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Three Perversities of Indian Law

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THREE PERVERSITIES OF INDIAN LAW

Jacob T. Levy*

Abstract:
Over some thirty years, the Supreme Court has severely attenuated the criminal and civil jurisdiction of Indian tribal reservation governments over non-Indians within their boundaries or even on tribal land. This Article shows that such attenuation has perverse consequences for the ability of such governments to function as governments, and to fulfill the objectives set for them by Congress' policy of encouraging tribal self-determination. Reservation governments that function well and oversee broad-based economic development risk attracting non-Indian migrants who undermine the tribe's ability to provide law and order, plan land use, or govern the reservation as a geographic area; who subtract from the reservation's tax base; and who might diminish the reservation's very geographic existence. This creates a reverse-Tiebout dynamic: good governments are punished for governing well. Reservation governments seeking to preserve their political and legal authority face perverse incentives to discourage in-migrants and to concentrate economic development in tribally-owned enterprises such as casinos that may further discourage good government.

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INTRODUCTION

The development of federal Indian law—among its many other faults—has been marked by an inattentiveness to dynamic effects and incentives. Jurisdictional rules have been crafted retrospectively rather than prospectively; the bench has been more prone to ask whether the non-Indian standing before them should have been subject to reservation rules than what would follow in the future for Indians *or* non-Indians from subjecting similarly-situated non-Indians to, or exempting them from, tribal jurisdiction. A constitutional order for an entire level of government has been assembled haphazardly and piecemeal, with no moment of attention to how the pieces of it fit together. Partly as a result, reservation governments have been left with incentives to avoid precisely the kinds of economic and institutional development that are central goals of post-1970 federal Indian policy. In this Article, I trace out this perverse structure of contemporary Indian law.

The Article thus subjects the *corpus* of Indian law to an internal rather than an external critique. External critiques have been common in the literature, pointing to racist assumptions at the foundation of the structure of Indian law, raging against the land seizures and expropriations that reduced Indians to a state of dependence, and imagining an alternative of undiminished sovereignty of Indian nations. These have often invoked principles of natural or customary international law against the whole history U.S.-Indian relations, and have been

influential within the subfield. Unsurprisingly, notwithstanding their moral force, these have not been especially influential outside the Indian law subfield or on the bench. As John Marshall observed at Indian law's birth, the judges of a legal system are poorly placed to adjudge the system under which they sit wholly illegitimate. There is real bite in the old joke that studying federal Indian law makes everyone a crit; but that has tended to marginalize the subfield, and I am to criticize without being (in that sense) critical.

I think there is more promise in critiques that are external to twentieth-century Indian law but not to the American legal order—for instance, to originalist argument that Congress' putative plenary power to regulate tribes' internal affairs exceeds its legitimate authority under the Constitution[1], or to a critique of the abuse of the idea of "trusteeship" and of the self-dealing of the United States government as trustee.[2] The plenary power doctrine and the trusteeship doctrine are central pillars of modern Indian law, and rejecting either would require a radical restructuring of that body of law; but it would not require (as external critiques sometimes seem to) rejecting the constitutional order, or American suzerainty over Indian tribes, or the settlement of non-Indians on the North American landmass.

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[1] See Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes* 34 ARIZ. ST. L.J. 113 (2002).

[2] I have offered initial versions of the latter critique in , *Indigenous Self-Government,* in STEPHEN MACEDO AND ALLEN BUCHANAN, eds., NOMOS XL: SECESSION AND SELF-DETERMINATION (2003); and in THE MULTICULTURALISM OF FEAR (2000), ch. 6-7.

The argument of this paper is still less radical. It neither criticizes the whole of Indian law from a perspective outside the American legal order, nor knocks out any of the central pillars of Indian law. It leaves untouched the concepts and meanings of domestic dependent nationhood, trusteeship, plenary power, and so on, objectionable though some of these are. The object of criticism here is the particular forms that tribal jurisdiction have taken since the Indian Reorganization Act, and indeed primarily during the era of self-determination (i.e. since 1970). The wrong turns that it identifies all lie within the past thirty years; and the grounds of critique all lie within stated federal policy. Judicial interpretations of tribal self-government and sovereignty during the era of self-determination have created perverse consequences that are not demanded even by the overarching terms of federal Indian law and policy.

For all that the *terms* of the critique are not radical, the *consequences* may well be. These policy and jurisprudential mistakes have been far-reaching. Undoing them would require significant changes to the current status of reservation governments within the legal and political system.

I. THE SETTING

A. *Indian Law and Indian Country*

Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.[3]

More than 300 Indian tribes, comprising some 1.2 million members, are recognized by the federal government and govern reservations in the lower 48 states.[4] Reservation lands and land owned by individual Indians but held in trust for them by the federal government amount to more than 50 million acres—altogether, an area around the size of Nebraska, larger than any single state on the eastern seaboard. (Reservation boundaries encompass more land than this, a crucial point for the discussion that is to follow.)

Tribal reservations are *sui generis* polities in the American legal order, and "Indian country" (which is not quite identical with reservations or trust lands, another point that we will return to) is governed by a *sui generis* body of law. John Marshall's Cherokee trilogy in the 1820s-30s established the basic legal framework of tribes' existence within the United States. Tribes are self-governing bodies which retain the "inherent sovereignty" they possessed prior to their incorporation into the United States, *except* to the extent that such

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[3] *United States v Mazurie*, 419 US 544 (1975) at ___ (Rehnquist for the Court).

[4] Native Alaskans are, and native Hawaiians are not, relevantly like Indians for purposes of federal Indian law; I will omit both from the analysis of this paper, because even native Alaskans are governed by a somewhat different statutory regime from that set over Indians in the lower 48. The 200 or so tribes that have not been federally recognized or whose recognition has been terminated also lie outside the scope of this discussion, since they have none of the powers or authority at issue here.

sovereignty is incompatible with either their status as "domestic dependent nations" *or* with express federal law. Their dependency means that they are prohibited from direct dealings with foreign nations or having international personality and hold their (traditional or reserved-by-treaty) lands as a unique "Indian title" which combines rights of occupation with limited governing jurisdiction but which is not property. Indian title is neither complete sovereignty nor complete ownership; it can be alienated only to the federal government (or its designees), and exists at the sufferance of the federal government.[5] Indian title is held in trust for Indians by the federal government; in addition, Indian tribes' status as legal dependents creates a general ward-trustee relationship between them and Washington— albeit one in which the trustee is judge in its own case about whether it is acting in the best interest of the ward. The trust relationship ostensibly protects tribes from the states, which (unlike under the Articles of Confederation) lack the authority to treat directly with them. Indeed, unless Congress specifies otherwise, tribes relate directly to the federal government on a government-to-government basis, unmediated by the states; and states have only complexly-limited jurisdiction in Indian Country. Congress, by contrast, has "plenary power"[6] to legislate over Indian Country— regulating not only "commerce with the Indian tribes" to the exclusion of state

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[5] See *Johnson v. McIntosh* 21 US 543 (1823)

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

regulation of the same, but also intra-tribal crimes,[7] tribes' internal governing structures,[8] and their judicial procedures.[9] A great deal of Congress' authority in Indian Country is delegated to the Bureau of Indian Affairs, one of the oldest continuously-existing administrative agencies, originally housed in the Department of War and now in the Department of the Interior.

Indian law is governed by the Indian law canons of construction, rules that are famously observed mostly (or, at the very least, "often") in the breach. The courts have held since the nineteenth-century era of treaty-making that both the power imbalance between tribes and the United States when treaties were written, and the ward-trustee relationship between them once the treaties went into effect, demanded that Indian rights under the treaties be construed liberally, and derogations of Indian sovereignty be construed narrowly.[10] This eventually expanded into a rule of statutory interpretation as well as of treaty construction.[11]

Indian title was traditionally vested in tribes as such, self-governing collective bodies, with a few exceptions. This changed as a result of the General Allotment

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[7] Major Crimes Act, 18 U.S.C. § 1153 (1885)

[8] Indian Reorganization Act, 25 U.S.C. 461 et seq. (1934)

[9] Indian Civil Rights Act, 25 U.S.C. §§ 1301-03 (1967)

[10] In Marshall's words, "the language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning." *Worcester v. Georgia*, 6 Pet. 515, 582 (1832)

[11] The expansion was made explicit no later than *Choate v Trapp:* "But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases." 224 U.S. 665 at 675 (1912). The canons now extend to Alaskan natives.

