recognition as well as de-recognition—a process the Court respects in foreign affairs. In that arena, the Court has never come close to assuming a foreign sovereign has lost or otherwise been divested of sovereign powers in the absence of clear statements from the political branches. And yet, with tribes, the Court has de-recognized tribal sovereign powers by holding those ancient and pre-constitutional powers no longer exist, for some reason, unless the tribes can

130. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2081 (2015).

point to specific re-affirmations from Congress. By holding that tribes are implicitly divested of sovereign powers, the Court de-recognizes their sovereignty.

The Constitution does not accidentally vest the recognition power with the executive. As even the Court has stated, following the Constitution in this matter allows the country to speak with "one voice."[131] Implicit divestiture has contributed to multiple voices on tribal sovereignty. Not only has the Court contradicted the will of the political branches, the Court lacks even internal consistency. When the recognition power of the executive is respected, federal recognition may change with new executives, or even during the administration of a single executive. The nation speaks with one voice. However, by inserting itself into the decision-making process, the Court has created confusion. It becomes unclear as to whether the Court will rule in favor of or against tribal sovereignty (although the odds are against), let alone whether such a holding is consistent with executive pronouncements.

The Court's reasoning in *Zivotofsky*, as to why the recognition power regarding foreign entities, has been constitutionally and historically vested in the executive applies with equal force to the question of whether the judiciary should be involved in making determinations about the loss of sovereignty in the context of Native Americans. In *Zivotofsky*, the Court based its decision not only on textual and historical grounds, but also on a functional reading of the Constitution,[132] finding that for reasons of unity and clarity, the recognition power is vested exclusively in the executive. "Recognition is a topic on which the Nation must 'speak . . . with one voice.'"[133] Further, the "President is capable in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition."[134] We might add that the judiciary is certainly not capable of carrying on delicate diplomatic contacts with foreign nations or Indian tribes. The Court readily acknowledges a need for delicacy and tact in the area of foreign recognition; the Court should also acknowledge the need for delicacy and tact in the area of tribal recognition. The Court has, in the past forty years added its voice to that of the political branches in tribal recognition matters, muddying the waters. There is an interesting question left open by the Court in *Zivotofsky* regarding whether tribal

131. *Zivotofsky*, 135 S. Ct. at 2086.

132. *Id.* (stating that "functional considerations" suggest that the power is exclusive).

133. *Id.* (quoting Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 424 (2003) (alteration in original) (second internal quotation marks omitted)).

134. *Id.*

Published by University of Oklahoma College of Law Digital Commons, 2017

recognition is, like in foreign affairs, an exclusively executive power or whether Congress should be involved. This Article does not seek to answer that question. Whether it is an exclusive executive power or shared political power, one thing it is not: a judicial power.

There are two seemingly related, but in reality, quite distinct governmental powers regarding Native American tribal sovereignty, one of which is appropriate for the judiciary, while the other, being an executive (or possibly shared political) power, is not. The Court has not been careful to distinguish between these powers, and has thus conflated them and asserted itself inappropriately at times into political branch determinations. The first governmental power, a judicial one, is to question the constitutional source of federal authority to interact with the tribes, as well as to investigate the potential status of tribal sovereignty as part of the constitutional structure. The second governmental power is the authority to recognize sovereigns, including domestic dependent nations. Although the recognition power is not operable against states by virtue of their being part of the constitutional structure, it nevertheless is a valid important diplomatic tool in structuring the United States' relationship with Native American tribes. It is a power appropriately vested in Articles I and II, not Article III.

2. Judicial Problems: A Lack of Clear, Determinate Standards

A cardinal principal of societies aspiring to be governed by the rule of law is that the rules of law are clear, determinate, and predictable. Michalyn Steele has called attention to the lack of clear, determinate, and predictable rules in the application of implicit divestiture,[135] and her suggestion to replace implicit divestiture through the political question doctrine is discussed in Part III. The Supreme Court has created, as only the Supreme Court can do, a three-part test for determining tribal sovereign divestiture,[136] followed by the creation of two exceptions to the third prong of the three part test,[137] followed by decisions demonstrating that the two

135. Steele, *supra* note 20.

136. United States v. Wheeler, 435 U.S. 313, 323 (1978). ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.").

137. Montana v. United States, 450 U.S. 544, 565 (1981) ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or

exceptions are to be narrowly construed with the burden resting on the tribes to show their applicability.[138] The exceptions work in theory, but the Court rarely allows them to be put into practice.

Implicit divestiture keeps everyone guessing. The stated standards are that tribes are divested of powers "inconsistent with their status" and that they retain regulatory powers necessary for tribal self-government, economic well-being, and the health and safety of the tribes. And yet, Supreme Court case law has provided no guidance as to what those lofty phrases mean. The Court paradoxically suggests that non-Indians' civil activities might implicate the health and welfare of a tribe giving rise to tribal regulatory authority, but that tribes lack criminal jurisdiction over non-Indians for even murders that go federally unprosecuted. Murders certainly implicate the health and welfare of the tribe, as do less serious offenses. Indians and non-Indians alike struggle to know how to structure their commercial relationships on tribal lands in the absence of predictable rules of law. Some lower courts, as Addie Rolnick argues, have already begun to implement a version of implicit divestiture that is less hostile to tribal sovereignty.[139] As admirable as those efforts may be, they do not remove doubt as to whether such decisions will be overturned on appeal.

The Court should be asked to confront the constitutionality of implicit divestiture. Given that the Court has recently thoroughly examined the recognition power (although in a context outside of tribal sovereignty), and given that the Court continually faces issues of tribal sovereignty, the Court should engage in a thorough examination of the recognition power as it pertains to tribal sovereignty. If it is true that judicial confusion follows political branch confusion, as Justice Thomas asserts, then the appropriate solution is to force the political branches to handle the issue by requiring explicit statements of divestiture and assert that the Court will no longer attempt to read congressional and executive tea leaves.[140] The default position should be that all that is not specifically surrendered is retained.

---

has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.") (citation omitted).

138. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353 (2001); *Montana*, 450 U.S. 544.

139. *See* Rolnick, *supra* note 4, at 1646 ("More recently, though, courts have followed the lead of tribes, scholars and advocates by employing an inside out approach to determine the boundaries of tribal criminal jurisdiction.").

140. This approach would be consistent with a canon of interpretation in federal Indian law that "tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous." *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02, at 114 (Nell J. Newton et al. eds., LexisNexis 2012) [hereinafter COHEN].

Published by University of Oklahoma College of Law Digital Commons, 2017

This approach would call for the reexamination of implicit divestiture cases since *Oliphant*. Of course, in abandoning the implicit divestiture framework, the Court should articulate a new (and constitutional) standard of review for tribal sovereignty cases. One approach is suggested in Part III. Before discussing that approach, though, it is necessary to address the potential justifications of implicit divestiture.

III. Potential Justifications of Implicit Divestiture Are Unavailing

The Court has not clearly characterized or justified its actions under implicit divestiture. Rather, it has proceeded without a thorough investigation of not only the recognition power, but of its own judicial authority to engage in acts of divestiture. There are three potential justifications for the Court's actions: (1) rulings under implicit divestiture are appropriate for the judiciary because they are constitutional in nature—that is, they regulate the boundaries among sovereigns; (2) rulings under implicit divestiture are appropriate exercises of federal common law, subject to congressional or executive override; (3) rulings under implicit divestiture are appropriate because they merely implement federal policy. This Part will address each of these potential justifications in turn to demonstrate why they are unconvincing.

Before doing so, however, a little bit of history is necessary. Despite the ambiguity in the nature of its doctrine, the Court routinely examines Native American legal history for purposes of ascertaining the historical "dependent status" of the tribes. Each of the potential justifications for implicit divestiture relies heavily on the historical record and thus a sound understanding of that history is necessary to discuss them and understand why they each fail. Because the historical record speaks to all three potential justifications, I first offer a brief review of Native American legal history as refracted through the lens of recognition, with particular attention to the Act of 1871 by which Congress announced a new policy to discontinue the practice of treaty making with the tribes. Some scholars and judges, including Justice Thomas, treat this statute as a sovereignty Rubicon upon the passing of which, they allege, tribal sovereignty suffered a fatal blow, either as a matter of constitutional law or due to changed federal policy.[141] Having discussed the historical record, I will then turn to the three

141. *See* United States v. Lara, 541 U.S. 193, 215 (2004) (Thomas, J., concurring) ("I would ascribe much more significance to legislation such as the Act of Mar. 3, 1871 . . . ."). Some scholars, though sympathetic to the theory of "treaty-substitutes," discussed herein, nevertheless suggest a return to a treaty-making process would bolster tribal sovereignty,

justifications mentioned above. I will also address, at the end of the Part, Justice Thomas's larger theoretical concerns with Native American sovereignty jurisprudence.

A. Native American Tribal Recognition – Some History

1. Institutional Engagement Until the Mid-Nineteenth Century

From the colonial period to 1871, Anglo-American governments interacted with Native American tribes generally on a nation-to-nation basis. English colonial governments recognized the sovereignty of Native American tribes and negotiated directly with them without much colonial coordination.[142] Global conflict prompted a British reevaluation of the Empire's institutional engagement with North American Indians and, during the French and Indian War, the Crown created two departments of Indian affairs in North America, one for the northern colonies and one for the southern colonies, and appointed commissioners for each.[143] After the war, the Crown formulated a unitary policy toward Native Americans; such singularity was expressed in British Peace Treaties with the Iroquois in 1768 and the Proclamation of 1763.

---

underscoring the importance of the Act of 1871. *See, e.g.*, Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 489 (2005); Hope Babcock, *A Possible Solution to the Problem of Diminishing Tribal Sovereignty*, 90 N.D. L. REV. 13 (2014); DELORIA & WILKINS, *supra* note 23, at 161 ("[I]t is long overdue that the federal government once again restrict itself to the exercise of the only clear traditional manner of dealing with Indian tribes — the treaty relationship.").

142. *See* ERIC FONER, GIVE ME LIBERTY 55 (3d ed. 2012). Despite their common allegiance to the Crown, colonial officials were free to formulate policies for their colonies that might differ from one another. As Mary Sarah Bilder has shown, the British Empire's approach to colonial law allowed for legal *divergence* in the colonies from standards in the motherland, but not *repugnance*. *See* MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE (2004). For example, the governments of Virginia, Maryland, and Pennsylvania entered into the Treaty of Lancaster with the Haudenosaunee Confederacy in 1744. FRANCIS JENNINGS, THE AMBIGUOUS IROQUOIS EMPIRE: THE COVENANT CHAIN CONFEDERATION OF INDIAN TRIBES WITH ENGLISH COLONIES FROM ITS BEGINNINGS TO THE LANCASTER TREATY OF 1744 (1984). New York was not party to the Treaty of Lancaster, even though it had been party to the Treaty of Albany in 1722 with the same tribal nations. With continuing land disputes between Native Americans and Anglo settlers following the Treaty of Lancaster, Virginia re-negotiated with the Six Nations, and concluded the Treaty of Logstown in 1752, but without representation from previous participants Maryland and Pennsylvania. JAYME A. SOKOLOW, THE GREAT ENCOUNTER: NATIVE PEOPLES AND EUROPEAN SETTLERS IN THE AMERICAS 206 (2003).

143. *See* WILCOMB E. WASHBURN, THE INDIAN IN AMERICA 95 (Henry S. Commager & Richard B. Morris eds., 1975).

Published by University of Oklahoma College of Law Digital Commons, 2017

Under the Articles of Confederation, Congress asserted federal primacy in dealing with the tribes, but without real power to prevent the states from formulating their own policies.[144] Following the Revolutionary War, Congress maintained the offices of Superintendents for Indian Affairs within the War Department, and continued to negotiate with the tribes through a treaty-making process.[145] The Northwest Ordinance, passed by Congress in 1787 while the Constitutional Convention was meeting, and reauthorized by the first Congress under the Constitution in 1789, likewise enshrined high ideals for the treatment of Native tribes into law:

> The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and, in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorised by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.[146]

Despite the fact that the new nation consistently acted contrary to the ideals of the Northwest Ordinance, the notion that the United States should deal with tribes as sovereign entities and respect their sovereign powers was nevertheless written into American law from its founding.

Absent, of course, from the Constitutional Convention, were representatives of tribes. This is not to say Indians were not on the minds of

---

144. Prior to the Declaration of Independence, but after fighting between British forces and revolutionaries had already begun, the Continental Congress created three geographical departments for Indian Affairs, patterned after the Crown's system, and appointed commissioners for each department including, among others, Benjamin Franklin and Patrick Henry. JAMES H. O'DONNELL III, SOUTHERN INDIANS IN THE AMERICAN REVOLUTION 23 (1973). The commissioners' immediate duty was to negotiate with various Indian tribes to procure their neutrality during the Revolutionary War. Congress even drafted a speech for the Commissioners: "This is a family quarrel between us and Old England. You Indians are not concerned in it. We don't wish you to take up the hatchet against the king's troops. We desire you to remain at home, and not join either side, but keep the hatchet buried deep." *Id.*

145. *See* CARL WALDMAN, ATLAS OF THE NORTH AMERICAN INDIAN 236 (3d ed. 2009). Congress instructed superintendents of Indian Affairs to "maintain a constant friendly correspondence with the chiefs of the several nations within [their] district" and hold several "general and particular treaties from time to time." U.S. War Office, Instructions to Superintendent of Indian Affairs for the Department 1 (1787), https://www.loc.gov/resource/bdsdcc.21401/?st=gallery.

