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The Thrust and Parry of Federal Indian Law

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ARTICLES

THE THRUST AND PARRY OF FEDERAL INDIAN LAW

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THE THRUST AND PARRY OF FEDERAL INDIAN LAW

Blake A. Watson*

I. INTRODUCTION

Karl Llewellyn is the inspiration for this Article. In his seminal 1950 law review commentary on the legitimacy of the canons of statutory construction, Llewellyn organized canons in pairs to show that “there are two opposing canons on almost every point.”¹ For example, the “thrust” of the derogation canon is countered by the “parry” of the remedial purpose canon:

Thrust

Statutes in derogation of the common law will not be extended by construction.

Parry

Such acts will be liberally construed if their nature is remedial.²

Llewellyn (and fellow Realist scholar Max Radin) argued that the canons are actually used not as aids in the interpretive process, but as manipulative devices invoked by judges to conceal their untethered, result-oriented views on statutory interpretation.³ In other words, rather than constraining interpretive choices, the mutually contradictory canons in reality “serve simply as post hoc ‘tools of argument’ utilized by judges to justify statutory constructions arrived at ‘by means other than the use of the canon.’”⁴ If the “thrust” of a particular canon steers the advocate or judge

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¹ Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

² *Id.* at 401 (citations omitted). See generally Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 230-32 (1996) (discussing the tension between the remedial purpose and derogation canons).

³ Watson, *supra* note 2, at 213-14 n.57; see Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869-81 (1930); see also Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 248 (1992); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 27 (1988); William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 826-28 (1985). For an in-depth critique of both Llewellyn's 1950 article and the continuing use of the canons of construction, see generally Symposium, *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 529 (1992).

⁴ Watson, *supra* note 2, at 214 (quoting Llewellyn, *supra* note 1, at 401). Whereas the legal realists derided the malleability of canons, scholars such as Cass Sunstein have challenged the proposition that “canons of construction, or background interpretive norms, are an outmoded and

in an unwanted direction, the “parry” of an opposing canon can be enlisted to arrive at the preferred destination.

In the field of Indian⁵ law, a subject with which Karl Llewellyn was intimately familiar,⁶ it is likewise possible to array numerous opposing pronouncements. The United States Supreme Court has issued a surprisingly large number of decisions impacting the legal rights of Indian tribes and individual Indians,⁷ and leading scholars have consistently remarked on the distressing degree to which the Court’s statements and holdings may be counterpoised. Phil Frickey describes Indian law as “a field where the Court has almost never even explicitly overruled a precedent,”⁸ and asserts that, “[m]ore than any other field of public law, federal Indian law is characterized by doctrinal incoherence.”⁹ Frank Pommersheim has remarked on the Supreme Court’s “bifurcated, if not fully schizophrenic, approach to tribal sovereignty.”¹⁰ Laurie Reynolds views the judicially crafted rules that allocate adjudicatory power among state, federal, and tribal courts as “creat[ing] an almost daunting set of

unhelpful guide to the courts.” CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 111 (1990); see Watson, *supra* note 2, at 270-71 (constructing a “best-case scenario” for the application of the remedial purpose canon).

⁵ Following the lead of Frank Pommersheim, Judith Resnik, and others, this Article will use the words “Indian” and “tribe” rather than “Native American.” See FRANK POMMERSEIM, *BRAID OF FEATHERS* 1 n.1 (1995); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 679 (1989). The focus of this Article is limited geographically to the United States.

⁶ See KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941) (describing traditional and evolving dispute-resolution procedures of the Cheyenne Tribe).

⁷ For a list of these decisions’ citations, see the Appendix to this Article. Any listing of Supreme Court decisions by subject matter, of course, risks being either overinclusive or underinclusive. The list appended to this Article, which contains 518 entries, was derived by a computer search for Supreme Court decisions containing either the word “Indian” or “tribe.” In some cases, decisions were added by virtue of being referenced in the retrieved cases. Some cases were deleted because the connection to Indian law was too attenuated.

⁸ Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1240 (1990) [hereinafter Frickey, *Practical Reasoning*].

⁹ Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1754 (1997) [hereinafter Frickey, *Adjudication and Its Discontents*]; see *id.* (“Its principles aggregate into competing clusters of inconsistent norms”); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 33-34 (1996) (“That federal Indian law is a snarl of doctrinal complications is probably the single thing most commonly known about it”); *id.* at 37-38 (“federal Indian law is doctrinally chaotic, awash in a sea of conflicting, albeit often unarticulated, values”).

¹⁰ Frank Pommersheim, *A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZ. L. REV. 393, 403 (1991/92); see Fred L. Ragsdale, Jr., *The Deception of Geography*, in *AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY* 63, 78-79 (Vine Deloria, Jr. ed., 1985) (describing a “binary approach” to Indian law by which “tribes are considered as being either sovereign nations or conquered peoples”).

inconsistencies.”¹¹ David Getches, painting perhaps the bleakest picture, characterizes the Supreme Court’s recent efforts in the field of Indian law as “a rudderless exercise in judicial subjectivism.”¹²

One consequence of “the oscillating nature of relations between the tribal, federal, and state governments throughout United States history”¹³ is that it provides, to borrow again from Llewellyn’s article on the canons, a “framework for maneuver.”¹⁴ In 1981, in *Montana v. United States*,¹⁵ the Supreme Court announced “the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”¹⁶ Six years later, in *Iowa Mutual Insurance Co. v. LaPlante*,¹⁷ the Court noted that “[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty [and consequently] [c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.”¹⁸ For the next decade, lower courts struggled to reconcile these two statements.¹⁹ The divergent interpretations produced confusion and uncertainty, which in turn required the Supreme Court in 1997 to revisit the issue and declare, somewhat cryptically, that “*Iowa Mutual* . . . [is] not at odds with, and do[es] not displace, *Montana*.”²⁰

The purpose of this Article is to set forth and critique contradictory pronouncements by the Supreme Court in the field of federal Indian law. Karl Llewellyn’s 1950 article concludes with a collection of canons of statutory construction, presented under “thrust” and “parry” headings. The central organizing feature of this Article is a collection of statements, in this instance from the United States Supreme Court, that are similarly

¹¹ Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539, 578 (1997). More generally, Professor Reynolds observes that “consistency, symmetry, and uniformity have never been highly valued in the constantly changing field of Indian law.” *Id.* at 579.

¹² David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1576 (1996).

¹³ James A. Casey, Note, *Sovereignty by Sufferance: The Illusion of Indian Tribal Sovereignty*, 79 CORNELL L. REV. 404, 406 (1994).

¹⁴ Llewellyn, *supra* note 1, at 401.

¹⁵ 450 U.S. 544 (1981).

¹⁶ *Id.* at 565.

¹⁷ 480 U.S. 9 (1987).

¹⁸ *Id.* at 18 (citations omitted).

¹⁹ See *infra* part VI.

²⁰ *Strate v. A-1 Contractors*, 117 S. Ct. 1404, 1410 (1997).

counterpoised. In order to compile these quotes, over 500 decisions addressing Indian law issues were canvassed.²¹

The resulting "thrust and parry" of federal Indian law is presented below in three parts. Part II of the Article begins by setting forth the Supreme Court's conflicting statements regarding federal authority in Indian country,²² with a particular focus on the various judicial doctrines under which the Court has justified federal assertion of power, and continuation of control, over Indian tribes. Part III then details the Supreme Court's wavering pronouncements with respect to state authority in Indian country by focusing on the enduring vitality of *Worcester v. Georgia*,²³ the Court's earliest and strongest statement against the intrusion of state law in tribal affairs. Part III also notes that opposition to *Worcester's* central tenet was always present, as evident from contemporaneous decisions by the Tennessee and Alabama Supreme

²¹ See App. The task of starting with *Commonwealth v. Cox*, 4 U.S. (4 Dall.) 170 (1800), and ending with *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 118 S.Ct. 1904 (1998), was both tedious and informative. The Supreme Court's Indian law jurisprudence falls into broadly defined categories and time periods. Excepting (perhaps) the Cherokee Nation's legal battle with the State of Georgia, see *infra* part III, the early Indian law decisions of the Supreme Court focus almost exclusively on the rights of non-Indians to Indian lands. See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). During the latter part of the nineteenth century, the Court began to define more precisely the jurisdictional relationships of the state, federal, and tribal governments. See, e.g., *United States v. McBratney*, 104 U.S. 621 (1881); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *United States v. Kagama*, 118 U.S. 375 (1886); *Talton v. Mayes*, 163 U.S. 376 (1896); *Ward v. Race Horse*, 163 U.S. 504 (1896). The early part of the twentieth century is dominated by depredation claims by non-Indians, property disputes involving individual Indians, and monetary claims by tribes for treaty violations. See, e.g., *Connors v. United States*, 180 U.S. 271 (1901) (claim under Indian Depredation Act); *Jefferson v. Fink*, 247 U.S. 288 (1918) (dispute over intestate descent of allotment); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937) (suit for damages due to breach of treaty).

Charles Wilkinson notes that the Supreme Court's decision in *Williams v. Lee*, 358 U.S. 217 (1959), "opened the modern era of federal Indian law." CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 1 (1987). A recurring issue in the modern era of federal Indian law is the extent to which tribes and states can assert adjudicatory, regulatory, and taxing authority in Indian country. See, e.g., *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997) (tribal adjudicatory jurisdiction); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983) (state adjudicatory jurisdiction); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (tribal and county regulatory zoning authority); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (tribal taxation of on-reservation oil and gas production by non-Indian lessees); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (state taxation of on-reservation oil and gas production by non-Indian lessees).

²² "Indian country," as presently defined by Congress, encompasses Indian reservations (including fee-patented non-Indian lands within a reservation), "dependent Indian communities," and allotments held by individual Indians, wherever located. See 18 U.S.C. § 1151 (1988); *United States v. Sandoval*, 231 U.S. 28 (1913) (originating the notion of dependent Indian communities). The "Indian country" definition also governs questions of civil jurisdiction. See *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975) ("While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction.").

²³ 31 U.S. (6 Pet.) 515 (1832).

Courts.²⁴ Finally, Part IV explores the discrepant statements of the United States Supreme Court on the interrelated subjects of tribal political status, inherent tribal sovereignty, and tribal authority over non-members.

The Article then offers, in Part V, some thoughts as to why federal Indian law has produced such contradictions. Two explanatory themes emerge: (1) the inability of the federal government to achieve an abiding consensus regarding the role of Indian tribes in the Federal Union; and (2) the tension between the normative tug of inherent tribal sovereignty and "measured separatism"²⁵ and the pragmatic pull of non-Indian infiltration of Indian country and the corresponding judicial reluctance to countenance tribal authority over non-members within reservation boundaries.

The unfortunate legacy of the thrust and parry of federal Indian law is illustrated in Part VI, which examines the reaction of state and federal courts in the past decade to the Supreme Court's seemingly irreconcilable statements in *Montana* and *Iowa Mutual* regarding tribal authority over non-members. The Court's casual and almost off-handed attempt in *Strate v. A-1 Contractors*²⁶ to harmonize these divergent lines of precedent suggests that, in the field of Indian law, there is presently little enthusiasm for Karl Llewellyn's admonition that "a court must strive to make sense *as a whole* out of our law *as a whole*."²⁷ However, while issues of statutory interpretation can be resolved "by means other than the use of the canon,"²⁸ the consequence of the thrust and parry of federal Indian law is doctrinal incoherence and a tendency toward judicial subjectivism which threatens to undermine foundational principles of tribal political status and tribal governmental authority.

²⁴ The *Caldwell* and *Foreman* decisions are discussed in SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 39-48 (1994) (citing *State v. Foreman*, 16 Tenn. (8 Yer.) 256 (1835); *Caldwell v. State*, 1 Stew. & P. (Ala.) 327 (1832)).

²⁵ WILKINSON, *supra* note 21, at 14. Wilkinson characterizes this theme as "whether and to what extent old promises should be honored today." *Id.* at 4.

²⁶ *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997).

²⁷ Llewellyn, *supra* note 1, at 399.

²⁸ *Id.* at 401.

II. FEDERAL AUTHORITY IN INDIAN COUNTRY

A. The Doctrine of Discovery

Thrust

It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, . . . or that the discovery of either by the other should give the discoverer rights in the country discovered. . . .
—*Worcester v. Georgia*²⁹

Parry

[D]iscovery [of the new world] gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.—
*Johnson v. M'Intosh*³⁰

The thrust and parry of federal Indian law begins with the Supreme Court's earliest decisions dealing with the legal rights, if any, that Indian tribes retained in the lands of the United States of America. As succinctly stated by Robert Williams, Jr., the Court was required at the outset to address "the problem of defining the American Indian's rights and status under European colonizing law."³¹ In *Johnson v. M'Intosh*,³² the Supreme Court announced that, by virtue of European "discovery" of the Americas, the political and property rights of the original inhabitants were unavoidably impaired:

They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, *that discovery gave exclusive title to those who made it*.³³

The legitimacy of the discovery doctrine had been vigorously challenged for several centuries prior to its acceptance in 1823 by Chief Justice John

²⁹ 31 U.S. (6 Pet.) 515, 543 (1832).

³⁰ 21 U.S. (8 Wheat.) 543, 573 (1823).

³¹ ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 7 (1990).

³² 21 U.S. (8 Wheat.) 543 (1823).

³³ *Id.* at 574 (emphasis added); see *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 142-43 (1810) ("[T]he nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.").

Marshall in *Johnson*.³⁴ Robert Williams has traced the origins of the discovery doctrine to at least the thirteenth century, when Pope Innocent IV asked the question, in the context of the Crusades, whether it is "licit to invade a land that infidels possess, or which belongs to them?"³⁵ According to Williams, the "two polar positions" that Innocent IV considered were: (1) that "infidels, by virtue of their nonbelief, possessed no rights to *dominium* that Christians were required to recognize"; and (2) that "infidels possessed the natural-law right to hold property and exercise lordship."³⁶

In similar fashion, the European discovery of the Americas, and the subsequent invasions and colonizing efforts, were accompanied by differing views regarding the political and property rights of the native peoples. Proponents of Indian rights invoked the works of the Spaniard Franciscus de Victoria (1480-1546), a Dominican scholar who contended that the original inhabitants of the western world were rational beings and could "claim the same natural rights possessed by any Christian European, including rights to property and lordship."³⁷ On the other hand, opponents of Indian rights cited, among other sources, English philosopher John Locke, who opined that private ownership of property is justified when

³⁴ See WILLIAMS, *supra* note 31, at 231. *Johnson* "is regarded as the textual source of the basic principles of modern federal Indian law, but its acceptance of the Doctrine of Discovery and its denial of territorial sovereignty to American Indian nations actually represents a point of closure, not a point of origin, in United States colonizing discourse." *Id.*

³⁵ WILLIAMS, *supra* note 31, at 44 (quoting THE EXPANSION OF EUROPE: THE FIRST PHASE 191-92 (J. Muldoon ed., 1977)). For other discussions of the origins of the discovery doctrine, see Getches, *supra* note 12, at 1577 n.15; Casey, *supra* note 13, at 409 n.27; Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 43-45 (1947).

³⁶ WILLIAMS, *supra* note 31, at 45. The Innocentian position was "that wars could not be waged against infidels solely because of their nonbelief," but that the "pope possessed the authority to deprive infidels of their property and lordship in certain situations, such as . . . the failure to admit Christian missionaries peacefully or the violation of natural law." *Id.* at 71.

³⁷ *Id.* at 98. Victoria's lectures on Indian rights, entitled "On the Indians Lately Discovered," were delivered in 1532 and published in 1557. *Id.* at 97. Victoria rejected the notion of "title by discovery" on the grounds that, since "the Indians 'were true owners, both from the public and the private standpoint,' the discovery of them by the Spaniards had no more effect on their property than the discovery of the Spaniards by the Indians had on Spanish property." Cohen, *supra* note 35, at 44-45 (quoting F. VICTORIA, DE INDIS ET DE IVRE BELLI REFLECTIONES II 7 (E. Nys ed., J. Bate trans., 1917)); see WILLIAMS, *supra* note 31, at 99.

On the other hand, Victoria was of the view that "the Law of Nations secured to the Spaniards the right to carry on trade among the Indians," *id.* at 102, and that "if the Spaniards . . . could not safely exercise their rights in the countries of the Indians, 'save by seizing their cities and reducing them to subjection, they may lawfully proceed to these extremities.'" *Id.* at 103 (quoting F. VICTORIA, *supra*, at 155).

there has been a mixing of an individual's labor with nature.³⁸ The Lockean labor theory of property, which was premised on the availability of vacant "waste" lands, was quickly applied to justify European claims to the New World on the grounds that the native peoples "had not established property rights in land both because they had wasted it by not developing it and because they did not recognize the same kinds of possessory rights associated with fee ownership."³⁹

Therefore, when the Supreme Court was presented with *Johnson v. M'Intosh*, the thrust of Victoria's notion that Indians have legal rights in American lands had already been parried by the Lockean discourse which "legitimated the appropriation of the American wilderness as a right, and even as an imperative, under natural law."⁴⁰ The inquiry in *Johnson*, as characterized by Chief Justice Marshall, was "the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country."⁴¹ At issue was a large tract of land north of the Ohio River in southern Illinois. Joshua Johnson and Thomas Graham, as devisees of Thomas Johnson, claimed title by virtue of Thomas Johnson's membership in a group of frontier land speculators who purchased the lands from Indian tribes in the 1770s. The defendant, William M'Intosh, claimed the property on the basis of an 1818 deed from the United States, which had obtained cessions of the disputed lands from the Indians in treaties negotiated between 1795 and 1803. Thus, if the tribes had the right to convey title to private individuals, Johnson and Graham would prevail.

The temporal superiority of the Johnson and Graham chain of title, of course, yielded to the broader principles, under the doctrine of discovery, that: (1) the Indians possess only a right of occupancy; (2) the United States has the "exclusive right to extinguish the Indian title of occupancy";⁴² and (3) consequently, Indians are "deemed incapable of

³⁸ See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 27 (1952) ("Whatsoever then he removes out of the state, that nature hath provided and left it in, he has mixed his *labor* with, and joined to it something that is his own, and thereby makes it his *property*.") (emphasis added).

³⁹ Joseph W. Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 19 (1991); see WILLIAMS, *supra* note 31, at 246-51 (discussing Locke's discussion of natural law and property and its application in colonial America); LOCKE, *supra* note 38, at § 36 (referring to the "vacant places of *America*"); § 41 (noting that the Indian tribes occupy "a fruitful soil, apt to produce in abundance what might serve for food, raiment, and delight, yet for *want of improving it by labor* have not one-hundredth part of the conveniences we enjoy.") (emphasis added).

⁴⁰ WILLIAMS, *supra* note 31, at 248.

⁴¹ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572 (1823).

⁴² *Id.* at 587. Interestingly, Marshall uses the word "they," as opposed to "it," to refer to the United States. *Id.*

transferring the absolute title to others."⁴³ However, the doctrine of discovery has never been completely accepted as a legitimizing theory for the assertion of federal authority over Indian lands. In fact, Justice Marshall's own endorsement of the discovery doctrine in *Johnson* is hardly ringing:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it, if the property of the great mass of the community originates in it; it becomes the law of the land, and cannot be questioned However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, *perhaps*, be supported by reason, and certainly cannot be rejected by Courts of justice.⁴⁴

Likewise, in the quote from *Worcester v. Georgia* which comprises the "thrust" of this section, Marshall candidly acknowledges that the application of the discovery doctrine to inhabited lands "is difficult to comprehend."⁴⁵

By endorsing the discovery doctrine, but holding also that Indians retained (some) political and property rights, the Supreme Court in *Johnson v. M'Intosh* "simultaneously ratified international law notions that colonization was lawful and that indigenous peoples possessed sovereignty and at least a limited set of legal rights."⁴⁶ Although the discovery doctrine tenets are no longer questioned in the Supreme Court, the doctrine's legitimacy is still subject to spirited scholarly debate.⁴⁷ Clearly, the

⁴³ *Id.* at 591. The Court rejected the idea, propounded by Daniel Webster on behalf of Johnson and Graham, that Indians could vest title to land in individual purchasers. WILLIAMS, *supra* note 31, at 309-10. It is yet another irony of federal Indian law that the sanctity and alienability of Indian property rights was championed in *Johnson* by non-Indian descendants of non-Indian land speculators. As Robert Williams has wryly observed, "what is missing in federal Indian law are the Indians." Robert A. Williams, Jr., "The People of the States Where They Are Found Are Often Their Deadliest Enemies": *The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981, 984 n.13 (1996).

⁴⁴ *Johnson*, 21 U.S. at 591-92 (emphasis added).

⁴⁵ 31 U.S. 515, 543 (1832); see Frickey, *Practical Reasoning*, *supra* note 8, at 1224-25 (Marshall in *Worcester* "seemed to express serious qualms about the normative basis for the colonization of North America").

⁴⁶ Frickey, *Domesticating Federal Indian Law*, *supra* note 9, at 51.

⁴⁷ Compare WILLIAMS, *supra* note 31, at 317 (after *Johnson*, the discovery doctrine's "underlying mediievally derived ideology—that normatively divergent 'savage' peoples could be denied rights and status equal to those accorded to the civilized nations of Europe—had become an integral part of the fabric of United States federal Indian law"); Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77

ongoing controversy regarding the “apparently corrupt origins”⁴⁸ of federal authority over Indian tribes contributes to the thrust and parry of federal Indian law.

B. Federal Acquisition of Indian Lands and Recognition of Indian Property Rights

Thrust

[The colonial charters] were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. . . . The power of making war is conferred by these charters on the colonies, but *defensive* war alone seems to have been contemplated.—*Worcester v. Georgia*⁴⁹

The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee. . . . Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title.—*United States v. Shoshone Tribe*⁵¹

Parry

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.—*Tee-Hit-Ton Indians v. United States*⁵⁰

[Indian title] is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.—*Tee-Hit-Ton Indians v. United States*⁵²

(1993) (urging the repudiation of discovery doctrine); *with* Getches, *supra* note 12, at 1580 n.24 (“It is difficult to imagine the young nation's Court being less restrictive of Indian rights in such hotly charged cases” as *Johnson*.); J. Youngblood Henderson, *Unraveling the Riddle of Aboriginal Title*, 5 AM. INDIAN L. REV. 75, 87-96 (1977) (reading *Johnson* as respectful of tribal sovereignty).