Act of 1887 which broke up reservation lands and vested fixed amounts in each tribe member (per the 1891 amendments, 160 acres of grazing land or 80 acres of framing land per person). This allocation, supposedly enough for Indians to become individually self-sufficient agriculturalists, conveniently opened up on the order of one hundred million of acres of "surplus" land for white homesteading. (That is, M acres of tribal lands were not divided up among N tribe members with M/N going to each. Rather, up to 160 acres went to each, and M-(Nx160) were simply expropriated from Indians altogether.)

Allotment as a policy was supposed to assimilate and detribalize Indians within a quarter-century or so. The twentieth century was marked by succeeding reversals of this goal. When assimilation was clearly failing to take place, the Roosevelt Administration initiated the so-called "Reorganization" era in 1934, ending allotment and refocusing federal attention on tribal governments. In turn, beginning in 1953, the federal government began terminating its trust relationship with many tribes, subjecting their reservations to state jurisdiction for the first time and auctioning off the land held under Indian title.[12]

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[12] Most tribes that had their trust relationship terminated remain unrecognized by the federal government, even if the tribe remains sociologically real; they lie outside Indian Country for purposes of federal law. More confusing is the status of non-terminated tribes in those states named in Public Law 280, which opened reservations to state jurisdiction. The extension of state jurisdiction over Indians on reservations creates complications of its own, and is not always separable from the contraction of tribal jurisdiction that is central to this paper; but the two phenomena are analytically distinct. P.L. 280 ordinarily substituted state for *federal* jurisdiction, and did not by itself alter the balance between tribal and non-tribal jurisdiction— though, *de facto*, it certainly tipped those scales away from the tribes.

Termination as official policy gave way, under the Nixon administration, to the current era of self-determination.

These successive waves of policy changes have each left ongoing legacies in Indian Country. Policy reversals never return to the *status quo ante;* instead they change the character of *new* policies while leaving behind valid claims and facts on the ground that arose under the prior regime. This has resulted in ownership and jurisdictional patchworks of considerable complexity. The General Allotment Act left behind a baffling mixture of tribally-owned lands, individual Indian lands held in trust with ever-more fractionated interests held by heirs and federally-granted resource leases over them, and land held in freehold by Indians or by non-Indians. When allotment was later rejected as bad policy badly administered, that *prevented further* allotment. It did not undo the vast transfer of Indian lands to individual non-Indian landowners, or change the new demographic and property mixture within reservation boundaries. Once tribal governments were reinvigorated under the Reorganization or self-determination policy eras, they faced new questions of governance over non-Indians and non-Indian land within reservations' political boundaries.

B. Self-determination and dependence

The trusteeship and dependence doctrines are shot through with implications of and justifications in terms of immaturity. This has always been true—Indians and Indian tribes have been conceived as wards of the United States on explicit

analogy with other cases of wardship including children. But the *type* of immaturity at stake, and the corresponding image of maturity, has shifted dramatically. From a nineteenth-century conception of individual Indians as cognitively and developmentally immature— Indians are lazy, cannot plan for the future, need to learn habits of work and thrift and diligence as children learn them— policy has shifted to a sense of *tribal institutional* immaturity.[13] The old *telos* or image of maturity was one of the individual Indian as indistinguishable from the individual Anglo-American, not least in being Christian but also and centrally in economic position and circumstances; the mature Indian was a sober farmer or wage-laborer, whereas the immature Indian was a either a hunter-gatherer with no thought of investment and improvement or a drunkard living off the largesse of federal annuity payments for past land transactions.[14] The contemporary *telos* is one of a tribal government that able to effectively govern, provide local public goods, and maintain the tribe's culture, with a reservation-based economy that is sufficiently prosperous to lift tribe members out of

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[13] For a broader treatment of the distinction between individual-level cognitive immaturity and group institutional development, see JENNIFER PITTS, A TURN TO EMPIRE, Princeton University Press 2005, and Pitts, *Empire, Progress, and the 'Savage Mind,'* in Jacob T. Levy and Iris Marion Young, eds., COLONIALISM AND ITS LEGACIES, forthcoming.

[14] For statements of the view that the federal government had harmed Indians' interests and kept them immature through an excess of generosity, leaving them too much land to wander over as gatherers such large annuity payments as to encourage indolence, see REPORT OF THE BOARD OF INDIAN COMMISSIONERS, November 23 1869, in Purcha, ed., DOCUMENTS OF UNITED STATES INDIAN POLICY, Second Ed., 1990, pp. 131-4; for a claim that the Cherokee had been civilized precisely because so much of their land had been taken away, see ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, November 23, 1868, in *id.*, pp 123-26. Both reports treat Christianization as an uncontroversial and official goal, of a piece with the goal of transforming Indians into farmers.

poverty and unemployment. The standard image of state-aided maturation has shifted from the state-sponsored missionary providing of farm implements to the BIA promulgating a model criminal code for tribal courts and providing legal training for the judges who will sit on them.[15] In the words of the Indian Self-Determination and Education Act (1974),

> [T]he United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.[16]

Furthermore,

> It is hereby declared to be the policy of Congress …] to help develop and utilize Indian resources, both physical and human, to a point where Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.[17]

The language and implication of perpetual immaturity is of course deeply problematic. While there is an image of *maturation* at work, there is no image of *maturity;* tribes are not envisioned as eventually outgrowing their dependence or wardship. The trust relationship is in principle ongoing, such that (for example) inalienable "Indian title" held in trust by the federal government never graduates into freehold, and the beneficial owners of the land over which mineral or timber leases have been granted never graduate from the need for BIA to act as their

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[15] U.S. Code, Title XXV, chapter 15.ii, §1311
[16] U.S. Code Title XXV, chapter 14.ii, §450a
[17] U.S. Code Title XXV, chapter 17, §1451

trustee in managing royalty payments.[18] But the *telos* of institutional maturity, effective self-government, and economic prosperity does provide benchmarks against which Indian law and policy can be measured. That *telos* now provides the official understanding of both the beneficiaries and the purposes of the trust relationship, in a way that ought to animate (for instance) the judicial uses of the canon of Indian construction. What counts as relevantly "favorable" to tribes is that which tends to promote effective tribal self-determination, institutional maturity, and economic prosperity.

My argument in this Article is that contemporary law and policy— mainly law, and mainly law grounded in arguable judicial interpretation rather than statutory or Constitutional requirements— fails this test across significant domains. In criminal jurisdiction, civil jurisdiction, and economic policy, the courts have gratuitously put tribes in the position of having to trade off one of the stated goals against another, or created serious disincentives toward reaching them. The argument is not an empirical one; I do not provide evidence that particular tribes have responded to the disincentives, or that any instance of tribal underdevelopment can be traced *in toto* to these unnecessary tradeoffs. Instead the argument is formal and marginal, showing the character of the choice

[18] The implication that Indian landowners or tribes are *less* capable of managing the leases and royalties than BIA has proven itself to be as a trustee is of course especially unpersuasive. See *Cobell v Babbitt*, 37 F.Supp.2d 6 (DDC 1999), *Cobell v Norton*, 240 F.3d 1081 (D.C.Cir. 2001), 334 F.3d 1128 (D.C.Cir. 2003), and associated litigation over the management of the so-called "Individual Indian Money" accounts.

situation into which tribes have been put, showing the character of the disincentives.

The three perversities to be surveyed are as follows.

1.*Criminal jurisdiction.* Because reservation governments lack criminal jurisdiction over non-Indians, their ability to protect the safety of residents (Indian or non-Indian) is eroded by any influx of non-Indians. Since strong economic growth is likely to both require and encourage inflows of non-Indian employees, firms, and consumers, there is an inverse relationship between tribes' ability to facilitate economic prosperity and their ability to fulfill the most basic governing functions of protection of life, limb, and property. Autarky becomes the only way to retain control over essential criminal matters.