146. Northwest Ordinance of 1787 art. III, *reprinted in* 32 JOURNALS OF THE CONTINENTAL CONGRESS 340 (Roscoe R. Hill ed., 1936).

the Framers. The Constitution of 1787 sought to address perceived defects relating to the United States' relationship with tribes under the Articles, including the threat tribes posed to the United States militarily as well as the lack of coherence and unity in negotiating with tribes.[147] The Constitution explicitly mentions "Indians" or "Indian Tribes" in two places. First, Article I, Section 2 excludes "Indians not taxed" from the population when counting persons for purposes of determining representation.[148] The second, in Article I, Section 8, grants to Congress the power to regulate Commerce "with the Indian Tribes."[149] The "Indians not taxed" clause is a constitutional acknowledgment that Native American tribes owed allegiance to a sovereign other than the United States and its several states. The Indian Commerce Clause is a more explicit constitutional acknowledgment of tribal entities. As we shall see, the executive treaty-making power in Article II, Section 2, though not explicitly mentioning tribal nations, also played an important role in federal and tribal relations from the founding until 1871.

Congress's Commerce Clause power relates to three entities: foreign nations, the states, and Indian tribes. While Congress has power to regulate commerce "among" the states, it has power to regulate commerce "with" foreign nations and Indian tribes. Read together, this tri-partite Commerce Clause suggests two things: (1) that the three entities mentioned have degrees of sovereignty; and (2) that Indian tribes do not, according to the Constitution, square neatly with either foreign nations or states.[150]

The first U.S. Congress placed Native American relations within the War Department, where it had resided under the Articles of Confederation and where it would remain until the creation of the Department of the Interior in 1849.[151] The Bureau of Indian Affairs would later take on a more important

147. *See* Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014).

148. U.S. CONST. art I, § 2. This phrase was repeated in the Fourteenth Amendment's Apportionment clause. U.S. CONST. amend. XIV, § 2.

149. U.S. CONST. art. I, § 8.

150. Alex Tallchief Skibine argues that even if the Constitution does not guarantee tribal sovereignty, it acknowledges it. *See* Skibine, *supra* note 4, at 80 ("Although the sovereignty of Indian tribes may not be guaranteed or defined in the Constitution, this does not mean that the tribes have no constitutional status.").

151. *See* CARL WALDMAN, ATLAS OF THE NORTH AMERICAN INDIAN 236 (3d ed. 2009). In 1806, Congress created the Office of Indian Trade within the War Department, which was charged with maintaining a trading post network for trading with Native Americans. In 1824, without authorization from Congress, Secretary of War John Calhoun created the Bureau of Indian Affairs within his department. Congress later formally established an office of Indian Affairs in 1832, whose office and officers remained located in the War Department

Published by University of Oklahoma College of Law Digital Commons, 2017

and outsized role in the formulation of Indian policy in the latter half of the nineteenth century, continuing well into the twentieth century. However, in the early Republic, Congress aggressively asserted itself in the devising of Indian policy, and executive interaction with tribes occurred mainly outside of the Bureau of Indian Affairs.[152] Beginning with its first session, Congress repeatedly passed Indian Non-Intercourse Acts primarily aimed at codifying the inalienability of tribal lands and establishing federal primacy over the states in interacting with tribes.[153] The Acts prevented the sale or grant of tribal lands to anyone without approval from the national government.[154] The Acts were aimed, in part, to preserve tribal sovereignty by ensuring that tribal territory remained intact.[155] However, such acts were a two-edged sword for sovereignty because not only did they establish federal primacy over the states, they also established federal primacy over the tribes. In disallowing the private sale of traditional tribal lands, the federal government assumed the power to determine the boundaries of tribal lands. Thus Congress, at the founding, simultaneously recognized and curtailed tribal sovereignty. This dual role of the federal government—conqueror and self-proclaimed protectorate of tribal sovereigns—persists to the present.

Congress passed the Indian Removal Act in 1830, signed into law by President Andrew Jackson.[156] The Act was the culmination of lengthy dialogue between southern states and the federal government. Acculturation

---

until 1849 when the Department of the Interior was created. *See* STEPHEN J. ROCKWELL, INDIAN AFFAIRS AND THE ADMINISTRATIVE STATE IN THE NINETEENTH CENTURY 78, 247 (2010).

152. Congress, however, did not dominate federal Indian policy at the founding. Indeed, it is arguable that a vigorous executive branch under George Washington set the agenda. *See, e.g.*, Greg Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015).

153. *See* COHEN, *supra* note 140, § 1.03, at 35.

154. Whereas early iterations of the law contained statutory expiration dates, the Non-Intercourse Act of 1834 was permanent and remains codified. *See* 25 U.S.C. § 177 (2012).

155. George Washington told the Seneca after passage of the Non-Intercourse Act of 1790, "Here then is the security for the remainder of your lands . . . . The general government will never consent to your being defrauded. But it will protect you in all your just rights." Reply of George Washington to the Seneca Chiefs (Dec. 29, 1790), *reprinted in* 7 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 146-50 (Jack D. Warren, Jr. ed., 1998). "The [Indian Non-Intercourse Act] . . . embodies the policy of the United States to acknowledge and guarantee the Indian tribes' right of occupancy of tribal lands and to prevent the tribes from disposing of their land improvidently." Narragansett Indian Tribe of Rhode Island v. Rhode Island, 296 F. Supp. 2d 153 (D.R.I. 2003), *aff'd in part, rev'd in part*, 407 F.3d 450 (1st Cir. 2005), *vacated en banc*, 415 F.3d 134 (1st Cir. 2005), *on reh'g*, 449 F.3d 16 (1st Cir. 2006), *cert. denied*, 549 U.S. 1053 (2006).

156. Ch. 148, 4 Stat. 411.

policies set in place during Washington's administration remained the official policy of the federal government until the Age of Jackson.[157] Acculturation, according to Christian Keller, was the policy by which the federal government recognized tribal sovereignty and self-government east of the Mississippi River conditioned upon the tribes adopting Anglo behaviors in government, industry and religion.[158] However, since at least the Jefferson administration, if not earlier, southern states, particularly Georgia, agitated for removal policies that would allow them to control tribal lands.[159] Meeting with some federal resistance to the idea, and being impatient, Georgia began removing Native Americans without federal authorization.[160] Continued federal policy asserting primacy over states with respect to Native Americans demanded that the federal government act. Congress did not simply order the military removal of Native Americans without a pretense of negotiation. Rather, it passed the Removal Act, set aside federal land west of the Mississippi River, and authorized the President to negotiate land exchanges with the southeastern tribes.[161] Such land exchanges were made through treaties. To be sure removal would occur, the removal treaties were negotiated at the end of a rifle—offers the tribes could not refuse—but the federal government at least paid lip service to tribal sovereignty by going through the motions of negotiating with the tribes on a nation-to-nation basis. In these actions, the United States continued to recognize the tribes' sovereignty, even as it was exercising military dominance over them.[162]

---

157. For a discussion of the shift from policies of acculturation to those of removal, see Christian Keller, *Philanthropy Betrayed: Thomas Jefferson, the Louisiana Purchase, and the Origins of Federal Indian Removal Policy*, 144 PROC. AM. PHIL. SOC'Y 39 (2000).

158. *Id.* at 45.

159. *Id.* at 54-55.

160. *Id.* at 55.

161. Indian Removal Act of 1830, §§ 1-2, 4 Stat. at 411-12.

162. Two interpretations of the actions of Jackson and Congress are generally offered, and they are not necessarily mutually exclusive. The first posits that Jackson was acting in concert with the south to deprive Native Americans of their territorial sovereignty to enrich Anglo-Americans. The second, more charitable interpretation of Jackson's actions, as put forth by Robert Remini, was that there was tension between the federal government and southern states and Jackson, recognizing that tribal sovereignty would be completely lost through acculturation in the states, genuinely thought the best way to protect tribal sovereignty was to remove the Indians from states into federal territory where the federal government would be on more solid legal and literal ground to serve as "guardians" of their "ward." That is, the federal government could hold vast lands in trust for Native Americans, thereby protecting their sovereignty. In either case, though, Jackson and Congress at least acknowledged theoretical tribal sovereignty by negotiating removal treaties either under

Published by University of Oklahoma College of Law Digital Commons, 2017

Against this backdrop of removal, the Supreme Court first fully entered the fray of Native American sovereignty. In three seminal cases now referred to as the Marshall Trilogy, the Court struggled to find where in the American constitutional system Native Indians fit.[163] Given the continued precedential value of the Marshall Trilogy, and the enduring characterization found therein, for better or worse, of Native American tribes as "domestic dependent nations," the Trilogy is well-trod scholarly ground.[164] The brief review here is limited to analyzing the Marshall Trilogy through the lens of the recognition power.

The first of the Trilogy, *Johnson v. M'Intosh*,[165] had its roots in *Fletcher v. Peck*.[166] In *Fletcher*, the Court entertained the theory that tribes did not occupy tribal lands in fee simple,[167] an idea that found full expression in *M'Intosh* thirteen years later. There, the Court held Native American tribal land to be inalienable—unless the sale was accompanied by the approval of the federal government.[168] Though not basing its ruling on the Non-Intercourse Acts, the Court nevertheless reinforced the policy behind them by acknowledging tribal sovereignty while simultaneously curtailing it, in the service of establishing the primacy of federal law over state common law.[169] The roots of the Federal-Native American Trust Relationship regarding real property are found in *M'Intosh*. "All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, . . . [which is] incompatible with an absolute and complete title in the Indians."[170] Marshall appealed to the law of nations to reach his ruling, which "laws" recognized an almost unfettered right in the Crown (and its American successor) to control indigenously occupied land.[171]

---

threat of force or after force had already been implemented. *See* 2 ROBERT V. REMINI, ANDREW JACKSON AND THE COURSE OF AMERICAN FREEDOM, 1822-1832 (1981).

163. See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

164. *See, e.g.*, Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627 (2006); 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).

165. 21 U.S. (8 Wheat.) 543.

166. 10 U.S. (6 Cranch) 87 (1810).

167. *Id.* at 117-19.

168. *M'Intosh*, 21 U.S. at 587.

169. *Id.*

170. *Id.* at 588.

171. *Id.* at 574.

In *Cherokee Nation v. Georgia*,[172] the Court held that the Cherokee Nation did not have standing to sue in federal court to challenge Georgia's incursions into its sovereignty, as it was not a state and not a foreign sovereign.[173] It is in this case that Marshall first referred to Native tribes as "domestic dependent nations," as well as a "ward" in need of a "guardian"[174]—characterizations that have permeated federal Indian law to the present. *Cherokee Nation* was a fractured opinion, with Justice Joseph Story—who would have granted standing to the tribe and heard the case on the merits—joining the dissent.[175] Story later privately expressed his satisfaction that some of the negative implications of *Cherokee Nation* were effectively overruled the following year in *Worcester v. Georgia*,[176] exclaiming, "Thanks be to God . . . the Court can wash their hands clean of the iniquity of oppressing the Indians and disregarding their rights."[177]

The State of Georgia had detained a Christian minister, Samuel Worcester, for proselyting to the Cherokee without a state-issued license.[178] Worcester challenged his detention in federal court.[179] The Court held that the State of Georgia could not interfere with Worcester's activities on the basis that the tribes were considered, under the Constitution and in treaties, as separate, distinct communities.[180] While protecting the tribes from state intrusion, the seeds of federal plenary power remained undisturbed. In *Worcester*, the Court did not issue orders to the federal government, but did order Georgia to release Worcester.[181] Georgia dragged its feet and Jackson helped little. Ultimately, Georgia relented, owing less to the Court's order than to political sentiment in Georgia itself. The immediate effect of the *Worcester* opinion was limited; federal removal policies continued

172. 30 U.S. (5 Pet.) 1 (1831).

173. *Id.* at 20.

174. *Id.* at 17.

175. *Id.* at 34 (Thompson, J., joined by Story, J., dissenting).

176. 31 U.S. (6 Pet.) 515 (1832).

177. R. KENT NEWMEYER, JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 215-16 (1985). Whatever the deficiencies of *M'Intosh* and *Cherokee Nation*, one might still sympathize with John Marshall, whose practice was to avoid a constitutional showdown and preserve the viability of the judiciary in national affairs. Had the Court granted the Cherokee Nation standing and ruled in its favor, Marshall would be in the position of issuing an order to either the State of Georgia or the federal executive, or both. Marshall, who recognized the futility of issuing a writ of mandamus to Thomas Jefferson almost thirty years earlier, would have certainly recognized the futility of issuing a writ of mandamus to Andrew Jackson.

178. *Worcester*, 31 U.S. at 538.

179. *Id.* at 537-38.

180. *Id.* at 559.

181. *Id.* at 562.

Published by University of Oklahoma College of Law Digital Commons, 2017

unabated and more than 4000 Native Americans lost their lives along the Trail of Tears.[182] Nevertheless, Marshall embedded a principle of retained sovereignty into the constitutional framework. Tribes retained theoretical sovereignty if they had not surrendered it via treaty. Such sovereignty received constitutional protection from state incursions. However, the question of federal power to disrupt sovereignty came to the fore in the latter half of the nineteenth century.

2. Tribal Recognition – Mid to Late Nineteenth Century

The idea of a separate Department of the Interior long preceded the Mexican-American War, but did not get off the ground until the United States acquired 529,000 additional square miles from Mexico as part of the Treaty of Guadalupe Hidalgo.[183] As the nation expanded its borders to the Pacific, a reevaluation of Indian policy became necessary. Having pushed tribal nations continually west, the nation began to run out of an unorganized "West." Robert Walker, President James K. Polk's Treasury Secretary, drafted a bill to create a Department of the Interior and shepherded it through Congress.[184] Over the objections of John C. Calhoun, Congress created the Department the day before Polk left office and moved the Bureau of Indian Affairs there.[185]

The transfer of the Bureau of Indian Affairs (BIA) to the Department of the Interior marked a shift in the bureaucratic treatment of tribal nations. While the United States continued to negotiate with tribes through the treaty-making process until 1871, and although the United States Army continued to "assist" in the realm of Indian affairs, the transfer denoted that tribal relations became less a matter of foreign affairs and more a matter of domestic concern, involving subjects, if not citizens, of the United States.