⁴⁸ Getches, *supra* note 12, at 1579 n.20.

⁴⁹ 31 U.S. at 545.

⁵⁰ 348 U.S. 272, 289-90 (1955).

⁵¹ 304 U.S. 111, 116-17 (1938); *see* *Shoshone Tribe v. United States*, 299 U.S. 476, 497-98 (1937) (“The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only, but it is ‘as sacred as that of the United States to the fee.’”) (quoting *United States v. Cook*, 86 U.S. (19 Wall.) 591, 593 (1873); citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Choate v. Trapp*, 224 U.S. 665, 671 (1912); *Yankton Sioux Tribe v. United States*, 272 U.S. 351

In *Johnson v. M'Intosh*, the discovery doctrine was held to have conferred on the United States the "exclusive right to extinguish the Indian title of occupancy, *either by purchase or by conquest*."⁵³ Two questions naturally follow: Did the United States in fact purchase Indian lands or take them by force? What difference, if any, does it make?

Justice Stanley Reed, who is the author of the "Every American schoolboy knows" quote, is in this instance both politically and factually incorrect since, as Phil Frickey has observed, "[e]very learned schoolchild would be appalled by this point, for it cannot be defended as accurate, if incomplete. Instead, it is just plain wrong, a mixture of myth and ethnocentrism masquerading as past legal practice."⁵⁴ In fact, the "thrust" of Chief Justice Marshall's references to the discovery doctrine, as evidenced by the quote from *Worcester*, focuses on purchase, not conquest, as the appropriate means of acquiring Indian lands.⁵⁵ Prior to *Johnson v. M'Intosh*, colonists (and their governments) acquired land from Indian tribes almost entirely by purchase,⁵⁶ and after *Johnson*, the United States continued to pay Indian tribes for ceded territory.⁵⁷ The price paid, of course, was invariably inadequate, but "except for a few tracts of land in the Southwest, practically all of the public domain of the continental United States . . . has been purchased from the Indians."⁵⁸

(1926)); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) ("They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it . . .").

⁵² 348 U.S. at 272.

⁵³ 21 U.S. at 587 (emphasis added).

⁵⁴ Frickey, *Domesticating Federal Indian Law*, *supra* note 9, at 32; *see id.* at 32 n.11 ("One of the oddest things about Justice Reed's dictum is that *Tee-Hit-Ton* involved the taking of aboriginal property interests in Alaska, where no Seventh Cavalry ever waged war upon Natives.").

⁵⁵ *See Worcester v. Georgia*, 31 U.S. 515, 544-45 (1832) (describing the doctrine as conferring "the exclusive right to purchase" and, in the same vein, "the exclusive right of purchasing such lands as the natives were willing to sell.").

⁵⁶ *See WILLIAMS*, *supra* note 31, at 249-51; PETER CHARLES HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* 21-22 (1992) (describing the efforts of the Puritans to purchase lands from the surrounding tribes).

⁵⁷ As George Washington himself observed, "[t]here is nothing to be obtained by an Indian war but the soil they live on and this can be obtained by purchase at less expense." *See* ALLAN W. ECKERT, *THAT DARK AND BLOODY RIVER: CHRONICLES OF THE OHIO RIVER VALLEY* 441 (1995) (quoting from a plan presented by Washington to Congress for settlement of Indian lands in the Ohio River Valley).

⁵⁸ Cohen, *supra* note 35, at 33-34; *see id.* at 35 ("[A]fter paying Napoleon 15 million dollars for the cession of political authority over the Louisiana Territory we proceeded to pay the Indian tribes of the ceded territory more than twenty times this sum for such lands in their possession as they were willing to sell.").

Cohen made his observations in 1947, just after the passage of the Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70-70v, which was enacted in part to enable tribes to seek redress for prior land cessions granted for "unconscionable consideration." 25 U.S.C. § 70a (1983). *See generally* DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW: CASES AND MATERIALS* 311-18 (3d ed. 1993). Cohen was careful to expressly exclude Alaska from his statement, as his article predated the

The Supreme Court bolstered the notion that purchase, not conquest, was the appropriate means of acquiring Indian lands by declaring as early as 1835 that it was "a settled principle, that [the Indians'] right of occupancy is considered as sacred as the fee simple of the whites."⁵⁹ The Supreme Court's solemn assurances regarding Indian title, which were repeated and strengthened in the 1937 "thrust" quote from *United States v. Shoshone Tribe*,⁶⁰ were further buttressed in 1946 when the Court held, with regard to Indian (or aboriginal) title, that "[t]he Indians have more than a merely moral claim for compensation."⁶¹ These assurances were jettisoned, however, by Justice Reed nine years later, in *Tee-Hit-Ton Indians v. United States*, when the Court held that "Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law."⁶² Consistent with the thrust and parry of federal Indian law, the *Tee-Hit-Ton* Court fails to even acknowledge the statements in *Shoshone Tribe* that aboriginal title is "[no] less valuable," "as sacred" and "as securely safeguarded" as non-Indian title.⁶³

enactment of the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1601-28 (1983 & Supp. 1998), wherein Alaska Natives agreed, in return for relinquishing aboriginal title claims, "to receive land selection rights to 44 million acres along with money payments totaling \$962.5 million." *Id.* at 913.

⁵⁹ *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835) (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 48 (1831)).

⁶⁰ 299 U.S. 476 (1937).

⁶¹ *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 47 (1946) (plurality opinion).

⁶² 348 U.S. 272, 285 (1955).

⁶³ 304 U.S. at 116, 117. See generally Nell J. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980).

C. The Guardian-Ward Relationship and Trust Doctrine

Thrust

[The federal government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.—*Seminole Nation v. United States*⁶⁴

Parry

[Because the statute] was adopted by Congress in the exercise of its control over [Indians] . . . [t]he wish of the ward had to yield to the will of the guardian.—*United States v. Rowell*⁶⁵

The next major Indian law issue to reach the Supreme Court after *Johnson v. M'Intosh* was the question of whether Indian tribes qualified as "foreign States" within the meaning of Article III, section 2, of the United States Constitution. In *Cherokee Nation v. Georgia*,⁶⁶ Chief Justice Marshall held that tribes are not foreign states, but are instead "domestic dependent nations [that exist] . . . in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."⁶⁷ This *dictum* is the point of origin for "the basis of a fiduciary relationship between the federal government and the tribes."⁶⁸

The trust doctrine was invoked by courts in the mid-nineteenth century in order to protect tribes from state coercion and intrusion.⁶⁹ However, despite this initial employment of the trust doctrine as a shield, the Supreme Court in the 1880s began to employ the doctrine as a sword in order to justify congressional regulation of the internal affairs of Indian

⁶⁴ 316 U.S. 286, 297 (1942); see *United States v. Mason*, 412 U.S. 391, 398 (1973) ("There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust.").

⁶⁵ 243 U.S. 464, 468 (1917).

⁶⁶ 30 U.S. (5 Pet.) 1 (1831).

⁶⁷ *Id.* at 17.

⁶⁸ See L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 826 (1996); see Williams, *supra* note 43, at 996 (noting that *Cherokee Nation* and *Worcester* constitute the first formal recognition by the Supreme Court of the federal-Indian trust relationship as a source of protection for Indian rights).

⁶⁹ *Id.* at 826; see Jeffrey M. Igou, Note, *Leaving the Reservation: The Eighth Circuit Eliminates Tribal Court Subject Matter Jurisdiction over Suits Between Nonmembers in A-1 Contractors v. State*, 30 CREIGHTON L. REV. 865, 880 (1997) ("Initially, the trust responsibility doctrine was used as a means of protecting the Indian tribes from ill treatment at the hands of the states, and concerned primarily the external relations between the tribes and the states in which they were located.").

tribes.⁷⁰ Consequently, in cases such as *United States v. Rowell*,⁷¹ the protective thrust of the trust doctrine was parried by the expansive view given to the authority of the United States as trustee. As a result, it is difficult to determine the parameters of the trust duty. For example, the Supreme Court has held that "the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust."⁷² The Court, however, has also held that, despite the existence of the trust relationship, individual Indians who were allotted lands pursuant to the Indian General Allotment Act of 1887⁷³ cannot recover money damages for mismanagement of their timber resources by the federal government.⁷⁴

In short, "the trust doctrine [is] a 'legal chameleon,' because its meaning has changed to suit the policy needs of various historical periods."⁷⁵ On one hand, the trust doctrine represents the "central protective principle of Indian tribal rights under our law,"⁷⁶ and serves as a basis for judging the federal government's conduct towards Indians "by the most exacting fiduciary standards."⁷⁷ On the other hand, the trust doctrine has been "used to legitimate federal power over Indians on grounds that it arose from the white man's burden of colonization."⁷⁸

⁷⁰ Igou, *supra* note 69, at 881; Gould, *supra* note 68, at 826; *see infra* part II.D. (discussing the hallmark case *United States v. Kagama*, 118 U.S. 375 (1886)).

The idea of relying on the trust relationship to legitimize the assertion of authority over tribal affairs was recognized from the outset. *See State v. Foreman*, 16 Tenn. (8 Yer.) 256, 351 (1835) (Green, J.) ("Under the circumstances in which we are placed in relation to those Indians, as their guardians and protectors, have we not a right to avail ourselves of the superiority of our situation and interpose our authority' and jurisdiction for the preservation of order . . . ?") (quoting Chancellor Kent).

⁷¹ 243 U.S. 464 (1917).

⁷² *United States v. Mitchell*, 463 U.S. 206, 226 (1983).

⁷³ 24 Stat. 388, *amended by*, 25 U.S.C. § 331 (1983); *see infra* part V.

⁷⁴ *United States v. Mitchell*, 445 U.S. 535 (1980).

⁷⁵ Gould, *supra* note 68, at 828 n.121 (quoting Clinton, *supra* note 46, at 132).

⁷⁶ Williams, *supra* note 43, at 997.

⁷⁷ *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *see Nevada v. United States*, 463 U.S. 110, 127 (1983) ("This Court has long recognized 'the distinctive obligation of trust incumbent upon the Government' in its dealings with Indian tribes.") (quoting *Seminole Nation*, 316 U.S. at 296); *United States v. Mason*, 412 U.S. 391, 398 (1973) ("There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust.").

⁷⁸ Gould, *supra* note 68, at 828 n.121 (summarizing Robert Clinton's observations regarding the employment of the trust doctrine following *United States v. Kagama*, 118 U.S. 375 (1886)).

D. The Plenary Power Doctrine

Thrust

[The] power to control and manage [tribal affairs is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions.—*United States v. Creek Nation*⁷⁹

The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.—*United States v. Alcea Band of Tillamooks*⁸¹

Parry

Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.—*Lone Wolf v. Hitchcock*⁸⁰

Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.—*Santa Clara Pueblo v. Martinez*⁸²

The "plenary power doctrine stands for the proposition that Congress has virtually unlimited power over Indian nations and can, therefore, abolish or abrogate at will the tribes' sovereignty or powers of self-government."⁸³ The plenary power notion surfaced in the 1880s and was firmly established by the end of the nineteenth century. The doctrine remains as an integral part of contemporary federal Indian law, despite

⁷⁹ 295 U.S. 103, 110 (1935); see *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119, 123 (1938) ("It is appropriate first to observe that while the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to constitutional limitations, and does not enable the United States without paying just compensation therefor to appropriate lands of an Indian tribe to its own use or to hand them over to others."); *Choate v. Trapp*, 224 U.S. 665, 671 (1912) ("there is a broad distinction between . . . the power to abrogate a statute and the authority to destroy rights acquired under such law.").

⁸⁰ 187 U.S. 553, 565 (1903); see *Williams v. Johnson*, 239 U.S. 414, 420 (1915) ("It has often been decided that the Indians are wards of the Nation and that Congress has plenary control over tribal relations and property and that this power continues after the Indians are made citizens, and may be exercised as to restrictions upon alienation."); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902) ("The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts.").

⁸¹ 329 U.S. 40, 54 (1946).

⁸² 436 U.S. 49, 56 (1978); see *Escondido Mut. Water Co. v. LaJolla Band of Mission Indians*, 466 U.S. 765, 788 n.30 (1984) ("[A]ll aspects of Indian sovereignty are subject to defeasance by Congress.").

⁸³ Alex Tallchief Skibine, *Braid of Feathers: Pluralism, Legitimacy, Sovereignty, and the Importance of Tribal Court Jurisprudence* (reviewing FRANK POMMERSHEIM, *BRAID OF FEATHERS* (1995)), 96 COLUM. L. REV. 557, 559-60 (1996).

suspect foundations, conflicting signals regarding its scope, and apparent incompatibility with another judicially endorsed doctrine: the notion of tribal sovereignty.

The origins of the plenary power doctrine in federal Indian law can be traced to two Supreme Court decisions: *Ex parte Crow Dog*⁸⁴ and *United States v. Kagama*.⁸⁵ The first case presented the question of whether Crow Dog, a member of the Brule Sioux band of Indians, could be lawfully tried and convicted in federal court for the murder of Spotted Tail, a fellow tribal member.⁸⁶ The Supreme Court held that, while Congress had conferred criminal jurisdiction upon the federal courts over certain offenses by Indians against non-Indians, and by non-Indians against Indians, "those [offenses committed] by Indians against each other were left to be dealt with by each tribe for itself, according to its local customs."⁸⁷

In response to *Crow Dog*, Congress enacted the Major Crimes Act of 1885, which granted jurisdiction to federal courts over murder and other enumerated crimes when committed by Indians in Indian country.⁸⁸

⁸⁴ 109 U.S. 556 (1883).

⁸⁵ 118 U.S. 375 (1886).

⁸⁶ The series of events which led to the Supreme Court's 1883 decision in *Ex parte Crow Dog*, the resulting enactment of the Major Crimes Act of 1885, and the subsequent 1886 *Kagama* decision which sustained the Major Crimes Act, are discussed in detail in HARRING, *supra* note 24, at 100-74.

⁸⁷ 109 U.S. at 571-72. The Court supported its holding in part by the observation that it would be unfair to impose on the Indians

[a] law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.

Id. at 571. Federal prosecution of Crow Dog was spurred by the view that the tribe's resolution of the matter was both inadequate and inappropriate. See HARRING, *supra* note 24, at 104 (describing the dispute resolution process that occurred in Crow Dog's case as "a tribal council meeting to arrange for a peaceful reconciliation of the parties with an ordered gift of horses, blankets, money, or other property").

⁸⁸ 23 Stat. 362, 385 (1885). See generally JEFFREY BURTON, INDIAN TERRITORY AND THE UNITED STATES, 1866-1906: COURTS, GOVERNMENT, AND THE MOVEMENT FOR OKLAHOMA STATEHOOD 128 (1995) (describing the legislative origins of the Major Crimes Act); Gould, *supra* note 68, at 827 (noting that *Crow Dog* induced Congress to legislate for the first time with regard to matters of tribal self-government).

Federal jurisdiction applies under the Major Crimes Act whether the victim is Indian or non-Indian. The Act, which now covers thirteen major crimes, reads as follows:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [rape and related offenses], incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other

Shortly thereafter, the authority of Congress to enact the Major Crimes Act was put before the Supreme Court in *Kagama*, which involved the murder of a Klamath Indian by another Klamath Indian near the Hoopa Reservation in northern California.⁸⁹ The attack on the validity of the Major Crimes Act was premised on "the most fundamental of constitutional principles—the *McCulloch* understanding that Congress ordinarily possesses only that authority delegated to it in the Constitution . . ."⁹⁰ Although the Constitution does provide Congress "with power over war, treaties, and the regulation of commerce with tribes,"⁹¹ it was unclear that Congress had relied on delegated powers in asserting authority over "major" crimes committed in Indian country by Indians.

In fact, in sustaining the Major Crimes Act, the Supreme Court expressly eschewed reliance on constitutional text.⁹² Instead, the Court found in the federal-tribal trust relationship the source of federal plenary authority over internal tribal affairs:

These Indians tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food.

persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

18 U.S.C. § 1153 (Supp. 1998). "It is unsettled whether the Major Crimes Act divests the tribal courts of concurrent jurisdiction." GETCHES, *supra* note 58, at 558. However, the Supreme Court has noted that "[t]he issue of exclusive jurisdiction over major crimes was mooted for all practical purposes by the passage of the Indian Civil Rights Act of 1968 which limits the punishment that can be imposed by Indian tribal courts to a term of 6 months or a fine of \$500." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203 n.14 (1978). In 1986, Congress increased the allowable punishments to imprisonment for one year and fines of up to \$5000, or both. Act of Oct. 24, 1986, Pub. L. No. 99-570, § 4217, 100 Stat. 3207 (1986) (codified at 25 U.S.C. § 1302 (1994)).

⁸⁹ See HARRING, *supra* note 24, at 144-46.

⁹⁰ Frickey, *Domesticating Federal Indian Law*, *supra* note 9, at 35 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

⁹¹ *Id.* at 59.

⁹² *United States v. Kagama*, 118 U.S. 375, 378-79 (1886). In construing the Indian Commerce Clause's scope, the Supreme Court opined:

[W]e think it would be a very strained construction of [the Indian Commerce] clause that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.

Id.

Dependent for their political rights. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, *and with it the power*.⁹³

The plenary power doctrine has been severely criticized both in terms of its scope and pedigree. As Robert Clinton has observed, "scholars consistently have questioned the purported doctrine of plenary federal authority over Indians because of the lack of any textual roots for the doctrine in the Constitution, the breadth of its implications, and the lack of any tribal consent to such broad federal authority."⁹⁴

The Supreme Court has also revised its thinking regarding the viability of the federal plenary power doctrine. With respect to the question of justiciability, the Court has retreated from the notion, most vividly expressed in the 1903 *Lone Wolf* decision,⁹⁵ that the exercise of federal power over Indian affairs is judicially unreviewable.⁹⁶ The Court has also on occasion attempted to distance itself from the free-floating

⁹³ *Id.* at 383-84 (emphasis added). It is interesting to compare *Kagama* with *Johnson v. M'Intosh*. In both cases, questionable foundational legal principles (the discovery doctrine and the notion of plenary power) are justified by the less than compelling argument of *fait accompli*. See *id.* at 385 (plenary federal power over Indian tribes must exist, in part, "because it has never been denied"); *Johnson*, 21 U.S. at 591 (the discovery doctrine, because the country was in fact "acquired and held under it," became "the law of the land, and cannot be questioned.").

⁹⁴ Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 856 n.41 (1990) (citing Milner Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1; R. BARSH & J. HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* (1980); Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979 (1981); Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989) (arguing for Indian consent as a limitation on federal authority); Robert T. Coulter, *The Denial of Legal Remedies to Indian Nations Under U.S. Law*, in RETHINKING INDIAN LAW 103 (National Lawyers Guild Committee on Native American Struggles ed., 1982); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195 (1984)); see Frickey, *Domesticating Federal Indian Law*, *supra* note 9, at 62 ("Kagama essentially stands for the proposition that in a colonized nation the centralized government has inherent power over the indigenous persons who are the victims of colonization.").

⁹⁵ *Lone Wolf v. Hitchcock* has been described as "devastating" to Indians insofar "as it justified the unilateral termination of treaties." JOHN R. WUNDER, "RETAINED BY THE PEOPLE": A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 40 (1994). The Court in *Lone Wolf* sustained legislation which abrogated an Indian treaty, holding that "as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation." 187 U.S. 553, 568 (1903).

⁹⁶ See *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84 (1977) (plenary power "does not mean that all federal legislation concerning Indians is . . . immune from judicial scrutiny"); *United States v. Alcea Bank of Tillamooks*, 329 U.S. 40, 54 (1948) (plurality opinion) ("The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute"); see Getches, *supra* note 12, at 1585 n.45 ("The Court no longer regards the political question doctrine as an absolute barrier to justiciability.").

plenary power doctrine, preferring instead to focus on the available constitutional sources of authority.⁹⁷

The thrust and parry of federal Indian law is quite apparent in the Court's decisions concerning the plenary power doctrine. The Court has retreated from some of its broader pronouncements, but it has not overruled them.⁹⁸ The Court has also declared that it will overturn federal legislation concerning tribal affairs if "the special treatment can[not] be tied rationally to the fulfillment of Congress' unique obligation toward the Indians."⁹⁹ To date, however, no statute has been invalidated on such grounds. It remains an operative constitutional law principle that "there is no such thing as an inherent congressional power: if the Constitution does not grant the power to Congress, it does not have that power."¹⁰⁰ Yet, as the "parry" quote from the 1978 decision in *Santa Clara Pueblo v. Martinez* indicates, in the peculiar field of federal Indian law, "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."¹⁰¹

E. The Indian Canons of Construction

Thrust

[I]t is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.—*County of Oneida v. Oneida Indian Nation*¹⁰²

Parry

Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or achieve the asserted understanding of the parties.—*Choctaw Nation v. United States*¹⁰³

⁹⁷ See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973) ("The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making.").

⁹⁸ See, e.g., *United States v. Dion*, 476 U.S. 734, 738 (1986) (quoting *Lone Wolf* for the proposition that Congress has the power to abrogate Indian treaties); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978) (citing *Kagama* for the proposition that Congress has plenary authority over the powers of tribal self-government).

⁹⁹ *Delaware Tribal Business Comm.*, 430 U.S. at 85 (citing *Morton v. Mancari*, 417 U.S. 535, 555 (1974)).

¹⁰⁰ Frickey, *Domesticating Federal Indian Law*, *supra* note 9, at 65 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

¹⁰¹ 436 U.S. 49, 56 (1978).

¹⁰² 470 U.S. 226, 247 (1985) (citing *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Winters v. United States*, 207 U.S. 564, 576-77 (1908)).

