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Tribal Sovereignty Preempted

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INTRODUCTION

In 1832, the US Supreme Court held in *Worcester v. Georgia* that the State of Georgia had no authority to exercise criminal jurisdiction over a non-Indian for conduct within the lands of the Cherokee Nation.[1] In passages repeated many times since, the Court said that "the several Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive" and that "[t]he Cherokee nation . . . is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force."[2] But in 2022, the US Supreme Court held in *Oklahoma v. Castro-Huerta* that the State of Oklahoma had full authority to exercise criminal jurisdiction over a non-Indian for conduct within the lands of the Muscogee Nation.[3] In passages contrasting markedly with those from *Worcester*, the Court said that "Indian country within a State's territory is part of a State, not separate from a State" and that "a State has jurisdiction to prosecute crimes committed in Indian country, unless state jurisdiction is preempted" by federal law.[4] How did this happen? How did the Supreme Court so radically revise the law on governmental authority within Indian country during the 190 years between *Worcester* and *Castro-Huerta*?[5]

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1 Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

2 *Id.* at 557, 561.

3 Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2490 (2022).

4 *Id.* at 2504.

5 The term "Indian country" is a term of art in federal Indian law. Although federal law does not provide a comprehensive definition of the term, the statutory definition for federal criminal jurisdiction is widely regarded as authoritative for both criminal and civil purposes. NEWTON ET AL. (EDS.), COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 184 (2012); RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 3(a) (AM. L. INST. 2022). For purposes of federal criminal jurisdiction, "Indian country" is defined as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all

If considered with some detachment, the transformation of the law on this point is an outstanding example of the common law method at work. By slow progression, later decisions extend, modify, and reinterpret earlier decisions until, ultimately, a case at the end of a doctrinal line—here, *Castro-Huerta*—reaches a holding exactly contrary to the holding of the case at the start of the doctrinal line—here, *Worcester*. That in itself is not unusual. After all, when contract law was still purely a matter of common law, the courts, in deciding which promises are enforceable, moved over several centuries from not always requiring consideration—in the medieval actions of covenant, debt, and detinue—to always requiring consideration—in the early modern action of *assumpsit*.[6] The intermediate steps are often no less intriguing than the simple fact that the common law sometimes moves, almost imperceptibly and with little apparent effort, from one point to its precise opposite. As Holmes remarked, the law "will become entirely consistent only when it ceases to grow."[7]

But federal Indian law is not just a curiosity of legal method and legal theory. The decisions of the Supreme Court have profound effects on the 574 recognized Indian tribes that stand in government-to-government relationships with the United States. Under the robust understanding of tribal sovereignty set out in *Worcester*, the tribes have inherent, comprehensive, and exclusive governmental authority within their borders, subject only to the overriding power of Congress.[8] Under the weak understanding of tribal sovereignty set out in *Castro-Huerta*, the tribes and the states share governmental

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Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151. Thus, Indian country includes all lands within the boundaries of a reservation, including lands owned in fee simple by non-Indians, and all lands outside the boundaries of a reservation owned in fee simple by a tribe or by members of a tribe. Throughout this article, I use the terms "Indian country" and "reservation" interchangeably, and I use the term "tribal lands" to refer to land within Indian country (or a reservation) that is owned by the tribe, by members of the tribe, or by the United States for the benefit of the tribe or members of the tribe. Despite the anachronism, I also use the term "Indian country" in reference to periods before the enactment of 18 U.S.C. § 1151.

[6] *See generally* A.W. BRIAN SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT (1975) (discussing the development of contract law from the medieval period).

[7] OLIVER WENDELL HOLMES, JR. THE COMMON LAW 36 (1881). Caleb Nelson, always perceptive, argues that certain questions of federal Indian law fall among the "purest enclaves of 'federal common law.'" Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 507 (2006).

[8] Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law,* 107 HARV. L. REV. 381, 393–398 (1993); William C. Canby, Jr., *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206, 207 (1973).

authority within tribal borders, again subject to the overriding power of Congress. With nothing less than Indian self-determination in the balance, the stakes could hardly be higher for the tribes. In this respect, *Castro-Huerta* is the most serious setback to tribal sovereignty in decades.

As first set out in Chief Justice Marshall's opinion in *Worcester*, the law on tribal and state authority within Indian country was both unitary and symmetrical. The case was an appeal brought by Samuel Worcester, a non-Indian, following his criminal conviction in Georgia state court.[9] The Georgia legislature, attempting to break the sovereignty of the Cherokee Nation and to appropriate Cherokee lands located within the territory claimed by Georgia, had enacted statutes that, *inter alia*, made it a crime for a "white person[]" to live on Cherokee lands without first pledging loyalty to the Georgia constitution and obtaining a license from the Georgia governor.[10] Worcester, a Congregationalist minister from Vermont who lived within the lands of the Cherokee Nation, ignored the pledge and license requirements. He argued that he was acting "in the capacity of a duly authorised missionary of the American Board of Commissioners for Foreign Missions, under the authority of the president of the United States."[11] With one dissent, the Supreme Court reversed Worcester's conviction, holding that the Georgia statutes were "repugnant to the constitution, laws, and treaties of the United States."[12]

Marshall's opinion treats state authority and tribal authority as mutually exclusive; the former leaves off where the latter begins. Marshall wrote that, within the territorial boundaries of the Cherokee Nation, "the laws of Georgia can have no force"[13] and the authority of the Cherokee Nation is "exclusive."[14] He reasoned that, because the Indian Commerce Clause of the US Constitution confers on Congress the sole power "[t]o regulate Commerce . . . with the Indian Tribes,"

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[9] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 536 (1832).

[10] *Id.* at 542.

[11] *Id.* at 538.

[12] *Id.* at 562–63. Justice McLean concurred. *Id.* at 563 (McLean, J. concurring). For a brief summary of McLean's opinion, see DEWI IOAN BALL, THE EROSION OF TRIBAL POWER: THE SUPREME COURT'S SILENT REVOLUTION 19–20 (2016). Justice Baldwin dissented. *Worcester*, 31 U.S. (6 Pet.) at 596 (Baldwin, J. dissenting). For a close study of the political and legal background (and the immediate aftermath) of *Worcester*, see Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969).

[13] *Worcester*, 31 U.S. (6 Pet.) at 561.