Just two years following the creation of the Department of the Interior, Congress began creating the reservation system. It did so by allocating funds for reservations in the Indian Appropriation Bill of 1851.[186] Tensions between Trans-Mississippi whites and Native Americans, including those

182. Ronald N. Satz, *The Cherokee Trail of Tears: A Sesquicentennial Perspective*, 73 GA. HIST. Q. 431 (1989).

183. *See* Henry Barrett Learned, *The Establishment of the Secretaryship of the Interior*, 16 AM. HIST. REV. 751, 751 (1911).

184. *Id.* at 763-71.

185. *See* 26 THE PAPERS OF JOHN C. CALHOUN: 1848-1849, at 337 (Clyde N. Wilson, Shirley B. Cook & Alexander Moore eds., 2003); *see also* Debate of Mar. 3, 1849, CONG. GLOBE 30th Cong., 2nd Sess. 666 (1849).

186. Ch. 14, 9 Stat. 574, 586-87.

who forced from the southeast on the Trail of Tears led to the creation of reservations in Oklahoma, to be followed elsewhere.[187] As with removal, the charitable interpretation of the creation of reservations was that the federal government acted with paternalistic regard for the integrity of Native American sovereignty. Commissioner of Indian Affairs Orlando Brown explained the rationale of the reservation system as designed to create well-defined boundaries that could be policed by the federal government.[188] In reality though, under the reservation system the policies of removal and acculturation were combined, while tribal sovereignty received continued recognition, albeit increasingly curtailed. No longer charged with merely administering a network of trade with the tribes, the BIA began administering the reservation system.[189] The BIA took on a new direction, becoming more aggressive in advocating a particular kind of Indian policy—one hostile to tribal sovereignty.[190] Supreme Court case law from the late nineteenth century reflects then extant BIA policy and continues to hold precedential value today.[191]

3. The Act of 1871

Following the Civil War, Congress turned its attention more fully to the West.[192] In an effort to protect overland trade routes, especially railroads, and to avoid the high cost of protecting western settlements militarily,[193] Congress sought to establish peace with and among Plains Indians. In July 1867, Congress passed a bill authorizing the creation of a seven-man

187. *See* WASHBURN, *supra* note 143, at 192.

188. *Id.* at 191-92.

189. *Id.*

190. Sidney Harring states that the BIA engaged in a sustained and systematic effort to extend U.S. criminal jurisdiction into Indian Country. *See* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 115 (1994). For a summary of critiques against the BIA, see Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 B.Y.U. J. PUB. L. 1 (2004).

191. *See Ex parte* Crow Dog, 109 U.S. 556 (1883); United States v. Kagama, 118 U.S. 375 (1886).

192. HEATHER COX RICHARDSON, WEST FROM APPOMATTOX: THE RECONSTRUCTION OF AMERICA AFTER THE CIVIL WAR (2007).

193. Lt. Gen. William T. Sherman, one of the commissioners charged with negotiating the treaties of 1867, wrote to the Secretary of War that "if fifty Indians are allowed to remain between the Arkansas and Platte we will have to guard every stage station, every train, and all railroad working patties. In other words, fifty hostile Indians will checkmate three thousand soldiers." Quoted in Letter to the Secretary of the Interior from N. G. Taylor, Commissioner (July 12, 1867), *reprinted in* S. EXEC. DOC. NO. 40-13, at 1, 4 (1867).

Published by University of Oklahoma College of Law Digital Commons, 2017

commission with the express aim of accomplishing these goals.[194] Congress instructed the commission to select two new sites for reservations and persuade Indians to abandon their nomadic life in exchange for agricultural pursuits.[195] Should the commissioners fail to achieve peace, the bill authorized the Secretary of War to raise an army to accomplish the tasks through force.[196] Thus, the "Peace" Commission carried with it the threat of forced removal. The Peace Commission succeeded in making new treaties with twenty tribes.[197]

In exchange for relocation to reservations, the United States promised homes, schoolhouses, churches, teachers, agriculture implements, livestock and other buildings and tools, so that the reservations might become "crucibles of assimilation."[198] Although the Senate ratified the treaties, the House of Representatives resented being locked out of the process because the agreements contained many expenditure decisions that included provisions to transfer land taken from tribes directly to railroads and other private interests.[199] The selection of railroad locations continued to be a source of high stakes congressional debate, negotiation and compromise.[200] Francis A. Walker, who served as Commissioner of Indian Affairs from 1871 to 1872, described that the House of Representatives had a "growing jealousy" toward the Senate who obligated the House to fund treaty-provisions "without inquiry."[201] Even as early as 1867, the House of Representatives had expressed its discontent with having to fulfill treaty obligations without being able to offer input on ratification. The House managed to insert a provision into an appropriations act purporting to repeal

194. Kerry R. Oman, *The Beginning Of The End: The Indian Peace Commission of 1867-1868*, 22 GREAT PLAINS Q. 35, 37 (2002), http://digitalcommons.unl.edu/greatplainsquarterly/2353.

195. *Id.*

196. *Id.*

197. *Id.* at 35.

198. Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 CARDOZO L. REV. 1185, 1201 (2016); *see also* George William Rice, Note, *Indian Rights: 25 U.S.C. Sec. 71: The End of Indian Sovereignty or a Self-Limitation of Contractual Ability?*, 5 AM. INDIAN L. REV. 239, 240 (1977).

199. Berger, *supra* note 198, at 1200-01.

200. The location of the transcontinental railroad was at the heart of the Kansas-Nebraska Act of 1854, by which Stephen Douglas procured southern support for a northern route by allowing the question of slavery in the newly organized territories to be determined by popular sovereignty. *See, e.g.*, NICOLE ETCHESON, BLEEDING KANSAS: CONTESTED LIBERTY IN THE CIVIL WAR ERA 9-28 (2004).

201. FRANCIS WALKER, THE INDIAN QUESTION 5, 11-12 (1874), *quoted in* FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 67 (Univ. of N.M. Press photo. reprint 1971) (1942).

"all laws allowing the President, the Secretary of the Interior, or the commissioner of Indian affairs to enter into treaties with any Indian tribes . . . ."[202] The constitutionality of this Act was never put before the courts. The Act was repealed a few months later, perhaps because Congress realized that the law allowing the President to enter into treaties—the law it sought to repeal—is in Article II of the Constitution.[203]

Due to the new treaties of 1867, an intra-branch debate between the two houses of Congress was re-ignited over the appropriate role of the House in negotiations with Native Tribes.[204] In 1869, the House flatly refused to appropriate funds to fulfill the new treaty obligations, to the embarrassment of the executive.[205] When the next session of Congress convened, the House relented but insisted on including a provision that "nothing in this act . . . shall be so construed as to ratify or approve any treaty made with any tribes, bands, or parties of Indians."[206] The Senate had already ratified the treaties, so the provision was not binding, but expressed the sentiment of the House.[207]

In 1871, when the two chambers were again deadlocked, the House renewed the tactic it had previously used to assert its role in Indian affairs by invoking its appropriation authority in the Constitution.[208] The appropriations bill, passed by the Senate, came back from the conference committee with the following proviso:

> Provided, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty: Provided further, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.[209]

---

202. Act of Mar. 20, 1867, ch. 13, § 6, 15 Stat. 7. Congressional records do not reveal discussion on congressional authority to "repeal" Article II of the Constitution. The Act of 1871 adopted a more measured approach in its attempt to insert Congress more fully into recognition and treaty-making powers.

203. *See* Act of Apr. 10, 1869, ch. 16, § 5, 15 Stat. 13, 40.

204. Clinton, *supra* note 21, at 167; *see also* Rice, *supra* note 198, at 240.

205. ROBERT M. UTLEY, FRONTIER REGULARS: THE UNITED STATES ARMY AND THE INDIAN, 1866-1891, at 215 n.4 (1979).

206. Act of Apr. 10, 1869, § 5, 15 Stat. at 40.

207. *See* LAURENCE F. SCHMECKEBIER, OFFICE OF INDIAN AFFAIRS 56-58 (1927).

208. U.S. CONST. art. I, § 7.

209. 25 U.S.C. § 71 (2012).

Published by University of Oklahoma College of Law Digital Commons, 2017

Senator Garrett Davis of Kentucky strenuously objected to the provision on constitutional grounds.[210] He viewed it as an inappropriate intrusion into the presidential power to "determine what tribes of Indians he will make treaties with, and what he will not."[211] However, Senator James Harlan, former Secretary of the Interior, argued that the bill in effect did nothing more than allow the House to participate in decisions "usually effected by the stipulations of treaties."[212] Specifically, he pointed to a bill passed the previous year authorizing the sale of Indian lands "with the consent of the Indians, under a contract to be made with them by the President."[213] Senator Harlan's characterization of the statute is not one of ordinary legislation for Indians, but one of the House's involvement in the process of contracting agreements with Indian tribes. Over the objections of Senator Davis, and at the prodding of President Grant, who was anxious to fulfill the treaty obligations, the Senate approved the bill. From that point forward, the United States ceased treaty negotiations with Native tribes, although it has continued to honor some pre-1871 treaties while abrogating others.[214]

Senator Harlan's statement in support of the constitutionality of the statute (the Act of 1871)—that it merely reorganized the manner in which the United States entered into agreements with Native American tribes qua tribes—is an early allusion to treaty-substitutes. "Treaty-substitutes" is the phrase that has come to denote those agreements between sovereign entities that do not use the traditional and formal language and procedures of treaties, but nevertheless recognize negotiations and agreements between sovereigns, particularly between the United States and Native American tribes.[215]

---

210. CONG. GLOBE, 41st Cong., 3rd Sess. 1822 (1871).

211. *Id.*

212. *Id.*

213. *Id.*

214. In *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the Supreme Court held that Congress could unilaterally abrogate treaties with Native American tribes under a theory of plenary power.

215. G. William Rice, Francis Paul Prucha, and others have discussed the use of treaty-substitutes in Native American affairs. *See* Rice, *supra* note 198, at 247; *see also* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 173, 233 (1994). Outside the context of Native American sovereignty, the United States uses a treaty-substitute process in its dealings with Taiwan. Congress passed the Taiwan Relations Act, creating a conduit for diplomatic relations between the United States and Taiwan outside PRC channels. Pub. L. No. 96–8, 93 Stat. 14 (1979). The Taiwan Relations Act was signed into law by President Carter, who had also unilaterally abrogated the Sino-American Mutual Defense Act. The United States and Taiwan conduct bilateral talks and enter into direct agreements. On December 16, 2015, the Obama administration announced a deal to

What is the legal effect of the Act of 1871? There are at least two competing interpretations:(1) that the statute de-recognizes the sovereignty of Indian tribes and nations, effectively announcing their complete conquest and assimilation, rendering them subject to full legislative power of the federal government;[216] and (2) that the statute does not de-recognize their status as sovereign nation, but merely alters the method of "ratifying" agreements with them.[217] The historical record reveals that the political branches continued to recognize tribal sovereignty and continued to negotiate bilateral and multilateral agreements with the tribes after 1871, with some notable exceptions. The Court, for its part, did not interpret the Act of 1871 as a sovereignty Rubicon prior to the rise of implicit divestiture.

4. Early Interpretations of the Act of 1871 (1872-1884)

The year following the Act of 1871, in *Holden v. Joy*, the Supreme Court was called upon to determine the status of the Cherokee Nation in a property dispute involving former Cherokee lands.[218] After citing the Act of 1871, the Court stated,

> Indian tribes are States in a certain sense, though not foreign States, or States of the United States . . . [A]cts of our government, both in the executive and legislative departments, plainly recognize such tribes or nations as States, and the courts of the United States are bound by those acts.[219]

This language echoed the language used by Senator Eugene Casserly during the debate over passage of the Act. Senator Casserly said that an Indian tribe is

---

sell $1.83 billion worth of arms to the ROC Armed Forces, a year and eight months after the U.S. Congress passed the Taiwan Relations Act Affirmation and Naval Vessel Transfer Act of 2014 to allow for the sale. *See* David Brunnstrom & Arshad Mohammed, *U.S. Plans to Sell Taiwan About $1.42 Billion in Arms*, REUTERS (June 29, 2017, 3:35 PM), https://www.reuters.com/article/us-usa-taiwan-arms/u-s-plans-to-sell-taiwan-about-1-42-billion-in-arms-idUSKBN19K2XO; Naval Vessel Transfer Act of 2013, Pub. L. No. 113-276, § 102, 128 Stat. 2989, 2989 (2014). The deal would include the sale of two decommissioned U.S. Navy frigates, anti-tank missiles, Assault Amphibious Vehicles, and FIM-92 Stinger surface-to-air missiles. *See* Brunnstrom & Mohammed, *supra*.

216. Rice, *supra* note 198, at 240-41.

217. *Id.* at 241.

218. 84 U.S. (17 Wall.) 211 (1872).

219. *Id.* at 242.

Published by University of Oklahoma College of Law Digital Commons, 2017

> like a State under a protectorate, a State *quasi* independent, having certain distinct and separate rights and yet subject to the control of another State. . . . It is not easy to define expressly their political relation to the United States . . . more independent than the States, less independent than foreign nations.[220]

The Court's early judicial interpretation of the Act of 1871 indicates that it did not believe the political branches had fully de-recognized the sovereign status of tribes and nations.