The language used in treaties with the Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.—*Worcester v. Georgia*¹⁰⁴

“Indian law” draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. . . . These instruments . . . must be read in light of the common notions of the day and the assumptions of those who drafted them.—*Oliphant v. Suquamish Indian Tribe*¹⁰⁵

While the exercise of federal authority over Indian affairs is normally thought of in terms of actions by the executive and legislative branches, the judiciary has played perhaps the most significant role in shaping the federal-tribal relationship.¹⁰⁶ The thrust and parry of federal Indian law is apparent not only in the substantive holdings of the Supreme Court, but also in its varying statements regarding how treaties and statutes should be interpreted and applied to Indians.

The judicially originated Indian canons of construction “are (1) the product of consciously articulated normative judgments; which (2) serve not as neutral interpretive guides, but rather as directives to construe ambiguous text liberally in order to advance substantive goals.”¹⁰⁷ These rules of interpretation are premised on “the Indians’ unequal bargaining

¹⁰³ 318 U.S. at 432; see *United States v. Choctaw Nation*, 179 U.S. 494, 532 (1900) (“It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians.”).

¹⁰⁴ 31 U.S. (6 Pet.) 515, 582 (1832) (McLean, J., concurring).

¹⁰⁵ 435 U.S. 191, 206 (1978).

¹⁰⁶ For example, Judith Resnik contends that the federal courts’ exercise of jurisdiction in instances where tribal courts possess concurrent jurisdiction can be described as “jurispathic,” a term she attributes to Robert Cover which means “that courts can kill law created by communities.” Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 732 (1989) (citing Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983)). Federal authority over Indian affairs, of course, is also exercised by the judicial development and enforcement of such concepts as the discovery doctrine, the trust relationship, and the plenary power doctrine. See *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 850 (1985) (stating that the right to be protected against an unlawful exercise of tribal court judicial power arises under federal common law and thus need not be based on a federal statute or constitutional provision).

¹⁰⁷ Watson, *supra* note 2, at 321; see *Hagen v. Utah*, 510 U.S. 399, 422 n.1 (1994) (Blackmun, J., dissenting) (“Because Congress’ authority to legislate unilaterally on behalf of the Indians derives from the presumption that Congress will act with benevolence, courts ‘have developed canons of construction that treaties and other federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians.’”) (quoting F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 221 (1982 ed.)).

power when agreements were negotiated.”¹⁰⁸ The presence of a trust relationship between the United States and the Indian tribes, which enabled the Supreme Court to justify the assertion of plenary power over Indians, likewise supports the application of the value-laden Indian canons as an ameliorating force when ambiguities arise regarding the assertion of federal authority.¹⁰⁹

The Indian canons of construction, like the canons of statutory construction collected and juxtaposed in Karl Llewellyn’s 1950 article, are not outcome determinative, and are susceptible to both misuse and nonuse. For example, Justice Rehnquist’s “parry” quote from *Oliphant v. Suquamish Indian Tribe*—that treaties should be read in light of “the assumptions of those who drafted them”—is difficult, if not impossible, to square with the *Worcester* quote and the Supreme Court’s similar statement in *Jones v. Meehan*.¹¹⁰ The *Jones* Court remarked that treaties must be construed “not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.”¹¹¹

Equally troubling is the fact that the Indian canons are often acknowledged but not utilized. It is well-established that, in determining the effect of “surplus land acts” that enabled non-Indians to purchase lands within Indian reservations, “Congress [must] clearly evince an ‘intent . . . to . . . change boundaries’ before diminishment [of the reservation] will be found.”¹¹² Yet, in *Hagen v. Utah*,¹¹³ the Court quickly brushed aside this

¹⁰⁸ *Hagen*, 510 U.S. at 422 n.1; see *Sokaogon Chippewa Community v. Exxon Corp.*, 2 F.3d 219, 224 (7th Cir. 1993), *cert. denied*, 510 U.S. 1196 (1994); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784, 822 (D. Minn. 1994); ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: CASES AND MATERIALS* 229-31 (3d ed. 1991) (summarizing the Indian canons); Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: “As Long as Water Flows, or Grass Grows upon the Earth”—How Long a Time Is That?, 63 CAL. L. REV. 601, 617 (1975) (analogizing Indian treaties to adhesion contracts).*

¹⁰⁹ See *Watson*, *supra* note 2, at 319-22.

¹¹⁰ 175 U.S. 1 (1899).

¹¹¹ *Id.* at 11; see Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 MONT. L. REV. 211, 238 (1991) (noting that *Oliphant* contradicted previous statements of the Court regarding the construction of Indian treaties and statutes concerning Indians). Justice Rehnquist’s interpretive approach, although at odds with prior statements of the Supreme Court, is not entirely without precedent. See *Caldwell v. State*, 1 Stew. & P. (Ala.) 327, 396 (1832) (Taylor, J.) (“The inquiry, however, is not, how did the Indians understand this language, but how was it understood by the sovereign whose agent employed it?”).

¹¹² *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (quoting *Rosebud v. Kneip*, 430 U.S. 584, 615 (1977)). In construing the clear statement rule, the Court in *Solem* articulated:

When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.

clear statement rule¹¹⁴ and other Indian canons to find that the boundaries of the Uintah Valley Reservation had been diminished by legislation authorizing non-Indian settlement.¹¹⁵

According to Phil Frickey, the “current Court has badly depreciated the canons, reducing them from clear statement requirements to be considered at the outset of the interpretive analysis to mere tiebreakers that apply only if the court would otherwise flip a coin.”¹¹⁶ David Getches goes further, suggesting that “[w]hile the Court may continue to cite the canons, it is difficult to attribute any significance to them in many recent cases.”¹¹⁷ The “on-again, off-again”¹¹⁸ application of the Indian canons, by providing a ready “framework for maneuver,”¹¹⁹ contributes in great measure to the thrust and parry of federal Indian law.¹²⁰

Id. at 472.

¹¹³ 510 U.S. 399 (1994).

¹¹⁴ Clear statement principles have been developed by courts “to ensure an unambiguous statement from Congress before allowing certain results to be reached.” Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2110-11 (1990). For example, “waivers of federal sovereign immunity must be ‘unequivocally expressed’ in the statutory text.” *United States v. Idaho ex rel. Director, Idaho Dep’t of Water Resources*, 508 U.S. 1, 6 (1993) (citing *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 (1990)). The clear statement principles seek to further their underlying policy objectives by ensuring that, before the courts will give effect to statutes that invade constitutional or other sensitive areas, Congress must fulfill its legislative role and speak directly and unmistakably on the issue. See WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 687-705 (2d ed. 1995).

¹¹⁵ *Hagen*, 510 U.S. at 399. Justice Blackmun, joined by Justice Souter, dissented, claiming that [a]lthough the majority purports to apply [the Indian canons] in principle . . . , it ignores them in practice, resolving every ambiguity in the statutory language, legislative history, and surrounding circumstances in favor of the State and imputing to Congress, where no clear evidence of congressional intent exists, an intent to diminish the Uintah Valley Reservation.

Id. at 424. Robert Laurence has observed that, while in *Hagen* the majority “‘talked the talk’ of judicial reluctance to cut back on tribal power,” the Court’s “‘walking the reluctant walk’ [was] another matter” Robert Laurence, *The Dominant Society’s Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography and the Indian Civil Rights Act*, 30 U. RICH. L. REV. 781, 794 (1996); see Getches, *supra* note 12, at 1620-22 (citing *Hagen* as an example of the “Retreat from the Established Canons of Construction”).

¹¹⁶ Frickey, *Domesticating Federal Indian Law*, *supra* note 9, at 73. See generally Watson, *supra* note 2, at 245 (discussing whether interpretive canons should be viewed as tiebreakers or rebuttable presumptions).

¹¹⁷ Getches, *supra* note 12, at 1621.

¹¹⁸ Laurence, *supra* note 115, at 795.

¹¹⁹ Llewellyn, *supra* note 1, at 401.

¹²⁰ The Supreme Court has not only manipulated interpretive maxims in the field of Indian law, it has espoused contradictory rules of construction. Compare *Elk v. Wilkins*, 112 U.S. 94, 100 (1884) (“General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them.”); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 622 (1870) (Bradley, J.,

III. STATE AUTHORITY IN INDIAN COUNTRY

Thrust

Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive The Cherokee nation, then, is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force—*Worcester v. Georgia*¹²¹

Congress can authorize the imposition of state taxes on Indian tribes [but] the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear.—*Montana v. Blackfeet Tribe*¹²³

Parry

[E]ven on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law.—*Organized Village of Kake v. Egan*¹²²

Our conclusion that the [Act at issue] does not expressly authorize direct [state] taxation of Indian tribes does not entail the further step that the Act impliedly prohibits taxation of nonmembers doing business on a reservation.—*Cotton Petroleum Corp. v. New Mexico*¹²⁴

dissenting) ("[A]ll laws of a general character passed by Congress will be considered as not applying to the Indian territory, unless expressly mentioned."); *with Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) ("[A] general statute in terms applying to all persons includes Indians and their property interests.").

¹²¹ 31 U.S. (6 Pet.) 515, 557, 561 (1832); *see The Kansas Indians*, 72 U.S. (5 Wall.) 737, 757 (1866) ("As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws."); *Elk v. Wilkins*, 112 U.S. 94, 99-100 (1884) ("Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any state.").

¹²² 369 U.S. 60, 75 (1962). The Court stated that "[t]he general notion drawn from . . . *Worcester v. Georgia* . . . , that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations." *Id.* at 72; *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685, 687 n.3 (1965) ("Certain state laws have been permitted to apply to activities on Indian reservations, where those laws are specifically authorized by acts of Congress, or where they clearly do not interfere with federal policies concerning the reservations.").

¹²³ 471 U.S. 759, 765 (1985).

¹²⁴ 490 U.S. 163, 183 n.14 (1989).

[Indian tribes] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.—*United States v. Kagama*¹²⁵

Mere subjection of Indian rights to legal challenge in state court . . . would no more imperil those rights than would a suit brought by the Government in district court Indian interests may be satisfactorily protected under regimes of state law.—*Colorado River Water Conservation District v. United States*¹²⁶

In spite of the presence and threat of Indian tribes in the eastern United States during the latter part of the eighteenth century, and despite (or perhaps because of) the importance of the question of control over westward expansion, the Constitution does not speak to whether states may assert regulatory authority in Indian country.¹²⁷ Consequently, in *Worcester v. Georgia*,¹²⁸ the last of the Indian law opinions authored by Chief Justice John Marshall, the Supreme Court was required to fashion foundational legal principles in response to the assertion that states may abolish tribal law and subject persons residing on tribal lands within state boundaries to state laws. In a decision described by Charles Wilkinson as “the headwaters of modern Indian law,”¹²⁹ the Court held that, as “[t]he whole intercourse between the United States and [the Cherokee] nation, is, by our constitution and laws, vested in the government of the United States,”¹³⁰ the attempted abrogation of tribal law and assertion of state authority was “repugnant to the constitution, laws, and treaties of the United States.”¹³¹ In short, “*Worcester*’s holding can be characterized as

¹²⁵ 118 U.S. 375, 384 (1886).

¹²⁶ 424 U.S. 800, 812 (1976).

¹²⁷ Frickey, *Practical Reasoning*, *supra* note 8, at 1168.

¹²⁸ 31 U.S. (6 Pet.) 515 (1832).

¹²⁹ WILKINSON, *supra* note 21, at 96; *see id.* (noting that an understanding of *Worcester* is essential to comprehending the field of federal Indian law).

¹³⁰ *Worcester*, 31 U.S. at 561.

¹³¹ *Id.* The Georgia statute at issue required non-Indians who reside in Cherokee territory to obtain a license from the state and to take an oath of allegiance. *See id.* at 539. As the act’s title indicates, baser motives were at play as well. *Id.* (describing the statute as “an act to prevent the exercise of assumed and arbitrary power, by all persons, under pretext of authority from the Cherokee Indians, and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the state within the aforesaid territory”) (emphasis added); *see also* ALTHEA BASS, *CHEROKEE MESSENGER* 108 (1936) (“In 1828 occurred the event that determined the expulsion of the Cherokees from Georgia. Gold was discovered near Dahlonega.”).

Samuel Worcester was a missionary who was sent to Cherokee territory in 1825 by the American Board of Foreign Missions and who lived with the Cherokee—both in Georgia and Oklahoma—the remainder of his life. *Id.* at 3-7. For a discussion on the conviction and imprisonment

follows: The United States has a plenary legislative power over tribes, but all powers not explicitly removed from the tribe reside with the tribe, and as a consequence, the state has no power."¹³²

One of the primary reasons for the thrust and parry of federal Indian law is the Supreme Court's inconsistent treatment of, and reliance on, *Worcester*. It is the schizophrenic use of *Worcester* that in large part causes the Court, in one case, to declare that "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history,"¹³³ and, in another case, to assert that "[s]tates and tribes have concurrent jurisdiction over the same territory."¹³⁴ Although a comprehensive review of the treatment of *Worcester* is beyond the scope of this Article, it is evident from a brief survey of applicable cases that the thrust of the *Worcester* directive against the assertion of state authority in Indian country has been parried, but not done away with entirely, by subsequent Supreme Court decisions.

Even from the beginning, it was evident that Marshall's categorical statements regarding the lack of state jurisdiction over Indians lands were not universally accepted. As discussed below, the Court itself in *Worcester* divided over the status and future of tribal sovereignty, and the extent to which state law should apply in Indian country.¹³⁵ The State of Georgia, of course, stubbornly resisted implementation of *Worcester*, and ultimately mooted the point by the forced evacuation of the Cherokee people.¹³⁶ Moreover, in two decisions which followed closely on the heels of the Supreme Court's 1832 decision, the highest courts of Alabama and Tennessee simply refused to follow the holding in *Worcester*, concluding

of *Worcester* and fellow missionary Elizur Butler, as well as the subsequent legal and political events which ultimately culminated in the infamous "trail of tears," see generally CHEROKEE MESSENGER, *supra* note 131; JILL NORGREN, THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS 112-41 (1996); GRACE STEELE WOODWARD, THE CHEROKEES 139-218 (1963); and Joseph Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969).

In 1992, one hundred and sixty years after the Supreme Court's decision in *Worcester*, the State of Georgia, through the State Board of Pardons and Paroles, issued an order which "acts to remove a stain on the history of criminal justice in Georgia . . . [by] unconditionally and fully pardon[ing] Samuel Austin Worcester and Elihu [Elizur] Butler." NORGREN, *supra*, at 2 (quoting the state's pardon). Ironically, the forced expulsion of the Cherokee people has ensured that Chief Justice Marshall's holding in *Worcester* technically remains good law. The Cherokee Nation today occupies lands in Oklahoma and North Carolina, "in which the laws of Georgia can have no force." 31 U.S. at 561.

¹³² Ragsdale, *supra* note 10, at 68.

¹³³ Rice v. Olson, 324 U.S. 786, 789 (1945) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)).

¹³⁴ Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989).

¹³⁵ See *infra* part V.

¹³⁶ 31 U.S. at 589.

that state laws do apply in Indian country.¹³⁷ As these state court decisions indicate, “[t]he language of John Marshall in *Worcester* was largely irrelevant to Indians confronted with the power of the states in the nineteenth century.”¹³⁸

Although certainly relevant, *Worcester* also played a less prominent role than one would expect in the development of Supreme Court authority regarding state power over tribal lands. The current thrust and parry of federal Indian law is due in part to the emergence in the nineteenth century of “two separate braces of opinions”¹³⁹ that impact this issue. The first line of opinions begins with *Worcester* and continues with *Ex parte Crow Dog*¹⁴⁰ and *Talton v. Mayes*,¹⁴¹ which both acknowledged and upheld tribal sovereign powers. The second line of opinions, which includes the previously discussed *Kagama* and *Lone Wolf* decisions,¹⁴² undercuts the notion of tribal sovereignty. This second line of precedent also includes *United States v. McBratney*,¹⁴³ “the pivotal 1882 decision that first legitimized the application of state law in Indian country by upholding state court jurisdiction over an alleged murder of one non-Indian by another non-Indian.”¹⁴⁴ Thus, even prior to the twentieth century, the Supreme Court’s “flat prohibition against unilateral state assertions of authority”¹⁴⁵ over tribal lands was eroding, with “the broad exclusionary

¹³⁷ These cases, and other state decisions upholding state criminal jurisdiction in Indian country in spite of *Worcester*, are discussed in HARRING, *supra* note 24, at 34-53 (1994) (discussing *State v. Foreman*, 16 Tenn. (8 Yer.) 256 (1835); *Caldwell v. State*, 1 Stew. & P. (Ala.) 327 (1832)). The *Caldwell* decision was the first case decided by the newly constituted, separate Alabama Supreme Court. See J.O. Sentell, *The Supreme Court of Alabama, 1820-1970—A Glimpse*, 31 ALA. LAWYER 144, 146 (1970).

¹³⁸ HARRING, *supra* note 24, at 52.

¹³⁹ WILKINSON, *supra* note 21, at 24.

¹⁴⁰ 109 U.S. 556 (1883) (holding that the murder of an Indian by a fellow tribal member was punishable only by tribal law in the absence of an express conferral of adjudicatory jurisdiction by Congress).

¹⁴¹ 163 U.S. 376 (1896) (holding that Indian tribes are not limited by requirements imposed by the Bill of Rights because tribal powers predate, and are thus not subject to, the Constitution).

¹⁴² See *supra* part II.D.

¹⁴³ 104 U.S. 621 (1881).

¹⁴⁴ WILKINSON, *supra* note 21, at 88. Wilkinson observes that “[t]here is no statutory support for the *McBratney* ruling” and that the decision instead

evidences one essential policy choice that the Supreme Court made and continues to honor: absent a highly explicit federal statute to the contrary, state laws prevail over tribal and federal laws in regard to an activity that occurs in Indian country and that is not directly involved with legitimate tribal concerns.

Id.

¹⁴⁵ Frickey, *Practical Reasoning*, *supra* note 8, at 1169.

language of *Worcester* . . . yield[ing] to the distinction between Indians and non-Indians."¹⁴⁶

Is the *Worcester* holding that state laws "have no force" in Indian country good law today? Clearly not: As the "parry" quote from *Organized Village of Kake* indicates, some state laws *do* apply within reservation boundaries, and in certain instances without express congressional authorization.¹⁴⁷ In recognition of this fact, the Court declared, in its 1973 decision in *Mescalero Apache Tribe v. Jones*,¹⁴⁸ that "[t]he conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester v. Georgia* . . . has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government."¹⁴⁹ On the same day, in *McClanahan v. State Tax Commission of Arizona*,¹⁵⁰ the Court reiterated, after discussing *Worcester* and subsequent limiting cases, that "[t]he modern cases thus tend to avoid reliance on *platonic notions* of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power."¹⁵¹

Yet, as in the case of Marc Antony's funeral oration for Julius Caesar, it remains unclear whether the Supreme Court has come to bury *Worcester*, or, consistent with virtually all Indian law scholarship, come to praise it.¹⁵²

¹⁴⁶ Frederick J. Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME L. REV. 600, 628 (1976).

¹⁴⁷ *Id.* at 628 (observing that, even in *Williams v. Lee*, 358 U.S. 217 (1958), which disallowed the assertion of state adjudicatory jurisdiction over an on-reservation dispute between a non-Indian creditor and an Indian debtor, the Supreme Court "noted that time and history had modified the principle of *Worcester v. Georgia* by allowing state law to extend to reservations where 'essential tribal relations were not involved.'") (quoting *Williams*, 358 U.S. at 219).

¹⁴⁸ 411 U.S. 145 (1973).

¹⁴⁹ *Id.* at 148; see *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 602 (1943) (distinguishing *Worcester* by noting that it "held that a State might not regulate the conduct of persons in Indian territory on the theory that the Indian tribes were separate political entities with all the rights of independent status—a condition which has not existed for many years in the State of Oklahoma.").

¹⁵⁰ 411 U.S. 164 (1973).

¹⁵¹ *Id.* at 172 (emphasis added); see *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980) ("Long ago the Court departed from Mr. Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries") (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832)); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331 (1983); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 257 (1992) (Marshall's views on state authority in Indian country "have, over time, lost their independent sway").

¹⁵² Antony's disingenuous protestation that he had "come to bury Caesar, not to praise him," is discussed in *Clum v. State*, 893 P.2d 1277, 1279 n.1 (Alaska Ct. App. 1995) (citing WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 3, sc. 2).

With the exception of Frederick Martone, *supra* note 146, the notion in *Worcester* that state laws have no force in Indian country appears to be universally praised by scholars. Indian law

Despite numerous statements suggesting that the decision is of historic interest only, members of the Court in the modern era of federal Indian law continue to invoke *Worcester*, both in majority¹⁵³ and dissenting¹⁵⁴ opinions. As noted by Frank Pommersheim, “the early decisions in Indian law authored by Chief Justice John Marshall . . . [h]ave been seriously vitiated and increasingly attenuated over the years, but they have not been overruled or completely abandoned.”¹⁵⁵

What is evident, however, is that the Court has moved away from bright-line statements, such as “thrust” quotes from *Worcester*¹⁵⁶ and *Blackfeet Tribe*,¹⁵⁷ and towards multi-factored, balancing tests, such as those found in the “parry” cases of *Organized Village of Kake*¹⁵⁸ and *Cotton Petroleum*.¹⁵⁹ As in any area of the law, the adoption of such increasingly complex and variable legal rules produces, as a natural by-product, a higher degree of indeterminacy, as well as the heightened potential for manipulation.¹⁶⁰ As Deborah Geier points out, “[t]he precise contours and

scholarship in general appears transfixed by the foundational cases and the concomitant normative questions of what federal Indian law “should have been” and “ought to be.” In fact, one distinguished scholar recently noted:

Many legal scholars would respond to the incoherence in this field by proposing theoretical modifications and doctrinal reforms to bring a more normatively attractive and descriptively coherent approach to it. Yet the question whether such scholarly reforms of the field are likely to be successful, and the even more basic question of what constitutes meaningful reform in the first place, are inquiries that are daunting in themselves and deserve attention.