[14] *Id.* at 557. Marshall added that both the inapplicability of state authority and the exclusiveness of tribal authority within Indian country were subject to modification by Congress. *Id.* at 561.

federal law demarcates the boundary between state authority and tribal authority.[15] In exercise of its power under the Indian Commerce Clause, Congress had ratified treaties with the Cherokee Nation (as with other Indian tribes) and had enacted statutes in 1790, 1793, 1796, 1799, and 1802 to regulate trade and intercourse with the Indians.[16] The question of state authority and tribal authority was a matter for Congress—and Congress alone—to determine: "The whole intercourse between the United States" and the Cherokee Nation "is, by our constitution and laws, vested in the government of the United States."[17] And the regime determined by Congress, Marshall said, was that the Cherokee Nation held exclusive power within Cherokee lands.[18]

Thus the unitary and symmetrical understanding of governmental authority in *Worcester*. A state had no authority over any person or activity within Indian country—unless Congress provided otherwise—and a tribe had full authority over every person and activity within Indian country—again, unless Congress provided otherwise.[19] It did not matter whether the person within Indian country was Indian or non-Indian. Worcester was not Indian, but the State of Georgia had no authority over him as long as he was on Cherokee land; instead, he was under the authority of the Cherokee Nation and, to the extent it asserted its authority, the United States. Marshall wrote that "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states."[20] Under *Worcester*, then, the line between state authority and tribal authority was the physical boundary of Indian country, subject only to whatever exceptions, adjustments, or modifications Congress made.[21]

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[15] U.S. CONST. art. I, § 8, cl. 3.

[16] *Worcester*, 31 U.S. (6 Pet.) at 551–57, 585–86; *see also* Act of July 22, 1790, Pub. L. No. 1-33, 1 Stat. 137; Act of March 1, 1793, Pub. L. No. 2-19, 1 Stat. 329; Act of May 19, 1796, Pub. L. No. 4-30, 1 Stat. 469; Act of March 3, 1799, Pub. L. No. 5-46, 1 Stat. 743; Act of March 30, 1802, Pub. L. No. 7-13, 2 Stat. 139.

[17] *Worcester*, 31 U.S. (6 Pet.) at 520.

[18] *Id.*

[19] Philip Frickey put this point about *Worcester* in similar terms: "The opinion relied upon two general principles: that the federal-tribal relationship was exclusive, such that any non-Indian governmental power relating to the Cherokee must be federal, not state; and that the tribe retained sovereignty over its reservation." Philip P. Frickey, *The Status and Rights of Indigenous Peoples in the United States*, 59 HEIDELBERG J. INT'L L. 383, 392 (1999).

[20] *Worcester*, 31 U.S. (6 Pet.) at 557.

[21] In the words of Judge Canby: "*Worcester* leaves little question that in Marshall's view, the tribes were inherently empowered to govern everything that happened within their territories" and that "[t]he boundaries of tribal power were essentially geographical." William C. Canby Jr., *The Status of Indian Tribes in American*

But during the second half of the nineteenth century, the Supreme Court began to dismantle the *Worcester* unity and symmetry. At first, the Court made relatively modest exceptions to *Worcester* by allowing the states to assert authority within Indian country in particular situations that, at least as understood by the Court, did not involve Indians or tribal interests. Most notably, the Court held in 1881 and 1896 that a state has exclusive jurisdiction to prosecute a crime committed within Indian country by a non-Indian perpetrator against a non-Indian victim.[22] And in 1885, the Court held that a state may tax the property of non-Indians within Indian country.[23] Even so, the analytic framework of *Worcester* generally held until the second half of the twentieth century. For the most part, Indian country remained under the exclusive authority of tribal governments and the federal government—state law, for most purposes, stopped at the reservation border. As late as 1942, Felix Cohen, writing in his foundational treatise on federal Indian law, introduced the topic of state authority within Indian country by stating confidently: "That state laws have no force within the territory of an Indian tribe in matters affecting Indians is a general proposition that has not been successfully challenged, at least in the United States Supreme Court, since . . . *Worcester v. Georgia*."[24] Cohen added that, although individual states sometimes resist this limitation, "when critical cases have been presented to the United States Supreme Court, the principles laid down in *Worcester v. Georgia* have been repeatedly reaffirmed."[25]

There were, however, major demographic and political developments during the century and a half after *Worcester* that had profound implications for tribal authority and state

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Law Today, 62 WASH. L. REV. 1, 4 (1987). William Walters characterizes *Worcester* somewhat differently. He argues that, as to state authority within Indian country, "Marshall's substantive conclusion is that Georgia's law represents an extraterritorial assertion of jurisdiction over the territory of a separate sovereign" but that, as to tribal authority within Indian country, Marshall held that "native tribes enjoy a federally recognized right to govern themselves, a right . . . which was absolutely incompatible with the assertion of state authority over federally recognized tribal territory." William Walters, *Review Essay: Preemption, Tribal Sovereignty, and* Worcester v. Georgia, 62 OR. L. REV. 127, 139, 141 (1983). That does not seem quite right. The better reading of *Worcester* is that the tribes have a federally recognized right to govern *their own territory*, not just "themselves."

[22] United States v. McBratney, 104 U.S. 621, 624 (1881); Draper v. United States, 164 U.S. 240, 247 (1896).

[23] Utah & N. Ry. v. Fisher, 116 U.S. 28, 32–33 (1885).

[24] FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 116 (1942).

[25] *Id.*; *see also id.* at 146. For a somewhat different account, see generally DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP 1790–1880 (2007).

authority within Indian country. Following both the removal of many eastern tribes to the western territories of the United States in the early nineteenth century and the concentration of both eastern and western tribes on reservations in the middle of the nineteenth century,[26] Congress in 1887 enacted the General Allotment Act (also known as the "Dawes Act").[27] Under that act, reservation lands were surveyed and subdivided, individual Indians and their families received farm-sized parcels of between forty and 160 acres, and most of the reservation lands designated as "surplus" were sold to non-Indians.[28] The intent behind allotment was in part to facilitate the assimilation of tribal Indians into non-Indian society, but the effect was to destroy much of the tribal land base.[29] By the end of the allotment period in 1934, tribal landholdings had fallen from 138 million acres to 48 million acres,[30] and many reservations had become "checkerboards" of Indian and non-Indian lands.[31] Although federal law still defines "Indian country" as all land within the outer boundaries of a reservation, much of the land within allotted reservations is now owned and occupied by non-Indians. This has led states to become more aggressive in applying their governmental authority within Indian country.

Allotment and assimilation inevitably made tribal governments weaker than they had ever been before—a point federal policymakers came to regret. After something of a false start under the Indian Reorganization Act of 1934 and a setback during the first several decades following the Second World War (a period known as the "Termination Era"),[32] the political branches settled on a new policy of Indian self-determination in the early 1970s.[33] This, in turn, has fostered a renaissance of tribal governments, which generally have increased in size, complexity, and sophistication.[34] As their governments have developed over the last half century, the tribes have rightly become more assertive of their authority, both with respect to

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[26] NEWTON ET AL., *supra* note 5, at 41–61.