The Court encountered another chance to consider the meaning of the Act of 1871 in *Elk v. Wilkins*, decided in 1884.[221] John Elk, a Winnebago Indian, petitioned the Court to declare him a United States citizen by reason of the Fourteenth Amendment's Citizenship Clause and his voluntary separation from his tribe.[222] The Court denied his claim, finding that Indians born of tribes or nations were not "subject to the jurisdiction" of the United States at birth, and were therefore excluded from citizenship without naturalization, the only other avenue to citizenship.[223] When analyzing the Act of 1871, the Court stated that its "utmost possible effect [was] to require Indian tribes be dealt with for the future through the legislative and not the treaty-making power."[224] Although the phrase "dealt with" is itself ambiguous, the Court's holding that Elk was not subject to the jurisdiction of the United States only makes sense if there remained continued recognition of tribal sovereignty after 1871. Had the tribes been de-recognized by the statute, the Court would have had to hold John Elk was now a citizen of the United States and his respective state. But the Court did not do so. Even as late as 1896, well into the Allotment Era, the Court held the Fifth Amendment had no operation within tribal courts on the basis that Constitutional due process protections did not extend to pre-existing sovereigns.[225] Thus, the effect of the Act of 1871, in its early interpretations, was not a wholesale de-recognition of tribal sovereignty; rather, it marked a change in the method of federal agreements made with Indian tribes (from treaty making and ratification) to legislative approval. G. William Rice argues that *Elk v. Wilkins* is a "definitive statement that the

220. CONG. GLOBE, 41st Cong., 3rd Sess. 1824 (1871).

221. 112 U.S. 94 (1884).

222. *Id.* at 95.

223. *Id.* at 109; *see* Berger, *supra* note 198, at 1197 (arguing the holding in *Elk v. Wilkins* was consistent with the desires of certain framers of the Fourteenth Amendment to protect Native Sovereignty by excluding Indians from application of the Citizenship Clause).

224. *Elk*, 112 U.S. at 107.

225. Talton v. Mayes, 163 U.S. 376 (1896).

utmost effect of the statute was a change in the method of the United States' ratification of an agreement between two international bodies politic."[226]

In the 1870s and early 1880s, the Supreme Court continued to interpret the relationship between the United States and the tribes as one of sovereign-to-sovereign, though not equal sovereigns. Did the political branches agree? Congress continued to appropriate money for Indian affairs. In 1876, in an appropriation act, Congress included a proviso that no further monies would be appropriated for the Sioux until the Sioux entered into an agreement with the President for the cession of the Black Hills.[227] If the Sioux lacked sovereignty after 1871, there would have been no need for Congress or the President to insist on their agreement, extorted as it may have been, to cede the Black Hills.

5. Allotment and Assimilation

Although the Act of 1871 caused no immediate change in the United States' relations with the tribes, two pieces of congressional legislation in the 1880s brought federal plenary power down from the realm of theory to actuality. Beginning with the Major Crimes Act of 1885,[228] the United States entered into a new era of federal-tribal relations. For the first time, Congress sought to legislate on Indian-on-Indian crime within Indian Country, and laid the groundwork for the first of two concerted efforts by the political branches to de-recognize tribes.

Prior to the Civil War, the BIA assisted with removal and early reservation systems. Following the Civil War, the BIA aggressively sought to fully assimilate Native Americans. According to Sidney Harring, the BIA formulated an assimilationist policy and then pushed that policy on Congress, rather than the other way around.[229] Part of that effort was to extend criminal jurisdiction over Native Americans, either at the federal level or the state level.[230] Meeting resistance at both levels, the BIA deliberately sought a test case by which it could either judicially establish the federal power to prosecute or, if denied, publicize, sensationalize and use it as "Exhibit A" in asking Congress for explicit criminal jurisdiction in

226. Rice, *supra* note 198, at 241.

227. Act of Aug. 15, 1876, ch. 280, 19 Stat. 176, 192.

228. Ch. 341, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153).

229. HARRING, *supra* note 190, at 134, 135-36 ("Since 1874, the BIA had been attempting to persuade Congress to extend federal jurisdiction over certain serious crimes . . . . The Senate had rejected the BIA's original 1874 proposal for a major crimes act because such legislation was inconsistent with existing notions of tribal sovereignty.").

230. *Id.* at 134.

Published by University of Oklahoma College of Law Digital Commons, 2017

Indian Territory.[231] The BIA found such a case in *Ex parte Crow Dog*,[232] in which the Supreme Court declined to extend federal criminal jurisdiction in Indian Territory for Indian-on-Indian crime in the face of ambiguous treaty provisions.[233] The Court's decision in *Crow Dog* was one of judicial minimalism and pragmatism, refusing to divest the tribes of exclusive criminal jurisdiction when confronted with contradictory and unclear federal law.[234] At the instigation of the BIA, the case received negative publicity. The *New York Times* reported,

> The Supreme Court has rendered a decision which will startle most readers. The decision is that there are persons living in the United States and not subject to the jurisdiction of any State or Federal Court. Those persons are Indians living in Indian reservations who commit crimes against other Indians.[235]

Congress, in short order, passed the Major Crimes Act of 1885, explicitly granting federal jurisdiction in Indian Territory over seven major Indian-on-Indian crimes.[236] The Major Crimes Act did not remove tribal jurisdiction for the same crimes and left in place exclusive tribal jurisdiction for all other crimes.

In considering the Major Crimes Act, it is important to consider not only what Congress did, but what Congress did not do. Congress could have gone much further in intruding upon Native American tribal sovereignty, but chose not to. In contrast to the BIA proposal, which resulted in the Major Crimes Act, the Indian Rights Association—a quintessentially progressive organization that sought to "civilize" and Christianize all Native Americans—proposed an "Act to Provide for the Establishment of

231. *Id.* at 102.

232. 109 U.S. 556 (1883).

233. *Id.* at 571-72.

234. *Crow Dog* contrasts starkly with modern cases of implicit divestiture where the Court, when faced with similar ambiguity regarding federal and tribal jurisdiction generally reads into their relationship a loss of tribal sovereignty. The Court in *Crow Dog* showed judicial restraint, presuming retained sovereignty in the absence of clear federal policy, a model the Court ought to consider following in the modern era.

235. *The Rights of Crow Dog*, N.Y. TIMES, Dec. 18, 1883, at 4. Bryan Wildenthal states that the "somewhat hysterical public reaction to this decision [was] orchestrated by the Bureau of Indian Affairs." BRYAN H. WILDENTHAL, NATIVE AMERICAN SOVEREIGNTY ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS 70 (2003).

236. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153.

Courts and Criminal Jurisdiction upon Indian Reservations."[237] Harring states that this act "would have put Indians under the complete legal force of U.S. law with few due process protections" and "was a far more repressive criminal apparatus to deal with misdemeanors and offenses against white standards of morality."[238] The BIA and Congress rejected this proposal, adopting the less intrusive Major Crimes Act.

The Court upheld the constitutionality of the Major Crimes Act the year after it was passed in *United States v. Kagama*.[239] At issue was the source of congressional power to legislate generally in Indian Territory. Interestingly, the Court specifically rejected the Indian Commerce Clause as the source of congressional police power.[240] Rather, the Court used a theory of congressional plenary power based in conquest, paternalism and racism.[241] The Court depicted a binary form of federalism, stating that in the United States constitutional system there can be only "these two" sovereigns, the federal government and the state government.[242] The Court thus depicted Indian Territory as a sovereign vacuum, in need of federal plenary authority. *Kagama* is an early case of judicial de-recognition.[243] By ignoring the existence of tribal sovereignty, the Court went beyond what Congress actually said and did in the Major Crimes Act, which did not purport to extinguish the tribes or their power to prosecute criminal offenses, both major and minor. Whereas the Court was quick to depict federal plenary power as engulfing tribal sovereignty, Congress had merely created concurrent jurisdiction.

The Indian Rights Association, though rebuffed by Congress in 1885 with the Major Crimes Act, did receive one big item on its wish list when

237. HARRING, *supra* note 190, at 134-35.

238. *Id.*

239. 118 U.S. 375 (1886).

240. *Id.* at 379.

241. *See* Lesley Karen Friedman, *Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts*, 14 U. HAW. L. REV. 519, 553 (1992); *see also* David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 777 (1991).

242. *Kagama*, 118 U.S. at 379. Justice Thomas, while criticizing *Kagama* for failing to locate a textual hook for congressional plenary power, apparently buys into the *Kagama* framework that sovereignty can only exist in the federal government or state government. He states that tribes are separate sovereigns or they are not, implicitly rejecting Marshall's domestic dependent nations framework. Suspicious also of federal plenary power, Justice Thomas therefore lays the groundwork for the argument that tribes can only be recognized as sovereign through a treaty making process or they are otherwise subject to state jurisdiction. *See* United States v. Lara, 541 U.S. 193, 215-18 (Thomas, J., concurring).

243. *See* HARRING, *supra* note 190, at 142.

Published by University of Oklahoma College of Law Digital Commons, 2017

Congress passed the Dawes Act of 1887.[244] In this legislation, Congress allotted land to individual tribal members to be held in trust for twenty-five years and thereafter to be held by the individual in fee simple.[245] The legislation also provided for the sale of the "surplus" of the reservation to non-Indian buyers, to be held in fee simple immediately.[246] The Dawes Act was the first of two full-scale legislative assaults on tribal sovereignty. Private ownership of land within reservations would, it was thought, lead not only to Indian assimilation, but also to complete state criminal and civil jurisdiction when the last parcel was sold and the federal trust relationship ended.[247] Allotment proceeded for the next fifty years, creating a checkerboard pattern of land ownership within reservations, but never reaching its twin goals of privatizing all land ownership and extinguishing tribal sovereignty.[248] Approximately ninety million acres were transferred from Indian to non-Indian control during the Allotment Era.[249]

6. Recognition of Tribal Sovereignty in the Early Twentieth Century

Assimilation efforts, like other Progressive Era policies, continued well into the twentieth century and culminated with the Citizenship Act of 1924.[250] Native Americans had, since the founding, been excluded from citizenship, with various exceptions for things like private land ownership and military service.[251] Even the Citizenship Clause of the Fourteenth Amendment, which states that "All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States,"[252] did not grant citizenship to Native Americans because they were not, generally speaking, "subject to the jurisdiction" of the United States.[253] By 1924, roughly 58% of Native Americans were already citizens, including those who had acquired citizenship through land ownership (allotted or

244. *General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887).*

245. *Id.* § 5, 24 Stat. at 389.

246. *Id.*

247. *Id.* § 6, 24 Stat. at 390 ("[E]very member of the respective . . . tribes of Indians to whom allotments have been made shall have the benefit and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside . . . ."); *see also* HARRING, *supra* note 190, at 154.

248. *See* COHEN, *supra* note 140, § 1.04, at 73, 78.

249. *Id.* § 1.04, at 73.

250. Ch. 233, 43 Stat. 253 (repealed 1952).

251. COHEN, *supra* note 140, § 1.04, at 78-79.

252. U.S. CONST. amend XIV, § 1.

253. *See* Berger, *supra* note 198, at 1196.

otherwise), as well as due to service in the United States military. [254] The Citizenship Act of 1924 granted blanket citizenship to all Native Americans—no naturalization process was required and no consent was requested.[255] Some tribes explicitly refused to recognize the Citizenship Act's applicability to them.[256] The Citizenship Act was passed the same year as the Immigration Act of 1924, which sought to preserve an "American" identity by restricting immigration from various regions.[257] Despite progressive efforts to homogenize American society, the Citizenship Act, importantly, did not require individuals to give up their tribal citizenship, as previous naturalization processes had done.[258] The Citizenship Act sought to accomplish the goals of assimilation without explicitly de-recognizing tribal authority.

The Court acquiesced to the political branches during the assimilationist period, not questioning congressional plenary power. Whereas in *Worcester*, the Court's characterization of tribes as sovereign entities served to protect them to some degree from *state* intrusion, such characterization was of no avail to protect them from *federal* power. The Court's holding in *Lone Wolf v. Hitchcock* made clear that the Court found no constitutional protection for tribes from the national government itself.[259] There, the Court held Congress could abrogate a treaty with an Indian tribe based on its plenary power—a decision firmly rooted in paternalistic theories of the relationship between the United States and Indian tribes.[260] Paternalism lay at the heart of another Court decision during the Progressive and Assimilation Eras in *United States v. Sandoval*.[261] When New Mexico and Arizona joined the United States as the last of the forty-eight contiguous states in early 1912, the status of its native peoples was called into question by the enabling acts of Congress. The Supreme Court had previously excluded the Pueblo of New Mexico from the definition of "Indian" when interpreting the Non-Intercourse Act of 1834,[262] based upon their perceived

254. *See* Kevin Bruyneel, *Challenging American Boundaries: Indigenous People and the "Gift" of U.S. Citizenship*, 18 STUD. AM. POL. DEV. 30 (2004).

255. 43 Stat. at 253; *see* COHEN, *supra* note 140, § 1.04, at 78-79.

256. For a discussion of the withholding of consent, see Bruyneel, *supra* note 254.

257. Ch. 190, 43 Stat. 153 (repealed 1952); *see* Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. AM. HIST. 67 (1999).

258. *See* COHEN, *supra* note 140, § 1.04, at 79.

259. 187 U.S. 553, 555 (1903).

260. *See id.* at 566.

261. 231 U.S. 28, 39 (1913).

262. 25 U.S.C. § 177 (2012).

Published by University of Oklahoma College of Law Digital Commons, 2017

capacity for self-government as well as their fee simple ownership of land.[263] The Enabling Act for New Mexico, however, extended the Non-Intercourse Act and related legislation explicitly to the Pueblo, bringing them within the guardian-ward relationship.[264] The Court in *Sandoval* found these provisions of the Enabling Act caused no constitutional harm either to the tribes or to the newly created State of New Mexico.[265] The Court's justification for intrusion into tribal, and potentially state, sovereignty was the plenary power first articulated in *Kagama* as well as explicitly racial categorizations underlying the guardian-ward construct.[266]

While not abandoning the guardian-ward relationship, federal policies toward native tribes began to change in the 1930s. The political branches' efforts to re-assert tribal culture and self-determination, if not full-scale sovereignty, began in earnest with the efforts of John Collier. Collier, a sociologist who valued community cohesion over stark individualism, sought to reverse some assimilationist policies, including allotment, by advocating Indian cultural retention and self-government.[267] President Franklin Roosevelt appointed Collier as the Commissioner of the BIA in 1933, and he served during the entirety of Roosevelt's administration.[268]

Collier pushed for and obtained the Indian Reorganization Act of 1934,[269] the centerpiece of the "Indian New Deal." The Indian New Deal ended the allotment process but did not effectuate a wholesale repeal of the Dawes Act.[270] Rather, it allowed the United States to buy fee simple land and then return it to its pre-existing status—that of federal land held in trust for the tribes.[271] The Indian New Deal also called for constitution-making among the tribes, and those tribes that accepted the New Deal adopted tribal

263. United States v. Joseph, 94 U.S. 614, 616, 618 (1876)

264. Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557, 560; *see* COHEN, *supra* note 140, § 1.03, at 57-58.