Frickey, *Adjudication and Its Discontents*, *supra* note 9, at 1777.

¹⁵³ See, e.g., *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 159 (1982).

¹⁵⁴ See, e.g., *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1167 n.40 (1996) (Souter, J., dissenting); *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 791 (1991) (Blackmun, J., dissenting); *Duro v. Reina*, 495 U.S. 676, 705 n.3 (1990) (Brennan, J., dissenting).

¹⁵⁵ Pommersheim, *supra* note 10, at 402-03.

¹⁵⁶ See *supra* notes 49, 104, and 121 and accompanying text.

¹⁵⁷ See *supra* note 123 and accompanying text.

¹⁵⁸ 369 U.S. 60 (1962); see *supra* note 122 and accompanying text.

¹⁵⁹ 490 U.S. 163 (1989); see *supra* note 124 and accompanying text.

¹⁶⁰ This basic point is often made in law school by having first year property students read *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805), and compare the ease of application—and corresponding predictive values—of the holding (“that mere pursuit gave Post no legal right to the fox”) and the *dictum* (that “the mortal wounding of such beasts, by one not abandoning his pursuit, may . . . be deemed possession of him”) with the dissent’s less definite proposal for determining when possessory rights to beasts *ferae naturae* arise. See *id.* at 177, 178. The majority rejected the dissent’s view on the grounds that

[i]f the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.

content of tribal sovereignty today are inevitably a function of the decision-making process that defines it"¹⁶¹ By "employ[ing] the use of presumptions and burdens of proof to define substance in the face of indeterminacy,"¹⁶² Geier contends:

The Court can and does fundamentally change the substantive law without appearing to do so. Without the appearance of change, the Court's opinions need not proffer any defense or rationale for the change. The balance of power in Indian country can thus be shifted dramatically without explicit and reasoned justifications solely through switching the presumptions underlying the outcome.¹⁶³

The ability to manipulate presumptions, and transform doctrinal law *sub silentio*, contributes greatly to the thrust and parry of federal Indian law. Geier herself expertly illustrates this point by demonstrating that, in two 1989 Supreme Court cases, *Cotton Petroleum*¹⁶⁴ and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,¹⁶⁵ the Court acted "[c]ontrary to stated federal policy . . . [and] shifted power from tribal governments to states . . . by reversing the implicit presumptions used by the Court in delineating the boundaries between state and tribal power."¹⁶⁶ Her discussion of *Cotton Petroleum* is particularly salient, as it provides a contextual understanding of the "thrust" and "parry" quotes from *Blackfeet Tribe* and *Cotton Petroleum*, respectively, presented at the outset of this part of the Article.¹⁶⁷

At issue in *Cotton Petroleum* was the authority of the State of New Mexico to impose a severance tax on the production of oil and gas by non-Indian lessees from wells located on the Jicarilla Apache Reservation.¹⁶⁸ In *Montana v. Blackfeet Tribe*,¹⁶⁹ decided four years earlier, the Court held that the State could not tax the Tribe's royalty interests, received under oil and gas leases issued to non-Indian lessees pursuant to the Indian Mineral

Id. at 179.

¹⁶¹ Deborah A. Geier, Essay, *Power and Presumptions; Rules and Rhetoric; Institutions and Indian Law*, 1994 B.Y.U. L. REV. 451, 452.

¹⁶² *Id.* at 453. Geier refers to this rhetorical device as "argument-from-ignorance," a term attributed to Richard H. Gaskins. *Id.* (citing RICHARD H. GASKINS, *BURDENS OF PROOF IN MODERN DISCOURSE* (1992)).

¹⁶³ *Id.*

¹⁶⁴ *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

¹⁶⁵ 492 U.S. 408 (1989).

¹⁶⁶ Geier, *supra* note 161, at 454.

¹⁶⁷ See *supra* notes 123-24 and accompanying text.

¹⁶⁸ 490 U.S. at 166.

¹⁶⁹ 471 U.S. 759 (1985).

Leasing Act of 1938,¹⁷⁰ because “[t]he statute contains no explicit consent to state taxation [and otherwise] . . . does not satisfy the requirement that Congress clearly consent to state taxation.”¹⁷¹ However, when the issue subsequently resurfaced in *Cotton Petroleum*, the Supreme Court declared that “congressional silence no longer entails a broad-based immunity from [state] taxation for private parties doing business with Indian tribes.”¹⁷² This statement was based on the Court’s assessment of the development, and current status, of applicable law:

This Court’s approach to the question whether a State may tax on-reservation oil production by non-Indian lessees has varied over the course of the past century. At one time, such a tax was held invalid unless expressly authorized by Congress; more recently, such taxes have been upheld unless expressly or impliedly prohibited by Congress.¹⁷³

As Geier points out,

[t]he latter assertion is a bit disingenuous because it was *Cotton Petroleum* itself that established as the majority rule that the appropriate presumption to apply is that state action against non-Indians in Indian country, even with respect to transactions intimately pertaining to land, is valid unless Congress acts to prohibit the application of state law.¹⁷⁴

A shift in power had occurred on the Court, “and an accompanying switch in the presumptions [was] brought to bear in preemption analysis.”¹⁷⁵

Even more disturbing is the fact that “*Cotton Petroleum* purported to make no new law.”¹⁷⁶ Modifications of, and abrupt changes in, the field of

¹⁷⁰ 25 U.S.C. §§ 396a-g (1997).

¹⁷¹ *Blackfeet Tribe*, 471 U.S. at 766-67.

¹⁷² 490 U.S. at 176. The *Cotton Petroleum* decision, written by Justice Stevens, adopts the position previously advocated by Stevens in his dissenting opinion in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 159 (1980), that state law applies to tribal affairs unless Congress affirmatively prohibits its application. See Geier, *supra* note 161, at 476-79.

¹⁷³ *Cotton Petroleum*, 490 U.S. at 173.

¹⁷⁴ Geier, *supra* note 161, at 478. One commentator articulated the effect of Justice Stevens’ opinion in *Cotton Petroleum*:

Justice Stevens’ opinion recast the question raised as ‘whether Congress has acted to grant the Tribe such immunity.’ He thus turned the Court’s Indian preemption analysis on its head by starting with a presumption *against* the preemption of state law; this is the approach normally reserved for federal-state preemption cases.

Getches, *supra* note 12, at 1619 n.202 (quoting *Cotton Petroleum*, 490 U.S. at 175).

¹⁷⁵ Geier, *supra* note 161, at 475. Geier points out that, prior to 1989, decisions striking down state power in Indian country—most often written by Justices Marshall, Brennan, or Blackmun—utilized the presumption that assumed state law was inapplicable in Indian country unless expressly authorized by Congress. *Id.* However, in 1989, the Justices who urged the antipodal view “finally controlled the Court and embedded their far different presumption into the preemption analysis.” *Id.*

¹⁷⁶ *Id.* at 481.

federal Indian law without accompanying "explicit and reasoned justifications"¹⁷⁷ enable proponents and opponents of state authority in Indian country to pick and choose between cases that employ "diametrically opposed presumptions"¹⁷⁸ and thus point in different directions in instances of congressional silence. The fact that the "conceptual clarity of . . . Marshall's view in *Worcester v. Georgia* . . . has given way to more individualized treatment of particular treaties and specific federal statutes"¹⁷⁹ has in turn opened the door to the development of seemingly incompatible precedents—the hallmark of the thrust and parry of federal Indian law.

IV. TRIBAL STATUS AND TRIBAL AUTHORITY IN INDIAN COUNTRY

A. *Political Status of Tribal Governments*

Thrust

The Cherokees are in many respects a foreign and independent nation.—*Parks v. Ross*¹⁸⁰

The Indians [t]ribes . . . were . . . [n]ations, distinct political communities, with whom the United States might and habitually did deal . . . either through treaties . . . or through Acts of Congress in the ordinary forms of legislation.—*Elk v. Wilkins*¹⁸²

Parry

In no respect can [the Cherokees] be considered a foreign State or territory . . . —*United States v. Cox*¹⁸¹

The North American Indians do not and never have constituted 'nations' . . . In short, the word 'nation' as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment.—*Montoya v. United States*¹⁸³

¹⁷⁷ *Id.* at 453.

¹⁷⁸ *Id.* at 464.

¹⁷⁹ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149 (1973) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 555-61 (1832)).

¹⁸⁰ 52 U.S. (11 How.) 362, 374 (1850).

¹⁸¹ 59 U.S. (18 How.) 100, 104 (1855).

¹⁸² 112 U.S. 94, 99 (1884).

¹⁸³ 180 U.S. 261, 265 (1901).

The numerous treaties made with [the Cherokee] by the United States recognize them as a people capable of maintaining the relations of peace and war [and] of being responsible in their political character for any violation of their engagements The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.—*Cherokee Nation v. Georgia*¹⁸⁴

The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several States are sovereign . . . finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of Congress defining the relations of that people with the United States.—*Cherokee Nation v. Southern Kansas Railway Co.*¹⁸⁵

As previously noted,¹⁸⁶ the question of whether Indian tribes qualified as “foreign States” within the meaning of Article III, section 2, of the United States Constitution, was seemingly answered in 1831 in *Cherokee Nation v. Georgia*,¹⁸⁷ when Chief Justice Marshall held that tribes are not foreign states, but instead should “be denominated domestic dependent nations.”¹⁸⁸ Although the military strength of Indians and the use of treaties supported the notion that the tribes should be considered foreign governments,¹⁸⁹ the determinative fact for the Court was that the Constitution empowers Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁹⁰

Cherokee Nation is clear on two points: (1) an Indian tribe is a “state” or “nation” in the sense that it is “a distinct political society, separated from others, capable of managing its own affairs and governing itself”;¹⁹¹ but (2) “tribes which reside within the acknowledged boundaries of the United States can[not], with strict accuracy, be denominated *foreign* nations.”¹⁹² The fact that Marshall’s opinion “acknowledged Indian tribes

¹⁸⁴ 30 U.S. (5 Pet.) 1, 16 (1831); see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)) (“Indian tribes are ‘distinct, independent political communities, retaining their original natural rights’ in matters of local self-government.”).

¹⁸⁵ 135 U.S. 641, 653 (1890).

¹⁸⁶ See *supra* notes 66-68 and accompanying text.

¹⁸⁷ 30 U.S. 1.

¹⁸⁸ *Id.* at 17.

¹⁸⁹ See *Williams*, *supra* note 43, at 988 (“Because of the fur trade, the tribes of eastern North America during the Classical Era of Indian-white treaty diplomacy were often treated in fact, if not wholly regarded in theory, as rough political, economic, and military equals by their European trading partners.”).

¹⁹⁰ U.S. CONST. art. I, § 8, cl. 3 (emphasis added); see *Cherokee Nation*, 30 U.S. at 18 (“In this clause [Indian tribes] are . . . contradistinguished . . . from foreign nations”).

¹⁹¹ 30 U.S. at 16 (discussing the status of the Cherokees).

¹⁹² *Id.* at 17 (emphasis added). The Court, however, was divided on these points. Justices Johnson and Baldwin would have gone further than Marshall and held that the Cherokees do not

as distinct nations capable of self-government,"¹⁹³ in conjunction with the holding a year later in *Worcester* that state law was inoperative in Indian country, "was proclaimed 'glorious news' by the Cherokee leader Elias Boudinot."¹⁹⁴

Despite the pellucid nature of *Cherokee Nation's* twin holdings, subsequent judicial decisions have not been entirely faithful to Marshall's description of tribal political status. For example, Chief Justice Roger Taney, in the infamous *Dred Scott* decision,¹⁹⁵ stated in *dictum* that "Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white"¹⁹⁶ More common is the reluctance to accept Marshall's characterization of Indian tribes as states or nations. The Alabama Supreme Court, in a decision issued one year after *Cherokee Nation*, could "find nothing . . . which tends in the remotest degree to countenance the opinion that the Indian tribes have ever been considered as distinct and independent communities."¹⁹⁷

qualify as a state, let alone a foreign state. *See id.* at 21 (Johnson, J., concurring) ("I cannot but think that there are strong reasons for doubting the applicability of the epithet *state*, to a people so low in the grade of organized society as our Indian tribes most generally are."); *id.* at 49 (Baldwin, J., concurring) ("the judicial power cannot divest the states of rights of sovereignty, and transfer them to the Indians, by decreeing them to be a nation, or foreign state"). On the other hand, Justice Thompson wrote a dissenting opinion, with which Justice Story concurred, that viewed the Cherokees as a foreign state. *See id.* at 59 (Thompson, J., dissenting) ("If we look to the whole course of treatment by this country of the Indians, from the year 1775, to the present day, . . . the conclusion appears to me irresistible, that they have been regarded . . . not only as sovereign and independent, but as foreign nations"). *See generally* Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 10 n.38 (1993) (noting that the seventh member of the Court, Justice Duvall, was not present).

Although Justice Story joined Justice Thompson's dissenting opinion, his commentaries contain a different view of the status of Indians:

As infidels, heathens, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations. The territory over which they wandered, and which they used for this temporary and fugitive purposes, was, in respect to Christians, deemed as if it were inhabited only by brute animals.

WILLIAMS, *supra* note 31, at 316 (quoting JOSEPH STORY, COMMENTARIES § 152, reprinted in M. Lindley, *The Acquisition and Government of Background Territory in International Law* 29 (1926)).

¹⁹³ Dussias, *supra* note 192, at 11.

¹⁹⁴ Rennard Strickland & William M. Strickland, *A Tale of Two Marshalls: Reflections on Indian Law and Policy. The Cherokee Cases, and the Cruel Irony of Supreme Court Victories*, 47 OKLA. L. REV. 111, 112 (1994). In his letter to his brother (and future Confederate General) Stand Watie, dated March 7, 1832, Elias Boudinot also optimistically declared that "[t]he question is forever settled as to who is right & who is wrong." WOODWARD, *supra* note 131, at 170-71.

¹⁹⁵ *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

¹⁹⁶ *Id.* at 404.

¹⁹⁷ *Caldwell v. State*, 1 Stew. & P. (Ala.) 327, 425 (1832) (Taylor, J.); *see id.* at 332 (Libscomb, C.J.) (examining, and dismissing, "this high pretension to savage sovereignty").

The Supreme Court itself has answered the thrust of *Cherokee Nation* with the parry of *Montoya v. United States*, which was decided during the post-1887 era of subjugation and allotment, and which “drew a distinction between nations and tribes, based on racist assumptions about the ‘uncivilized’ nature of the Indians.”¹⁹⁸

In sum, the Supreme Court has addressed, but not conclusively resolved, the question of the political status of the Indian tribes within its boundaries. Proponents of Indian sovereignty can cite to *Holden v. Joy*, an 1872 decision in which the Court proclaimed that “the acts of our government, both in the executive and legislative departments, plainly recognize such tribes or nations as States”¹⁹⁹ Opponents of Indian sovereignty can invoke the Court’s equally straightforward declaration, made a mere twelve years later in *United States v. Kagama*, that the Indian tribes “were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, [and] not as nations”²⁰⁰ Neither case has been overruled; consequently, both cases are “good” law.

The Tennessee Supreme Court, as evidenced in an 1835 decision upholding the extension of state criminal jurisdiction into Cherokee country, was likewise unimpressed with Chief Justice Marshall’s depiction of Indian tribes as nations or states:

[I]t is assumed in *Worcester’s* case, as undeniably true, that ‘the Indian nations had always been considered as distinct and independent political communities To this we answer, and we do it with unfeigned regret, that our political, legislative, executive, and judicial history, so far from proving the recognition of the sovereign independence of the Indian nations within our limits, with the single exception [of *Worcester*] above, proves, and conclusively, directly the reverse.

State v. Foreman, 16 Tenn. (8 Yer.) 256, 311-12 (1835); see *id.* at 335 (noting that Marshall’s view that Indian tribes are distinct and sovereign political communities “is confidently believed to be incorrect, and that sooner or later it must be abandoned.”).

¹⁹⁸ Dussias, *supra* note 192, at 7 n.17; see *infra* note 265 and accompanying text.

¹⁹⁹ 84 U.S. (17 Wall.) 211, 242 (1872).

²⁰⁰ 118 U.S. 375, 381 (1886).

B. Inherent Sovereignty as a Source of Tribal Power

Thrust

The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.—*United States v. Wheeler*²⁰¹

[T]he Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government—*Merrion v. Jicarilla Apache Tribe*²⁰³

Tribal powers are not implicitly divested by virtue of the tribes dependent status.—*Washington v. Confederated Tribes of Colville Indian Reservation*²⁰⁵

Parry

Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of . . . the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two.—*United States v. Kagama*²⁰²

[T]ribal sovereignty over nonmembers "cannot survive without express congressional delegation," and is therefore *not* inherent.—*South Dakota v. Bourland*²⁰⁴

Indian tribes are prohibited from exercising . . . those powers . . . that are . . . "inconsistent with their status."—*Oliphant v. Suquamish Indian Tribe*²⁰⁶

What is the source, and extent, of tribal adjudicatory and regulatory power? Are Indian tribes truly sovereign?²⁰⁷ One view is that "Indian tribal sovereignty remains a doctrine of considerable vitality because of its internal significance for tribal governments and the resulting external consequences for the states and non-Indian individuals and corporations within Indian country."²⁰⁸ A contrary view is that "tribal sovereignty is

²⁰¹ 435 U.S. 313, 323 (1978).

²⁰² 118 U.S. 375, 379 (1886).

²⁰³ 455 U.S. 130, 149 n.14 (1982).

²⁰⁴ 508 U.S. 679, 695 n.15 (1993) (citation omitted) (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)).

²⁰⁵ 447 U.S. 134, 153 (1980).

²⁰⁶ 435 U.S. 191, 208 (1978) (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976) (emphasis added by Supreme Court)).

²⁰⁷ See generally *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 456 (1793) (Wilson, J.) ("Who, or what, is a sovereignty? What is his or its sovereignty? On this subject, the errors and the mazes are endless and inexplicable.").

²⁰⁸ GETCHES, *supra* note 58, at 395.

subject to the whim of Congress and is therefore not true sovereignty but sovereignty by sufferance."²⁰⁹

Is the notion of sovereignty by sufferance, as Frank Pommersheim contends, "oxymoronic on its face"?²¹⁰ The Supreme Court, not surprisingly, has vacillated on the question of inherent tribal sovereignty as a source of tribal power. The topic can be divided into two related issues: (1) whether Indian tribes remain sovereign governments; and (2) whether, in the words of Frederick Martone, tribal governmental authority is based on "inherent right or congressional license."²¹¹

It is the claim of tribal sovereignty—a controversial and muddled blend of territorial authority and the right of self-government—that distinguishes Indians from other ethnic groups in the United States.²¹² Frederick Martone, writing in 1976, argued that "the use of the term 'sovereignty' in connection with an Indian tribe is wholly inaccurate as against the United States,"²¹³ and urged the Supreme Court to "forthrightly deny the existence of tribal sovereignty"²¹⁴ In fact, the Supreme Court *had* already denied the existence of tribal sovereignty, as evidenced by the "parry" quote from *United States v. Kagama*.²¹⁵

Nevertheless, in the year prior to Martone's invitation to jettison tribal sovereignty, the Supreme Court resurrected *Worcester* and declared that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."²¹⁶ Moreover, the Court, following Martone's law review article, reaffirmed its acceptance of the Indian sovereignty doctrine in the "thrust" quotes from the 1978 *United*

²⁰⁹ Casey, *supra* note 13, at 404.

²¹⁰ Pommersheim, *supra* note 10, at 409.

²¹¹ Martone, *supra* note 146, at 600.

²¹² See Gould, *supra* note 68, at 815; see Skibine, *supra* note 83, at 559 ("[T]he Indian sovereignty doctrine . . . states that Indian tribes were once fully sovereign nations and that they still can exercise powers of self-government inside their reservations pursuant to this inherent sovereignty."); Casey, *supra* note 13, at 407 ("[T]he essence of tribal sovereignty is simply the extent to which a tribe can attend to its own affairs and control its own cultural, societal, and economic development free from outside restraints."); Dussias, *supra* note 192, at 3 n.8 (defining and discussing the notion of sovereignty).

²¹³ Martone, *supra* note 146, at 618. Martone further contended that the term "Indian sovereignty" was accurate as against the states "only to the extent Congress preempts the field and permits tribal self-government to the exclusion of state jurisdiction." *Id.*

²¹⁴ *Id.* at 634.

²¹⁵ See WILKINSON, *supra* note 21, at 57 (asserting that *Kagama* refutes the notion that Indian tribes possess an inherent and retained right to self-government); Martone, *supra* note 146, at 622 (asserting that the Supreme Court in *Kagama* unequivocally rejected the notion of inherent tribal sovereignty).

²¹⁶ *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832)).

*States v. Wheeler*²¹⁷ and 1982 *Merrion v. Jicarilla Apache Tribe*²¹⁸ decisions.

Thus, with respect to the initial question regarding whether Indian tribes remain sovereign governments, the Court has issued decisions in the modern era of federal Indian law which support the view of tribes as sovereign powers. Yet, on the (inevitable) other hand, the Supreme Court's "parry" quote from *United States v. Bourland* ostensibly complies with Martone's request by including the operative words which deny the existence of tribal sovereignty: "[T]ribal sovereignty . . . is . . . *not* inherent."²¹⁹

The *Bourland* decision also impacts the second (overlapping) inquiry: whether the source of tribal power is grounded in inherent, retained sovereignty or congressional delegations of governmental authority.²²⁰ The Marshall trilogy (*Johnson*, *Cherokee Nation*, and *Worcester*), as well as *Ex parte Crow Dog* and *Talton v. Mayes*, support the notion of inherent, retained sovereignty.²²¹ The 1993 *Bourland* decision, contrariwise, supports the "congressional delegation" theory of tribal power. There is no reason to believe, however, that the thrust and parry of federal Indian law regarding this issue has ended, particularly if recent history is a guide to future behavior. Consider the following "thrust" and "parry" statements, arranged below in chronological order, from five Supreme Court decisions issued in a four year span between 1978 and 1982:

²¹⁷ 435 U.S. 313 (1978).