[27] *Id.* at 72.

[28] *Id.* at 72–74.

[29] Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 8–10, 12 (1995).

[30] NEWTON ET AL., *supra* note 5, at 74.

[31] *See* Royster, *supra* note 29, at 17–18 n.91.

[32] NEWTON ET AL., *supra* note 5, at 79–93.

[33] *Id.* at 93–108. Some commentators place the start of the self-determination era with the beginning of the Kennedy administration in 1961. *See, e.g.*, *id.* at 93–95. Although the Kennedy and Johnson administrations explored the possibility of moving federal policy away from termination, it was Nixon's 1970 statement to Congress that finally announced a firm federal commitment to Indian self-determination. *See* Special Message to the Congress on Indian Affairs, 1 Pub. Papers 564 (July 8, 1970).

[34] NEWTON ET AL., *supra* note 5, at 93–108.

their own members and with respect to nonmember Indians and non-Indians present within Indian country.

The more complex demographics within Indian country and the often conflicting assertions of state and tribal authority have prompted the Supreme Court to revise the unitary and symmetrical framework of *Worcester*. The contemporary Court has bifurcated the law on governmental authority within Indian country so that there are now two distinct doctrinal lines under *Worcester*. In the first line of cases, running from *Williams v. Lee* in 1959[35] to *Castro-Huerta*[36] in 2022, the Court has steadily expanded state authority within Indian country; in the second line, running from *Oliphant v. Suquamish Indian Tribe* in 1978[37] to *United States v. Cooley* in 2021,[38] the Court has steadily restricted tribal authority within Indian country. The law today is far removed from what it was after Marshall's opinion in *Worcester*.[39]

This article analyzes these two lines of cases to argue three separate but related points. First, the considerations that drive the Supreme Court's expansion of state authority within Indian country are wholly different from the considerations that drive the Court's restriction of tribal authority within Indian country. From *Williams v. Lee* to *Castro-Huerta*, the Court has developed and refined a particular preemption analysis under which tribal, federal, and state interests are compared to determine whether Congress has prohibited the exercise of state authority within Indian country. At least, that is what the Court claims to do. As a practical matter, the Court simply looks to see whether a state has *any* interest in the exercise of its authority within Indian country and, after identifying such an interest, the Court allows the state to apply its laws to non-Indians and nonmember Indians. Tribal and federal interests are

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[35] Williams v. Lee, 358 U.S. 217 (1959).

[36] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022).

[37] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[38] United States v. Cooley, 141 S. Ct. 1638 (2021).

[39] Although it concerns the limits of state governmental authority over Indians, the Supreme Court's recent decision in *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023), directly implicates neither line of cases emanating from *Worcester*. *Brackeen* considers constitutional challenges to the Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended in scattered sections of 25 U.S.C.). *Brackeen*, 143 S. Ct. at 1622–23. That statute gives tribal courts exclusive jurisdiction "over any child custody proceeding involving an Indian child" whose residence or domicile is within the reservation of the child's tribe. 25 U.S.C. § 1911(a). The plaintiffs in *Brackeen* did not challenge that provision. Instead, the plaintiffs challenged various provisions in the act that concern child-custody proceedings in state courts involving an Indian child whose residence or domicile is outside the reservation of the child's tribe. *Brackeen*, 143 S. Ct. at 1622–23. Unlike *Worcester* and the cases under it, which concerned the scope of state authority within Indian country, *Brackeen* concerned the scope of state authority outside Indian country.

increasingly irrelevant to the Court's preemption analysis. Under this doctrinal line, state interests have primacy.

By contrast, the cases from *Oliphant* to *Cooley* turn on the Court's assessment of whether the application of tribal authority to a non-Indian or a nonmember Indian within Indian country threatens the non-Indian's or nonmember's rights or interests. As I have argued elsewhere,[40] the application of tribal governmental authority to nonmember Indians and non-Indians presents the Court with a trilemma of three competing legal and policy objectives: the preservation of traditional tribal sovereignty over all persons and activities within Indian country, the preservation of tribal governments' placement outside the federalist framework of the Constitution, and the preservation of individual fundamental rights. It is impossible to realize all three objectives simultaneously, and the Court has chosen to jettison the first by redefining tribal sovereignty as limited to tribal members within Indian country. Under this doctrinal line, the individual rights of non-Indians and nonmember Indians have primacy.

Second, despite this bifurcation of the law regarding governmental authority within Indian country and despite the distinct considerations that drive the two doctrinal lines, there is an identifiable convergence of results—or at least an identifiable trend toward such a convergence. The cases regarding state authority increasingly tend to uphold *any* assertion of state authority over non-Indians and nonmember Indians within Indian country. Although the Court's cases have not yet reached that endpoint, it certainly is within sight and reach after *Castro-Huerta*. And the cases regarding tribal authority within Indian country increasingly tend to reject *any* assertion of tribal authority over non-Indians and nonmember Indians. Again, the Court's cases have not yet reached that endpoint, but it came very close in 2016 with a 4-4 vote in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*.[41] This article argues that both lines of cases are hardening into categorical rules.

Third, through these decisions on governmental authority within Indian country, the Supreme Court has arrogated to itself the prerogative of making federal Indian law and policy. In the late nineteenth century, the Court held that

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[40] *See* Michael Doran, *Redefining Tribal Sovereignty for the Era of Fundamental Rights*, 95 IND. L.J. 87, 95–97 (2020).

[41] Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 579 U.S. 545, 546 (2016) (per curiam).

Congress had plenary power over Indians and Indian tribes,[42] and in the early twentieth century, the Court held that any challenge to legislation enacted under this congressional plenary power was not justiciable.[43] But today, the Court not only adjudicates questions of federal Indian law; it actively and aggressively reshapes federal Indian policy, subject to only occasional congressional override.

In principle, there is nothing objectionable about the Supreme Court making law and policy here in the same way that common law courts have made law and policy for centuries. But the Court is poorly suited to do so in matters concerning Indians. With few exceptions, the members of the Court over the past several decades generally have demonstrated little interest in or understanding of federal Indian law.[44] Both the foundational principles and the intricate details generally appear lost on the justices. Furthermore, in many of the cases that the Court has used to reshape federal Indian law, there is not even a tribe that is party to the lawsuit; this was certainly true in *Castro-Huerta*, in which the Court radically enlarged state criminal jurisdiction within Indian country.[45] And most importantly, the Court as an institution is badly positioned to sort through the competing interests—of tribal, federal, and state governments; of individual Indians and non-Indians; and of Indian and non-Indian businesses—that inevitably converge and collide. It is long past time for Congress to reclaim supremacy in policymaking on important matters of tribal sovereignty.