2. *Civil and regulatory jurisdiction.* The boundaries and civil and regulatory jurisdiction of reservation governments are neither stable nor entrenched nor well-known in advance; and they are consistently vulnerable to diminution in response to the presence of (especially resident) non-Indians. Again, the inflows of non-Indians that are likely to be associated with economic prosperity imperil the jurisdictional autonomy of reservation governments. This encourage a reverse Tiebout dynamic. Ordinarily we think that local jurisdictions have incentives to provide good policies, uncorrupt government, stable laws, and prosperity-encouraging fiscal arrangements, because those are widely desired and so will lead to an inflow of residents and firms, increasing the jurisdiction's

tax revenue. The incentives faced by a reservation government run in nearly the opposite direction. If new residents or firms are non-Indian, and especially if they buy land, they diminish the reservation's jurisdiction and potentially its tax base as well.

3. *Economic policy.* Civil jurisdiction, at least, can be maintained to some degree *if* the newcomers have a clear consensual or contractual relationship to the tribe as such. Because considerable uncertainty surrounds the question of what constitutes such a consensual relationship, a tribe seeking to preserve its jurisdiction is well-served to concentrate economic activity in tribally-owned enterprises. Moreover, for reasons of tax preference and immunity from state taxation and regulation, tribally-owned enterprises have a large *de facto* subsidy compared with private, even if Indian-owned, firms on reservations.

However true it may be that most Indian societies have some cultural affinities with collective and communal enterprises rather than with the supposed individualism of private enterprise, Indian polities are not immune to the familiar effects of state ownership and control of major economic firms. Some of these impair the political maturation of tribal governments, such as the difficulty of maintaining a free and independent press when the polity typically owns the newspapers as well as the firms that advertise in them. More of them impair the economic development that is supposed to be a central goal of Indian policy; political connections and short-term success at serving as *de facto* jobs programs become more important than productivity or efficiency to firms' survival.

Moreover, the curious development of gambling-centered economies in particular may have perverse effects on both institutional development and broad-based economic growth on reservations. Successful tribal gambling enterprises—and not all of them are, by any means—rest overwhelmingly on a flow of funds from outsiders. Economies, polities, and public treasuries that are so dependent on a single source of revenue, one that does not in turn depend on any internal wealth-building or productivity growth, and one that is directly under the control of the political leadership are prone to a variety of pathologies that are familiar from commodity-centered economies in the developing world and that are referred to as "the resource curse."[19]

Throughout, my complaint is in a sense akin to that which ended the era of termination and launched that of self-determination. As President Nixon observed in his administration's request for a Congressional change of policy,

> The very threat that [the trusteeship] relationship may someday be ended has created a great deal of apprehension among Indian groups and this apprehension, in turn, has had a blighting effect on tribal progress. Any step that might result in greater social, economic or political autonomy is regarded with suspicion by many Indians who fear that it will only bring them closer to the day when the Federal government will disavow its responsibility and cut them adrift. In short, the fear of one extreme policy, forced termination, has often worked to produce the opposite extreme: excessive dependence on the Federal government.[20]

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[19] I wish to emphasize that nothing I say in this paper about the effects of casinos on tribal economies or politics should be taken to impugn tribal *autonomy* to create gambling enterprises. Criticism of Indian gaming typically centers on the desire of states and municipalities to extract tax revenue or on moralistic or paternalistic concern about (mainly non-Indian) gamblers. I think IGRA gives states too *much,* not too little, authority over casino decisions; and reserving moral opprobrium for Indian-operated casinos in a society where nearly every state government actively encourages participation in state-sponsored lotteries is uninterestingly hypocritical.

[20] President Richard Nixon, *Special Message to the Congress on Indian Affairs,* July 8, 1970.

Like the threat of termination, self-determination as judicially construed has put tribes in the position of facing a kind of punishment for success. Under Nixon's interpretation of termination, those "step[s] that might result in greater social, economic or political autonomy" brought with them the risk that tribes' formal political and legal standing might be eliminated altogether. In the modern era, those steps instead carry the risk of a kind of whittling away of jurisdiction, rendering the tribes slowly but consistently *less* able to act as effective governing entities. Tribes that wish to ensure their continuing viability as polities have very strong reason *not* to pursue policies that might lead to broad private-sector-led economic development, or indeed to much economic development at all.

II. Criminal jurisdiction

Felix Cohen's important *Handbook of Indian Law*[21] notes that, in very early treaties between Indian tribes and the American states or the United States, jurisdiction over non-Indian crimes against Indians in Indian country were "frequently" reserved to tribal authorities, but that this practice ceased quickly and completely. The new United States claimed authority over such crimes, and treaties with Indians often explicitly reserved jurisdiction over (while promising punishment for) non-Indian criminals. Indeed, the regulatory power granted by the Indian Commerce Clause was, for a century following the founding, primarily used to regulate the conduct of non-Indians in Indian country—

[21]FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1st ed. 1941).

traders, would-be land-buyers, missionaries, and criminals. Crimes committed by non-Indians against Indians in Indian country were clearly under federal, not state, jurisdiction. Since tribal criminal justice was traditionally centered on restitution, reconciliation, and rehabilitation rather than punishment, the question of criminal jurisdiction over outsiders rarely arose.

During the reorganization era, however, tribes increasingly adopted constitutional and legal systems modeled on European-American ones—systems that included formal judicial systems and mechanisms of criminal law. By the late 1960s tribal criminal justice systems had become sufficiently widespread that they were thought to be in need of federal procedural guarantees, written into the Indian Civil Rights Act; and they only became more significant during the next decade's turn to self-determination. Some thirty reservations asserted criminal jurisdiction over crimes committed on their territory by non-Indians by the time the Court squarely faced the question of whether tribal governments *could* prosecute and punish non-Indians, in 1978's *Oliphant v Suquamish Tribe.*[22] For the first time, it was declared an essential attribute of domestic dependency that they had not retained the authority to do so.

The reasoning of Rehnquist's majority opinion is puzzling, and it has only become moreso as judges gloss it in other cases. Much of the case's reasoning rests on argument that Congress had traditionally implicitly assumed that tribal governments had no criminal jurisdiction over non-members; but, as Marshall

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[22] *Oliphant v Suquamish Indian Tribe,* 435 US 191 (1978)

and Burger noted in dissent, this implicit assumption is very far from an "affirmative withdrawal by treaty or statute."[23] The court argues in turn from a strained reading of ambiguous treaty and statute history; from the supposedly necessary meaning of tribes' status as dependent; and from an overriding federal interest in protecting non-Indians from trial at the hands of a racially and culturally alien community that

> seeks to impose upon them the restraints of an external and unknown code… which judges them by a standard made by others and not for them… It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by… a different race, according to the law of a social state of which they have an imperfect conception.[24]

The majority opinion notes several times that the issue had not squarely arisen before because tribal governments had only recently developed formal adversarial judicial procedures and criminal codes; it refers to the older understanding of tribes as being "without laws," even while acknowledging the recent changes in tribal judicial systems. It fails to recognize that this history could cut either way. Assuming that the power to prosecute outsiders had once been an attribute of independent Indian sovereignty, one could decide that the power's desuetude meant that it had been forfeited as a condition of dependency— the court's interpretation— or one could think that it had

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[23] *Id.* at ___

[24] *Id.* at __ quoting from and relying on *Ex parte Crow Dog,* 109 U.S. 556 (1883), which had denied the federal government authority over intra-tribal crimes. Among other things, the extensive reliance on *Crow Dog* is remarkable for that case's explicit reference to *racial* difference. Under twentieth-century Indian law, the status of being a member of an Indian tribe is a political not a racial one, a distinction the Court has been at pains to insist upon in order to keep tribal privileges from running afoul of equal protection jurisprudence. *Crow Dog* remains good law, but ought to be at least embarrassing to rely upon for reasons for new decisions.

remained a power *in potentia,* awaiting the development of the mechanisms for its exercise. The latter interpretation is arguably *more* compatible with the developmental approach of self-determination as a policy; it looks to tribes gaining more *de jure* authority as they develop the institutions that make that authority *de facto* possible. Rather than restricting tribes to the outermost bounds of authority that they had in the nineteenth century, it allows them to grow into their full potential sovereignty, limited only by those restrictions that are inherent in domestic dependency (the lack of international personality and powers of war and peace) or have been explicitly held to be so in the past (the inability to alienate land).

Oliphant has been subjected to sustained criticism as a piece of jurisprudence. What concerns us here, however, is the desirability of the policy regime it created, a policy regime Congress could alter.[25] It could delegate to tribes jurisdiction over all crimes, or all crimes not covered by the Major Crimes Act, committed on reservations. [26] Its ongoing failure to do so has been blamed for the widespread prevalence of non-Indian crime against Indians.