²¹⁸ 455 U.S. 130 (1982).

²¹⁹ 508 U.S. at 695 n.15; see Gould, *supra* note 68, at 814 (after Justice Thomas' footnote in *Bourland*, "the era of inherent sovereignty was largely closed."); see also *National Farmers Union Ins. Co. v. Crow Tribe*, 468 U.S. 1315, 1318 (1984) (Rehnquist, J.) ("only the National and State Governments exercise true sovereignty"); *United States v. Antelope*, 430 U.S. 641, 646 (1977) (describing tribes as "once-sovereign political communities").

²²⁰ The "delegated authority" and "retained sovereignty" theories of tribal government power are roughly analogous to the property concepts of the "contingent remainder" future interest and the "vested remainder subject to divestment" future interest. Under the "delegated authority" theory, tribal authority is contingent on affirmative congressional action, whereas under the "retained sovereignty" theory, tribal powers are "vested" (i.e., pre-exist) but may be "divested" by Congress. See generally ROGER A. CUNNINGHAM, ET AL., *THE LAW OF PROPERTY* 98-104 (2d ed. 1993).

²²¹ See, e.g., *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823) (holding that the discovery doctrine "diminished," but did not eliminate, tribal "rights to complete sovereignty"); Gould, *supra* note 68, at 822 (noting "that the power of the Cherokees to prosecute tribal members was not subject to the grand jury requirements of the Fifth Amendment because the Cherokees had existed as a separate nation prior to the Constitution," supported "the view that tribal rights were not delegated by the Congress, but were inherent").

- 1978: Indian tribes are prohibited from exercising . . . those powers “inconsistent with their status.”—*Oliphant v. Suquamish Indian Tribe*²²²
- 1978: [U]ntil Congress acts, the tribes retain their existing sovereign powers.—*United States v. Wheeler*²²³
- 1980: Tribal powers are not implicitly divested by virtue of the tribes’ dependent status.—*Washington v. Confederated Tribes of Colville Indian Reservation*²²⁴
- 1981: [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 without express congressional delegation.—*Montana v. United States*²²⁵
- 1982: [T]he Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government.—*Merrion v. Jicarilla Apache Tribe*²²⁶

The Court is aware of the conflict between the *Oliphant* and *Colville* quotes, but has not expressly resolved the inconsistency.²²⁷ Moreover, despite strong disapproving language in *Bourland*, the Court has not

²²² 435 U.S. 191, 208 (1978) (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976) (emphasis added by Supreme Court)).

²²³ 435 U.S. 313, 323 (1978); see WILKINSON, *supra* note 21, at 61 (describing *Oliphant* as “mark[ing] the historic low ebb of the doctrine of tribal sovereignty” but noting that, “astonishingly, just sixteen days after deciding *Oliphant* the Court rendered [in *Wheeler*] an endorsement of the tribal sovereignty doctrine in such ringing terms that the existence of the doctrine, so uncertain just a few days before, now seemed irrevocably to be established as part of the nation’s constitutional and political system.”); Clinton, *supra* note 94, at 858 (discussing the incongruous approaches to tribal sovereignty in *Oliphant* and *Wheeler*).

²²⁴ 447 U.S. 134, 153 (1980).

²²⁵ 450 U.S. 544, 564 (1981) (citations omitted).

²²⁶ 455 U.S. 130, 148-49 n.14 (1982); see C.E. Willoughby, Comment, *Native American Sovereignty Takes a Back Seat to the “Pig in the Parlor”: The Redefining of Tribal Sovereignty in Traditional Property Law Terms*, 19 S. ILL. U. L.J. 593, 613 (1995) (noting that the Court heard *Merrion* just six days after deciding *Montana*).

²²⁷ In *City of Polson v. Confederated Salish & Kootenai Tribes*, 459 U.S. 977 (1982) (mem.), Justice Rehnquist, dissenting from the denial of petitions for writs of *certiorari*, noted that the court of appeals “saw an inconsistency” between the recognition in *Oliphant* (and *Wheeler*) of the notion of implicit divestiture of tribal sovereignty, and the statement in *Colville* that tribal powers are not divested by dependent status. *Id.* at 979-80. On this particular point, however, Rehnquist agreed with the court of appeals that the *Oliphant/Wheeler* position was ascendant in light of the Court’s citation to *Wheeler* in *Montana*. *Id.* at 980 (citing *Montana*, 450 U.S. at 564-65). The Court has continued to adhere to the *Oliphant/Wheeler* position. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 427 (1989) (“[R]egulation of ‘the relations between an Indian tribe and nonmembers of the tribe’ is necessarily inconsistent with a tribe’s dependent status, and therefore tribal sovereignty over such matters of ‘external relations’ is divested.”) (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978)). It has not, however, expressly overruled *Colville* on this point.

explicitly overturned *Wheeler's* endorsement of Felix Cohen's view that "[t]he powers of Indian tribes are, in general, *"inherent powers of a limited sovereignty which has never been extinguished."*²²⁸ However, the Court has, as discussed below,²²⁹ moved away from the notion of territorial sovereignty and in so doing has restricted tribal authority over non-members.

C. Tribal Authority over Non-Members

Thrust

Civil jurisdiction over [the activities of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.—*Iowa Mutual Insurance Co. v. LaPlante*²³⁰

Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.—*United States v. Martinez*²³²

Parry

[T]he general proposition [is] that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.—*Montana v. United States*²³¹

Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.—*Strate v. A-1 Contractors*²³³

²²⁸ *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (quoting F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1945)). One scholar noted Cohen's contribution to Indian law:

Felix S. Cohen, distinguished scholar and principal architect of the Indian Reorganization Act, observed that "[p]erhaps the most basic principle of all Indian law . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress." They are instead "inherent powers of a limited sovereignty which has never been extinguished."

See Gould, *supra* note 68, at 815-16 (quoting F. COHEN, *supra* note 228, at 122).

²²⁹ See *infra* notes 230-63 and accompanying text.

²³⁰ 480 U.S. 9, 18 (1987) (citing *Montana*, 450 U.S. at 565-66); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980); *Fisher v. District Court*, 424 U.S. 382, 387-89 (1976)).

²³¹ 450 U.S. at 565.

²³² 436 U.S. 49, 65 (1978).

²³³ 117 S. Ct. 1404, 1409 (1997).

[T]ribes have the power to manage the use of its territory and resources by both members and nonmembers.—*New Mexico v. Mescalero Apache Tribe*²³⁴

The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members.—*Duro v. Reina*²³⁵

In the Cherokee opinions, Chief Justice John Marshall “recognized that tribal sovereignty was based on the notion of tribal authority over members of the tribal entity as well as authority over an established geographic territory.”²³⁶ A geographically-based view of tribal sovereignty differs from a membership-based (or consent-based) view of tribal sovereignty.²³⁷ When sovereignty is based on territory, tribal adjudicatory and regulatory jurisdiction encompasses all activities within reservation boundaries, whether conducted by tribal members or others.²³⁸ As Fred Ragsdale, Jr., has pointed out, when the Supreme Court decided *United States v. McBratney*²³⁹ in 1882, and upheld state court jurisdiction over an alleged murder of a non-Indian by a non-Indian,²⁴⁰ it “changed Indian

²³⁴ 462 U.S. 324, 335 (1983).

²³⁵ 495 U.S. 676, 693 (1990); see *United States v. Kagama*, 118 U.S. 375, 381-82 (1886) (“They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations.”); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., concurring) (the overriding sovereignty of the United States caused the Indians to lose “the right of governing every person within their limits except themselves.”).

²³⁶ Igou, *supra* note 69, at 885.

²³⁷ See generally Dussias, *supra* note 192.

²³⁸ See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (describing Indian nations as “having territorial boundaries, within which their authority is exclusive”). The geographically-based view of sovereignty is reflected in the following 1834 congressional report:

The right of self-government is secured to each tribe, with jurisdiction over all persons and property within its limits, subject to certain exceptions, founded on principles somewhat analogous to the international laws among civilized nations As to those persons not required to reside in the Indian country, who voluntarily go there to reside, they must be considered as voluntarily submitting themselves to the laws of the tribes.

Douglas B. Cubberley, Note, *Criminal Jurisdiction over Nonmember Indians: The Legal Void After Duro v. Reina*, 16 AM. INDIAN L. REV. 213, 216-17 (1992) (quoting *Report of the Committee Regulating the Indian Department*, H.R. Rep. No. 474, 23d Cong., 1st Sess. 14-22 (1834)).

²³⁹ 104 U.S. 621 (1881).

²⁴⁰ The *McBratney* case involved the murder of a non-Indian by another non-Indian within the Ute Reservation wholly contained in the state of Colorado, for which the defendant was convicted in the Circuit Court for the District of Colorado. *Id.* The defendant challenged the conviction on jurisdictional grounds and the U.S. Supreme Court agreed, holding that the state of Colorado, not the federal court, had jurisdiction to try the case. *Id.* at 624. The Court based its decision on a finding that, with its admission to the Union, Colorado had acquired criminal jurisdiction over its own citizens and other non-Indians throughout its entire territory, including the Ute Reservation, and the reservation

country from a geographical concept to something else—[but] exactly what else is a difficult question.”²⁴¹ The extent to which tribal power is based on territorial dominion instead of consent, and the scope of tribal adjudicatory, regulatory, and taxation authority over non-members, are indeed perplexing questions, which in turn have produced inharmonious answers from the Supreme Court in recent years.

Allison Dussias and Scott Gould have explored in great detail the movement from a geographically-based view of tribal power to a membership-based view or consent paradigm.²⁴² On one hand, the Court has followed up its statement in *United States v. Mazurie*, that Indian tribes exercise “sovereignty over both their members and their territory,”²⁴³ with similar endorsements of the geographically-based view of tribal power.²⁴⁴ On the other hand, in *Duro v. Reina*,²⁴⁵ the Court rejected tribal court criminal jurisdiction over non-member Indians and, arguably, “declared that the retained sovereignty of tribes is no longer territorial, but instead is limited to the authority necessary to control the internal relations of tribal members, and to preserve customs and social order.”²⁴⁶

was no longer within the sole jurisdiction of the United States. *Id.*; see *supra* notes 143-44 and accompanying text.

²⁴¹ Ragsdale, *supra* note 10, at 68.

²⁴² Professor Dussias’ thesis is that:

[A]lthough the Court still treats tribes as having some attributes of sovereignty over both their members *and* their territory, a geographically-based view of Indian tribal authority has been at least partially rejected by the Court in favor of a view of sovereignty that bases a tribe’s authority over people and activities on the tribe’s reservation on the membership of individual Indians in a political entity, the tribe, rather than on tribal authority over the territory within the boundaries of the reservation.

Dussias, *supra* note 192, at 4 (citations omitted). Professor Gould proposes the following “consent paradigm”: “[A]bsent a congressional delegation of authority, federal preemption, or a finding of inherent civil jurisdiction, the sovereign rights of tribes are sufficient to prevail in disputes between tribes and tribal members only.” Gould, *supra* note 68, at 840-41; see Frickey, *Adjudication and Its Discontents*, *supra* note 9, at 1768 (noting that Gould’s work “contains important insights” but “falls victim . . . to the desire to impose an artificial coherence upon the field”).

²⁴³ 419 U.S. 544, 557 (1975) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832)); see Igou, *supra* note 69, at 886 (*Mazurie* “reaffirmed the notion of a territorial-based sovereignty” by holding that “an Indian tribe could regulate the sale of alcohol by nonmembers on fee lands located within the boundaries of the reservation.”); Gould, *supra* note 68, at 839 (noting that *Mazurie* supports the notion of tribal territorial sovereignty).

²⁴⁴ See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 457 (1989) (“tribal sovereignty is in large part geographically determined”); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (observing that the Court has repeatedly recognized a significant geographical element to tribal sovereignty).

²⁴⁵ 495 U.S. 676 (1990).

²⁴⁶ Gould, *supra* note 68, at 851; see *id.* at 814 (contrasting *Mazurie*’s rejection of consent-based sovereignty with the Court’s acceptance in *Duro* of the view that tribal sovereignty is based upon consent). One commentator characterized the *Duro* Court holding as follows:

The effect of inconsistent statements regarding the nature of tribal sovereignty is most evident in the Supreme Court's decisions since 1980 concerning tribal civil authority over non-members.²⁴⁷ The thrust and parry in this area of federal Indian law is best seen by the presentation of a chronological "top ten" list of Supreme Court statements:

- 1980: Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest.—*Washington v. Confederated Tribes of Colville Indian Reservation*²⁴⁸
- 1981: [T]he general proposition [is] that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.—*Montana v. United States*²⁴⁹
- 1981: [T]ribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.—*Montana v. United States*²⁵⁰
- 1983: [T]ribes have the power to manage the use of their territory and resources by both members and nonmembers.—*New Mexico v. Mescalero Apache Tribe*²⁵¹
- 1987: Civil jurisdiction over [the activities of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.—*Iowa Mutual Insurance Co. v. LaPlante*²⁵²
- 1989: [R]egulation of "the relations between an Indian tribe and nonmembers of the tribe" is necessarily inconsistent with a tribe's dependent status, and therefore tribal sovereignty over such matters of "external relations" is divested.—*Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*²⁵³

The *Duro* Court, embracing a wholly membership-based view of tribal sovereignty, stated firmly that "in the criminal sphere *membership* marks the bounds of tribal authority" and declined to give weight to the fact that in many instances only the tribe would be in the position to provide effective law enforcement within the boundaries of the reservation.

Dussias, *supra* note 192, at 35 (quoting *Duro*, 495 U.S. at 693).

²⁴⁷ *Duro* and *Oliphant* have established that a tribe's criminal jurisdiction does not extend beyond its members.

²⁴⁸ 447 U.S. 134, 152-53 (1980) (citing 17 Op. Atty. Gen. 134 (1881); 7 Op. Atty. Gen. 174 (1855), 23 Op. Atty. Gen. 214 (1900); *Powers of Indian Tribes*, 55 I.D. 14, 46 (1934)).

²⁴⁹ 450 U.S. 544, 565 (1981).

²⁵⁰ *Id.*

²⁵¹ 462 U.S. 324, 335 (1983).

²⁵² 480 U.S. 9, 18 (1987).

²⁵³ 492 U.S. 408, 427 (1989) (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978)).

- 1992: [There only exist] very narrow powers reserved to tribes over the conduct of non-Indians within their reservations.—*County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*²⁵⁴
- 1993: [T]ribal sovereignty over nonmembers “cannot survive without express congressional delegation,” and is therefore *not* inherent.—*South Dakota v. Bourland*²⁵⁵
- 1997: Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.—*Strate v. A-1 Contractors*²⁵⁶
- 1997: [T]ribes retain considerable control over nonmember conduct on tribal land.—*Strate v. A-1 Contractors*²⁵⁷

As one would expect, scholars have criticized these holdings as exacerbating doctrinal incoherence. Laurie Reynolds notes that the presumption favoring civil tribal authority over non-members in *Iowa Mutual* “stands in stark contrast” to *Montana*’s “general proposition” that civil tribal jurisdiction does not extend to non-members.²⁵⁸ David Getches contends that “[i]n reaching its decision, the *Montana* Court announced remarkable departures from established Indian law principles . . . [a]nd effectively retreat[ed] from the previous year’s *dictum* in *Colville*”²⁵⁹ Scott Gould suggests that, “in deciding that tribes could not exercise sovereign rights over non-Indians without congressional delegations of authority, the [*Montana*] Court reversed the basic presumption of tribal power that had operated since John Marshall led the Court.”²⁶⁰ Finally, Phil Frickey observes that “*Strate* is consistent with the trend denying

²⁵⁴ 502 U.S. 251, 266-67 (1992) (citing *Montana*, 450 U.S. at 566).

²⁵⁵ 508 U.S. 679, 695 n.15 (1993) (quoting *Montana*, 450 U.S. at 564).

²⁵⁶ 117 S. Ct. 1404, 1409 (1997).

²⁵⁷ *Id.* at 1413.

²⁵⁸ Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089, 1128-29 (1995).

²⁵⁹ Getches, *supra* note 12, at 1610-11; *see id.* at 1595 (describing *Oliphant*, *Colville*, *Montana*, and *Brendale* as “internally contentious decisions” in light of recently released internal Supreme Court memoranda); Igou, *supra* note 69, at 891 (noting that “[l]ess than one year later, the Court, without expressly overruling *Colville*, announced a different test” in *Montana* for determining tribal civil authority over non-members).

²⁶⁰ Gould, *supra* note 68, at 875; *see id.* at 895 (noting that “*Montana* abolished the historical presumption on which inherent sovereignty had rested. Henceforth, tribes would no longer be deemed to retain all powers not divested. Their sovereign powers would extend only to their members, unless Congress chose to augment them.”).

Robert Laurence takes issue with the “characterization of the *Montana* test as a presumption against tribal inherent power, with two exceptions,” arguing that the test “could just as easily be seen as two potentially huge domains of tribal inherent power, with a prohibition for power applied outside those domains.” Laurence, *supra* note 115, at 797.

tribal sovereignty . . . , but the contours of this precedent remain subject to substantial uncertainty pending elaboration in the lower courts.”²⁶¹

In sum, “over the last two decades, the Court has waffled on whether to continue to recognize the distinction between governmental authority rooted in sovereignty and associational authority based on consent.”²⁶² Deborah Geier joins forces with other Indian law scholars in declaring that the contours of tribal sovereignty, including the important component of civil tribal authority over non-members, “remain fluid instead of fixed, ambiguous instead of clear.”²⁶³ The sheer number of recent Supreme Court holdings that can be collected and opposed, and the fact that the Court has engaged in little effort to reconcile such statements, again underscores the existence of the thrust and parry of federal Indian law.

V. EXPLANATIONS FOR THE THRUST AND PARRY OF FEDERAL INDIAN LAW

In order to collect the opposing quotes for this Article, over five hundred Supreme Court decisions, dating from 1800 to 1998, were examined.²⁶⁴ The fact that these decisions span almost two centuries (and are nearly co-extensive with the Supreme Court itself), explains in part the existence of the thrust and parry phenomenon. Indian law, as Charles Wilkinson notes, “encompasses not only Indians and law but also time.”²⁶⁵

Mere passage of time, however, cannot by itself account for the extent of doctrinal inconsistency exposed in this Article. The contradictions in federal Indian law are also due to the inability of the federal government to achieve an abiding consensus regarding the role of Indians in the Federal Union.²⁶⁶ Evolving conceptions of Indians and the appropriate role of Indian tribes, as well as fluctuating congressional policies in this field, have caused the Supreme Court to correspondingly alter its views of the federal-state-tribal relationship over time. In addition, the demographic consequences of non-Indian infiltration of Indian country, due mostly to the now-discredited, late nineteenth century policies of

²⁶¹ Frickey, *Adjudication and Its Discontents*, *supra* note 9, at 1775 n.124; *see id.* (“Strate may have deflated the general presumption favoring tribal-court jurisdiction over nonmembers who are voluntarily present on reservation land which *National Farmers Union* and *Iowa Mutual* seemed to create.”).

²⁶² *Id.* at 1776 n.128.

²⁶³ Geier, *supra* note 161, at 452.

²⁶⁴ *See supra* note 21.

²⁶⁵ *See generally id.*

²⁶⁶ *See generally* Clinton, *supra* note 94 (discussing the role of tribes, and tribal courts, in the Federal Union).

allotment and assimilation, play a major role in the current thrust and parry of federal Indian law, particularly with respect to the issue of tribal authority over non-members. These explanatory themes are briefly discussed below.

A. Varying Views of Indians and Indian Tribes

As partial justification for the application of the doctrine of discovery to a land that was already inhabited, Chief Justice John Marshall in *Johnson v. M'Intosh* suggested that "the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy."²⁶⁷ In the formative years of the United States, the "savage" Indian people were seen as a "problem," as Rennard Strickland and William Strickland point out:

The American Indian was an obstacle to all that the American public wanted, and thus, the Native would have to be overcome. Rather than being immoral in this expansionist society, removal was sanctioned by the ultimate authority of their beliefs, by God and God's plan of conquest. The idea of the Indian as a savage and as an obstacle to civilization was almost totally pervasive during this period

. . . .

There was pity for the plight of the Indian—real pity. Some Americans were truly saddened over the Indians' fate, but to most the Indian was victim of the inevitability of civilized progress.²⁶⁸

The Supreme Court's operative judicial principles of federal Indian law (e.g., the discovery doctrine; the guardian-ward trust relationship; the plenary power doctrine; the power to unilaterally abrogate Indian treaties; and the movement away from a geographically-based view of tribal

²⁶⁷ 21 U.S. (8 Wheat.) 543, 573 (1823); *see id.* at 589 ("Although we do not mean to engage in the defence (sic) of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them."); Cohen, *supra* note 35, at 58 ("[T]he 'menagerie' theory of Indian title [is] the theory that Indians are less than human and that their relation to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined."); William N. Bassett, *The Myth of the Nomad in Property Law*, 4 J.L. & RELIGION 133 (1986) (noting that war and the expropriation of Irish lands was rationalized by the English view that the Gaelic Irish were nomadic (and pagan) barbarians).

It should be noted, in view of John Marshall's reference to the "superior genius of Europe," that the Indians in *Johnson* were in effect, if not actually, paid twice for the same property! The tribe first deeded the land to European-American land speculators in 1775 for \$31,000 (which apparently was never returned), and then ceded the tract to the United States in 1818, presumably for certain concessions in return. *Johnson*, 21 U.S. (8 Wheat.) at 556-57, 593-94.

²⁶⁸ Strickland & Strickland, *supra* note 194, at 118-19.

sovereignty) were formulated in a time period imbued with Eurocentric views of Indians.²⁶⁹ The failure to decolonize federal Indian law leads to continued reliance on foundational doctrines that are not easily squared with contemporary thinking and values.²⁷⁰ This tension in turn contributes to incongruity in the evolving field of federal Indian law.