This article proceeds as follows. Part I traces, from *Worcester* to *Castro-Huerta*, the doctrinal line concerning state authority within Indian country, and it identifies the deference to state interests that has led the Court to expand that authority since 1959. Part II traces, from *Worcester* to *Cooley*, the doctrinal line concerning tribal authority within Indian country, and it identifies the solicitude for individual rights that has led the court to restrict that authority since 1978. Part III sets out the argument for Congress to reassert its position and to displace the Supreme Court as the principal source of federal Indian law.

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[42] United States v. Kagama, 118 U.S. 375, 384–85 (1886).

[43] Lone Wolf v. Hitchcock, 187 U.S. 553, 567–68 (1903).

[44] *See infra* Part III.

[45] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2505 (2022) (Gorsuch, J., dissenting); *see also, e.g.*, Montana v. United States, 450 U.S. 544 (1981); Strate v. A-1 Contractors, 520 U.S. 438 (1997); Nevada v. Hicks, 533 U.S. 353 (2001).

I. EXPANDING STATE AUTHORITY WITHIN INDIAN COUNTRY

The unity and symmetry of *Worcester* remained untouched for only a few decades. Although the Supreme Court did not seriously reconsider the portion of *Worcester* stating that tribes have full authority over all persons and activities within Indian country until the late 1970s, the Court did reconsider the portion of *Worcester* stating that state law "can have no force" within Indian country before the end of the nineteenth century.[46] The case law on this point developed slowly at first, but it picked up pace considerably after World War II. Even so, it would be a full 190 years before *Castro-Huerta* effectively overruled *Worcester*.[47]

A. Early Doctrinal Development

The initial period of doctrinal development permitting states to exercise authority within Indian country ran from *Worcester* in 1832 to just before *Williams v. Lee* in 1959.[48] The Supreme Court cases in this period fall into two broad categories. First are the decisions regarding state criminal authority within Indian country. The Court has never allowed a state to exercise jurisdiction over a crime committed by an Indian within Indian country; but during the nineteenth century, it did allow states to exercise jurisdiction over a crime committed by a non-Indian against a non-Indian within Indian country. This intrusion on tribal and federal authority long appeared to be anomalous, but it proved critical in *Castro-Huerta*. Second are the Court's decisions regarding state civil authority within Indian country. During this initial period, the Court's decisions consistently rejected state efforts to tax or regulate Indians within Indian country, but they allowed states to tax and regulate non-Indians within Indian country.

1. State Criminal Authority

The two cases that serve as bookends for this article, *Worcester* and *Castro-Huerta*, both involve criminal proceedings, and both address the state's authority over a crime committed

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[46] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

[47] For a very fine analysis of the cases concerning state authority within Indian country after *Worcester*, see Dylan R. Hedden-Nicely, *The Terms of Their Deal: Revitalizing the Treaty Right to Limit State Jurisdiction in Indian Country*, 27 LEWIS & CLARK L. REV. 457, 467–95 (2023).

[48] *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1586–89 (1996).

by a non-Indian within Indian country.[49] The Court's long path to the *volte-face* in *Castro-Huerta* began with two decisions near the end of the nineteenth century. First, *United States v. McBratney*,[50] decided in 1881, held that the federal government had no jurisdiction to prosecute a non-Indian for the murder of a non-Indian with the boundaries of the Ute Reservation, which lay "wholly within the exterior limits of the State of Colorado."[51] The Court reasoned that, although crimes within Indian country generally fall under federal authority, the enabling act that granted Colorado statehood did not reserve federal jurisdiction over the Ute Reservation.[52] Relying on the equal footing doctrine, Justice Gray wrote for the unanimous Court:

> The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatsoever, without any such exception as had been made in the treaty with the Ute Indians and in the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States.[53]

Gray's opinion did not cite *Worcester* or even allude to the *Worcester* statement that state law "can have no force" within Indian country,[54] and Gray's opinion never considered the possibility of the Utes exercising criminal jurisdiction over a non-Indian defendant. The result was exclusive state jurisdiction over a crime committed by a non-Indian against a non-Indian within Indian country.

Fifteen years later, the Court extended *McBratney*. In *Draper v. United States*,[55] a non-Indian murdered another non-Indian on the Crow Reservation, which is "wholly situated within the geographical boundaries of . . . Montana."[56] The *Draper* Court unanimously followed the reasoning of *McBratney*, even though the enabling act that granted Montana statehood specifically provided that "Indian lands" within Montana "shall remain under the absolute jurisdiction and control of the

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[49] *Worcester*, 31 U.S. (6 Pet.) at 515 (1832); *Castro-Huerta*, 142 S. Ct. at 2491–92 (2022).

[50] United States v. McBratney, 104 U.S. 621 (1881).

[51] *Id.* at 621.

[52] *Id.* at 623.

[53] *Id.* at 624; *see also* COHEN, *supra* note 24, at 121.

[54] Canby, *supra* note 8, at 207.

[55] Draper v. United States, 164 U.S. 240 (1896).

[56] *Id.* at 242.

Congress of the United States."[57] And a half century after *Draper*, the Supreme Court, in *New York ex rel. Ray v. Martin*,[58] confirmed that the same rule of state jurisdiction applied to the original thirteen states.[59] This, then, was the first significant cutback of *Worcester*. Since 1881, the Supreme Court has consistently held that states have exclusive jurisdiction over crimes committed within Indian country by non-Indians against non-Indians. As Judge Canby observed, *McBratney* and *Draper* "made it impossible any longer to deal with Indian jurisdiction on a purely geographical basis."[60]

Yet this state criminal authority is not unbounded. Under the Indian Country Crimes Act, which dates to 1817, the federal government has jurisdiction over crimes committed within Indian country by a non-Indian against an Indian or by an Indian against a non-Indian.[61] And under the Major Crimes Act, which dates to 1885, the federal government has jurisdiction over certain specified felonies committed within Indian country by an Indian against an Indian.[62] And even as it extended state authority under *McBratney* and *Draper*, the Supreme Court continued to hold that crimes described by the Indian Country Crimes Act and the Major Crimes Act fell within federal jurisdiction.[63]

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[57] *Id.* at 244.

[58] *See* New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).

[59] *Id.* at 498.

[60] Canby, *supra* note 8, at 209–210.