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[25] The *Oliphant* court was clear on this point; the six-member majority stated that Congress *could* subject non-Indians to tribal jurisdiction, and the two-member minority held that they already *were* subject to such jurisdiction. We have strong reason to think that Justice Kennedy, who joined the court later, might disagree with this conclusion; see his concurrence to *US v Lara* discussed *infra.* But his views expressed there found no agreement among other members of the court.

[26] There are constitutional differences between the exercise of inherent tribal sovereign powers and the exercise of authority delegated from Congress. In this context the most important difference is that the prohibition on double jeopardy prevents federal prosecutions stacked on top of tribal prosecutions that use delegated federal power, but not those using inherent power—though it appears *(U.S. v Lara)* that if Congress declares its action to be a relaxing of limits on

> As a result, misdemeanor crime by non-Indians against Indians is perceived as being committed with impunity. This implicit message of lack of accountability deters victims from reporting crimes, and police from making arrests because they know there will be no prosecution. This, in turn, encourages the spread of crime and ultimately, the commission of even more serious crime.[27]

The *Oliphant* rule both discourages lawfulness among non-Indians already present on reservations, and acts as a perverse selection mechanism to attract precisely those non-Indians who might want the opportunity to be lawless—say, drunken young men inclined to commit violence or mischief against property.[28] Probably as a result, and unlike whites or blacks, Indians are more likely to be subject to interracial than intraracial violent crime, and they are victims of violent crime at a much higher rate than are members of any other racial group.[29] The scarce time and resources of U.S. Marshals, U.S. attorneys, and federal trial courts are, unsurprisingly, not much devoted to property crimes or assaults; but no one else has the authority to prosecute such crimes by non-Indians against Indians on reservations.[30] Tribes themselves are left powerless to provide one of

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inherent sovereignty, rather than a delegation of federal power, that the courts will defer to Congress' declaration on this point.

[27] Janet Reno, *U.S. Department Of Justice Commitment To American Indian Tribal Justice Systems,* Judicature 79 (Nov.–Dec. 1995), 113–17.

[28] I owe the point about selection to Cass Sunstein.

[29] Lawrence A. Greenfeld and Steven K. Smith, AMERICAN INDIANS AND CRIME, Bureau of Justice Statistics, US Department of Justice, February 1999.

[30] Except in those states to which Congress has delegated its criminal jurisdiction over Indian Country in Public Law 280, a 1953 statute that was one of the main instruments of the termination policy. In those states, however, there are sometimes real problems of local racial animus as well as intergovernmental quarrels about the allocation of law enforcement resources. "Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." *US v Kagama* at ___. Carole Goldberg has demonstrated that PL 280 has aggravated problems of lawlessness where it applies. Carole Ambrose and Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 28 CONN. L. REV. 697 (2006); Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405-48 (1997).

the most basic of governmental functions: security for the life, limb, and property of their constituents.

How severe a problem this is depends on how many non-Indians live, work, or travel on or near a reservation. And here the perversity becomes apparent. As a tribe becomes more prosperous— as on-reservation businesses become more successful, for example— more outsiders[31] will have reason to frequent the reservation more often, whether as customers, as employees, as firm owners, or as residents. And the more that happens, *the less able tribes are to preserve law and order on reservations.* Economic development generates *de facto* lawlessness; it undermines the ability of tribal governments to act as governments that can protect the rights of their members. By contrast, the more autarkic a tribe is, the more economically closed off it is to the outside world, the poorer it is likely to be—but also the safer. The economic and the governmental development aims of self-determination have been placed on a collision course.

III. CIVIL JURISDICTION

As late as 1980, even after *Oliphant,* the Supreme Court observed as a general proposition that "Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have

[31] By "outsiders" here and later I mean "non-Indians," not only "non-tribe members;" after *Duro,* Congress acted to ensure tribal jurisdiction over Indians who were enrolled members of other tribes, and the Court approved in *Lara.*

a significant interest."[32] Tribes' domestic dependent status might have been "inconsistent with [the power to] prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights," as well as with independent foreign relations or land alienation; but the list of exceptions to tribes' jurisdiction did *not* include any reference to the ability to tax or regulate non-Indians.

That "broad measure" was not comprehensive even then. In the first place, the presence of non-Indians was itself a factor in determining whether any given spot was "on reservation lands" at all. The allotment era had envisioned an end of reservations without quite explicitly providing for it; this created uncertainty about reservation boundaries when allotment ended. Sometimes Congress formally shrank reservations; sometimes it did not. By the 1930s many tribes retained treaties delineating old borders, treaties that had never been federally repudiated—but those borders now included large numbers of non-Indian freeholders, buyers of "surplus lands" or buyers from those buyers. The courts responded with a doctrine of implied or imputed diminution—where a Congressional intent to diminish reservation boundaries could be imputed *in part on the basis of demographic changes after the fact*[33]. If large numbers of non-Indians had migrated in between allotment and a later court case, that was relevant to evaluating whether the reservation had been legally shrunk at the time of allotment. That later events could affect the imputed legal history of earlier

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[32] *Washington v Confederated Tribes of the Colville Indian Reservation,* 447 US 134 (1980) at ___.

[33] *Rosebud Sioux Tribe v Kneip, DeCoteau v District County Court, Solem v Bartlett.*

events was admitted to be admittedly "unorthodox"[34]—something of an understatement. Where diminution had occurred (or was held to have occurred), the tribe had no jurisdiction at all outside the shrunken boundaries.

Even within the reservation's recognized boundaries, civil and regulatory jurisdiction was not universal.[35] Some decades of cases had found limits on tribes' ability to regulate the activities on non-Indians on land owned in fee by non-Indians. The ability to zone as well as the ability to regulate hunting and fishing on outsider-owned property was pared back. Still, a default presumption of civil and regulatory jurisdiction persisted; non-Indian conduct when it wasn't on non-Indian fee land was subject to both regulation by tribal authorities and civil jurisdiction in tribal courts. "Reservation Indians" have a right, in doctrinal language to which the Court often returns, "to make their own laws and be ruled by them,"[36] a careful locution that is compatible with the thought that it is *only* Indians who are to be ruled by the laws, like members of a church or a voluntary association who have a right to make their own rules and live by them. *Oliphant* illustrates the difficulty with such a reading: the existence of a system of *laws*,

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[34] *Solem v Bartlett,* 465 US 463 at ___, 1984, fn ___.

[35] Throughout this section I use "civil jurisdiction" as shorthand for the regulatory authority of reservation governments and the subject-matter and personal jurisdiction of their courts. The Supreme Court has to date "avoided" "the question [of] whether tribal regulatory and adjudicatory jurisdiction are coextensive" for the purposes under discussion here. *Nevada v Hicks,* 533 US 353, 2001, at ___. It has progressively narrowed the scope of both tribal judicial jurisdiction and tribal regulatory jurisdiction using the same reasoning and tests, and has freely applied precedents from each category to new cases arising in the other.

[36] *Williams v. Lee,* 358 U.S. 217, 1959

and the effective capacity of that system to rule, depends in part on the ability of the system to maintain lawfulness and prevent lawlessness within its territory.

And indeed, the *Williams* court that first articulated this test did *not* use it to analogize "their own laws" to the rules of a voluntary association, as has sometimes been done since. The case barred a non-Indian from suing a reservation Indian in state court on a cause of action that arose on reservation territory; a debt that arose on tribal land between a tribe member and a non-member had to be adjudicated in tribal court. After all, at the wellspring of federal Indian law we find the thought that "[t]he Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress."[37] Allowing state jurisdiction to follow outsiders onto reservation territory would "infringe on the right of the Indians to govern themselves."

In 1981, this longstanding general presumption of civil jurisdiction over non-members was effectively reversed.

Montana v United States, held that, on land owned in fee by non-Indians even though within reservation boundaries, "the exercise of tribal power beyond what is *necessary* to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes and so cannot survive

[37] *Cherokee v Georgia*

without express Congressional delegation."[38] Drawing on and extending the logic of *Oilphant,* the court concluded that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," with only two exceptions:

> a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relations with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[39]

A. The non-jurisdiction rule and the second Montana exception

The final sentence of the passage quoted immediately above seems to leave the possibility that non-Indian conduct could be regulated on a mere showing that it "has some direct effect on… the health or welfare of the tribe." This would be less than a general police power, but would leave a general regulatory and governing capacity with the tribes. The appearance is misleading; "although broadly framed, this exception is narrowly construed,"[40] and has been ever-more narrowly construed since it was first articulated.