There also exists a tension between the current policies of tribal permanence and self-determination²⁷¹ and Supreme Court statements made when the prevalent assumption was that individual Indians would be assimilated into mainstream society and tribal governments would consequently disappear (or be terminated). The failure to resolve the political status and role of Indian tribes has led to a "bifurcated, if not fully schizophrenic, approach to tribal sovereignty as either extensive and enduring, or marginal and fleeting"²⁷²

²⁶⁹ See generally Robert Clinton, *Peyote and Judicial Political Activism: Neo-colonialism and the Supreme Court's New Indian Law*, 38 FED. B. NEWS & J. 92 (1991); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989); WILLIAMS, *supra* note 31, at 215 ("[I]n English colonizing legal theory a savage could never validly exercise sovereignty over land, for sovereignty, by its very definition, was a power recognized to exist only in civilized peoples whose laws conformed with the laws of God and nature."); H. Rep. No. 336, 41 Cong., 3d Sess. 10-11 (1871) ("We see nothing about Indian nationality or Indian civilization which should make its preservation a matter of so much anxiety to the Congress or to the people of the United States.").

Racially-charged statements are unfortunately commonplace in Indian law jurisprudence. For example, see *Montoya v. United States*, 180 U.S. 261, 265 (1900), where the Court asserted:

Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word.

Id.; see *Felix v. Patrick*, 145 U.S. 317, 330 (1892) ("Congress, too, has recognized their dependent condition, and their hopeless inability to withstand the wiles or cope with the power of the superior race . . ."); *Beecher v. Wetherby*, 95 U.S. 517, 526 (1877) ("Congress undoubtedly expected that at no distant day the State would be settled by white people, and the semi-barbarous condition of the Indian tribes would give place to the higher civilization of our race."); *Wilson v. Wall*, 73 U.S. (6 Wall.) 83, 88 (1867) ("We can hardly expect the Indians to be very profound on the subject of adverbs or prepositions . . ."); *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (C.C.D. Neb. 1879) (No. 14,891) (determining, for purposes of habeas corpus jurisdiction, whether an Indian is a 'person,' and deciding that the dictionary definition of a 'person' "is comprehensive enough, it would seem, to include even an Indian").

²⁷⁰ Robert Clinton and Robert Williams have urged the decolonization of federal Indian law and the creation of a differently structured federal-state-tribal relationship. See generally Clinton, *supra* note 47; Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219. But see Frickey, *Adjudication and Its Discontents*, *supra* note 9, at 1777 ("To the extent that scholarly efforts in federal Indian law presume, if only implicitly, that federal judges could accomplish a decolonization of federal Indian law if only they would see the light, the scholarly activity is unlikely to be practically productive.").

²⁷¹ See *infra* part V.B.

²⁷² Pommersheim, *supra* note 10, at 403.

The Supreme Court's earliest decisions on tribal sovereignty set the stage for the enduring debate regarding the political status of Indian tribes.²⁷³ On one end of the Marshall Court's sovereignty continuum is the Chief Justice himself, who in *Worcester* set forth a vision of tribal territorial power immune from state incursion that was without exception and without an ending point.²⁷⁴ Positioned somewhere in the middle is Justice William Johnson, who in his concurring opinion in *Cherokee Nation* "wrote that tribes possessed power over only their own members, and thus not sovereignty over land."²⁷⁵ Further down the spectrum is Justice John McLean, who concurred in *Worcester* but expressed the less sanguine view that tribal territorial sovereignty is by necessity a temporary arrangement that must soon come to an end. McLean parries the Marshall position by suggesting that cessation of tribal governmental authority is inevitable:

The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary. . . . [A] sound national policy does require that the Indian tribes within our states should exchange their territories, upon equitable principles, or, eventually, consent to become amalgamated in our political communities. . . . [I]f a contingency shall occur, which shall render the Indians who reside in a state, incapable of self-government, either by moral degradation or a reduction of their numbers, it would undoubtedly be in the power of a state government to extend to them

²⁷³ See Clinton, *supra* note 94, at 845 n.14 ("The split in legal theories evident in the various opinions in *Worcester v. Georgia* . . . reflects residual differences in American theories of sovereignty."); Gould, *supra* note 68, at 820-21 (describing the divergent views of Chief Justice Marshall and Justices Johnson and McLean); WILKINSON, *supra* note 21, at 33-34 (same); Getches, *supra* note 12, at 1586 (same).

²⁷⁴ See Frickey, *Practical Reasoning*, *supra* note 8, at 1228, Professor Frickey notes:

Chief Justice Marshall's approach encourages critical assessment of colonial preunderstandings by measuring Indian interests from their strongest historical perspective, even if (as was the case in the Cherokee dispute) in the contemporary circumstances they seem weaker. Essentially, in critically balancing the interests of the colonizing government and the victims of colonization, Chief Justice Marshall decided that it should not count against Indian interests that colonization was taking a toll.

Id.

²⁷⁵ Gould, *supra* note 68, at 820. Justice Johnson likened the tribes of North America to the tribes of Israel:

Their condition is something like that of the Israelites, when inhabiting the deserts. Though without land that they can call theirs in the sense of property, their right of personal self government has never been taken from them; and such a form of government may exist though the land occupied be in fact that of another.

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 27 (Johnson, J., concurring).

the aegis of its laws. Under such circumstances, the agency of the general government, of necessity, must cease.²⁷⁶

In some respects, the vision of each Justice has been in part accepted, and in part rejected, in contemporary federal Indian law. Marshall's view of Indian nations "as distinct political communities, having territorial boundaries, within which their authority is exclusive,"²⁷⁷ has given way to the present reality of non-Indian infiltration of Indian country; yet, Indian tribes continue to exist and exercise a degree of sovereignty over their territory. McLean's vision of temporary, disappearing tribal sovereignty discounted the tenacity of the Indian people, as well as the possibility that Congress might replace the operative principles of assimilation and termination with the policies of permanent co-existence and tribal self-determination. Yet, McLean correctly predicted that "the passage of time, the proximity to non-Indians, and other changing circumstances could erode a tribe's sovereign status and extend state jurisdiction over the reservation."²⁷⁸ Finally, while Johnson's limited view of tribal sovereignty "by consent" appears to be "the prevailing sentiment of the Court,"²⁷⁹ the twin notions of territorial sovereignty and tribal authority over non-members have not been entirely repudiated.²⁸⁰

²⁷⁶ *Worcester v. Georgia*, 31 U.S. 515, 593-94 (1832) (McLean, J., concurring); see HARRING, *supra* note 24, at 43 (noting that McLean, sitting as a circuit judge, authored opinions which "undermined" Marshall's view of tribal sovereignty).

James Kent, writing at approximately the same time as McLean, reached similar conclusions regarding the future of tribal self-government:

[Indians] have generally, and with some very limited exceptions, been unable to share in the enjoyments, or to exist in the presence of civilization; and judging from their past history, the Indians of this continent appear to be destined, at no very distant period of time, to disappear with those vast forests which once covered the country, and the existence of which seems essential to their own.

3 J. KENT, COMMENTARIES 318 (1828) (quoted in Martone, *supra* note 146, at 604). Justice Johnson, in his earlier concurring opinion in *Fletcher v. Peck*, also depicted the Indian tribes in a state of flux, with diminishing governmental powers:

[T]he state of the Indian nations . . . will be found to be very various. Some have totally extinguished their national fire, and submitted themselves to the laws of the states: others have, by treaty, acknowledged that they hold their national existence at the will of the state within which they reside: others retain a limited sovereignty . . .

10 U.S. (6 Cranch) 87, 146 (1810) (Johnson, J., dissenting).

²⁷⁷ *Worcester*, 31 U.S. at 557.

²⁷⁸ Getches, *supra* note 12, at 1586.

²⁷⁹ Gould, *supra* note 68, at 821; see *id.* at 872 (the Court by the 1980s "had come to all but openly embrace the philosophies of Justices McLean and Johnson. Tribal sovereignty over territory was at best temporary. Tribes had become 'something like . . . the Israelites, when inhabiting the deserts,' with powers of self-government that were merely personal.") (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 27 (1831) (Johnson, J., concurring)).

²⁸⁰ See *supra* part IV.C.

Such diverse, unreconciled views regarding the political status of Indian tribes have produced divergent decisions. In both *Oliphant* and *Montana*, two cases which severely cut back tribal criminal and civil sovereignty, respectively, the Supreme Court "referred approvingly to Justice Johnson from the Marshall Court."²⁸¹ However, just a few years earlier, in *United States v. Mazurie*, the Court invoked the opposing views of Chief Justice Marshall and declared that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."²⁸² Likewise, the statement in *Iowa Mutual*, that civil jurisdiction over the activities of non-Indians on reservation lands "presumptively lies in the tribal courts,"²⁸³ reflects a conception of tribal government that favors the views of Marshall over Johnson and McLean. The Court continues to "pick[] out [its] friends"²⁸⁴ and, in so doing, perpetuates the thrust and parry of federal Indian law.

B. Varying Congressional Policies Towards Indians

Justice Brennan once observed, in dissent, that "[t]his country has pursued contradictory policies with respect to the Indians."²⁸⁵ The observation comes as no surprise to even the most casual student of federal Indian policy; the enactment by Congress of inharmonious legislation²⁸⁶ is an old and familiar story.²⁸⁷ Federal Indian policy, which often promotes contradictory objectives,²⁸⁸ has changed over time, as described below, and

²⁸¹ Gould, *supra* note 68, at 873; see *Montana v. United States*, 450 U.S. 544, 565 (1981) (quoting *Fletcher v. Peck*, 10 U.S. 87, 147 (1810) (Johnson, J., concurring)); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) (same).

²⁸² 419 U.S. 544, 557 (1975) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832)).

²⁸³ *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

²⁸⁴ The metaphor is borrowed from Judge Harold Levanthal, who in a different context once stated that the use of legislative history is "akin to 'looking over a crowd and picking out your friends.'" Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (conversation with Judge Levanthal).

²⁸⁵ *Duro v. Reina*, 495 U.S. 676, 709 (1990) (Brennan, J., dissenting).

²⁸⁶ See Willoughby, *supra* note 226, at 594.

²⁸⁷ The periodic nature of federal Indian policy was well-known in the nineteenth century. See Martone, *supra* note 146, at 610 (noting that a "contributor to the second volume of the *Harvard Law Review* in 1888 divided the history of Indian law into four periods, culminating in the General Allotment Act") (citing Austin Abbott, *Indians and the Law*, 2 HARV. L. REV. 167 (1888)); see Williams, *supra* note 43, at 983 ("Indian law, as countless law review articles, books, and casebooks tell us, is punctuated by 'good' and 'bad' periods.").

²⁸⁸ See SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 52 (1989) (noting that the 1789 report of Secretary of War Henry Knox on the status of Indian affairs, and the trade and intercourse acts enacted between 1790 and 1834 in response to Knox's report, contained contradictory policies: "[o]n the one hand, Indian tribes were recognized as nations with treaty-making powers and

“congressional treatment of Indians has fluctuated from total separation to total assimilation, including the complete termination of tribal status.”²⁸⁹

The episodic federal Indian policies since 1830 can be summarized with five buzzwords: removal, assimilation, reorganization, termination, and self-determination. The Cherokee cases were litigated at a time when Congress, backed by President Andrew Jackson, passed the 1830 Indian Removal Act,²⁹⁰ authorizing the removal of eastern Indian tribes to a point west of the Mississippi River.²⁹¹ In 1834, the last of the Nonintercourse Acts was enacted,²⁹² which in part prohibited settlement on Indian land²⁹³ and in general complemented the removal policy with a policy of separation.²⁹⁴

The shift in congressional policy from removal to assimilation is marked by two significant legislative enactments. The first is the Act of March 3, 1871,²⁹⁵ which ended treaty-making with tribes by proclaiming that “[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty”²⁹⁶ The decision to deal with tribes by statutes and agreements, rather than by treaty, undermined the political status of tribes, and the 1871 Act was soon thereafter invoked by the Supreme Court in *United States v. Kagama* in support of the plenary power doctrine and the notion that, “within the broad domain of sovereignty” there exists only the federal government and the states.²⁹⁷

rights to their land. On the other hand, Knox was urging the federal government to ‘civilize’ and ultimately assimilate the tribes.”).

²⁸⁹ Martone, *supra* note 146, at 604.

²⁹⁰ Act of May 28, 1830, ch. 148, 4 Stat. 411 (codified as amended at 25 U.S.C. § 174) (1995).

²⁹¹ See Casey, *supra* note 13, at 411-12; Geier, *supra* note 161, at 456 n.12.

²⁹² Act of June 30, 1834, ch. 11, 4 Stat. 729 (codified in scattered sections of 25 U.S.C.).

²⁹³ *Id.* § 11.

²⁹⁴ See Martone, *supra* note 146, at 608 (noting that the nonintercourse acts were designed to isolate the Indians). Whether the removal and separation of Indian tribes should result in a permanent co-existence, however, was a point on which there was no consensus. See Frickey, *Domesticating Federal Indian Law*, *supra* note 9, at 59 (“Marshall thought that the Constitution, by providing Congress with power over war, treaties, and the regulation of commerce with tribes, ‘comprehend[s] all that is required for the regulation of our intercourse with the Indians’ because he assumed that the historical pattern of noninterference with internal tribal matters would continue.”) (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)); Martone, *supra* note 146, at 609 (contending that the policy of removing and separating the Indians was coupled with the ultimate goal of either assimilation or termination of the tribes).

²⁹⁵ 25 U.S.C. § 71 (1994) (originally enacted as Act of March 3, 1871, ch. 120, 16 Stat. 544).

²⁹⁶ *Id.*

²⁹⁷ *United States v. Kagama*, 118 U.S. 375, 379 (1886); see Gould, *supra* note 68, at 827-28. Frederick Martone points to the 1871 legislation as evidence of his view that tribal powers are today derived from congressional delegations rather than inherent sovereignty. See Martone, *supra* note 146,

The second major legislative effort which promoted the policy of assimilation was the General Allotment Act of 1887.²⁹⁸ The allotment policy was designed to transfer communally owned tribal lands to individual Indians, who presumably would become farmers, Christians, and eventually tax-paying American citizens.²⁹⁹

Allotment and assimilation governed federal Indian policy in the last part of the nineteenth century and the first part of the twentieth century. The allotment era, however, was a failure from all perspectives, except from the viewpoint of non-Indians who were able to purchase cheaply and settle former tribal lands. By 1934, "approximately two thirds of Indian lands [were] converted to non-Indian ownership and very little progress [was made] towards the assimilation of Indians into United States culture."³⁰⁰ This "disastrous allotment era ended with the enactment of the Indian Reorganization Act of 1934, which heralded a major shift in federal Indian policy 'from assimilation to self-determination,' in large part by encouraging Indian tribes to adopt their own constitutions and to provide for the own court systems."³⁰¹ The era of "reorganization" thus marked a significant stopping point in the erosion of tribal sovereignty, as well as a rebuke to Justice McLean's view that Indian tribal governments would inevitably wither, die, and disappear.³⁰²

at 607 ("It would be difficult to conceive of language evidencing an intent to extinguish tribal sovereignty vis-a-vis the United States clearer than this."). Congress, however, included a savings clause in the 1871 Act which provided that "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." 25 U.S.C. § 71; see Frickey, *Domesticating Federal Indian Law*, *supra* note 9, at 57-58 (noting that, a decade after *Kagama*, "the Court vigorously reaffirmed inherent tribal sovereignty" in *Talton v. Mayes*, 163 U.S. 376 (1896)).

²⁹⁸ Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (amended and codified in scattered sections of 25 U.S.C.).

²⁹⁹ See Casey, *supra* note 13, at 411-12; Geier, *supra* note 161, at 456 n.12; GETCHES, *supra* note 58, at 168-214.

³⁰⁰ Casey, *supra* note 13, at 413.

³⁰¹ Blake A. Watson, *The Curious Case of Disappearing Federal Jurisdiction over Federal Enforcement of Federal Law: A Vehicle for Reassessment of the Tribal Exhaustion/Abstention Doctrine*, 80 MARQ. L. REV. 531, 551 (1997) (quoting Vincent C. Milani, Note, *The Right to Counsel in Native American Tribal Courts: Tribal Sovereignty and Congressional Control*, 31 AM. CRIM. L. REV. 1279, 1281 (1994)). The Indian Reorganization Act is also called the Wheeler-Howard Act. See Act of June 18, 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-79 (1995)).

³⁰² See Martone, *supra* note 146, at 613 ("The [IRA] was a last-minute attempt to prevent the inexorable doom of all tribes predicted over one hundred years earlier."). Martone described the beginnings of the reorganization era:

From the first colonial settlement until 1934, the consistent policy of the United States had been, at first, to seize and possess the continent, and then, to assimilate any Indians who might be left. But the New Deal brought men to Washington who, for the first time, were of the opinion that there might yet be a continuing role for the tribe in the federal system.

The era of reorganization, however, reverted temporarily to the era of assimilation and termination in the 1950s, when Congress sought to solve the Indian "problem" by authorizing states to assume civil and criminal jurisdiction over Indian country,³⁰³ terminating the federal-tribal relationship, and "mak[ing] the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States . . ."³⁰⁴ The termination era was, however, short-lived:

The 'termination' policy [which at one point] ended the federal-tribal relationship with over 100 tribes and bands transferring most of the authority over the affected Indians to the states . . . was abandoned in practice in the early 1960s and officially in 1970 when President Nixon issued a message to Congress calling for a new federal policy of 'self-determination' for Indian tribes.³⁰⁵

The "era of self-determination represents the most recent trend in federal Indian policy. It remains to be seen, however, if it will be the last."³⁰⁶

As this brief summation of congressional Indian policy makes clear, "Indians and their tribes have survived despite the drastic fits and starts of this century's federal Indian policy, which has twice cycled between coercing assimilation and encouraging tribal self-government."³⁰⁷ These policy fluctuations are "the results of an ill-defined tribal-federal relationship"³⁰⁸ which in turn stems from "the lack of any consensus within

Id. at 612.

³⁰³ See Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1988), 25 U.S.C. §§ 1321-26 (1988), 28 U.S.C. § 1360 (1988)) (commonly referred to as Public Law 280); GETCHES, *supra* note 58, at 233-34; Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

³⁰⁴ H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953).

³⁰⁵ Watson, *supra* note 301, at 553 n.109 (citing GETCHES, *supra* note 58, at 229-39, 252-54). The self-determination policy calls for "the strengthening of tribal governments, the protection of tribal culture, the encouragement of tribal economic self-sufficiency, and the promotion of tribal self-determination or autonomy." Geier, *supra* note 161, at 456 n.12; see, e.g., Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1534 (1995); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n (1995 & Supp. 1997); Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-63 (1995); Native American Grave Protection and Repatriation Act, 25 U.S.C. §§ 3001-13 (1995); Indian Tribal Justice Act of 1993, 25 U.S.C. §§ 3601-31 (1995).

³⁰⁶ Casey, *supra* note 13, at 414.

³⁰⁷ Frickey, *Practical Reasoning*, *supra* note 8, at 1138.

³⁰⁸ Casey, *supra* note 13, at 415. Casey describes the inconsistent federal views regarding Indian tribes:

Tribal-federal relations have periodically oscillated between two diametrically opposed views on the status of Indian tribes. At one end of the spectrum is the belief that tribes are independent political communities and should control their own development. At the other

the Republic"³⁰⁹ regarding the role of Indian tribes in the Federal Union. The relationship between the vacillating congressional Indian policies and the inconsistencies in Supreme Court Indian jurisprudence is, in the view of Charles Wilkinson, a defining feature of this field of law:

Inevitably, Indian policy has been cyclic. This is due in part to the sheer length of time during which it has been made. Even more fundamentally, federal Indian policy has always been the product of the tension between two conflicting forces—separatism and assimilation—and Congress has never made a final choice as to which of the two it will pursue. Thus the laws are not only numerous; they are also conflicting, born of the explicit regimen and implicit tone of the eras in which they were enacted.³¹⁰

The Supreme Court sometimes "deserves generally high marks in protecting tribal rights from erosion,"³¹¹ and sometimes "drift[s] with the congressional tide,"³¹² and fails to preserve Indian rights from state and federal encroachment. David Getches presents a compelling argument that the current Court subjectively "gauges tribal sovereignty as a function of changing conditions—demographic, social, political, and economic—and the expectations they create in the minds of affected non-Indians."³¹³ While it is unclear "whether Indian law [will be] brought back on course with fundamental principles, or whether it will continue as a rudderless exercise in judicial subjectivism,"³¹⁴ there is little question that fluctuating

end lies the belief that the tribal system should be dismantled and individual Indians should be assimilated into the greater American society.

Id. at 407-08.

³⁰⁹ Martone, *supra* note 146, at 634.

³¹⁰ WILKINSON, *supra* note 21, at 13.

³¹¹ Frickey, *Practical Reasoning*, *supra* note 8, at 1204.

³¹² *Id.* at 1178.

³¹³ Getches, *supra* note 12, at 1575. In support of his thesis, Getches points to "confidential memoranda and draft opinions discovered in the files of the late Justice Thurgood Marshall and retired Justice William Brennan," *id.*, and in particular a memorandum from Justice Antonin Scalia describing current Supreme Court Indian law jurisprudence:

[O]pinions in this field have not posited an original state of affairs that can subsequently be altered only by explicit legislation, but have rather sought to discern what the current state of affairs ought to be by taking into account all legislation, and the congressional "expectations" that it reflects, down to the present day.

Id. (quoting Memorandum from Justice Antonin Scalia to Justice William J. Brennan, Jr., (Apr. 4, 1990) (Duro v. Reina, No. 88-6546), in *Papers of Justice Thurgood Marshall* (reproduced from the Collections of the Manuscript Division, Library of Congress)).