265. *Sandoval*, 231 U.S. at 46.

266. See, for example, the Court's statement that the Pueblos adhere "to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed, and inferior people." *Id.* at 39.

267. *See* KENNETH R. PHILIP, JOHN COLLIER'S CRUSADE FOR INDIAN REFORM, 1920-1954, at xii (1977).

268. *Id.* at xiv, 117.

269. Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101-5129).

270. PHILIP, *supra* note 267, at 159.

271. For a compilation of cases addressing the constitutionality of the Indian Reorganization Act, including the provisions allowing the re-purchase of former tribal lands, see Ann K. Wooster, J.D., *Validity and Construction of Indian Reorganization Act*, 28 A.L.R. Fed. 2d 563 (2008).

constitutions based upon a model drafted by the BIA.[272] In this regard, the Indian New Deal "fought" one form assimilation by introducing another—the imposition of western-style constitutionalism as a condition for continued recognition.

Nevertheless, the Indian New Deal was an effort by the political branches to re-recognize aspects of Native American tribal sovereignty that had been lost in the Allotment Era. Despite Collier's efforts to get away from the guardian-ward relationship, Congress insisted upon continued oversight of the tribes, and planted the seeds for the second full-scale assault on tribal sovereignty with the passage of the Kansas Act of 1940. Through the Kansas Act of 1940, Kansas was granted almost complete criminal jurisdiction within tribal territory, to be followed by grants to more states.[273] With seventy-five years worth of hindsight, the Indian New Deal looks less like a fully formed "era" of federal-Indian relations, and more like the efforts of one man (successful as they may have been) to slow a longer process of de-recognition that began with the Dawes Act in 1887 and culminated with termination policies in the 1940s, 1950s, and early 1960s. Yet policies enshrined in law during the Indian New Deal continue to provide the basis for many claims of sovereignty in the present.[274]

7. Termination

The Termination Era from the mid-1940s until the mid-1960s was a second attempt at political de-recognition of tribal sovereignty. Despite the aims of the Indian New Deal, and perhaps in reaction to them, Congress passed a series of laws aimed at ending the special relationship between the federal government and the tribes, including the federal trusteeship of tribal lands, ending tribal self-government, and leaving Native Americans fully under the sovereignty of state governments.[275] Termination included the granting of criminal or limited-criminal jurisdiction to some states to police Native American communities.[276] Interestingly, though, Congress adopted

---

272. Indian Reorganization Act of 1934, § 16, 48 Stat. at 987 (codified at 25 U.S.C. § 5123).

273. *See* Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified as amended at 18 U.S.C. § 3243); COHEN, *supra* note 140, § 6.04, at 580-81.

274. Historians, sociologists and other scholars continue to debate Collier's legacy. For a discussion of his mixed legacy, see Elmer R. Rusco, *John Collier: Architect of Sovereignty or Assimilation*?, 15 AM. INDIAN Q. 49 (1991). *See also* Lawrence C. Kelly, *The Indian Reorganization Act: The Dream and the Reality*, 44 PAC. HIST. REV. 291 (1975).

275. *See* COHEN, *supra* note 140, § 1.06, at 84-93.

276. *See, e.g.*, Act of Aug. 15, 1953 (Public Law 280), Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326 & 28 U.S.C. § 1360).

Published by University of Oklahoma College of Law Digital Commons, 2017

termination policies on a tribe-by-tribe and state-by-state basis, instead of through wholesale termination legislation.[277] For example, Congress passed Public Law 280 in 1953 which granted full criminal jurisdiction to five states over Indian Territory.[278] The localized process suggests Congress's wish to reserve for itself some powers to continue to recognize sovereignty for some tribes, while not for others. Some of the tribes targeted for termination, despite large populations and well-developed government structures, had abundant natural resources, calling into question congressional motives for termination policies.[279]

8. The Present Period - Self-Determination

One might be forgiven for a bit of whiplash in attempting to keep up with federal Indian policy in the mid-twentieth century. After the termination policies, which attempted to end self-government of the tribes, the political branches returned to policies of self-government and tribal sovereignty in the 1960s. Presidents Johnson and Nixon began the process of re-recognizing tribes that had been de-recognized in the Termination Era. Congress made further efforts to affirm the place of tribes in the American constitutional system with the passage of the Indian Civil Rights Act of 1968 (ICRA).[280] Modern federal policies of self-determination are discussed more fully herein as part of the discussion of why the Court, if it is attempting to implement federal policy through implicit divestiture, is doing a poor job.

Despite the federal government's long oppression of Native Americans, which was enacted through policies of acculturation, removal, reservation, allotment and assimilation, federal policy has generally been, since the founding, to recognize tribal sovereignty, with the important exceptions of the Allotment and Termination Eras. Those latter policies have been repudiated since the 1960s. From the 1960s until the present, federal policy formulated by the political branches has continuously recognized Native American tribal sovereignty, which makes the current judicial hostility to Native American tribal sovereignty something of a curiosity. Why did the Court become hostile to notions of tribal sovereignty during a period of

277. *See* COHEN, *supra* note 140, § 1.06, at 88, 91-92.

278. Act of Aug. 15, 1953, 67 Stat. 588; *see* COHEN, *supra* note 140, § 6.04, at 537-78.

279. For the legislative background of termination policies, and the abandonment of the same, see Michael C. Walch, Note, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181 (1983).

280. Pub. L. No. 90-284, tit. IV, 82 Stat. 78 (codified at 25 U.S.C. §§ 1301-1303 (2012)).

foreign and domestic détente? Some of the potential justifications for implicit divestiture are addressed in the following sections.

B. Implicit Divestiture Is Not Constitutional in Nature

Perhaps, one might argue, that given the *sui generis* status of Indian tribes, the Court was *not* exercising a power of recognition in *Oliphant* and *Montana*, but was only doing its job by regulating the boundaries of federalism—highlighting the jurisdictional lines that states, tribes, and the federal government should not cross. That is, perhaps the Court was pronouncing upon the constitutional status of tribes. This issue became the subject of constitutional dialogue between the Court and the political branches in *Duro v. Reina*,[281] Congress's "*Duro*-Fix,"[282] and *United States v. Lara*.[283]

First, in *Duro v. Reina*, the Court held that the Salt River Pima-Maricopa Indian Community—a federally recognized tribe—lacked jurisdiction to try an Indian non-member in tribal court.[284] Albert Duro, an Indian but not a member of the Pima-Maricopa Tribe, was alleged to have committed a murder on tribal land.[285] He was arrested by federal authorities and charged with murder, but the U.S. Attorney declined to prosecute and he was released to the custody of the Tribe.[286] The Tribe, whose criminal jurisdiction over non-Members was limited to misdemeanors by the ICRA, charged Duro with the illegal discharge of a weapon.[287] Duro challenged his arrest through the habeas procedure of the ICRA, and argued in federal court that the Tribe lacked jurisdiction for even the minor misdemeanor charge.[288] The Supreme Court, following the reasoning in *Oliphant*, agreed.[289] It found that the same issues present for *non-Indians* in tribal courts—a lack of voting ability and other "citizenship" rights enabling participation in tribal governance—were present for *non-member Indians* as well, leading to, in the Court's words, "unfairness" to the defendant.[290] As

281. 495 U.S. 676 (1990).

282. Pub. L. No. 101-511, tit. VIII, § 8077(b), 104 Stat. 1856, 1892 (1990) (codified at 25 U.S.C. § 1301(2) (2012)); *see* United States v. Lara, 541 U.S. 193, 216 (2004) (Thomas, J., concurring) (discussing 25 U.S.C. § 1301(2)).

283. 541 U.S. 193.

284. *Duro*, 495 U.S. at 685.

285. *Id.* at 679.

286. *Id.* at 680.

287. *Id.* at 681.

288. *Id.* at 682.

289. *Id.* at 685.

290. *Id.* at 688.

Published by University of Oklahoma College of Law Digital Commons, 2017

with *Oliphant* and *Montana*, the Court's assertion of the power to de-recognize an aspect of tribal sovereignty in *Duro*, is constitutionally suspect.

Before continuing the *Duro* narrative, let's step back and consider what happened. The three branches of the federal government tag-teamed to create a criminal jurisdiction vacuum within tribes. Duro allegedly killed a fourteen-year old boy on tribal lands.[291] The federal prosecutor (executive branch) declined to prosecute Duro.[292] Because Congress (legislative branch) had limited tribal criminal jurisdiction to misdemeanors, the Tribe could not bring felony charges.[293] When the Tribe brought a minor misdemeanor charge, the Supreme Court (judicial branch) prohibited even this action.[294] Duro walked, apparently free to commit more murders on tribal lands, courtesy of the quirks of federal Indian law.

Congress felt that the Court had overstepped its bounds in *Duro* and reacted. Congress amended the ICRA to affirm tribal sovereignty to try a case just like that of Duro (the "*Duro*-Fix").[295] The one-sentence amendment to the ICRA stated that Native American powers of self-government include "the inherent powers of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all* Indians."[296] The question remained, however, as to whether Congress, in enacting the *Duro*-Fix, was delegating to the tribes a federal power to prosecute, or rather recognizing and affirming not just jurisdiction, but aboriginal sovereignty. That is, was Congress merely allowing the tribes to exercise what was otherwise a federal power, or was it recognizing the tribes' own sovereign rights?[297] Congress's language of recognition served as a clue. In either case, though, congressional action here was a re-assertion of political branch control over the recognition power.

The Court had the chance in *United States v. Lara* to interpret the *Duro*-Fix, including its constitutionality. Billy Jo Lara, like Albert Duro, was an

---

291. *Id.* at 679.

292. *Id.* at 680.

293. *Id.* at 681.

294. *Id.* at 685.

295. Pub. L. No. 101-511, tit. VIII, § 8077(b), 104 Stat. 1856, 1892 (1990) (codified at 25 U.S.C. § 1301(2) (2012)).

296. *Id.*

297. Between the *Duro*-Fix and the Court's opinion in *Lara*, scholars debated this question. *See, e.g.*, Alex Tallchief Skibine, Duro v. Reina *and the Legislation That Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767, 769 (1993); L. Scott Gould, *The Congressional Response to* Duro v. Reina*: Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 62 (1994).

Indian accused of a crime by a tribe other than his own, and challenged his federal arrest as a violation of double jeopardy after having been convicted in tribal court.[298] In deciding his fate, the Court had to interpret not only the *Duro*-Fix, but also its own actions in *Duro*.[299] The Court could have "struck down" the *Duro*-Fix as a violation of constitutional principles, in a manner reminiscent of *City of Boerne v. Flores*[300] and *Dickerson v. United States*,[301] and freed Lara. That is, the Court could have held that once an aspect of tribal sovereignty was lost, even implicitly, then it was gone forever. And the only possible way Congress could "restore" an inherent power was through a delegation of federal power, which would trigger double jeopardy.[302] This approach was advocated by Justices Souter and Scalia in dissent who wrote, "our previous understanding of the jurisdictional implications of dependent sovereignty were constitutional in nature."[303]

However, a majority of the Court felt differently and held that Congress, in recognizing criminal jurisdiction over non-member Indians, was in fact recognizing and affirming inherent tribal sovereign authority.[304] In doing so, the Court necessarily characterized its own decision in *Duro*, and by extension *Oliphant* and other implicit divestiture cases, as something other than eternal constitutional law, although it is not clear what that is. The Court acknowledged to a degree that the recognition power belonged to the political branches and not to the Court.[305] One might think that the Court, in the face of Congress's "*Duro*-Fix," would begin to "tread lightly" in future cases. One would be wrong. Congress's *Duro*-Fix and *Lara* did not signal

298. *Lara*, 541 U.S. at 196-97.

299. *See id.* at 196.

300. 521 U.S. 507 (1997). The Religious Freedom Restoration Act (RFRA) was a legislative "fix" to the Court's ruling in *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990). In *Flores*, the Court ruled the RFRA unconstitutional as it applied to the states because, the Court asserted, Congress cannot alter the substance of Constitutional provisions (as interpreted by the Court), but can only seek to enforce them through the Fourteenth Amendment. *Flores*, 521 U.S. at 536.

301. 530 U.S. 438 (2000). In *Dickerson*, the Court disallowed a congressional "fix" to the Court's ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966). *Dickerson*, 530 U.S. at 431.

302. Under this approach, the Court would not technically "strike down" the *Duro*-Fix, but would interpret it in a manner to render it consistent with its understanding of the Constitution, despite the clear language of the statute recognizing an "inherent" power, not a delegated one. Justice Thomas calls attention to the problems of delegations of executive power not only to non-executive branches of government, but also tribal governments. *See Lara*, 541 U.S. at 216-17 (Thomas, J., concurring).

303. *Id.* at 228 (Souter, J., dissenting).

304. *Id.* at 210.

305. *Id.* at 207.