Indeed *Montana* itself began that trend. Because the conduct at issue did not "threaten the Tribe's political or economic security" or "imperil [its] subsistence or welfare"—far more demanding tests than merely having "some direct effect on"—it was immune to tribal regulation. Only borderline-emergency conditions,

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[38] *Montana v United States,* 450 US 544 at ___, 1981, internal citations omitted.
[39] *Id.*
[40] *County of Lewis v. Allen,* 63 F.3d 509 (9th Cir. 1998)

when some identifiable action imperils the tribe's very political or economic survival [or else consent, to which I will return] would justify tribal civil jurisdiction. Of course, as per *Oliphant,* it's only *non-criminal* conduct that so imperils the tribe that the tribe could conceivably regulate, shrinking the exception still further; imperiling tribal welfare by murdering the tribes' members will not result in tribal jurisdiction.

Subsequent cases, especially *Brendale v Yakima*[41] and *Strate v A-1 Contractors*, made clear that the courts would construe the "health or welfare" exception narrowly.[42] *Brendale* held that the effect must be "demonstrably serious and *must imperil* the political integrity, economic security, or the health and welfare of the tribe;"[43] mere "direct effect" would not do. Indeed the court construed the second exception as a merely *possible* exception:

> Although *Montana* recognized, as an exception to its general principle, that a tribe "may" retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the tribe's political integrity, economic security, or health and welfare, that exception does not create tribal authority to zone reservation lands. The fact that the exception is prefaced by the word "may" indicates that a tribe's authority need not extend to all conduct having the specified effects, but, instead, depends on the circumstances.[44]

Strate went farther still, refusing to treat action that concededly "imperil[s…] health or welfare" as subject to tribal reach, if it imperiled the health or welfare of *members* of the tribe without imperiling the existence of the tribe itself. The case

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[41] *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408, 1989.

[42] *Strate v A-1 Contractors*, 520 U.S. 438, 1997

[43] *Brendale* at ___, emphasis added.

[44] *Brendale* at ___, internal citations omitted. This is the sort of moment that leads students of Indian Law to become crits.

concerned a traffic accident on a road that ran through the reservation (which lay on land held in trust for the tribe— unlike the land owned in fee by non-Indians at stake in *Montana).* In deciding that the tribe lacked jurisdiction over a non-Indian driver, Ginsburg noted that

> undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana's* second exception requires no more, the exception would severely shrink the rule.

Ginsburg stressed that the *Montana* test should not be "read in isolation" but rather in light of the "necessary to protect tribal self-government" proviso. Borrowing language from *Williams* but transforming it from a sufficient to a necessary condition for jurisdiction, Ginsburg concluded that authority over accidents caused by non-Indian drivers is not "needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.' The *Montana* rule, therefore, and not its exceptions, applies."[45]

Most recently, in a pair of 2001 cases, *Nevada v. Hicks* and *Atkinson Trading Company v. Shirley,* the court explicitly equated the *Montana* rule plus its second exception with the *Montana* dictum rejecting jurisdiction over non-members "beyond what is necessary to protect tribal self-government or to control internal relations." [46] The "has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" language of the second exception

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[45] *Id.* at ____. See also *Ford Motor Co. v. Todecheene*, 394 F.3d 1170, 1180 (9th Cir. 2005) and *Burlington Northern R.R. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999), applications of *Strate* at the appeals court level affirming in different circumstances that endangering or killing members of the tribe does not trigger the second *Montana* exception.

[46] *Nevada v. Hicks; Atkison Trading Company v Shirley,* 532 U.S. 645 (2001) at ___.

has now effectively been replaced. *Atkinson* held that a hotel on land owned in fee by a non-Indian could not be subject to a tribal hotel occupancy tax, effectively removing businesses operated within reservation boundaries by non-Indians on non-tribal land from the reservation government's tax base and regulatory authority altogether, even though the hotel was under the protection of the tribal ambulance, police, and fire departments, surrounded by tribal land, and operated by a licensed "Indian trader." Neither the trader nor the guests—tourists visiting a reservation—would be construed to have a consensual relationship with the tribe authorizing taxation. *Hicks* was more radical still: torts allegedly committed by Nevada state police against a tribe member *on tribal land* in executing a search warrant related to a crime committed off the reservation could not be adjudicated by tribal courts.[47] This was the first case to squarely hold that *Montana* provided the rule to decide tribal jurisdiction over non-Indians regardless of whether the land was owned by the tribe or not, and that *within* the *Montana* analysis the status of the land would be at best one factor to consider.

Those two cases have come close to whittling away tribal jurisdiction over non-members altogether—rejecting, for example, the apparent survival in *Montana* and *Brendale* of a decisive distinction between tribal and non-tribal land, and so undoing the traditional rule that the reservation's writ could at least run over

[47] Note that the question at hand was not one of police officers' immunity for actions committed in the line of duty, but rather of which court could hear the case in which such a claim of immunity could be raised.

such land.[48] After twenty years of *Montana* progeny, the exceptions appear vanishingly small.[49] No unified Supreme Court majority has ever agreed that any regulation fell into either one.[50] Circuit courts have followed the same general rule. The second exception has never been found to be satisfied in a court of appeals. Besides the Tenth Circuit's finding in favor of the Navajos in *Atkinson,* later reversed,[51] the consent exception has been triggered twice at the circuit court level, both times on the Ninth Circuit. A non-Indian filing a cross-claim against a fellow defendant in a reservation court does consent to that court's jurisdiction in that case, and so falls under the first Montana

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[48] Scalia in *Nevada v. Hicks* maintains that the *locus* of the actions remain one consideration in whether to grant jurisdiction, but that the *locus* is not dispositive in this case. He offers no guidance on when and how it ever would be, and Souter joined by Kennedy and Thomas in *Atkinson* suggests that jurisdictional questions are to be resolved only with reference to who (Indian or non-Indian) not where (tribally-owned or controlled land or non-Indian fee land). Lower courts have sometimes sidestepped the Montana framework because a case arose on concededly tribal land; but at the Supreme Court level, there are three votes for finding *locus* irrelevant and more for finding it sometimes relevant in principle but apparently never so in practice. The two justices who drew distinctions based on *locus* in *Brendale,* O'Connor and Stevens, are no longer on the Court.

[49] For more complete analysis of *Montana* and its progeny, see Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 Am. U. L. Rev. 1177 (2001); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L.J. 1, 37 (1999).

[50] The *Montana* court did retrospectively characterize some earlier cases as falling within the two exceptions; but in no case decided since has tribal authority been found to fall within either. In the fractured *Brendale* court, four justices held that the Yakima tribe had no authority over to zone either of the properties at issue; three held that the tribe had authority over both; and Justices Stevens and O'Connor held that the tribe could zone land that it had a treaty-guaranteed right to exclude non-Indians from altogether, because the greater power includes the lesser, but that the tribe could not zone land outside that "closed" area. That finding of tribal authority was dismissed as a "minor exception" to the pattern that tribal jurisdictions was never found over non-members on non-member land by Scalia writing for the court in *Nevada v. Hicks* at ___. As noted in the text, Scalia went on to find that, while non-Indian ownership was all but sure to prevent tribal jurisdiction, Indian ownership was far from sufficient to guarantee it; and Souter, Kennedy, and Thomas all maintain that land ownership is irrelevant. Souter, concurrence, at ___.