³¹⁴ *Id.* at 1576.

congressional policies in this field have played a major role in the current thrust and parry of federal Indian law.³¹⁵

C. The Effect of Infiltration and Demography

The demographic consequences of non-Indian infiltration of Indian country have also contributed to the current thrust and parry of federal Indian law, particularly with respect to the issue of tribal authority over non-members. As a result of the sale of "surplus" tribal lands to non-Indians pursuant to the allotment policy, and the voluntary opening of reservation borders by some tribes,³¹⁶ the Supreme Court is faced with the task of assessing the scope of tribal sovereignty and tribal authority over non-members in circumstances far different than those present when Chief Justice Marshall set forth the foundational principles of federal Indian law.³¹⁷

Scott Gould notes that, the facts and contextual circumstances of *M'Intosh*, *Cherokee Nation*, and *Worcester*, did not require the Court to address either the existence or scope of tribal adjudicatory, regulatory, and taxation authority over non-Indians.³¹⁸ The concepts of tribal territorial sovereignty and immunity from state law were developed during a period when treaties provided a degree of "measured separatism."³¹⁹ However, westward expansion, manifest destiny, and the desirability of certain Indian lands put pressure on Congress to open the reservations for non-Indian settlement. The policy of allotment, assimilation, and sale of surplus tribal lands permanently impacted Indian country:

³¹⁵ Frederick Martone contends that criticism of Congress for its fluctuating policies towards Indians and Indian tribes is unwarranted because "Congress reflects the policies of its time [and t]he policies and the law change because the historical conditions change." Martone, *supra* note 146, at 605. The thrust and parry of federal Indian law is not, however, simply due to the historical fact of shifting congressional Indian policy; rather, it is due to the judicial implementation of such policies and the effect of time: Inconsistent statements ensued as the Court fashioned Indian law in disparate contexts, and the practice of relying on doctrines and holdings from different eras has produced numerous contradictions over the course of nearly two centuries of Supreme Court Indian law jurisprudence.

³¹⁶ See BURTON, *supra* note 88, at 116-17 (noting that the "five civilized nations" permitted non-members to enter and reside in Indian country).

³¹⁷ See Martone, *supra* note 146, at 634 ("Congress has been caught between changing tides of opinion running from full separation to total assimilation, but neither is immediately achievable. The reality is that the tribe cannot be separate, if only because historical forces and the Indian's already achieved partial integration are irreversible.").

³¹⁸ Gould, *supra* note 68, at 818; see *id.* at 820 ("Because there was room enough to separate the tribes from settlers, Congress and the Court had little reason to consider whether tribal sovereignty extended over anyone but Indians."); Dussias, *supra* note 192, at 11.

³¹⁹ WILKINSON, *supra* note 21, at 16.

During the period of federal allotments, the total inventory of tribal land fell by sixty-two percent, from 138 million acres in 1887 to 52 million acres in 1934 Reservation demographics were radically affected. Largely because of the allotment policy, non-Indians now comprise almost half of the population on the nation's reservations. In 1990, of the total of 807,817 people residing on reservations, only 437,358, or 54.1% were Indians. In 1980, among the ten most populous reservations, only the Navajo reservation had more Indians than non-Indians. Of the remaining nine, Indians numbered only 25,053, or little more than twelve percent. The effects were even more striking on some smaller reservations.³²⁰

The infiltration of Indian country by non-Indians caused the Supreme Court to reevaluate Indian law precedents in light of new circumstances. Until the past few decades, "tribes simply did not govern much and certainly had little impact except on their own members."³²¹ The recent assertions by tribes of criminal and civil jurisdiction over non-members have been met with resistance by the Court, which has "curtailed exercises of tribal governing power that cast a cultural shadow on non-Indian values, personal liberties, or property interests."³²² Changing demographics have played a prominent role in reservation diminishment and disestablishment cases.³²³ The presence of non-Indians in Indian country also contributed to the curtailment of tribal criminal jurisdiction over non-Indians in *Oliphant*

³²⁰ Gould, *supra* note 68, at 830 (footnotes omitted).

³²¹ WILKINSON, *supra* note 21, at 3.

³²² Getches, *supra* note 12, at 1575; *see id.* at 1594 ("[A]s tribal assertions of jurisdiction became more extensive, the Court started to retreat from its modern-era affirmations of unextinguished tribal powers, altering the margins of the tribes' jurisdiction in order to preserve the values and interests of the larger society.").

³²³ Robert Laurence and Frank Pommersheim have focused on demographics as the actual determining factor when the Supreme Court decides whether Congress, by making "surplus" tribal lands available for sale and settlement, intended to either disestablish completely or partially diminish the reservation boundaries. *See* Laurence, *supra* note 115, at 790. Laurence cites present ownership of the land as the decisive factor:

If the land in controversy is owned today primarily by Indians—as was true in *Seymour v. Superintendent*, *Mattz v. Arnett* and *Bartlett*—the reservation was not diminished years ago by statute, while, if the land is owned today primarily by whites—as was true in *DeCoteau v. District County Court*, *Rosebud Sioux Tribe v. Kneip* and *Hagen*—the reservation was diminished years ago by statute.

Id. (footnotes omitted). Another commentator cynically observes:

[I]f you want an accurate predictor about the results in the case, don't look at what the legislation says, just go to the demographics. In a diminishment case you can have absolute certainty of result by checking out the demographics. If the demographics are unfavorable to Indians, they will lose. And I'm hard put to see how that could ever be a principled decision.

James M. Grijalva et al., Commentary, *Diminishment of Indian Reservations: Legislative or Judicial Fiat?*, 71 N.D. L. REV. 415, 421-22 (1995) (remarks of Frank Pommersheim).

v. Suquamish Indian Tribe,³²⁴ where the fact that “only about fifty of the 3,000 residents of the reservation were members of the tribe”³²⁵ influenced the Court’s determination that tribes lack “the power to try non-Indians according to their own customs and procedure.”³²⁶

The infiltration of Indian country by non-Indians has not led to the demise of tribal sovereignty, as predicted by Justice McLean and others.³²⁷ The authority of Indian tribes, however, has “been severely eroded by the increased presence and dominance of non-Indian society”³²⁸ The Supreme Court, in *Montana* and *Brendale*, “established that once tribal trust lands are conveyed to non-Indians, treaty rights to exclusive use and occupation are forfeited [and] tribes lose the incidental power to regulate non-Indian use of lands.”³²⁹ In *Bourland*, the Court confirmed that “when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory

³²⁴ 435 U.S. 191 (1978).

³²⁵ Frickey, *Practical Reasoning*, *supra* note 8, at 1198.

³²⁶ 435 U.S. at 211; see Gould, *supra* note 68, at 847-48 (“Demographics surely influenced the [*Oliphant*] decision, as did underlying concerns about due process [T]he tribe had the impossible burden of persuading an unsympathetic Court that an exclusive minority of reservation residents possessed the inherent right to decide the liberty of the majority.”); Casey, *supra* note 13, at 421 (noting that the Court in *Oliphant* appeared concerned that non-Indians would be treated unjustly in Indian courts).

Justice Rehnquist, the author of the *Oliphant* decision, noted that a similar argument was made in *Ex parte Crow Dog*—that it is inappropriate for an Indian offender to be judged “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.” *Oliphant*, 435 U.S. at 210-11 (quoting *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883)). Of course, the Supreme Court’s concern about Indian offenders being subjected to the criminal laws of other sovereigns was short-lived; within three years the Major Crimes Act, 23 Stat. Ch. 431, 362; § 9, 385 (1885), was passed and its constitutionality sustained in *United States v. Kagama*, 118 U.S. 375, 385 (1886).

In a similar vein, it appears that the Supreme Court’s 1882 decision in *United States v. McBratney*, 104 U.S. 621 (1881), which held that a murder of a non-Indian by a non-Indian in Indian country is subject to state criminal jurisdiction, was impacted “by the reality that non-Indians live and own land on reservations as a result of federal policies.” Getches, *supra* note 12, at 1587.

³²⁷ See BURTON, *supra* note 88, at 194 (describing Congressman Orville Platt’s contention, soon to be realized in the Curtis Act, H.R. 8581, 55th Cong., 2d Sess., (1898), that the governments of the Five Civilized Tribes should be terminated, and noting “that immigration from the United States . . . , together with the fact that most of the newcomers had entered the Territory with the permission of the Indians, . . . [supported the contention] that the Five Tribes governments had annulled the conditions under which the country had been set apart for them”).

³²⁸ Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 336 (1989); see WILKINSON, *supra* note 21, at 22 (“The promise of a measured separatism—of a comprehensive tribal sovereignty within reservation boundaries—can fairly be called into question simply because the demography of Indian country is so changed from what it was when the promises were made.”).

³²⁹ Gould, *supra* note 68, at 890-91.

control."³³⁰ Thus, as in the case of criminal jurisdiction, the civil regulatory and adjudicatory authority of tribes over non-members has been impacted by demographics.³³¹

Despite evident concerns regarding the assertion of tribal authority over non-members, the official federal Indian policy continues to promote tribal sovereignty and tribal self-determination. Acceptance of "group governmental rights" in a country focused on individual rights, however, is grudging in some quarters and, as Frank Pommersheim notes, the distinctive status of tribalism within a democratic society contributes to the thrust and parry of federal Indian law:

[T]he thrust of tribal sovereignty is often "counter" to the thrust of that of other minority groups within this country. The object of almost all litigation of other minorities in this society is increased access to rights and institutions within the dominant society. This goal is well understood, even if resisted, within the dominant legal and judicial community. However, the object of most, if not all, tribally initiated or defended Indian law litigation is to establish and vindicate an historical, non-assimilated right to an autonomy that seeks to preserve a "measured separatism." This emphasis is not recognized within the national and state legal communities' web of beliefs.³³²

The tension between the proclaimed congressional policy of tribal sovereignty and self-determination, and the judicial reluctance to fully accept the implications of tribalism, is often palpable. The doctrinal incoherence of federal Indian law, in turn, is in large part attributable to a failure of the Court to openly acknowledge, and deal with, these opposing forces.³³³

³³⁰ 508 U.S. 679, 692 (1993).

³³¹ See Laurence, *supra* note 115, at 804 ("[W]ill courts read the [*Montana*] exceptions [to the general proposition that tribes lack civil jurisdiction over non-members] broadly? Probably not, if I am right about judicial reluctance being a function of modern demographics."). In the only pertinent Supreme Court decision since Laurence's prediction, the *Montana* exceptions were in fact narrowly construed. See *Strate v. A-1 Contractors*, 117 S. Ct. 1404, 1414-16 (1997).

³³² Pommersheim, *supra* note 10, at 408-09; see Robert N. Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 HAMLINE L. REV. 543, 596 (1985) (noting that tribal sovereignty is resisted because tribal rights "too starkly challenge western notions of democratic self-government.").

³³³ See Getches, *supra* note 12, at 1576 ("[T]he Court has not openly rejected the traditional principles Cohen described, and the Justices continue to profess deference to congressional authority over the scope of aboriginal powers and rights. Particularly when non-Indian interests are not seriously threatened, the Court often recites and sometimes acts upon foundation principles.").

VI. CONCLUSION: THE LEGACY OF THE THRUST AND PARRY OF FEDERAL INDIAN LAW

This Article concludes by examining the efforts of lower courts in the past decade to determine the scope of tribal civil authority over non-members in light of the Supreme Court's seemingly irreconcilable statements in *Montana* and *Iowa Mutual*.³³⁴ Laurie Reynolds, who has written extensively on the Court's treatment of tribal adjudicatory and regulatory jurisdiction, observed, prior to the 1997 *Strate* decision, that the statement in *Iowa Mutual* that

"[c]ivil jurisdiction over [the activities of non-Indians on reservation lands] presumptively lies in the tribal courts" appears to be flatly inconsistent with the Court's earlier articulation [in *Montana*] of "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."³³⁵

The Supreme Court, however, sees no such inconsistency, explaining in *Strate* that *Iowa Mutual* and *National Farmers Union*³³⁶ "are not at odds with, and do not displace, *Montana*."³³⁷ Yet, as seen below, in the ten years between *Iowa Mutual* and *Strate*, the lower courts struggled with, or simply ignored, the facially inconsistent presumptions of *Montana* and *Iowa Mutual*.

The declaration in *Montana* of a "general proposition" that tribal civil jurisdiction does not extend to non-members, at least as to activities on fee lands that do not fall within the two "*Montana* exceptions" articulated by the Court,³³⁸ was viewed by some as a departure from established

³³⁴ See *supra* notes 15-20, 218-19, 246 and accompanying text.

³³⁵ Reynolds, *supra* note 11, at 566 (quoting *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 1, 18 (1987); and *Montana v. United States*, 450 U.S. 544, 565 (1981)) (footnotes omitted).

³³⁶ 471 U.S. 845 (1985).

³³⁷ *Strate v. A-1 Contractors*, 117 S. Ct. 1404, 1410 (1997).

³³⁸ There has been some confusion following *Montana* with respect to whether its "general proposition" applies only to tribal regulation of activities of non-members on fee lands within reservation boundaries. The *Strate* decision characterizes *Montana* as "describ[ing] a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on *non-Indian land within a reservation*, subject to two exceptions." 117 S. Ct. at 1409-10 (emphasis added). The Court, however, extended the application of *Montana* to tribal lands that are subject to an easement for a state highway, on the grounds that right-of-way rendered the lands in question as "equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Id.* at 1413 (footnote omitted).

Under the "*Montana* exceptions" a tribe may exercise civil authority over non-members in the following circumstances: (1) when non-Indians are engaged in "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," 450 U.S. at 565; and (2) when "the conduct of non-Indians on fee lands within [the] reservation . . . threatens or

precedents.³³⁹ Nevertheless, the Supreme Court has invoked the *Montana* presumption on a fairly consistent basis in cases concerning tribal civil authority.³⁴⁰

The scope of tribal civil jurisdiction, however, was not directly at issue in *Iowa Mutual*; instead, the question presented was "whether a federal court may exercise diversity jurisdiction before the tribal court system has an opportunity to determine its own jurisdiction."³⁴¹ The Court held that the litigant must exhaust available tribal remedies, including appellate remedies, before a federal court may exercise its jurisdiction.³⁴² In support of this holding, Justice Thurgood Marshall noted that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty."³⁴³ This sentence is then followed by the assertion that "[c]ivil jurisdiction over such activities *presumptively lies* in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."³⁴⁴

The "presumptively lies" language of *Iowa Mutual* was discussed only once by the Supreme Court prior to *Strate*. In *Brendale*, the Justices debated, but did not resolve, whether *Iowa Mutual* should be broadly viewed as reaching the question of whether tribal courts have civil jurisdiction over non-Indians, or narrowly read (along with *National Farmers Union*) as "establishing no more than an 'exhaustion rule' permitting tribal courts to determine their jurisdiction, or lack thereof, in the first instance."³⁴⁵

has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. The Supreme Court in *Strate* declined to broadly construe the *Montana* exceptions. See 117 S. Ct. at 1414-16.

³³⁹ See *supra* notes 244-45 and accompanying text; see also *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 456 (1989) ("*Montana* strangely reversed the otherwise consistent presumption in favor of inherent tribal sovereignty over reservation lands") (Blackmun, J., concurring in the judgment, dissenting as to the consolidated cases).

³⁴⁰ See *Strate*, 117 S. Ct. at 1409-16; *South Dakota v. Bourland*, 508 U.S. 679, 688-97 (1993); *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 266-67 (1992); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 422-31, 443-44 (1989). But see *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 171-72 (1982) (Stevens, J., dissenting) (contending that the majority failed to follow *Montana*).

³⁴¹ 480 U.S. 1, 11 (1987).

³⁴² See Watson, *supra* note 301, at 563-69.

³⁴³ 480 U.S. at 18. Significantly, Marshall cited *Montana* as authority for his statement. *Id.*

³⁴⁴ *Id.* (emphasis added).

³⁴⁵ *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 454 n.5 (1989) (Blackmun, J., concurring). Justice White, who was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, contended that *Iowa Mutual* did not speak to "whether the Indian Tribe had authority over the nonmembers involved." *Id.* at 427 n.10 (plurality opinion). Justice Blackmun, joined by (fellow former) Justices Brennan and Marshall, agreed with Justice White that *Iowa Mutual* established an exhaustion rule, but asserted that "*Iowa Mutual* also stands for the proposition that civil

In the years between *Iowa Mutual* and *Strate*, thirty-four state and federal decisions expressly invoked the “presumptively lies” language of *Iowa Mutual*.³⁴⁶ In fifteen of these cases, the courts failed to even mention *Montana*,³⁴⁷ and in eleven other decisions the references to *Montana* do not pertain to its presumption against tribal civil authority over non-members.³⁴⁸ Thus, in the aforementioned twenty-six decisions the courts

jurisdiction over non-Indians is a recognized part of inherent tribal sovereignty and exists ‘unless affirmatively limited by a specific treaty provision or federal statute.’” *Id.* at 455 n.5 (quoting *Iowa Mutual*, 480 U.S. at 18).

³⁴⁶ *Lower Brule Sioux Tribe v. South Dakota*, 104 F.3d 1017, 1026 (8th Cir.) (Beam, J., concurring and dissenting), *cert. denied*, 118 S. Ct. 64 (1997); *Yellowstone County v. Pease*, 96 F.3d 1169, 1175 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1691 (1997); *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1419 (8th Cir. 1996); *United States v. Tsosie*, 92 F.3d 1037, 1041 (10th Cir. 1996); *A-1 Contractors v. Strate*, 76 F.3d 930, 936 (8th Cir. 1996) (en banc), *aff’d*, 117 S. Ct. 1404 (1997); *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1299 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 779 (1995); *A-1 Contractors v. Strate*, No. 92-3359, 1994 WL 666501, at *5 (8th Cir. Nov. 29, 1994); *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 813 (7th Cir.), *cert. denied*, 510 U.S. 1019 (1993); *Stock West Corp. v. Taylor*, 964 F.2d 912, 922 (9th Cir. 1992) (en banc) (O’Scannlain, J., dissenting); *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991); *Stock West Corp. v. Taylor*, 942 F.2d 655, 659 (9th Cir. 1991); *Burlington Northern R.R. v. Crow Tribal Council*, 940 F.2d 1239, 1244 (9th Cir. 1991); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1228 (9th Cir. 1989); *Twin City Constr. Co. v. Turtle Mountain Band of Chippewa Indians*, 866 F.2d 971, 972 (8th Cir.) (en banc) (Lay, J., dissenting), *cert. denied*, 490 U.S. 1085 (1989); *White Mountain Apache Tribe v. Smith Plumbing Co.*, 856 F.2d 1301, 1305 (9th Cir. 1988); *Brown v. Washoe Hous. Auth.*, 835 F.2d 1327, 1329 (10th Cir. 1988); *Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577, 578 (9th Cir. 1987); *Nevada v. Hicks*, 944 F. Supp. 1455, 1462 (D. Nev. 1996); *Wilson v. Marchington*, 934 F. Supp. 1176, 1182-84 (D. Mont. 1995), *rev’d*, 127 F.3d 805 (9th Cir. 1997); *AG Organic, Inc. v. John*, 892 F. Supp. 466, 475 (W.D.N.Y. 1995); *Kerr-McGee Corp. v. Farley*, 915 F. Supp. 273, 277 (D.N.M. 1995), *aff’d*, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998); *Bowen v. Doyle*, 880 F. Supp. 99, 124 (W.D. N.Y. 1995); *Middlemist v. Lujan*, 824 F. Supp. 940, 946 (D. Mont. 1993), *aff’d*, 19 F.3d 1318 (9th Cir.), *cert. denied*, 115 S. Ct. 420 (1994); *Tom’s Amusement Co. v. Cuthbertson*, 816 F. Supp. 403, 406 (W.D.N.C. 1993); *A-1 Contractors v. Strate*, Civ. No. A1-92-24, 1992 WL 696330, at *3 (D.N.D. Sep. 16, 1992); *Tamiami Partners Ltd. v. Miccosukee Tribe*, 788 F. Supp. 566, 569 (S.D. Fla. 1992), *rev’d*, 999 F.2d 503 (11th Cir. 1993); *State v. Ducheneaux*, No. CIV. 88-3049, 1990 U.S. Dist. Lexis 20834, at *49 (D.S.D. Aug. 21, 1990); *Snowbird Constr. Co. v. United States*, 666 F. Supp. 1437, 1443 (D. Idaho 1987); *Blaze Constr. Co. v. United States*, 27 Fed. Cl. 646, 654 (Ct. Cl. 1993); *Klammer v. Lower Sioux Convenience Store*, 535 N.W.2d 379, 381 (Minn. Ct. App. 1995); *Red Fox v. Hettich*, 494 N.W.2d 638, 644, (S.D. 1993); *Nenana Fuel Co. v. Native Village*, 834 P.2d 1229, 1250 n.1b (Alaska 1992) (Rabinowitz, J., dissenting); *Sage v. Sicangu Oyate Ho, Inc.*, 473 N.W.2d 480, 482 (S.D. 1991); *Geiger v. Pierce*, 758 P.2d 279, 280 (Mont. 1988).

³⁴⁷ See *Bruce H. Lien Co.*, 93 F.3d 1412; *Tsosie*, 92 F.3d 1037; *Alzheimer & Gray*, 983 F.2d 803; *Smith*, 947 F.2d 442; *Burlington Northern R.R.*, 940 F.2d 1239; *Stock West, Inc.*, 873 F.2d 1221 (9th Cir. 1989); *Twin City Constr. Co.*, 866 F.2d 971; *Brown*, 835 F.2d 1327; *A G Organic, Inc.*, 892 F. Supp. 466; *Bowen*, 880 F. Supp. 99; *Middlemist*, 824 F. Supp. 940; *Tamiami Partners Ltd.*, 788 F. Supp. 566; *Snowbird Constr. Co.*, 666 F. Supp. 1437; *Blaze Constr. Co.*, 27 Fed. Cl. 646; *Klammer*, 535 N.W.2d 379.