Published by University of Oklahoma College of Law Digital Commons, 2017

the death of implicit divestiture. Rather, they seem to have embedded it more by reinforcing the idea that virtually all sovereignty is lost except that which is specifically affirmed. Congress, at the time it fixed *Duro*, could have also "fixed" *Oliphant*, but chose not to. Congressional silence on the issue may have emboldened the Court, who seems to have interpreted such silence as a green light to proceed with implicit divestiture. Thus, the Court continues to make assumptions about the loss of tribal sovereignty that intrude upon the recognition power.[306]

The Supreme Court and Congress, then, both agree that implicit divestiture is not constitutional in nature. Unlike the Court's federalism cases involving states, implicit divestiture is completely divorced from the text and structure of the Constitution. Rather, it is an exercise through which the Court itself attempts to structure the relationship between the United States and the tribes.

C. Implicit Divestiture Is Not Appropriate Federal Common Law-Making

Perhaps the most tenable defense of implicit divestiture jurisprudence is the argument that the Court is doing nothing more than creating federal common law, subject to congressional override. The Court's decision in *Lara*, in which it acquiesced to the congressional override of *Duro*, supports such a view.[307] Federal common law is not and should not be absent in federal Indian law. Indeed, the rule of explicit divestiture I propose in Part III of this Article might reasonably be characterized as a common law rule. However, federal Indian law common law rules must abide by the limits placed upon the judiciary to create common law in other contexts. Implicit divestiture is not appropriate federal common law. To argue that it is, necessitates an expansive view of the judiciary's common law-making power that is belied by (1) the limited and circumspect nature of the federal common law power, (2) the vesting of the recognition power, and (3) the history of tribal recognition.

---

306. Rulings under the implicit divestiture framework are not constitutional in nature, as the Court acknowledges, in the sense that they are not unassailable by the political branches (in the way that the Court's rulings in *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990) *are* unassailable). This is not to say that there is *no* constitutional lawmaking to be done by the Court outside the context of implicit divestiture. Appropriate judicial constitutional law in federal Indian law is discussed in Part III.

307. *See Lara*, 541 U.S. at 221-23. As Alex Tallchief Skibine notes, the majority's reasoning was "deeply perplexing" because the majority re-interpreted previous implicit divestiture cases as attempts to implement federal policy, not traditional federal common law. *See* Skibine, *supra* note 4, at 79.

The Court's *Erie* doctrine[308] significantly reduced the power of federal courts to create common law.[309] Still, there are some limited areas where the Court may formulate common law. "These instances are 'few and restricted,' and fall into essentially two categories: those in which the federal rule of decision is 'necessary to protect uniquely federal interests,' and those in which Congress has given the courts the power to develop substantive law."[310] This latter category involves federal areas of substantive law, such as bankruptcy and admiralty, and allows the judiciary to fill in the gaps of statutory law.[311] Because Congress has not given the judiciary explicit power to develop substantive federal Indian law, this latter category cannot be used to justify common Indian lawmaking.

The other category of appropriate federal common law, described in *Texas Instruments*, is the protection of federal interests.[312] Interestingly, although the Court in *Lara* characterized its implicit divestiture rulings as federal common law, it did not in that case or in any other case point to the federal interest at stake.[313] In *Oliphant*, the Court seems to suggest that the federal interest at stake is to protect non-Indians from what the Court viewed as non-constitutional criminal procedures.[314] That justification may have been plausible in the eighteenth or early nineteenth centuries when tribes were still treated as akin to foreign sovereigns, but makes no sense in the twentieth and twenty-first centuries, as Native Americans are United States citizens. In *Oliphant*'s progeny, the Court makes little, if any, effort to point to a federal interest it sought to protect.

Further, and more importantly, federal common law is only appropriate where the political branches do not already occupy the field (to borrow language from preemption doctrine) by statute or by constitutionally vested authority.[315] If an area of law is addressed by statute or constitutionally committed to another branch of government, the Court should defer to that branch's authority.[316] The problem in federal Indian law is, as Alex

---

308. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

309. *Id.* at 78-79.

310. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (citations omitted).

311. *Id.* at 641.

312. *Id.* at 640.

313. *See* United States v. Lara, 541 U.S. 193, 205-07 (2004).

314. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 (1978).

315. *See generally* Skibine, *supra* note 4.

316. *See id.* at 97. For a similar argument in the context of federal common law in international law, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law*

Published by University of Oklahoma College of Law Digital Commons, 2017

Tallchief Skibine points out, the "Court seems to think that there are no constraints because it has given Congress plenary power over Indian nations . . . if Congress can potentially act without limits in Indian affairs, so can the Court."[317] Whether congressional plenary power can be justified or not, the powers of recognition and de-recognition are committed constitutionally to the political branches, not to the judiciary. If the Constitution had been silent on the power of recognition, then perhaps the Court's implicit divestiture doctrine might have been defensible as federal common law. But the Constitution is not silent. Even when the political branches have not explicitly addressed a particular aspect of sovereign power, the courts are still not warranted in appropriating the prerogative of another branch to de-recognize that aspect of sovereignty, because the duty to so lies elsewhere.

The history of Native American tribal recognition, which the Court must turn to as part of the implicit divestiture exercise, indicates that the political branches have recognized tribal sovereignty through the nation's history, even if they have simultaneously acted to curtail it. The political branches have occupied the field—literally and figuratively. Although there is a place for common law in federal Indian law, adjusting sovereign powers is a matter to be worked out between the tribes and the political branches.

What is a court to do then, when faced with the issue of whether a tribe may exercise a particular sovereign power that the political branches have not explicitly addressed even though they have the constitutional authority to do so? The Court must maintain the status quo, allowing the political branches to protect explicitly any federal interest that *they* deem harmed by the exercise of tribal sovereignty. The proposed rule of explicit divestiture is discussed more fully in Part III of this paper.

D. Implicit Divestiture Does Not Implement Federal Policy

Justice Thomas, while calling into question the constitutionality of the Act of 1871, indicates that the statute "nevertheless reflects the view of the political branches that the tribes had become a purely domestic matter."[318] Even if that were true 145 years ago (and the historical record suggests otherwise), there is no reason that federal policy must remain fixed in the 1870s. If the Court is attempting to implement federal policy through implicit divestiture, it is doing a poor job. Federal policy since the late

---

as Federal Common Law: A Critique of the Modern Position, 110 HARV. L. REV. 815 (1997).

317. Skibine, *supra* note 4, at 97-98.

318. *Lara*, 541 U.S. at 218 (Thomas, J., concurring).

1960s has consistently characterized the relationship of the United States to the tribes as "nation-to-nation," even if it leaves some of the particulars unaddressed.

Although the Indian Reorganization Act of 1934 created a crude preliminary process of recognition and acknowledgement, the formal process used today by which the United States recognizes tribal sovereignty was put in place in 1978.[319] The federal acknowledgement process is a creature of the BIA, relying on delegated authority from Congress to the executive to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs."[320] Through the promulgation of regulations, the BIA created an application process through which tribes can apply for federal recognition (and all the benefits that go along with recognition, including funding for housing, health and other services, and potential gaming operations).[321] The BIA has set up criteria for recognition, which include elements of Indian "identity," communal cohesion, governmental structure and governing documents.[322] The BIA's federal acknowledgement process, like implicit divestiture, is not without its critics. Matthew L.M. Fletcher offers a sharp critique of the both the theory behind the federal acknowledgement process and the manner in which it has been implemented.[323] Vine Deloria, Jr. has sharply criticized the apparent ability of low-level federal bureaucrats to negate previous acts of Congress respecting tribal recognition.[324]

---

319. *See* Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271, 273 (2001).

320. 25 U.S.C. § 9 (2012).

321. *See* Myers, *supra* note 319, at 279-83.

322. 25 C.F.R. § 83.11 (2015).

323. Matthew L. M. Fletcher, *Politics, History and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487 (2006). See also the two books reviewed by Fletcher therein: RENÉE ANN CRAMER, CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT (2005) and MARK EDWIN MILLER, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGMENT PROCESS (2004).

324. Fletcher, *supra* note 323, at 515-16; *see also* Gerald Carr, *Origins and Development of the Mandatory Criteria Within the Federal Acknowledgement Process*, 14 RUTGERS RACE & L. REV. 1, 4, 8 (2013). Carr calls attention to a curious statute, 25 U.S.C. § 5130 (formerly § 479a) the "findings" of which found that in addition to BIA and congressional recognition, tribes can be recognized by a "court decision." Courts, though asked to do so, have never recognized tribes in terms of extending recognition though, as argued herein, they have judicially de-recognized various sovereign powers of the tribes. The constitutionality of the statute, or at least its "finding," is suspect, given the apparent lack of authority for an Article I Congress to take an Article II prerogative power and vest it in an Article III court.

Published by University of Oklahoma College of Law Digital Commons, 2017

In addition to the BIA process and congressional policies to encourage Indian self-determination, successive heads of the executive branch have consistently lauded tribal sovereignty since the 1970s. In a special message to Congress in 1970, President Nixon affirmed the national policy of recognizing and encouraging Native American self-determination.[325] President Carter signed the American Indian Religious Freedom Act, affirming the right of Native Americans to practice religious ceremonies otherwise prohibited by law.[326] On January 24, 1983, Ronald Reagan issued a presidential proclamation regarding the relationship of the United States to Native American tribes and nations. There, he expressed his administration's intent to "restore tribal governments to their rightful place among the governments of this nation and to enable tribal governments, along with state and local governments, to resume control over their own affairs."[327] In furtherance of that goal, President Reagan moved the White House Liaison Office for Native Tribes to the Office of Intergovernmental Affairs to underscore its "commitment to recognizing tribal governments on a government-to-government basis."[328] Presidents George H.W. Bush, Clinton, and George W. Bush have issued similar statements.[329] President Obama, during the course of announcing the United States' support for the United Nations Declaration on the Rights of Indigenous Peoples, told Native American leaders that he wanted to improve the "nation-to-nation"

---

325. *See* President Richard Nixon, *Special Message to the Congress on Indian Affairs*, AM. PRESIDENCY PROJECT (July 8, 1970), http://www.presidency.ucsb.edu/ws/?pid=2573. Although many scholars regard Nixon's legacy in Indian affairs favorably, Carole Goldberg has recently offered a sharp critique based upon his Supreme Court appointments, including those who helped create implicit divestiture. *See* Carole Goldberg, *President Nixon's Indian Law Legacy: A Counterstory*, 63 U.C.L.A. L. REV. 1506 (2016).

326. Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (2012)).

327. *Statement of President Ronald W. Reagan on American Indian Policy* 5 (Jan. 24, 1983), http://www.tribalconsultation.arizona.edu/docs/Executive%20Branch/idc-002004. pdf.

328. *Id.* at 2.

329. For George H.W. Bush's characterization of the federal Indian relationship as "government-to-government," see President George Bush, *Proclamation 6230—National American Indian Heritage Month, 1990*, AM. PRESIDENCY PROJECT (Nov. 14, 1990), http://www.presidency.ucsb.edu/ws/?pid=1933. For Bill Clinton's statement using the same characterization, see President William J. Clinton, *Executive Order 13084—Consultation and Coordination with Indian Tribal Governments*, AM. PRESIDENCY PROJECT (May 14, 1998), http://www.presidency.ucsb.edu/ws/index.php?pid=55959&st=clinton&st1=native+american. For George W. Bush's statement using the same characterization, see President George W. Bush, *Executive Order: American Indian and Alaska Native Education*, WHITE HOUSE (Apr. 30, 2004), https://georgewbush-whitehouse.archives.gov/news/releases/2004/04/ 20040430-10.html.

relationship between the United States and the tribes.[330] The political branches have occupied the field of sovereign recognition. The Court should respect that. To the extent the Court must guess at federal policy regarding any particular sovereign power because the political branches have not been clear,[331] it ought to give primary importance to the statements of the political branches affirming tribal sovereignty and nationhood, rather than assuming the political branches consider sovereign powers to be lost.

Further, the Court itself has at least once conceded that implicit divestiture is not an attempt to implement federal policy. In *Oliphant*, the Court stated, "Even ignoring . . . congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress."[332] That is, faced with an inability to ascertain federal policy, the Court's approach was to assume a divestiture of a sovereign power, rather than maintaining the status quo until such time as the political branches explicitly announce a policy. In doing so, the Court created its own policy.

E. Justice Thomas's Concerns

As indicated in the introduction, the Court's implicit divestiture doctrine has many critics. One prominent critic of the Court's modern Indian law jurisprudence in general is Justice Clarence Thomas. Justice Thomas has characterized federal Indian policy as it relates to tribal sovereignty as "schizophrenic" and suggests the confusion has likewise created tensions in Supreme Court jurisprudence regarding the same.[333] Justice Thomas has staked out a curious position in tribal sovereignty cases. Beginning with *Lara*, Justice Thomas has repeatedly called for a complete overhaul of the Court's approach to resolve the tensions between plenary power and inherent sovereignty, even while concurring with the majority in most Indian law opinions.[334] It is not clear how much support Justice Thomas has attracted. His many concurrences, which read like dissents, have not been

330. Krissah Thompson, *U.S. Will Sign U.N. Declaration on Rights of Native People, Obama Tells Tribes*, WASH. POST (Dec. 16, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/16/AR2010121603136.html.

331. In an internal court memo discussing *Duro*, Justice Scalia indicated that the Court's efforts in tribal sovereignty cases consist of "[seeking] to discern what the current state of affairs ought to be by taking into account . . . congressional 'expectations.'" Memorandum from Antonin Scalia to William Brennan (Apr. 4, 1990), *reprinted in* FLETCHER, *supra* note 18, at 345.

332. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

333. United States v. Lara, 541 U.S. 193, 219 (2004) (Thomas, J., concurring).

334. Steele, *supra* note 20, at 685-86.

Published by University of Oklahoma College of Law Digital Commons, 2017

joined by other Court members. However, Justice Thomas's dissenting opinion in *Michigan v. Bay Hills Indian Community*, in which he argued for a limited conception of tribal sovereign immunity, garnered three additional votes.[335] And certainly at least four members of the Court, presumably including Thomas, were skeptical of tribal sovereignty in the recent *Dollar General* split decision.[336] Justice Thomas's concerns deserve consideration here in light of their relation to the recognition power and implicit divestiture.