[51] *Shirley v. Atkinson; Shirley Trading Company v. Atkinson*, 210 F. 3d 1247 (10th Cir. 2000).

exception[52]—a seemingly minimal proposition that had nonetheless not been accepted by a panel of the court two years before[53]—and a non-Indian contracting to carry out tribally-licensed bingo operations on a reservation is subject to the tribe's bingo regulations.[54] And the second exception is interpreted without any "aggregation analysis;" that is, the particular non-Indian's particular activity must imperil the tribe, and it will not suffice to show that *many* non-Indians engaged in the activity many times over would do so.[55] As one District Court judge asked rhetorically,

> What *does* it mean to have the "ability to enact and be governed by its own laws" if the Navajo Nation cannot extend the scope of its own laws to protect the very lives of its own police officers on its own lands, and in its own courts? When *does* the exception for "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe" apply?[56]

The perversity of the post-*Montana* and *Strate* system operates in a few ways. First, as a tribe becomes relatively institutionally robust—as its members

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[52] *Smith v. Salish Kootenai College,* 434 F.3d 1127, (9th Cir. 2006) (en banc)

[53] *Smith v. Salish Kootenai College* 378 F.3d 1048 (9th Cir. 2004)

[54] *United States* ex rel. *Morongo Band of Mission Indians v. Rose,* 34 F.3d 901 (9th Cir. 1994)

[55] *Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996); *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001).

[56] *MacArthur v. San Juan County*, 391 F. Supp. 2d 895 (2005) at 234. Judge Jenkins felt constrained to write the following remarkable passage defending his willingness to engage in good-faith analysis of the *Montana* exceptions:

> Following the recent guidance of *Atkinson Trading Co. v. Shirley* and taking the *Montana* Court at its word--and, of course, there should be no reason to infer that the United States Supreme Court does not mean what it says--the two *Montana* "exceptions" allowing for the exercise of inherent tribal sovereignty over non-Indians on non-Indian fee lands must be read to have some genuine substantive meaning and day-to-day practical significance in the lives of Native Americans and their tribes, bands and communities. [fn 90:] This court has not yet grown so cynical as to infer that the *Montana* analysis was concocted merely as a device to be used to diminish Indian tribal sovereignty "one case at a time," though some argue quite convincingly that such has been its actual effect, intended or not.

Id. at 144.

progress past a subsistence level of material well-being, as its political institutions come to seem stable rather than a hair's-breadth away from collapse—a tribe could actually *lose* jurisdiction over non-members. The institutional and economic health of tribes varies widely, and it is not fanciful to think that some *do* exist on that political or economic margin. The stated threshold isn't so low as to be irrelevant to actual reservations.

More importantly, however, it will rarely be the case that one particular set of non-Indians engaged in one particular kind of conduct will be the difference between economic or political survival or collapse (or that courts will be able to perceive where the tipping point between survival and collapse is). Tribes are liable to be trapped in a version of the sorites paradox: there is no n such that $n-1$ grains of sand are not a heap but n grains of sand are, such that $n+1$ hairs make a man not bald but n hairs bald. No particular non-Indians may ever be subjected to jurisdiction because it can't be shown that their particular conduct would threaten or imperil the tribe's political integrity or economic subsistence, and "aggregation analysis" is not permitted. But as tribal population shrinks as a share of the local population, and as non-Indians own increasing shares of land nominally within reservation boundaries, the inability to regulate those persons on that land makes the tribe irrelevant as a governing body, unable to do any of those things that local governments must be able to do.

Finally, the most recent diminution cases, in which local demography in the present was used as evidence of the diminution of reservation boundaries in the

past, were in 1994 and 1998.[57] Not only does the in-migration of non-Indian residents attenuate the criminal and civil jurisdiction of tribal courts and tribal governments' regulatory authority; it plausibly might still reduce the physical size of the reservation itself.

Of course, as was discussed in the previous section, the development of tribal economies is very likely to depend on and contribute to inflows of non-Indian populations. Tribes' institutional incentives to discourage newcomers amounts to a disincentive for economic growth.

B. The first Montana exception

The *Montana* rule excepts those non-Indians who have implicitly accepted jurisdiction by entering into consensual relations with the tribe or its members. That exception has in turn been construed narrowly, especially in *Atkinson,* if not quite so vanishingly narrowly as the second. It will not be triggered unless there is a tight nexus between the relationship and the regulation or tax at issue. It will not be triggered by acceptance of the protection of reservation government's emergency personnel—neither the unknowing acceptance of police protection by driving through the reservation, nor the knowing acceptance of fire and police protection by operating a permanent hotel within reservation boundaries. The consequences of this will be held until section IV.

C. An objection

[57] *Hagen v Utah,* 510 US 399 (1994); *South Dakota v Yankton Sioux Tribe,* 522 US 399 (1998).

Through sections II and III I have implicitly appealed to a possible, counterfactual, legal system in which reservation governments had jurisdiction over non-Indians geographically present within the reservation's boundary. Over the past three decades courts have generally argued, in my view unpersuasively, that such jurisdiction is precluded by the basic meaning of domestic dependency, or that it was never an attribute of Indian sovereignty to begin with; but my argument for the jurisdiction here is forward-looking and consequentialist rather than backward-looking and grounded in an account of sovereignty.

Such consequentialist considerations are not, however, jurisprudentially or normatively final. Even if I am right about the perversities of the current system, and even if those perversities could count as a reason for courts to construe Indian sovereignty differently, that reason might not be dispositive. If non-Indians have a (moral or Constitutional) right not to be governed by tribal jurisdictions, then they should not be so governed— or, depending on one's theory of rights, the case for jurisdiction at least becomes much harder to make. Justice Kennedy has made the case for such a right most forcefully and explicitly, though it lurks in the background of other arguments as well—for instance, Souter's concurrence in *Hicks*.[58]

[58] The arguments of Souter and Kennedy that there is something close to a Constitutional right for nonconsenting non-Indians *never* to be subject to tribal jurisdiction are subject to a more

> Lara [an Indian but an enrolled member of a different tribe], after all, is a citizen of the United States. To hold that Congress can subject him, within our domestic borders, to a sovereignty outside the basic structure of the Constitution is a serious step. The Constitution is based on a theory of original, and continuing, consent of the governed. That consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State. Each sovereign must respect the proper sphere of the other, for the citizen has rights and duties to both. Here, contrary to this design, the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity for conduct occurring wholly within the territorial borders of the Nation and one of the States. This is unprecedented. There is a historical exception for Indian tribes, but only to the limited extent that a member of a tribe consents to be subjected to the jurisdiction of his own tribe. [59]

This is, it must be said, not particularly good political theory, though arguments from consent rarely are. All citizens of the United States are treated as having consented to the whole of the constitutional order. The standards of Lockean tacit consent are applied to the federal government and the states. All tribally-enrolled Indians are treated as having consented to the jurisdiction of their tribes, but in a way that suggests a requirement of express consent—even though Indians may be born to a tribal identity and simly never renounce it, just as most American citizens are born to that citizenship and never renounce it. But somehow the absence of express consent is *fatal* to tribal jurisdiction over non-members, even though nothing is more common in the federal system than for a person to be subject to the criminal or civil jurisdiction of a state without express consent. Mere habitation from birth, or mere physical presence in the state even

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searching analysis by Judith V. Royster, SYMPOSIUM: INDIAN LAW AT A CROSSROADS: *Montana at the Crossroads*, May, 2006, 38 Conn. L. Rev. 631.

[59] Kennedy, concurrence, to *US v Lara*, 541 US 194 (2004).

though one is in transit elsewhere, are certainly sufficient for criminal jurisdiction, and are often sufficient for civil jurisdiction as well (even if choice of law requirements sometimes mandate that the local courts apply law from elsewhere to a case involving transients). As in Lockean tacit consent, "passing through" is enough. Why this could not even in principle be true of tribal jurisdiction is left unexplained.

Consent, as many have pointed out since Locke's time, is either such an exacting standard that there is very little of it in the world, and so very few legitimate exercises of political power, or such a weak standard that it is implausibly everywhere, and constrains states almost not at all. In Kennedy's hands it manages to be both at once—exacting for tribes, and unconstraining for non-tribal governments.

Souter in *Hicks* suggests that, because tribal courts "differ from other American courts […] in their structure, in the substantive law they apply, and in the independence of their judges," there is something approaching a right of non-Indians not to be subject to them. Keeping non-Indians free from tribal civil jurisdiction

> squares with one of the principal policy considerations underlying *Oliphant,* namely, an overriding concern that citizens who are not tribal members be 'protected… from unwarranted intrusions into their liberty.'