[61] *See* 18 U.S.C. § 1152. Tribal jurisdiction for such crimes is concurrent with federal jurisdiction if the offender is Indian and the victim is non-Indian and exclusive of federal jurisdiction if both the offender and the victim are Indians.

[62] *See id.* § 1153. The Supreme Court has held that federal jurisdiction under the Major Crimes Act preempts state jurisdiction. *See* United States v. John, 437 U.S. 634, 654 (1978) ("We . . . hold that [the Major Crimes Act] provides a proper basis for federal prosecution of the offense involved here, and that Mississippi has no power similarly to prosecute [the Indian defendant] for that same offense."); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 359 (1962) ("Since the burglary with which petitioner [an Indian] was charged occurred on property plainly located within the limits of [the Colville Indian Reservation], the courts of Washington had no jurisdiction to try him for that offense.").

[63] Thus, *United States v. Celestine*, 215 U.S. 278, 290–91 (1909), upheld federal jurisdiction under the Major Crimes Act over a crime committed by an Indian against an Indian within the Tulalip Indian Reservation, even though the defendant had received a patent for his allotment and had been made a citizen of the United States. *United States v. Chavez*, 290 U.S. 357, 360, 365 (1933), upheld federal jurisdiction under the Indian Country Crimes Act over two non-Indians accused of stealing livestock from Indians within the Pueblo of Isleta. The case law concerning jurisdiction under the federal prohibition on alcohol within Indian country had a somewhat more tortured history during this period, largely because of disputes about what constitutes Indian country. *See*, *e.g.*, *In re* Heff, 197 U.S. 488 (1905) (finding that the prohibition on alcohol was no longer applicable once an Indian had received allotment and patent and had become United States citizen); United States v. Sutton, 215 U.S. 291 (1909) (finding that

In fact, the Court made it clear that this federal criminal jurisdiction within Indian country was exclusive of—rather than concurrent with—state criminal jurisdiction. First, the Court refused to apply the *McBratney* and *Draper* rule of exclusive state jurisdiction to crimes committed within Indian country by a non-Indian against an Indian. In *Donnelly v. United States*,[64] decided in 1913, a non-Indian who had murdered an Indian within the Hoopa Valley Reservation appealed his conviction in federal court under the Indian Country Crimes Act. The Supreme Court specifically rejected Donnelly's argument that, under *McBratney* and *Draper*, the admission of California on an equal footing and without an express reservation of federal jurisdiction over public lands "conferred upon [California] undivided authority to punish crimes upon those lands, even when set apart for an Indian reservation, excepting crimes committed by the Indians."[65] The Court noted that both *McBratney* and *Draper* had reserved the question of federal jurisdiction over such crimes and stated that "[u]pon full consideration, we are satisfied that offenses committed by or against Indians are not within the principle of the *McBratney* and *Draper* Cases."[66] Then in 1946, the Court held that federal jurisdiction in such cases *precludes* state jurisdiction. In *Williams v. United States*,[67] a unanimous court, reviewing the conviction of a non-Indian for the statutory rape of an Indian within the Colorado River Indian Reservation in Arizona, said without qualification:

> While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, the laws and courts of the United States, *rather than those of Arizona*, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian.[68]

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the prohibition on alcohol was applicable after allotment so long as United States still held allotted lands in trust); Hallowell v. United States, 221 U.S. 317 (1911) (same).

[64] Donnelly v. United States, 228 U.S. 243, 252 (1913).

[65] *Id.* at 271.

[66] *Id.* The following year, the Court in *United States v. Pelican*, 232 U.S. 442, 452 (1914), upheld federal criminal jurisdiction over the murder of an Indian, within Indian country, by two men assumed to be non-Indians. A little over a decade after that, the Court held in *United States v. Ramsey*, 271 U.S. 467, 471–72 (1926), that federal criminal jurisdiction over a non-Indian defendant under the Indian Country Crimes Act continued after the admission of Oklahoma as a state.

[67] Williams v. United States, 327 U.S. 711 (1946).

[68] *Id.* at 714 (emphasis added). In *Williams v. Lee*, the Supreme Court cited both *Donnelly v. United States* and *Williams v. United States* for the proposition that, as to any crime within Indian country committed "by or against an Indian, tribal

That was directly contrary to what the Court would hold eight decades later in *Castro-Huerta*.[69]

2. State Civil Authority

The assertion of state civil authority within Indian country presented itself in two forms during the period between *Worcester* and *Williams v. Lee*. First, the states tried to tax Indians and Indian property.[70] The Supreme Court rejected those efforts. A pair of decisions in 1866—*The Kansas Indians*[71] and *The New York Indians*[72]—held that states do not have the authority to tax Indian lands, whether held in common by the tribe or in severalty by individual Indians. Although the Court did not cite the *Worcester* holding about state authority within Indian country in either case, it said in *The Kansas Indians* that tribes "enjoy the privilege of total immunity from State taxation" and that they "have their own customs and laws by which they are governed."[73] "As long as the United States recognizes [the] national character" of the tribes, the Court reasoned, "they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws."[74] Several decades later, the Court followed *The Kansas Indians* and *The New York Indians* to hold that states cannot tax Indian lands after allotment and patenting, as long as the lands continued to be held in trust by the United States on behalf of Indians and Indian tribes.[75]

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jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." Williams v. Lee, 358 U.S. 217, 220 (1959).

[69] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2504–05 (2022). In *Rice v. Olson*, 324 U.S. 786 (1945), an Indian defendant was convicted in Nebraska state court of burglary on the Winnebago Reservation. In his *habeas corpus* petition, the defendant argued, *inter alia*, that the Nebraska state courts lacked jurisdiction over the crime. *Id.* at 787. The Supreme Court remanded the case for a determination of whether the defendant had been denied the right to counsel. *Id.* at 791.

[70] For a comprehensive review of the Supreme Court's decisions on state taxation within Indian country, see generally Richard Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX L. 897 (2010).

[71] *In re* Kan. Indians, 72 U.S. 737, 757, 759, 760 (1866).

[72] *In re* N.Y. Indians, 72 U.S. 761, 771–72 (1866).

[73] *Kan. Indians*, 72 U.S. at 756.

[74] *Id.* at 757. *See also* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1174–76 (1995); VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 52–53 (1983).