Justice Thomas has critiqued federal Indian law jurisprudence as recently as the 2015 term. His concurring opinion in *Puerto Rico v. Sanchez Valle* suggests he remains suspicious of the notion that the tribes retain any aboriginal sovereignty.[337] However, his most extensive commentary of federal Indian law is found in his *Lara* concurrence to which he has repeatedly cited. In *Lara*, Justice Thomas calls attention to a tension created in the Court's jurisprudence by two competing notions: (1) that Congress has plenary power to legislate on behalf of the tribes; and (2) that the tribes retain inherent and aboriginal sovereignty.[338] If Congress truly has plenary power to abrogate tribal sovereign powers, he argues, then tribal sovereignty itself is nullified, especially as it is characterized in *Wheeler*—as a source of power distinct and separate from Congress.[339] Justice Thomas is suspicious, however, of congressional plenary power in Indian affairs, which is consistent with his wider jurisprudence, through which he seeks to root congressional power in explicit textual commitments.[340]

Justice Thomas is also suspicious of tribal sovereignty itself, at least for tribes who have not had their sovereignty specifically re-affirmed through treaty. In this, Justice Thomas's approach is similar to implicit divestiture.

---

335. 134 S. Ct. 2024, 2045-55 (2014) (Thomas, J., dissenting).

336. *See* Dollar General Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016).

337. "I continue to have concerns about our precedents regarding Indian law . . . ." Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1877 (Thomas, J., concurring in part and concurring in the judgment) (citing his concurrence in *Lara*, 541 U.S. at 214-26).

338. *Lara*, 541 U.S. at 214-15.

339. *See id.* Justice Thomas's concerns are an iteration of an ongoing concern regarding "imperium imperio"—how can a state exist within another state. For a discussion of an older debate regarding the same issue, see ALISON LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 55-94 (2011).

340. Justice Thomas has been careful to distinguish between congressional plenary power and executive power. While suspicious of congressional plenary power to legislate, he leaves open the door for executive power. In this, Justice Thomas's approach may be closer to the foreign sovereign recognition cases in finding the executive to have sole recognition power. *See* Steele, *supra* note 20, at 682.

Indeed, one may say it is implicit divestiture on steroids, a kind of judicial termination policy where the Court would not only hold that some tribes are divested of particular sovereign powers, but that they are divested of sovereignty itself. If one follows Justice Thomas's approach to its logical conclusion, as he asks us to do, one would find many tribes judicially terminated and tribal members living only as citizens of the United States and the several states. Justice Thomas's approach, presumably, is to state that Congress had no authority to pass the Major Crimes Act,[341] for example, but also that tribal sovereignty in many cases has been completely annihilated through the Act of 1871. What's left? Native American individuals who are the citizens of the state in which they reside, as well as citizens of the United States. The states would exercise, then, full criminal and regulatory authority over Native Americans, with no governmental role left for tribes. Justice Thomas's approach, if adopted, would force the United States to return to a treaty-making process with the tribes if it wished to affirm tribal sovereignty and negotiate with the tribes on a nation-to-nation basis.

Justice Thomas offers a thoughtful critique of federal Indian jurisprudence and he is right to call attention to the questionable sources of congressional plenary power—a doctrine which runs counter to the idea of a national government founded upon limited and enumerated legislative powers. However, his approach to tribal sovereignty suffers from the same constitutional defect as implicit divestiture—that is, he assumes the judiciary can exercise a power of de-recognition. Even if Justice Thomas were to find no constitutional home or status for the tribes, as a member of the Court he must still defer to the executive branch in the exercise of the recognition power. The significance he would ascribe to the Statute of 1871 is misplaced for reasons set forth herein. The Act of 1871 was not a sovereignty Rubicon and treaty making is not the "one mechanism" for sovereign nations to interact with each other, as he asserts.[342] Not only in tribal affairs, but also in foreign affairs, sovereign or quasi-sovereign entities may be recognized even in the absence of treaties, as is the case with Taiwan.

Justice Thomas's approach demonstrates the perils of a binary federalism. He falls into the same trap as the Court did in *Kagama*, in the belief that there are but two sovereigns within our federal system. Should the Court follow Justice Thomas's reasoning in some sort of judicial

341. 18 U.S.C. § 1153 (Westlaw through Pub. L. No. 115-90).

342. *See* United States v. Lara, 541 U.S. 193, 219 (2004) (Thomas, J., concurring).

Published by University of Oklahoma College of Law Digital Commons, 2017

termination of tribal sovereignty, it will make the same mistake the Court in *Kagama* did—reading into the Act of 1871 congressional intent to extinguish tribal sovereignty where such intent is not there. Even the Act under direct consideration in *Kagama*—the Major Crimes Act—does not purport to extinguish tribal sovereignty, although it intrudes upon it by establishing concurrent jurisdiction in criminal cases. There is no need to interpret the Statute of 1871 as the defining moment of Native American sovereignty. To the extent the political branches did, during the height of the United States' imperial period, disparage tribal sovereignty near the point of extinction, as it also did during the Termination Era, there is no reason they could not retreat and re-establish it through the recognition power. Even if the Act of 1871 had embedded a de-recognition policy, it has been overridden by subsequent recognitions of native sovereignty, by both political branches.

IV. Replacing Implicit Divestiture with Explicit (and Constitutional) Divestiture

A. A Rule of Explicit Divestiture

When the Supreme Court has confronted the sovereign status of *foreign* entities, it has remained "hands off" and deferential to the political branches. When confronted with the sovereign status of Indian tribes and nations, the Court has chosen to involve itself much more aggressively in the substance of the issues. The Court's greater involvement is understandable to a point, in that Indian tribes and nations are closely intertwined with the United States historically, geographically and constitutionally in ways that foreign sovereigns are not. It is not unreasonable for the Court to do in federal Indian law what it often does in other areas of constitutional law—referee jurisdictional disputes between competing government institutions. Nevertheless, the prerogative power to recognize (and de-recognize) sovereign entities, whether foreign or domestic, remains with the political branches in the least, if not solely with the executive. The very same reasons that lead the Court to avoid ruling on the sovereign status of foreign entities (the need for unity and clarity) also demand that the Court not muddy the waters in Indian policy.

The Court's foray into judicial de-recognition has led to unpredictable and sometimes contradictory results. Whereas *Oliphant*, *Montana*, and *Strate* all purport to have found a historical basis sufficient for determining that various aspects of sovereignty have been divested because they are "inconsistent" with the status of the tribe, *Wheeler* and *Santa Clara* suggest

that tribes retain inherent aboriginal sovereignty. The Court has de-recognized a large enough number of sovereign powers that aboriginal sovereignty has been judicially reduced to not much more than a theory that expresses itself in double jeopardy cases. As for predicting what the Supreme Court or any other federal court will do when faced with a contested exercise of tribal sovereignty, it is anyone's guess. Recently, the Fifth Circuit has offered a more liberal interpretation of the *Montana* exceptions,[343] but the Supreme Court remains divided. *Wheeler* and *Santa Clara* also state that tribal sovereignty is subject to complete legislative defeasance by the United States, in a way that state sovereignty is not.[344] Yet if sovereignty is to mean anything, it ought not to be extinguishable at the legislative whim of another sovereign. The Court does not currently have a workable system for deciding cases of tribal sovereignty.

The Court should therefore adopt a rule of explicit divestiture. Under explicit divestiture, the Court would presume all sovereign powers are retained except those which have been explicitly and constitutionally surrendered. Explicit divestiture begins with the Court acknowledging, as it has many times before, that Indian tribes in North America were sovereign entities prior to the arrival of Europeans and that aboriginal sovereignty is perpetual, though subject to extinction or diminution through conquest. Under explicit divestiture, the Court would continue to acknowledge the losses of sovereign powers effectuated through treaty or appropriate statute. The Court would abandon the third prong of the *Oliphant*/*Montana* formulation—the idea that sovereign powers that are inconsistent with their status as domestic dependent nations have been lost. Using an explicit divestiture rule, the Court would adopt a default position that "All is retained except that which is specifically surrendered." That is, in the absence of clear statements from the political branches indicating their intrusion into traditional aspects of sovereignty, the Court should assume such sovereignty remains. In the presence of such statements, the Court should restrict itself to its traditional constitutional duty of examining the source of power for federal action.

In following a rule of explicit divestiture, the Court would not be breaking new ground. Rather, it would be returning to the pragmatic and constitutional approach used in *Ex parte Crow Dog*. There, the Court was

343. *See* Dollar General Corp. v. Miss. Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014).

344. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.").

Published by University of Oklahoma College of Law Digital Commons, 2017

asked by the BIA to find that the federal government could exercise criminal jurisdiction in Indian Country for Indian-on-Indian crime.[345] Essentially, the BIA asked the Court to find that the tribes were implicitly divested of a sovereign power—exclusive criminal jurisdiction in Indian Territory. Finding no clear and unambiguous language in the treaties, however, the Court declined, and the matter was subsequently placed before the political branches, who responded as the BIA hoped.[346] The Court then reviewed the congressional response (the Major Crimes Act) to ascertain its constitutionality in *Kagama*.[347] Even if one disagrees with the Court's decision in *Kagama*, as many scholars do,[348] the constitutional dialogic process set off by *Crow Dog* is a good pattern for the modern Court to follow.

This approach would call into question a line of cases. For example, had the Court used an explicit divestiture approach in *Oliphant*, it would have followed the lead of Justice Thurgood Marshall and Chief Justice Burger, who would have limited the Court's inquiry into whether the Suquamish had surrendered through treaty or statute the power to try non-Indian criminals.[349] Similarly, the result in *Montana* might very well be different under an explicit divestiture approach given that most treaties establishing reservations do not expressly limit tribal regulatory authority. Other cases called into question include those discussed herein, such as *Strate* and *Plains Commerce Bank*.

A rule of explicit divestiture would help resolve issues currently facing the Court or likely to face the Court. For example, in *Dollar General*, had the Court addressed the merits, and had the Court adopted an explicit divestiture rule, the Court would look only to see whether the national government, through treaty or statute, had explicitly divested the Mississippi Band of Choctaw Indians of civil jurisdiction over a tort claim by a member against a non-member for acts alleged to have occurred on tribal lands, either through treaty or statute. Addie Rolnick points us to several issues of criminal law for which tribal jurisdiction are still in question due to the Court's current jurisprudence, including tribal extraterritorial jurisdiction over members and juvenile justice.[350]

---

345. *See supra* notes 232-34 and accompanying text.

346. *See supra* notes 236 and accompanying text.

347. *See* United States v. Kagama, 118 U.S. 375 (1886).

348. *See, e.g.*, Clinton, *supra* note 21; Frickey, *supra* note 141, at 489.

349. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (Marshall, J., dissenting).

350. Rolnick, *supra* note 4.

A rule of explicit divestiture would also serve as a partial response to the concerns raised by Justice Thomas in *Lara*. Justice Thomas's two concerns with modern federal Indian law jurisprudence are: (1) that he cannot find a constitutional basis for federal plenary power and (2) he has concerns that there is no strong basis for continued aboriginal sovereignty in the absence of treaty making.[351] Justice Thomas appears willing to go further than implicit divestiture and assume *all* aboriginal sovereignty is lost, or at least that which has not been established through treaty.

To his first concern, a rule of explicit divestiture does not assume the existence of federal plenary power, and would allow Justice Thomas and like-minded thinkers to continue to question it. As with any other piece of federal legislation, the Court may analyze acts of divestiture to ensure they are rooted in an enumerated power. Treaties, especially ones with Native American tribes, are likewise subject to some judicial scrutiny.

To Justice Thomas's second concern, however, explicit divestiture would flip the Court's assumptions about tribal sovereignty. Under the Court's current implicit divestiture jurisprudence, the Court scours the historical record to pick out evidence suggesting any particular sovereign power is preserved or lost. Using such an approach, it is no wonder that the Act of 1871 stands out as central. Through explicit divestiture, though, where tribal sovereignty is presumed to continue in the absence of clear statements from the political branches, the Act of 1871 recedes in importance.

B. What Role Is Left for the Court?

Although the Court would show more deference to the political branches in structuring the relationship between the United States and the tribes under an explicit divestiture approach, the Court would not transform itself into a rubber-stamping branch. The Court would not adopt a "where Congress goes, we will follow" attitude, as it seemed to do in earlier cases like *Kagama* and *Lone Wolf*. Just as implicit divestiture runs afoul of the separation of powers, wholesale judicial acquiescence in unmoored federal power over the tribes would render the judiciary a meaningless branch in Indian law. Rather, under explicit divestiture, the judiciary could and should investigate the sources of congressional and executive power to legislate for or otherwise interact with tribes. The judiciary should maintain its ability to serve as a check on federal and state interactions with tribes.

Further, in Indian law, there remains a constitutional question that is entirely appropriate for the Court to address. That question is "Do tribes

351. United States v. Lara, 541 U.S. 193, 214–26 (2004) (Thomas, J., concurring).

Published by University of Oklahoma College of Law Digital Commons, 2017

have constitutional status?" Judges, scholars and the tribes themselves are divided on the question. The tribes were not represented at the Convention in Philadelphia and tribes as such are not represented in Congress. The most concerted effort to create an "Indian" state—the State of Sequoyah—was rebuffed by Congress.[352] And yet the Constitution acknowledges tribes in several places. The framers of the Fourteenth Amendment sought to preserve tribes as self-governing entities by carving out an exception to the Citizenship Clause.[353] And the Tenth Amendment is, as its ultimate clause suggests, a nod to popular and not just state sovereignty.[354] If Native Americans have truly become part of "We the People" through citizenship and constitution-making, then they ought to be able to take advantage of the federal structure offered by the United States constitutional system. If the Court truly believes in the principles it unanimously espoused in its "Ode to Federalism" in *Bond v. United States*,[355] it should protect, not attack, tribal sovereignty. In any event, the question is worth considering. Even if the judiciary does not have the only or ultimate say on the constitutional question, it still has a say. Further, even if the Court were to find a constitutional "home" for tribes, such a finding would not render the recognition power a nullity with respect to tribes. The political branches

352. *See* ROBERT L. TSAI, AMERICA'S FORGOTTEN CONSTITUTIONS 152-84 (2014).