"Unwarranted" is question-begging; and the liberty interests at stake in criminal trials can't be seamlessly analogized to liability in tort suits. But the phrasing is less important than the underlying claim: non-tribe members have a moral-

constitutional right, weighty enough to ground a positive legal right, not to be subject to criminal jurisdiction *or* lawsuit *or* regulation by reservation governments. Souter is at pains to make explicit what had been increasingly clear since *Montana* but not fully acknowledged: that this presumptive immunity to tribal authority was personal rather than territorial, that non-tribe-members as such should not be subject. Souter does not, as Kennedy had, hint that this right might be strong enough to trump Congressional legislation; he does not address the question. But, like Kennedy's, Souter's argument concerns the rights of non-members, not the meaning of domestic dependency or the boundaries of retained inherent sovereignty.

What could justify such a right, independent of any inquiry into the law or procedures of the particular tribe? Souter does complain about tribal judicial proceedings and substantive laws, but in an entirely general way. In any event, it is very odd to make the answer to the question *where does jurisdiction lie?* turn on an answer to the questions *what and how will that jurisdiction decide the case?*

It seems to me that some combination of the following must underlie Souter's and Kennedy's arguments.

1) A sense that tribal law properly is personal law rather than territorial governance, regardless of how much a given reservation government tries to comport itself like a county or a state, and that it is improper to subject anyone to personal law to which he does not subscribe—rather like subjecting a non-believer to the jurisdiction of canon or rabbinical courts.

2) An idea that, because reservation law is made by a government in which non-tribe members are not participants and cannot become participants, it violates basic democratic norms to subject them to it.
3) A static conception of tribal judicial systems and legal codes as so hopelessly inadequate, or at best so hopelessly opaque to outsiders, that they cannot be analogized to the systems and codes of states, counties, or municipalities.

(1) seems to me a gross mistake about the legal status of Indian tribes, albeit a mistake that has sometimes been made. It's true that non-believers have a right not to be sanctioned by religious courts; but religious courts in the United States aren't allowed to impose criminal punishments on *anyone.* The only punishments at their disposal are intra-religious: excommunication, for example. The same is true for the disciplinary code of voluntary associations, corporations, universities, and so on; they may not sanction nonmembers at all, but they may not sanction anyone with criminal penalties. So long as reservation governments are *governments,* with responsibility for maintaining peace and order in geographically-defined territories, the analogy to voluntary associations or religions fails.

The inadequacy of a particular tribe's courts might ground a right not to be tried in them. Unjust substantive laws might ground a right not to be subject to them. Or, in either case, there might be no right to immunity in the first instance but a good claim to appeal outside the system if inadequacy could be shown. Souter

complained about the general unreviewability of reservation courts—but that seems to call for reviewability, not for gutting jurisdiction. For example, the rule in *Santa Clara Pueblo v Martinez*[60] that the protections of the Indian Civil Rights Act are not enforceable by federal courts in the absence of specific Congressional instruction to the contrary could be confined to tribe members (and questions about membership) with no injury to that decision's arguments; or Congress could authorize federal court review over all persons.

In either event, the *categorical* constriction of jurisdiction is an odd response for an avowedly developmentalist area of law. If non-Indians (though not Indians!) have a legal right never to be judged by a judiciary that is not suitably independent of the reservation's executive, and some reservations don't meet the requisite threshold of judicial independence, then depriving all reservations of jurisdiction over all non-Indians is hardly the only possible response. Reservation governments might be offered the possibility of certification and preclearance by some combination of BIA and the Department of Justice if they wished to extend jurisdiction, providing them with an incentive to move toward an independent judiciary (or to adopt the other procedural protections that are taken to be similarly important). Alternatively, federal court review might be authorized on the particular question of the adequacy of a tribe's judicial institutions, though this would leave more uncertainty than would preclearance

[60] *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978).

about which tribes could regulate or try nonmembers. The right not to be tried by inadequate courts fails to ground a right not to be tried by Indians.

Similarly, the right not to be tried by culturally alien laws might justify imposing choice-of-law rules on tribal courts in civil disputes involving non-Indians, but can't ground a right to be free of those courts altogether—and can't easily ground a right to be free of culturally-reasonably-transparent rules from zoning to the prohibition of vandalism to liability in tort for reckless driving. The supposed cultural opacity of tribal law to outsiders has been used as a justification for a right to be free of that law; but none of the cases that have arisen involved non-Indians being subjected to the culturally or religiously specific requirements of tribal membership. Insofar as a tribe is both a territorial government and a cultural community, it must distinguish the two roles and not import the rules of the latter to the laws of the former. Tribes do not seem to have had any difficulty in doing so, however.

I suspect that part of the explanation for Kennedy's and Souter's worry is simply the expectations problem. Faced with particular non-Indians, they thought that those Indians had reasonably failed to expect that they would be subjected to tribal jurisdiction. Non-Indians who drive through reservations on public roads, or non-Indians who have bought land that was long since parceled out as surplus and who live among others similarly situated, may not think to pay much attention to where reservation boundaries lie on a map. The defendants at hand may well not have known the rules. (Indeed, had the rules been clear, the

cases would not have reached the Supreme Court!) But that never suffices as a reason to choose one jurisdictional or procedural rule over another, since the point of those rules is to operate prospectively. Expectations adjust to the rules that are in fact in place.

We are then left with (2), the idea that the restrictive character of tribes as polities generates a right in non-members not to be governed by them. This commits the error I attributed to Kennedy above; it slips from one consent-based justification to another depending on where it looks. Neither states nor the federal government are disabled from trying a person or regulating his or her conduct within their boundaries because of the person's citizenship. Indeed, *no* polity other than Indian reservations is routinely prevented from exercising criminal jurisdiction over all those within its boundaries, regardless of whether the person is a citizen or not, with a few quirky exceptions such as diplomatic immunity. (But reservations may not expel non-member offenders, as nations may expel diplomatic offenders.) How democratic or ethnically-specific the legislating government is does not enter into the question. To take an extreme case, no court ever suggested that blacks in the Jim Crow and pre-Voting Rights Act south lacked the obligation to obey the general criminal law of the states they were in, even if some particular laws were overturned and even if blacks were prevented wholesale from access to the polls.

IV. ECONOMIC POLICY

Recall the first *Montana* exception:

"a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relations with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."

This exception has not been read very broadly, but its parameters are still unclear. Besides the right to tax, license, and regulate those actors who enter into contracts with the tribe and its enterprises, and the right to adjudicate disputes arising under those contracts, it may include very little. One of the only times that jurisdiction has been found under the first exception concerned a private non-Indian operator of a tribally-licensed bingo business. Just as the second exception has been construed to require threats to the tribe's existence as such, regardless of threats to the health and safety of individual tribe members, we have some reason to think that consent to doing business with the tribe or under its aegis is more likely to meet the first exception than are "consensual dealins" with "its members."

In that environment of uncertainty, a tribe seeking to protect its civil jurisdiction and so its ability to operate as a functioning government has reason to be risk-averse. We have already seen that this acts as a disincentive to non-autarkic economic development altogether. Moreover, reasonably risk-averse tribes, unsure how far their writ extends, will seek at the margin to create economies dominated by tribally-owned enterprises. This brings us to the third perversity:

the recurring incentive to concentrate whatever economic development *does* take place in the hands of the tribe and the firms that it owns.

The domination of reservation economies by firms owned by tribes has been occasionally remarked upon, but typically in connection with the ostensibly socialistic cultural inheritance of the tribes. I am agnostic as to the importance of that inheritance, but mean to point out that, *regardless* of cultural explanations, tribes have been left with strong legal and policy incentives to engage in government-led and government-owned development.

The first *Montana* exception is exemplary, as well as being important in its own right. Consider:

1) Tribes' civil jurisdiction over non-Indians is at its maximum in regulating those who enter into contractual relations with the tribe and its agencies.
2) Tribes and tribally-owned enterprises are immune to federal corporate taxation. By contrast, private firms on reservations are still typically exempt from state taxation, but are *not* exempt from federal taxation. This amounts to a substantial *de facto* subsidy for tribally-owned as against privately-owned firms.
3) Because of the limits on taxing powers found by *Montana* and its progeny, economic growth that brings profits or increased property values to non-Indians does not generate increased tax revenue for the tribe. In a primarily private on-reservation economy, Indians could be competitively *disadvantaged* by being taxed by the tribe when non-Indians were not.

Reservation governments are thus stymied in any attempt to align economic growth with growth in public finance through taxation. By contrast, tribally-owned firms operate as direct sources of tribal revenue.