³⁴⁸ See *Duncan Energy Co.*, 27 F.3d at 1298-1301; *Stock West Corp.*, 964 F.2d at 918-19; *Stock West Corp.*, 942 F.2d at 659 n.3; *White Mountain Apache Tribe*, 856 F.2d at 1305; *Wellman*, 815 F.2d at 578; *Kerr-McGee Corp.*, 915 F. Supp. at 280; *Tom’s Amusement Co.*, 816 F. Supp. at 405; *A-1 Contractors*, 1992 WL 696330 at *3; *Nenana Fuel Co.*, 834 P.2d at 1241 n.14 (Moore, J., concurring); *Sage*, 473 N.W.2d at 482; *Geiger*, 758 P.2d at 280.

operated (incorrectly) under the assumption that tribal civil authority is presumed to extend to non-members; only the eight remaining cases note the tension between *Montana* and *Iowa Mutual*.³⁴⁹

The most considered effort at reconciling the two divergent Supreme Court precedents is found in the *Strate* appellate decisions.³⁵⁰ The issue in *Strate* was whether the Fort Berthold Tribal Court had subject matter jurisdiction over a civil cause of action against non-Indians that arose on the reservation.³⁵¹ In the Eighth Circuit's panel decision upholding tribal jurisdiction, the majority found that the *Montana* presumption applies "only to *fee lands* owned by non-Indians,"³⁵² and relied instead on the "presumptively lies" language of *Iowa Mutual* and the statement in *Iowa Mutual* that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty."³⁵³ The

³⁴⁹ See *Lower Brule Sioux Tribe*, 104 F.3d at 1026; *Yellowstone County*, 96 F.3d at 1175-76; *A-1 Contractors*, 76 F.3d 930 934-37; *A-1 Contractors*, No. 92-3359, 1994 WL 666051, at *3-*5; *Hicks*, 944 F. Supp. at 1465-66; *Wilson*, 934 F. Supp. 1181-84; *Ducheneaux*, No. CIV. 88-3049, 1990 WL 605077, at *25; *Red Fox*, 494 N.W.2d at 645.

³⁵⁰ See *A-1 Contractors*, No. 92-3359, 1994 WL 666501.

In *Ducheneaux*, the district court noted that the effect of *Iowa Mutual* on *Montana* "is unclear," No. Civ. 88-3049, 1990 WL 605077, at *17, but nonetheless held that "*Montana* remains viable case law precedent." *Id.* In *Red Fox*, the South Dakota Supreme Court applied the *Iowa Mutual* presumption to the issue of judicial (adjudicatory) jurisdiction, and the *Montana* presumption to the issue of legislative (or regulatory) jurisdiction. See *Red Fox*, 494 N.W.2d at 646-47 ("In contrast to the determination of the judicial jurisdiction of a tribal court, '[t]he primary effect of *Montana* is to create a threshold presumption that tribes do not have legislative and regulatory jurisdiction over non-Indians on fee lands within the reservation.'") (quoting Pommersheim, *supra* note 328, at 345).

The remaining cases center their discussions of *Iowa Mutual* and *Montana* around the *Strate* panel and *en banc* decisions. See *Lower Brule Sioux Tribe*, 104 F.3d at 1026 (noting that the *Iowa Mutual*/*Montana* conflict was resolved in the *Strate en banc* decision) (Beam, J., concurring and dissenting); *Yellowstone County*, 96 F.3d at 1175 (rejecting the adjudicatory/regulatory distinction and expressly agreeing with the *Strate en banc* decision); *Hicks*, 944 F. Supp. at 1466 (noting that the Ninth Circuit in *Pease* cited the *Strate en banc* decision with approval); *Wilson*, 934 F. Supp. at 1184 (agreeing with, and adopting, the dissent to the Eighth Circuit's panel decision in *Strate*).

³⁵¹ A gravel truck, driven by Lyle Stockert and owned by A-1 Contractors, collided with a car driven by Gisela Fredericks. The injured Fredericks and her adult children filed suit in tribal court, suing Stockert, A-1 Contractors, and Continental Western Insurance Co. (which was eventually dismissed from the case), seeking damages for personal injury, loss of consortium, and medical expenses. Neither Stockert nor Mrs. Fredericks are tribal members; however, Mrs. Fredericks resides on the reservation, was married to a tribal member (now deceased), and her adult children are enrolled members of the tribe. See *Strate*, 76 F.3d at 932. At the time of the accident, A-1 was working on the reservation under a subcontract agreement with a corporation wholly owned by the tribe. *Id.* Stockert and A-1, after exhausting available tribal court remedies, filed suit in federal district court, seeking to enjoin the tribal court from asserting jurisdiction. *Id.* at 933. The district court, which cited the presumptions from both *Iowa Mutual* and *Montana*, held that the personal injury suit was within the *Montana* exceptions and that the tribal court had jurisdiction. See *A-1 Contractors v. Strate*, Civ. No. A1-92-24, 1992 WL 696330 (D.N.D. Sept. 16, 1992).

³⁵² 1994 WL 666051, at *4 (emphasis added).

³⁵³ *Id.* at *5 (emphasis added) (quoting *Iowa Mutual*, 480 U.S. at 18).

dissenting judge, on the other hand, argued that *Montana* was dispositive, and that the *Iowa Mutual* presumption was in any event not in conflict with the *Montana* presumption.³⁵⁴

The *en banc* decision in *Strate*, which overturned the panel decision and held that the tribal court was without adjudicatory authority, is both a product and an example of the thrust and parry of federal Indian law. The proponents of tribal court jurisdiction, the plaintiffs in the tribal suit and the four dissenting Eighth Circuit judges, invoked many of the Supreme Court decisions that appear under the "thrust" headings in this Article: *Iowa Mutual*,³⁵⁵ *Merrion*,³⁵⁶ *Mazurie*,³⁵⁷ *Worcester*,³⁵⁸ *Colville*,³⁵⁹ and *Wheeler*.³⁶⁰ The defendants in the tribal action and the ten federal appellate judges who comprised the *en banc* majority, on the other hand, relied primarily on Supreme Court decisions that appear under the "parry" headings in this Article: *Montana*,³⁶¹ *Bourland*,³⁶² *Brendale*,³⁶³ *Duro*,³⁶⁴ *County of Yakima*,³⁶⁵ and *Oliphant*.³⁶⁶

The *en banc* decision in *Strate* has been criticized for shifting the "presumption of tribal authority over nonmembers to a presumption against tribal authority"³⁶⁷ and for being "inconsistent with historical conceptions of tribal sovereignty."³⁶⁸ It is difficult, however, to conceive how the court of appeals "shifted" presumptions when the opposing presumptions were already in place. It is also hard to fault the appellate court for being inconsistent with historical conceptions of tribal sovereignty that are

³⁵⁴ *Id.* at *9 (opining that *Montana* and *Iowa Mutual* "establish one comprehensive and integrated rule: a valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember. but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law.").

³⁵⁵ 76 F.3d at 941, 944, 946, 949; *see supra* note 230 and accompanying text.

³⁵⁶ 76 F.3d at 942, 946-47; *see supra* note 203 and accompanying text.

³⁵⁷ 76 F.3d at 942, 946; *see supra* note 216 and accompanying text.

³⁵⁸ 76 F.3d at 942; *see supra* notes 29, 104 and accompanying text.

³⁵⁹ 76 F.3d at 946; *see supra* note 205 and accompanying text.

³⁶⁰ 76 F.3d at 942, 946; *see supra* note 201 and accompanying text.

³⁶¹ 76 F.3d at 934-41; *see supra* note 225 and accompanying text.

³⁶² 76 F.3d at 935; *see supra* note 204 and accompanying text.

³⁶³ 76 F.3d at 935 n.4, 935-37, 939; *see supra* note 244 and accompanying text.

³⁶⁴ 76 F.3d at 935, 937, 939; *see supra* note 235 and accompanying text.

³⁶⁵ 76 F.3d at 935-37; *see supra* note 254 and accompanying text.

³⁶⁶ 76 F.3d at 936-37; *see supra* note 206 and accompanying text.

³⁶⁷ Igou, *supra* note 69, at 907.

³⁶⁸ *Id.* at 908.

themselves inconsistent!³⁶⁹ The Eighth Circuit had plenty of “good law” to choose from, and consequently there was, in Karl Llewellyn’s words, a “framework for maneuver.”³⁷⁰

The Supreme Court affirmed the Eighth Circuit’s rejection of tribal court jurisdiction—despite the fact that the United States, as *amicus curiae*, urged reversal³⁷¹—in an unanimous decision by Justice Ginsberg.³⁷² The 1997 *Strate* decision trumpets the “parry” cases (*Montana*, *Oliphant*, *Duro*, *Brendale*, and *Bourland*), and downplays “thrust” cases such as *Iowa Mutual*. Following the lead of the court of appeals,³⁷³ the Supreme Court reconciled *Montana* and *Iowa Mutual* by noting, somewhat defensively, that “the [*Iowa Mutual*] statement stands for nothing more than the unremarkable proposition that, *where tribes possess authority to regulate the activities of nonmembers*, ‘[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.’”³⁷⁴

In other words, in order to reconcile *Montana* with *Iowa Mutual*, the Court asserts that *Iowa Mutual* stands merely for the proposition that tribal adjudicatory jurisdiction is presumed to exist only when tribes can regulate the activities of non-Indians.³⁷⁵ The notion that *Iowa Mutual* “stands for nothing more”³⁷⁶ and “does not limit the *Montana* rule”³⁷⁷ was certainly not

³⁶⁹ Historic conceptions of tribal sovereignty vary from time period to time period, and from person to person. Chief Justice John Marshall’s understanding of tribal sovereignty differs from the views of Justice John McLean, his contemporary, as well as from those of Justice Samuel Miller, the author of the 1886 *Kagama* decision. See *United States v. Kagama*, 118 U.S. 375 (1886).

³⁷⁰ Llewellyn, *supra* note 1, at 401.

³⁷¹ In so doing, the Court rejected the position of the United States, as *amicus curiae*, that the tribal court had subject matter jurisdiction to adjudicate the tort suit. The United States cites the “presumptively lies” language of *Iowa Mutual* no less than nine times in its brief. See Brief for the United States as Amicus Curiae Supporting Petitioners at 3, 4 n.2, 10, 11, 13, 15, 17, 19, 24, *Strate v. A-1 Contractors*, 117 S. Ct. 1407 (1997) (No. 95-1872). The United States contended that the *Iowa Mutual* presumption “governs this case,” *id.* at 19, and that *Montana*’s contrary rule should be limited to the scope of tribal regulatory power and not apply to tribal adjudicatory authority. *Id.* at 14. Both contentions were rejected.

³⁷² Justices Blackmun, Brennan, and Marshall, who in *Brendale* viewed the *Iowa Mutual* decision as broadly confirming tribal court civil jurisdiction over claims against non-members arising from occurrences on any land within a reservation had left the Court prior to *Strate*. See *supra* note 330. Significantly, Justice Thomas, who replaced Justice Marshall, penned the *Bourland* decision, and Justice Kennedy, who replaced Justice Brennan, was the author of another “parry” case, *Duro v. Reina*. See *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Duro v. Reina*, 495 U.S. 676 (1990).

³⁷³ In particular, the Court followed Judge Hansen of the Eighth Circuit, who dissented from the panel decision and authored the *en banc* decision.

³⁷⁴ 117 S. Ct. 1404, 1413 (1997) (quoting *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 1, 18 (1987)) (emphasis added).

³⁷⁵ Stated another way, *Iowa Mutual* “instructs” that state and federal courts should presume that tribal courts have jurisdiction over nonmembers whenever state and federal courts should presume that tribes have jurisdiction over nonmembers.

³⁷⁶ 117 S. Ct. at 1413.

evident to the courts that viewed *Iowa Mutual* as raising a presumption in favor of adjudicatory and regulatory tribal jurisdiction over non-members, nor was it evident to the majority of judges on the panel decision in *Strate* (and a substantial minority, nearly one-third, of the Eighth Circuit judges sitting *en banc*).

Phil Frickey believes that, "in federal Indian law, lawyerly analysis that is devoid of broader historical and theoretical perspectives leads to misleading conclusions about the determinacy and substance of what the law 'is' at any given moment."³⁷⁸ I agree. David Getches contends that recent Supreme Court Indian law decisions "have been based essentially on the Justices' subjective judgments about how they ought to allocate sovereign authority over non-Indians in Indian country in order to avoid cultural clashes."³⁷⁹ I concur. In some respects, it appears that the thrust and parry of federal Indian law is ending, and that the thrust of Indian sovereignty will be finally parried by a legal transformation of tribal governments into "clubs" that exercise authority only over members and non-members who consent to be regulated.³⁸⁰ Time, of course, will tell.

It is not, however, preordained that Justice McLean's view of tribal sovereignty will ultimately prevail. Nor does the future of federal Indian law hinge on finding "the solution" to the problem of doctrinal incoherence.³⁸¹ Rather, the future of Indian law and tribal rights will depend in large part on the degree to which courts heed the advice of Karl Llewellyn, offered in his famous law review article on the canons of statutory construction, to "strive to make sense *as a whole* out of our law *as a whole*."³⁸² It must not be forgotten, moreover, that the "whole" of federal Indian law includes the thrust of the foundational cases, the recognition of the special history and political status of Indian tribes, the continuing existence of the federal-tribal treaty relationship,³⁸³ and the policies of permanent co-existence and tribal self-determination.

³⁷⁷ *Id.*

³⁷⁸ Frickey, *Adjudication and Its Discontents*, *supra* note 9, at 1767.

³⁷⁹ Getches, *supra* note 12, at 1654.

³⁸⁰ The Supreme Court has declared that "Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations . . .'" *United States v. Mazurie*, 419 U.S. 544, 557 (1975). The enduring vitality of *Mazurie*'s acknowledgement of tribal sovereignty is questionable, however, in light of the Court's more recent statements and holdings in *Brendale*, *Duro*, *Bourland*, and *Strate*.

³⁸¹ See Frickey, *Adjudication and Its Discontents*, *supra* note 9, at 1784 ("After a half-millennium of colonization, I am skeptical that anything approaching a 'solution' in this area will ever emerge, whether by doctrinal innovation or its alternatives.").

³⁸² Llewellyn, *supra* note 1, at 399.

³⁸³ See Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 969 (1996) (arguing that federal Indian law unduly focuses on "statutes universally

APPENDIX: SUPREME COURT INDIAN LAW DECISIONS

Commonwealth v. Coxe, 4 U.S. (4 Dall.) 170 (1800)
Fletcher v. Peck, 10 U.S. (6 Cranch.) 87 (1810)
Danforth's Lessee v. Thomas, 14 U.S. (1 Wheat.) 155 (1816)
Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823)
Patterson v. Jenks, 27 U.S. (2 Pet.) 216 (1829)
Sundry Goods v. United States, 27 U.S. (2 Pet.) 358 (1829)
Reynolds v. McArthur, 27 U.S. (2 Pet.) 417 (1829)
Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)
Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835)
Denn v. Reid, 35 U.S. (10 Pet.) 524 (1836)
Clark v. Smith, 38 U.S. (13 Pet.) 195 (1839)
Lessee of Lattimer v. Poteet, 39 U.S. (14 Pet.) 4 (1840)
Kinney v. Clark, 43 U.S. (2 How.) 76 (1844)
Ladiga v. Roland, 43 U.S. (2 How.) 581 (1844)
United States v. Rogers, 45 U.S. (4 How.) 567 (1845)
Marsh v. Brooks, 49 U.S. (8 How.) 223 (1850)
Gaines v. Nicholson, 50 U.S. (9 How.) 356 (1850)
United States v. Brooks, 51 U.S. (10 How.) 442 (1850)
Parks v. Ross, 52 U.S. (11 How.) 362 (1850)
Thredgill v. Pintard, 53 U.S. (12 How.) 24 (1851)
United States v. Dawson, 56 U.S. (15 How.) 467 (1853)
United States v. Coxe, 59 U.S. (18 How.) 100 (1855)
Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1857)
Scott v. Sanford, 60 U.S. (19 How.) 393, 404 (1856)
New York v. Dibble, 62 U.S. (21 How.) 366 (1858)
Doe v. Wilson, 64 U.S. (23 How.) 457 (1859)
Crews v. Burcham, 66 U.S. (1 Black) 352 (1861)
United States v. Holliday, 70 U.S. (3 Wall.) 407 (1865)
The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867)
The New York Indians, 72 U.S. (5 Wall.) 761 (1866)
Wilson v. Wall, 73 U.S. (6 Wall.) 83 (1867)
Smith v. Stevens, 77 U.S. (10 Wall.) 321 (1870)
The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870)
Walker v. Henshaw, 83 U.S. (16 Wall.) 436 (1872)
Holden v. Joy, 84 U.S. (17 Wall.) 211 (1872)
Best v. Polk, 85 U.S. (18 Wall.) 112 (1873)
United States v. Cook, 86 U.S. (19 Wall.) 591 (1873)

applicable to all Indian nations" and deemphasizes the treaty process and "the rights of Indians as they are articulated specifically in the history of the tribe with the federal government.").

Leavenworth, L. & G. R.R. Co. v. United States, 92 U.S. 733 (1875)
United States v. 43 Gallons of Whiskey, 93 U.S. 188 (1876)
United States v. Joseph, 94 U.S. 614 (1876)
Bates v. Clark, 95 U.S. 204 (1877)
Beecher v. Wetherby, 95 U.S. 517 (1877)
Harkness v. Hyde, 98 U.S. 476 (1878)
United States v. Perryman, 100 U.S. 235 (1879)
Langford v. Monteith, 102 U.S. 145 (1880)
Pennock v. Commissioners, 103 U.S. 44 (1880)
United States v. McBratney, 104 U.S. 621 (1881)
United States v. 43 Gallons of Whiskey, 108 U.S. 491 (1883)
Dubuque & S.C. R. Co. v. Des Moines Valley R. Co., 109 U.S. 329 (1883)
Ex Parte Crow Dog, 109 U.S. 556 (1883)
United States v. Brindle, 110 U.S. 688 (1884)
United States v. Carpenter, 111 U.S. 347 (1884)
Elk v. Wilkins, 112 U.S. 94 (1884)
Utah & N. Ry. Co. v. Fisher, 116 U.S. 28 (1885)
Eastern Band of Cherokee Indians v. United States, 117 U.S. 288 (1886)
Libby v. Clark, 118 U.S. 250 (1886)
United States v. Kagama, 118 U.S. 375 (1886)
Choctaw Nation v. United States, 119 U.S. 1 (1886)
Buttz v. Northern Pac. R. Co., 119 U.S. 55 (1886)
United States v. Jones, 121 U.S. 89 (1887)
United States v. Le Bris, 121 U.S. 278 (1887)
Ex Parte Gon-shay-ee, 130 U.S. 343 (1889)
Ex Parte Captain Jack, 130 U.S. 353 (1889)
In re Mills, 135 U.S. 263 (1890)
In re Lane, 135 U.S. 443 (1890)
Cherokee Nation v. Southern Kan. Ry. Co., 135 U.S. 641 (1890)
Ex Parte Wilson, 140 U.S. 575 (1891)
Ex Parte Mayfield, 141 U.S. 107 (1891)
McLish v. Roff, 141 U.S. 661 (1891)
Boyd v. United States, 142 U.S. 450 (1892)
Southern Kansas Ry. Co. v. Briscoe, 144 U.S. 133 (1892)
Pickering v. Lomax, 145 U.S. 310 (1892)
Felix v. Patrick, 145 U.S. 317 (1892)
Mattox v. United States, 146 U.S. 140 (1892)
United States v. 'Old Settlers,' 148 U.S. 427 (1893)
Pam-To-Pee v. United States, 148 U.S. 691 (1893)
United States v. Thomas, 151 U.S. 577 (1894)
Missouri, K. & T. Ry. Co. v. Roberts, 152 U.S. 114 (1894)
United States v. Blackfeather, 155 U.S. 180 (1894)
Cherokee Nation v. Journeycake, 155 U.S. 196 (1894)

Mattox v. United States, 156 U.S. 237 (1895)
Maricopa & P. R. Co. v. Territory of Arizona, 156 U.S. 347 (1895)
Spalding v. Chandler, 160 U.S. 394 (1896)
Marks v. United States, 161 U.S. 297 (1896)
Alberty v. United States, 162 U.S. 499 (1896)
Talton v. Mayes, 163 U.S. 376 (1896)
Ward v. Race Horse, 163 U.S. 504 (1896)
Lucas v. United States, 163 U.S. 612 (1896)
Draper v. United States, 164 U.S. 240 (1896)
Nofire v. United States, 164 U.S. 657 (1897)
United States v. Gorham, 165 U.S. 316 (1897)
Ex Parte Johnson, 167 U.S. 120 (1897)
Boff v. Burney, 168 U.S. 218 (1897)
United States v. Union Pac. Ry. Co., 168 U.S. 505 (1897)
Thomas v. Gay, 169 U.S. 264 (1898)
New York Indians v. United States, 170 U.S. 1 (1898)
Wagoner v. Evans, 170 U.S. 588 (1898)
Brown v. United States, 171 U.S. 631 (1898)
Lomax v. Pickering, 173 U.S. 26 (1899)
Collier v. United States, 173 U.S. 79 (1899)
United States v. Navarre, 173 U.S. 77 (1899)
Yerke v. United States, 173 U.S. 439 (1899)
United States v. New York, 173 U.S. 464 (1899)
Stephens v. Cherokee Nation, 174 U.S. 445 (1899)
Price v. United States, 174 U.S. 373 (1899)
Jones v. Meehan, 175 U.S. 1 (1899)
United States v. Parkhurst-Davis Mercantile Co., 176 U.S. 317 (1900)
Bad Elk v. United States, 177 U.S. 529 (1900)
Corralitos Co. v. United States, 178 U.S. 280 (1900)
Good Shot v. United States, 179 U.S. 87 (1900)
United States v. Andrews, 179 U.S. 96 (1900)
Contzen v. United States, 179 U.S. 191 (1900)
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