353. *See* Berger, *supra* note 198.

354. U.S. CONST. amend. X. Carol Tebben suggests the federalism principles behind the Tenth Amendment serve to protect tribal sovereignty. *See* Carol Tebben, *An American Trifederalism Based upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318 (2003).

355. 564 U.S. 211, 221 (2011) ("Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. Some of these liberties are of a political character. The federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.' Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. True, of course, these objects cannot be vindicated by the Judiciary in the absence of a proper case or controversy; but the individual liberty secured by federalism is not simply derivative of the rights of the States. Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.").

still have a role in structuring what remains an ambiguous relationship among the national government, the states, and the tribes.

Under explicit divestiture, the Court would continue to play the same role it does in other federalism cases. The Supreme Court has no say in the creation of new states, for example. To create and "recognize" new states, Congress must pass enabling acts, signed by the President, and states must adopt state constitutions that comport with the enabling act and with the federal Constitution. Once admitted, however, states enter the Union on equal footing with other states. At that point, the Court steps in to fulfill its constitutional duty to determine whether state laws violate the Constitution and whether a congressional exercise of power unjustifiably interferes with a power reserved to the states. Similarly, the Court has no say in the recognition or de-recognition of tribes. However, once those tribes are recognized and become part of the constitutional order, the Court should, as it does with states, police jurisdictional boundaries.

C. Other Proposals: Similarities and Differences

Other scholars have proposed similar ways of getting away from implicit divestiture. Michalyn Steele suggests the use of the political question doctrine as a feasible way for the Court to remove itself from the contentious issues of tribal sovereignty.[356] That is, the Court could acknowledge the lack of judiciable manageable standards for determining inherent sovereignty and whether certain sovereign powers are inconsistent with the tribes' status, leaving such questions to the political branches. This approach would be far better than the current doctrine of implicit divestiture. For, under implicit divestiture, the Court has adopted a position of suspicion and hostility toward retained tribal sovereignty, whereas under the political question doctrine, the Court would at least be neutral on the issue and the tribes would be able to avail themselves of the political process. Indeed, Steele makes the case for a similar rule of explicit divestiture by arguing that "courts should presume that tribes have retained inherent authority unless Congress has specifically and explicitly divested the tribe of [that] particular [authority]."[357] An added value of Steele's approach is that it allows the Court some face-saving as it upends nearly four decades of jurisprudence. "[T]he Court can justifiably reverse course after examining the struggle of lower courts to find judicially manageable standards. . . . [I]t can undo precedent when presented with evidence of the

356. Steele, *supra* note 20, at 672.
357. *Id.*

Published by University of Oklahoma College of Law Digital Commons, 2017

infirmity of its previously announced standards."[358] A rule of explicit divestiture as I propose herein would demand that the Court confess to and repent of its past doctrine. Such an abrupt course change is sometimes hard to effectuate. Steele's political question approach would follow the pattern of other political question cases decided on a lack of judicially manageable standards, and permit the Court to exit the scene with more grace and dignity.

Yet, as Steele acknowledges, adopting the political question doctrine in the area of tribal sovereignty would be controversial because it would seemingly put the tribes' existence at the mercy of the political branches, with no apparent recourse to the courts. For this reason, Steele does not argue for a "wholesale embrace" of the political question doctrine in Indian affairs, but rather seeks to engage in a discussion of its potential applicability. Nevertheless, Steele states that under this approach, "tribal challenges to congressional diminutions of inherent tribal authority must . . . be treated as political questions."[359] Although this approach would be better than implicit divestiture, it opens the tribes up to termination without judicial recourse, contrary to their acknowledged status in *Cherokee Nation* and *Worcester*. The history of the Allotment and Termination Eras informs us that the political branches may turn hostile toward tribal sovereignty in short order, perhaps in the context of global conflict or, more likely, with the discovery of valuable resources on tribal lands.[360] The political question doctrine approach would preclude the Court from investigating and enforcing the limits of congressional power in Indian affairs as well as investigating and opining upon the constitutional status of the tribes.

While it is true that the Court should give greater deference to political branch determination regarding tribal sovereignty, this deference should be based upon an acknowledgement that the recognition power is vested in the political branches, and not in the judiciary. The advantage to an explicit divestiture approach over the political question doctrine is that the Court could still exercise its Article III powers to police jurisdictional boundaries among federal, state, and tribal authorities. Under a rule of explicit

358. *Id.* at 706.

359. *Id.* at 710.

360. Frank Pommersheim has expressed skepticism of the reliability of Congress to respect tribal sovereignty. "The reality today is that tribes are whipsawed sometimes by Congress, sometimes by the Supreme Court. Occasionally they get assistance from Congress as in the *Duro* override legislation, and occasionally, though not in recent memory, from the Supreme Court itself." Pommersheim, *supra* note 1, at 305-06.

divestiture, the Court could employ a judicial shield in the defense of tribal sovereignty; under the political question doctrine, it could not.

Addie Rolnick advocates for an "inside out" approach to tribal sovereignty in the criminal context, by which questions of retained sovereign powers are centered upon and resolved by their relationship to tribal self-governance, rather than an "outside in" approach where tribal sovereign powers are considered merely to be gap-fillers in the maze of federal and state jurisdiction.[361] While not specifically abandoning implicit divestiture, the "inside out" approach would certainly be more favorable to tribes and provide greater flexibility in the design and implementation of tribal criminal justice systems. She notes that various scholars have advocated this approach, and some lower courts already employ it, despite tensions with the Supreme Court's jurisprudence.[362] Indeed, the Fifth Circuit's opinion in *Dollar General* may be characterized as moving in this direction.

This "inside out" approach is a much better way to address tribal criminal jurisdiction within the Court's current implicit divestiture framework by reframing the question of whether a sovereign power is inconsistent with a tribe's status as whether the sovereign power is an element of a tribe's sovereignty and whether it has to be taken away.[363] If the implicit divestiture doctrine is to remain in place (and there appears to be only one member of the current Court even interested in a wholesale re-evaluation of tribal sovereignty law), then Rolnick's approach makes sense. It offers a way to render implicit divestiture more predictable and determinate, as well as friendly to tribal sovereignty, or at least not hostile to it. However, the use of an "inside out" approach does not avoid the constitutional issue raised herein, for it would leave power in the hands of the judiciary to de-recognize tribal sovereignty, even if the bar for de-recognition is raised. It is also unclear whether the "inside out" approach could transfer easily to the civil arena, where the Court has been most active in recent years in divesting tribes of sovereignty.

V. Conclusion

When Anglo-American colonists sought to justify their separation from British rule, they turned to one of England's own—John Locke, the formidable defender of the Glorious Revolution—to find articulation of

361. Rolnick, *supra* note 4, at 1640.
362. *Id.* at 1645-46.
363. *Id.* at 1640.

Published by University of Oklahoma College of Law Digital Commons, 2017

their cause. And while Locke's two treatises on government played a central role in the unfolding drama, his *Some Thoughts Concerning Education* was likewise enlisted in the cause.[364] There, Locke argued that parents have a responsibility to treat their children as rational beings by rearing them with patience and kindness, with the goal of preparing them for the responsibilities of adulthood.[365] Locke emphasized that parents should train their children to use their own reason.[366] American colonists argued that Brtish authorities did not treat the colonists as rational humans and did not allow the colonies to "mature" into self-governance.[367] Therefore, they said, the British were violating their responsibility as a just "parent," and forcible separation was justified.[368]

Two strains of American paternalism developed out of this revolutionary rhetoric. First, the "Lockean" kind by which newly acquired American territories were encouraged to "mature" into self-governing states. Indeed, the statehood process, as first set forth in the Northwest Ordinance, created new states on equal footing with the original ones throughout the long nineteenth century.[369] The second strain of paternalism, though, disallowed for growth and maturity in the "ward." Under this latter theory, the ward was considered permanently unable of full participation in civic life. This brand of paternalism was used to justify slavery as well as restrictions on women's civil rights.

Paternalism has permeated federal-Indian relations throughout United States history and continues to do so today, primarily through Supreme Court doctrine. The characterization of the Native Americans as "wards"

---

364. *See* JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION (Bartleby.com 2001) (1693), http://www.bartleby.com/37/1/. For an argument that *Some Thoughts Concerning Education*, along with an *Essay on Human Understanding*, were more widely used than the *Second Treatise on Government* in framing the revolutionary debate, see JAY FLIEGELMAN, PRODIGALS AND PILGRIMS: THE AMERICAN REVOLUTION AGAINST PATRIARCHAL AUTHORITY, 1750-1800 (1982); *see also* HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW & THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY (2005).

365. LOCKE, *supra* note 364, §§ 34-42.

366. *Id.* §§ 61-62.

367. *See* FLIEGELMAN, *supra* note 364, at 3-4.

368. *See, e.g.*, THOMAS PAINE, COMMON SENSE pt. 3 (1776), *reprinted in* THOMAS PAINE'S COMMON SENSE: THE CALL TO INDEPENDENCE 78 (Thomas Wendel ed., 1975) ("But Britain is the parent country, say some. Then the more shame upon her conduct. Even brutes do not devour their young, nor savages make war upon their families; . . . .").

369. Territories acquired out of the Louisiana Purchase and Mexican Cession became states. However, the statehood process seems to have stopped; the United States maintains territories in Guam, Samoa, and Puerto Rico who, in legal structure at least, have come to resemble the old English colonies.

https://digitalcommons.law.ou.edu/ailr/vol42/iss1/2

and the federal government—complete with a "Great White Father" at the head—as the "guardian" found a place in both law and policy. [370] And yet the historical record provides no clear answer to the question of which strain of paternalism the federal government in the nineteenth and early twentieth centuries proposed to adopt with the tribes (regardless of their need to have a "guardian" in the first place). Implicit divestiture has calcified paternalism with respect to native tribes by suggesting that tribal governance in general and tribal courts in particular are not to be trusted in the administration of justice to tribal outsiders.

We live in a historical moment where the political branches are relatively friendly toward the notion of tribal sovereignty, compared with past eras. The Tribal Law and Order Act amended the Indian Civil Rights Act to give tribes greater sentencing power for felonies, although it does not come close to allowing tribes to punish as they see fit.[371] The 2013 Reauthorization of the Violence Against Women Act granted tribes the right to prosecute non-Indians for certain cases of domestic violence, with the promise of even greater criminal jurisdiction to come.[372] The Obama administration in 2010 affirmed United States support for the United Nations Declaration on the Rights of Indigenous People.[373] His predecessors in the Oval Office have dealt with tribes on a nation-to-nation basis. Of the three branches of government, the judiciary is the one currently suspicious of, if not completely hostile to, native sovereignty.

The Court's treatment of tribal sovereignty is not only needless, but violates the separation of powers. The Constitution spells out who has the power to interact with sovereign entities, including the power to recognize them and the power to de-recognize them and it is not the Court. The Court should more closely follow the Constitution's vesting of the recognition power by abandoning implicit divestiture and replacing it with a rule of explicit divestiture.

---

370. *See, e.g.*, FRANCIS PAUL PRUCHA, THE GREAT WHITE FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIAN (1986); WILCOMB E. WASHBURN, RED MAN'S LAND / WHITE MAN'S LAW: A STUDY OF THE PAST AND PRESENT STATUS OF THE AMERICAN INDIANS (1971); LORING BENSON PRIEST, UNCLE SAM'S STEPCHILDREN: THE REFORMATION OF UNITED STATES INDIAN POLICY, 1865-1887 (1942).

371. *See* Tribal Law and Order Act, Pub. L. No. 111-211, 124 Stat. 2261 (2010) (codified as amended in scattered sections of 21, 25, 28, and 42 U.S.C.)

372. *See* 2013 Reauthorization of the Violence Against Women Act, tit. IX, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120 (codified at 25 U.S.C. § 1304).

373. Caren Bohan, *Obama Backs U.N. Indigenous Rights Declaration*, REUTERS (Dec. 16, 2010), https://www.reuters.com/article/us-obama-tribes/obama-backs-u-n-indigenous-rights-declaration-idUSTRE6BF4QJ20101216?sp=true.

Published by University of Oklahoma College of Law Digital Commons, 2017

Despite the political branches' currently friendliness to tribes, the lessons of history are that federal policy toward tribal sovereignty can change, and change quickly. Not only was federal policy toward tribal policy hostile in the latter half of the nineteenth century and the first decades of the twentieth, but after a period of friendly, even if paternalistic, policies during the "Indian New Deal" of the Franklin Roosevelt administration, the policy changed quickly with the onset of the Cold War. Global events or domestic energy crises might cause the federal government to alter course again, perhaps engaging in another period of termination. Under such circumstances, the political branches may suddenly become less friendly to notions of tribal sovereignty, and be tempted to exceed their constitutional powers to the detriment of tribes. Tribes should be able to appeal to the safe haven of the Constitution for protection from the political branches. For that reason, the Court should not remove itself completely from issues of sovereignty. Adopting a rule of explicit divestiture would not rob the Court of its ability and authority to engage in judicial responsibilities. If limits are to be found on federal plenary power, it is the Court that will need to find them. In the meantime, the Court should retreat from implicit divestiture and allow the recognition power to be exercised by the branches in which it is vested.

https://digitalcommons.law.ou.edu/ailr/vol42/iss1/2