4) Tribes are sovereign polities and benefit from sovereign immunity. Like other sovereigns, they may waive this immunity with respect to one or another cause of action and category of plaintiff, either contractually or legislatively; and many choose to do so, in order to become credible contract partners. But it is up to the tribes whether to do this or not. Tribally owned firms are thus often, e.g., not liable to be sued in tort, providing them with another competitive advantage over private firms.

5) A special subset of sovereign immunity concerns state taxation of sales to non-Indians. State sales taxes may legally be imposed on on-reservation sales to non-Indians (though not on on-reservation sales to Indians). Collecting these, however, has proven to be an object of serious contention between tribes and states. Tribes have every incentive to avoid collecting them, since some have built up very profitably enterprises based on undercutting, e.g., state cigarette taxes. States have many more enforcement options against private on-reservation firms than they do against tribally-owned on-reservation firms.

6) Finally, if not quite in the same way, the casino economy that has come to dominate a few tribes' economic systems is always an economy dominated by the reservation government. Under the Indian Gaming

> Regulatory Act, tribes must negotiate compacts with the states in which they are situated in order to authorize on-reservation gambling. That is, far from being a zone that is free of state regulation on gambling, reservations are zones subject to highly political and negotiation-based rules. If any tribe has engaged in this politically-difficult, time- and labor-intensive process for a casino of which it was not at least part owner, I am not aware of it.

Tribal economies dominated by tribally-owned firms are undesirable in a few ways. One is the perfectly ordinary one that government-owned firms tend to be relatively inefficient, unproductive, and unresponsive to market signals. They lack the immediate disciplining effects of the market faced by owner-operated firms, or the substitute disciplining effects provided by the stock market. They are not allowed to fail. These differences might be minor in magnitude (though I doubt it); perhaps government-owned firms are only a little bit slower to respond to market signals than private ones. But reservation economies need high, sustained, compounded growth. Since it's a matter of stated policy that the gap between on- and off-reservation economies should narrow over time, they need *higher* sustained, compounded growth than the rest of the American economy. Even slight disincentives to productivity growth compound over time to leave the laggards ever-farther behind instead.

Bu tribally-dominated economies may be politically undesirable as well. Even where tribes do not own all the reservation media, they often own most of the

firms that advertise in those media. In that environment it has proven to be very difficult to build or sustain an independent and critical press that will monitor reservation governments. Reservation political systems tend to be highly patronage-intensive, sometimes with the expected attendant corruption. In one of the most sophisticated studies of the political economy of tribal development, Cornell and Kalt note that

> there are enormous incentives for tribal politicians to retain control of scarce resources and use them to stay in office. This leads to patronage, political favoritism and, in some cases, corruption. It reduces politics to a battle between factions trying to gain or keep control of tribal government resources that they can then distribute to friends and relatives. People vote for whomever they think will send more resources in their direction.[61]

Casino economies in particular—economies that are overwhelmingly centered on a single, government-owned, economic enterprise and source of revenue that is primarily a mechanism for external cash to flow inward— may be prone to an analogue of the "resource curse" that afflicts developing countries whose economies are dominated by certain natural resources. The resource curse both tends to slow economic growth and tends to stunt democratization and institutional maturation.[62]

The literature on the resource curse is deeply divided as to its causes and mechanisms. Many development economists have traditionally stressed foreign-exchange effects—the so-called "Dutch disease"—and vulnerability to volatility in commodities markets. These effects depend only on the share of GDP or

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[61] Stephen Cornell and Joseph P. Kalt, *Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't*, JOINT OCCASIONAL PAPERS ON NATIVE AFFAIRS No. 2005-02, p. 8.

[62] The literature on the resource curse is vast. For a recent overview, see MACARTAN HUMPHREYS, JEFFERY SACHS, AND JOSEPH STIGLITZ, eds., ESCAPING THE RESOURCE CURSE (2007).

exports that consists of a single resource commodity—not on how that commodity is produced or on whether it is state-controlled. Since Indian country is fully integrated within the dollar zone of the United States economy, it is of course not subject to any mechanism that is dependent on currency exchange rates. Volatility might be relevant to commodity-intensive tribal economies but is not to casino-intensive economies.

But political scientists and neo-institutional economists have often emphasized a different story about resources, one that seems to match the political economy of casinos. Certain resources—especially those that must be extracted rather than grown—are easily dominated by central states. The states become flush with cash in a way and to a degree that is pretty independent of the condition of the society's economy. They are free of the need to depend on local taxation, and therefore free of the need to be particularly responsive to citizens' demands for participation, good governance, or public good provision. Rent-seeking political activity tends to dominate over productive economic activity, because the gains to the former swamp those to the latter in magnitude. Not only does economic development suffer, because productivity growth fails to be rewarded. Political development suffers as well; corruption and political violence become common, the rule of law and stable democracy uncommon.

The analogy to casino economies is a speculative one. But the factors that neo-institutionalists emphasize in explaining the resource curse are all present. Some of the effects are as well; problems of the failure of the rule of law, violence

surrounding elections, and corruption have all been widely noted on reservations over the past two decades or so. I emphasize that I have not yet studied whether, among reservations, there is even a *prima facie* correlation between casino-dependence and these kinds of governance problems.

Even if the resource curse analogy fails, however, the other effects remain. Tribally-owned enterprises are *de facto* subsidized within reservation economies, and tribes face marginal but real incentives to favor them, to the potential detriment of both the economic and the political development that self-determination as a policy professes to encourage.

V. Conclusion

Federalism and subsidiarity as approaches to decentralization differ largely on the basis of their rigidity. Subsidiarity aims to have each kind of decision or policy set by the most-decentralized polity possible, where many different kinds of polities could qualify—neighborhoods, municipalities, counties, metropolitan areas, regions defined by shared environmental conditions (e.g. watersheds) or economic ties, states or provinces, or even nation-states in the special case of the European Union. On a case-by-case, question-by-question basis, the smallest possible decisionmaker is identified and given authority. By contrast, federal systems are characterized by rigidity: only two levels of government, the center and the states or provinces, divide or share authority over rigidly (typically constitutionally) defined subject areas; and the states or provinces typically have rigid borders which are not subject to easy revision even after demographic or

economic changes. I have argued elsewhere that the apparent advantage of subsidiarity is likely to be illusory, and the inflexibility of federalism may well prove superior over the long term.[63] The agents that allocate that case-by-case authority under a system of subsidiarity will themselves be parties to the dispute; often it will be the central government deciding what level of government is best able to decide a given issue, and predictable biases will lead it to over-centralize. And the variety of overlapping jurisdictions of multiple sizes that result will be unlikely to engender citizen loyalty of the sort that could stabilize the decentralization of the system. The inflexibility of borders and rigid allocation of authority in a federal system will help correct for those biases. The optimal level of flexible decentralization is probably not stably available, and relatively rigid decentralization is probably a more-viable second-best.

The instability in the authority, jurisdiction, and boundaries of reservation governments provides a *reduction ad absurdum* of this worry about flexibility. In its concern for the right of individual non-Indians before the bench not to be subject to tribal jurisdiction, the Supreme Court has been entirely inattentive to the incentives and dynamic effects it was creating. Governments that will lose their territorial integrity, ability to maintain law and order, and public finance in the event of in-migration face a choice between providing an attractive society

[63] Jacob T. Levy, *Federalism, Liberalism, and the Separation of Loyalties*, 101 AM. POLI. SCI. REV. 101 (3), 459-477 (2007).

for such migrants and spiraling into impotence, or retaining authority at the price of good government.

Poverty and underdevelopment on Indian reservations seems grimly overdetermined. In this paper I have not argued that the formal and jurisdictional perversities of Indian law have sole responsibility for those conditions. There is all too little variation on the dependent variable; Indians were hardly prosperous, on average, during the reorganization or termination eras, and indigenous peoples have not thrived in other settler states either. If, however, self-determination has *more* promise than earlier policy regimes—and I think it does—then it ought to be given a chance to work. Current law has hamstrung the policy regime in bizarre fashion, leaving reservations *qua* governments singularly unable to pursue effective development strategies without jeopardizing their status or effectiveness as governments. If the rule of law, private sector-led and broad-based economic development, and effective democratic institutions are worthwhile goals for reservations, they ought not to be set in conflict with one another.