[75] United States v. Rickert, 188 U.S. 432, 441 (1903); Childers v. Beaver, 270 U.S. 555, 556 (1926). Because it has plenary power over Indians and Indian tribes, Congress can override the general rule that states may not tax or regulate Indians within Indian country. Thus, in *Goudy v. Meath*, 203 U.S. 146, 150 (1906), the Supreme Court held that the State of Washington could tax the lands allotted in severalty to a Puyallup Indian once the lands became freely alienable under federal law. *See also* Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251,

Second, the states during this period attempted to regulate and tax non-Indians within Indian country. These efforts were more successful than the efforts to tax Indians and Indian property, and like *McBratney* and *Draper*, they undermined the *Worcester* holding that state law "can have no force" within Indian country. In its 1858 decision in *New York ex rel. Cutler v. Dibble*,[76] the Supreme Court considered the constitutionality of a New York law that prohibited non-Indians from settling or residing on any lands owned or occupied by an Indian tribe. The Court characterized the statute as "a police regulation for the protection of the Indians from intrusion of the white people, and to preserve the peace."[77] Despite the obvious similarity to the Georgia statute found unconstitutional in *Worcester*, the Court upheld the New York statute as a function of the state's power to regulate the Indians themselves, stating that "the State of New York had the power of a sovereign over [Indian] persons and property, so far as it was necessary to preserve the peace of the Commonwealth" and that this power "has never been surrendered."[78] Eight decades later, Felix Cohen marked the case as an outlier.[79]

The Court also allowed the states and territories to impose taxes on non-Indians within Indian country. In 1885, *Utah & Northern Railway v. Fisher*[80] upheld a tax by the Idaho Territory on lands owned by a railroad company within the reservation for the Shoshone-Bannock Tribes. The Court reasoned that the authority of the territorial government "may rightfully extend to all matters not interfering with" the protections provided by the treaty between the United States and the tribes, and that taxation of the railroad company and its lands did not impair "any just rights of the Indians . . . under the

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260 (1992). Similarly, in *British-American Oil Producing Co. v. Board of Equalization of Montana*, 299 U.S. 159, 166 (1936), the Court upheld a Montana state tax on the production of oil and gas on lands of the Blackfeet Indians because a federal statute governing the relevant leases specifically allowed the imposition of state taxes. And in *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 611–12 (1943), the Court allowed Oklahoma to impose transfer taxes on certain types of property in the estates of decedent Indians. Although the Court cited *Worcester*, *The Kansas Indians*, and *The New York Indians*, it determined that "[t]he underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians." *Id.* at 603. Specifically, the Court said, *Worcester* was grounded in "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" because of unique actions taken by the federal government with respect to the Oklahoma tribes. *Id.* at 602.

[76] N.Y. *ex rel.* Cutler v. Dibble, 62 U.S. (21 How.) 366, 367 (1858).

[77] *Id.* at 370.

[78] *Id.*

[79] COHEN, *supra* note 24, at 120–21, 308–09.

[80] Utah & N. Ry. Co. v. Fisher, 116 U.S. 28, 28, 33 (1885).

treaty."[81] Ten years later, *Maricopa & Phoenix Railroad Company v. Arizona Territory* reached the same result on similar facts.[82]

In 1898, *Thomas v. Gay* extended the reasoning of *Utah & Northern Railway* and *Maricopa & Phoenix Railroad Company* to uphold a tax imposed by the Oklahoma Territory on cattle owned by non-Indians that were grazed by lease on Indian lands.[83] Brushing aside the concern that a tax on the non-Indians might reduce the economic return to the Indians, the Court said that "it is obvious that a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians" and dismissed "[t]he suggestion that such a tax on the cattle constitutes a tax on the lands" as "purely fanciful."[84] Later that term, the Court reached the same result in *Wagoner v. Evans*, which was substantially the same as *Thomas v. Gay*, except that the terms of the grazing leases required the employment of Indians in herding the cattle.[85]

3. From *Worcester* to Public Law 280

The development of the law on state authority within Indian country during the period from *Worcester* in 1832 to just before *Williams v. Lee* in 1959 was progressively favorable to the states and correspondingly unfavorable to the tribes. *Worcester* took the absolutist position that state law stopped at the border of Indian country. But *McBratney* and *Draper* eroded that rule by allowing states to exercise exclusive jurisdiction over any crime committed within Indian country by a non-Indian against a non-Indian. And although *The Kansas Indians*, *The New York Indians*, and other cases protected Indians and Indian lands from state taxation, the decisions from *Utah & Northern Railway* to *Wagoner* allowed states to tax non-Indians within Indian country, even where the taxes had economic effects on the Indians themselves. By 1930, the Supreme Court could fairly summarize its cases in the following terms:

> [T]he usual Indian reservation [is] set apart within a State as a place where the United States may care for its Indian wards and lead them into habits and ways of civilized life. Such reservations are part of the State within which they lie, and her laws, civil and criminal, have the

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[81] *Id.* at 31–32.
[82] Maricopa & Phx. R.R. Co. v. Ariz. Territory, 156 U.S. 347, 352 (1895).
[83] Thomas v. Gay, 169 U.S. 264, 273–74 (1898).
[84] *Id.* at 273–74. *See also* Pomp, *supra* note 70, at 990–92.
[85] Wagoner v. Evans, 170 U.S. 588, 591 (1898).

> same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards. Private property within such a reservation, if not belonging to such Indians, is subject to taxation under the laws of the State.[86]

But even as it weakened *Worcester*, the Supreme Court continued to acknowledge that Congress retained the ultimate power to enlarge or restrict state authority within Indian country. In 1953, Congress significantly revised the rules about state authority with the enactment of Public Law 280,[87] which generally devolved federal criminal and civil jurisdiction within Indian country to California, Minnesota, Nebraska, Oregon, and Wisconsin.[88] Congress subsequently extended Public Law 280 to eleven other states—Alaska, Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington[89]—although several of those states took only limited jurisdiction.[90]

B. Contemporary Doctrinal Development

Charles Wilkinson identified the Supreme Court's 1959 decision in *Williams v. Lee* as the beginning of the modern era of federal Indian law.[91] Whether that characterization remains as accurate today as it was when Wilkinson first offered it depends on how one understands the case law of the last few decades. But Wilkinson was surely right that *Williams v. Lee* was a watershed. Although the case has been praised as an important victory for tribal self-determination,[92] it actually marked a turn toward greater state authority within Indian country, even when that state authority affects tribes and tribal interests. *Williams v. Lee* took another step away from the *Worcester* holding that state law "can have no force" within Indian

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[86] Surplus Trading Co. v. Cook, 281 U.S. 647, 651 (1930).

[87] Public Law 280, Pub. L. No. 83-280, 67 Stat. 588. *See generally* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 536–38 (1975).

[88] NEWTON ET AL., *supra* note 5, at 537–39 & n.44.

[89] *Id.* at 537 & n.47. Congress made the assumption of jurisdiction mandatory for Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin; the assumption of jurisdiction was voluntary for Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. *Id.*

[90] Arizona, for example, assumed jurisdiction only for air and water pollution. *Id.*

[91] CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 59 (1987).

[92] *See, e.g.*, CANBY, *supra* note 8, at 212; Bethany R. Berger, Williams v. Lee *and the Debate over Indian Equality*, 109 MICH. L. REV. 1463, 1519–25 (2011); Gregory Ablavsky, *Too Much History:* Castro-Huerta *and the Problem of Change in Indian Law*, 2022 S. CT. REV. 293, 339–41, 343 (2023).

country.[93] It analyzed the application of state law under an infringement analysis that subsequently proved unfit for many situations, which in turn opened the way to a preemption approach that has led to no end of mischief.

1. *Williams v. Lee* and the Infringement Approach

The underlying dispute in *Williams v. Lee* was simple. Lee, a non-Indian, ran a general store on the part of the Navajo Reservation lying within Arizona, and he sued the Williamses, an Indian couple, in Arizona state court for failure to pay for goods that Lee sold to them on credit.[94] As members of the Navajo Nation, the Williamses argued that the tribal courts had exclusive jurisdiction over the suit. Writing for a unanimous Court, Justice Black pointed to *Worcester* as one of Marshall's "most courageous and eloquent opinions" and observed that "the broad principles of that decision came to be accepted as law."[95] Even so, Black said, the Court "[o]ver the years . . . has modified th[ose] principles."[96]

In an effort to make sense of the case law after *Worcester*, Black reasoned that the Court had allowed state law to intrude within Indian country "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized."[97] Thus, he said, state courts may exercise jurisdiction over civil suits brought by Indians against non-Indians and over criminal cases for offenses committed by non-Indians against non-Indians. The ultimate question, Black wrote, is whether "absent governing Acts of Congress . . . the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them."[98]

Black added that any act of Congress changing this jurisdictional baseline must "*expressly* grant[] [the states] the jurisdiction which *Worcester v. State of Georgia* had denied."[99] He noted that Congress had never conferred jurisdiction on the Arizona courts over lawsuits against the Navajo with respect to matters arising within the Navajo Nation and that Arizona had not assumed such jurisdiction under Public Law 280.[100]

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93 Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

94 Williams v. Lee, 358 U.S. 217, 217–18 (1959). For extensive background on the case, see Berger, *supra* note 92, at 1499–1519.

95 *Williams*, 358 U.S. at 219.

96 *Id.*

97 *Id.*

98 *Id.* at 220.

99 *Id.* at 221 (emphasis added).

100 *Id.* at 222–23.

Because, Black said, "[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves," the Arizona state courts lacked jurisdiction over the dispute between Lee and Williams.[101]

This analysis is known as the "infringement test." Superficially, it appears to be a triumph for tribes and for tribal governance—an affirmation that, unless Congress expressly says otherwise, state law cannot "infringe[] on the right of reservation Indians to make their own laws and be ruled by them."[102] But a closer look reveals complications. The infringement test does not invalidate every state law that applies to Indians within Indian country; even *Worcester* might have come out the other way under the infringement test. Although it nominally supports tribal governments and tribal courts, *Williams v. Lee* actually offered the states a new basis on which to assert their authority within Indian country.[103]

Subsequent decisions highlighted these limitations. A pair of opinions authored by Justice Frankfurter in 1962—*Metlakatla Indian Community v. Egan*,[104] and *Organized Village of Kake v. Egan*[105]—addressed the applicability to Alaska Natives of state conservation laws banning the use of fish traps. In *Metlakatla Indian Community*, the Secretary of the Interior had specifically authorized the Metlakatlans to use fish traps in the waters surrounding the Annette Islands, the community's reservation. The State of Alaska argued that the Metlakatlans "ha[d] always paid state taxes," that "it ha[d] always been assumed that the [Metlakatlan] reservation is subject to state laws," and that the Metlakatlan reservation was not properly regarded as Indian country.[106] With no reference to *Williams v. Lee* or the infringement test, the Court held that the Secretary of the Interior had authority to authorize the use of traps under the 1891 statute that had created the Metlakatlan reservation.[107]

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[101] *Id*. at 223.

[102] *Id.* at 220.

[103] DELORIA, JR. & LYTLE, *supra* note 74, at 54, 205; *See* Thomas J. Lynaugh, *Developing Theories of State Jurisdiction over Indians: The Dominance of the Preemption Analysis*, 38 MONT. L. REV. 63, 72–73 (1977). For sharp criticism of the *Williams v. Lee* test, see Russel Lawrence Barsh, *The Omen:* Three Affiliated Tribes v. Moe *and the Future of Tribal Self-Government*, 5 AM. INDIAN. L. REV. 1, 6–8 (1977). *Cf.* Keith M. Werhan, *Sovereignty of Indian Tribes: A Reaffirmation and Strengthening in the 1970's*, 54 NOTRE DAME L. REV. 5, 15 (1978).

[104] Metlakatla Indian Cmty., Annette Islands Rsrv. v. Egan, 369 U.S. 45 (1962).

[105] Organized Vill. of Kake v. Egan, 369 U.S. 60 (1962).

[106] *Metlakatla*, 369 U.S. at 51.

[107] *Id.* at 58–59.

But the companion case, *Organized Village of Kake*, involved the use of fish traps by Alaska Natives for whom Congress had never created a reservation. There was, Frankfurter wrote, "no statutory authority under which the Secretary of the Interior might permit [the Alaska Natives] . . . to operate fish traps contrary to state law."[108] In upholding the application of the Alaska ban, Frankfurter denigrated the broad sweep of *Worcester*:

> The general notion drawn from Chief Justice Marshall's opinion in *Worcester* v. *Georgia* . . . , *The Kansas Indians* . . . , and *The New York Indians* . . . 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. By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law.[109]

Frankfurter noted that, under *Williams v. Lee*, "even 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."[110] *A fortiori*, he reasoned, "[s]tate authority over Indians is yet more extensive over activities, such as in this case, not on any reservation."[111] The infringement test thus offered scant protection against the Alaska law banning the use of fish traps.[112]

Warren Trading Post Co. v. Arizona Tax Commission,[113] which the Court decided in 1965, further demonstrated the inadequacy of the infringement test. In that case, a non-Indian retailer doing business as a trader on the Navajo Reservation challenged an Arizona gross-receipts tax. The Court apparently saw no basis for concluding that a tax imposed on a non-Indian business "infringed on the right of reservation Indians to make their own laws and be ruled by them," and the sole reference to *Williams v. Lee* was for the proposition that "[c]ertain state laws have been permitted to apply to activities on Indian reservations, where those laws are specifically authorized by

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[108] *Organized Vill. of Kake*, 369 U.S. at 62.

[109] *Id.* at 72.

[110] *Id.* at 75.

[111] *Id.*

[112] In a separate line of cases concerning the authority of the State of Washington to apply its conservation laws to both off- and on-reservation treaty-based fishing rights of the Puyallup and Nisqually Indians, the Court never cited *Williams v. Lee* or applied the infringement test. *See* Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392 (1968); *see also* Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44 (1973); Puyallup Tribe, Inc. v. Dep't of Game of Wash., 433 U.S. 165, 165–66 (1977).

[113] Warren Trading Post Co. v. Ariz. State Tax Comm'n, 380 U.S. 685 (1965).

acts of Congress, or where they clearly do not interfere with federal policies concerning the reservations."[114] Although the Court invalidated the application of the Arizona tax to the non-Indian trader, its rationale leaned in a new direction. In reference to the extensive rules for licensed Indian traders, the Court said that the "apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders."[115] This focus on the federal preemption of state law would soon become the Court's preferred approach to analyzing state authority within Indian country.[116]

2. *McClanahan* and the Preemption Approach

In 1973, the Supreme Court fundamentally changed the analysis of state authority within Indian country. *McClanahan v. Arizona State Tax Commission*[117]—which David Getches called "perhaps the definitive modern-era case" on the question of state authority within Indian country[118]—held that Arizona could not tax the income of a Navajo tribal member who lived and worked on the Navajo Reservation. The Court could have reached that result under the *Williams v. Lee* infringement test by holding that state taxation of income properly falling within the tribal tax base would undermine the revenues of the Navajo tribal government and thus would "infringe[] on the right of

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[114] Williams v. Lee, 358 U.S. 217, 220 (1959); *Warren Trading Post Co.*, 380 U.S. at 687 n.3.

[115] *Warren Trading Post Co.*, 380 U.S. at 690.

[116] The Court appears most comfortable applying the infringement test to the assertion of state court civil jurisdiction over Indians for matters arising within Indian country. In *Kennerly v. District Court of the Ninth Judicial District of Montana*, 400 U.S. 423, 429–30 (1971), the Court applied *Williams v. Lee* to hold that the Montana state courts had no subject matter jurisdiction over a lawsuit against members of the Blackfeet Indian Tribe to collect debts incurred within the boundaries of the Blackfeet Reservation. The dispute in *Kennerly* centered on whether the Blackfeet Indian Tribe, by action of its tribal council, had unilaterally conferred jurisdiction on the Montana state courts. *See* Matthew L.M. Fletcher, *Retiring the Deadliest Enemies Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 84–85 (2007). And in *Fisher v. District Court of the Sixteenth Judicial District of Montana*, 424 U.S. 382 (1976), the Court again applied *Williams v. Lee* to hold that the Montana state courts had no subject matter jurisdiction over a child custody proceeding involving members of the Northern Cheyenne Tribe. The Court reasoned that "[s]tate-court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court" because "[i]t would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves." *Id.* at 387–88.

[117] McClanahan v. State Tax Comm'n. of Ariz., 411 U.S. 164, 165 (1973).

[118] Getches, *supra* note 48, at 1590.

reservation Indians to make their own laws and be ruled by them."[119] But the Court refused to apply that test, saying that *Williams v. Lee* "deal[s] principally with situations involving non-Indians."[120] Instead, the Court analyzed the applicability of the Arizona income tax as a question of federal preemption.[121] That, in turn, has led the Court in subsequent cases to determine a state's authority within Indian country by reference to the state's interest in asserting that authority.

From the start, *McClanahan* leaned hard against the tribes. Justice Marshall began his opinion for the Court by stating that "[t]his case requires us once again to reconcile *the plenary power of the States over residents within their borders* with *the semi-autonomous status of Indians* living on tribal reservations."[122] Marshall cited and discussed *Worcester*, *The Kansas Indians*, and *The New York Indians*, but then abruptly argued that "the Indian sovereignty doctrine" recognized in those cases "has undergone considerable evolution in response to changed circumstances."[123] He said that "the trend" in the modern era "has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption."[124] Tribal sovereignty—the basis for the statement in *Worcester* that state law "can have no force" within Indian country—was, for Justice Marshall, only a "backdrop" against which to read the treaties and federal statutes that "define the limits of state power."[125]

McClanahan ultimately held that federal law preempted application of the Arizona tax to the income of an Indian within Indian country, but the damage was done. The Supreme Court had put down several ominous markers: the states have "plenary power" over all residents within their borders, but the tribes do not; tribal sovereignty is just a "backdrop" consideration; and the real question is whether federal law has preempted the

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[119] *See Williams*, 358 U.S. at 220.

[120] *McClanahan*, 411 U.S. at 179. Russel Lawrence Barsh understood the relationship between *Williams v. Lee* and *McClanahan* somewhat differently. Barsh wrote that Justice Marshall "failed . . . to reconcile" the two cases, choosing instead "[to] distinguish[] them." Barsh, *supra* note 103, at 16.

[121] *See McClanahan*, 411 U.S. at 173–75; *see also* Lynaugh, *supra* note 103, at 74–75.

[122] *McClanahan*, 411 U.S. at 165 (emphasis added).

[123] *Id.* at 171.

[124] *Id.* at 172.

[125] *Id.* at 168, 172. David Getches offered a more optimistic view on this point, stating that the "backdrop" language in *McClanahan* secures a "central role" for tribal sovereignty. Getches, *supra* note 48, at 1590. *Cf.* DELORIA, JR. & LYTLE, *supra* note 74, at 54–57, 205–07.

application of state law within Indian country.[126] The open-endedness of the preemption analysis ultimately would enable the Court to expand state authority within Indian country far beyond anything previously allowed.[127] As Judge Canby argued, "*McClanahan* contained the seeds of enormous change."[128]

McClanahan confirmed that states cannot tax Indians within Indian country in the absence of congressional authorization, but it did nothing to disturb the rules allowing states to tax non-Indians within Indian country. In *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*,[129] and *Washington v. Confederated Tribes of the Colville Indian Reservation*,[130] the Court leveraged the state authority to tax non-Indians to validate ancillary state regulation of Indians. Both *Moe* and *Confederated Tribes of the Colville Indian Reservation* involved the on-reservation sale of cigarettes to Indians and non-Indians, and both cases held that the states could not tax cigarette sales to Indians (in *Moe*) or to member Indians (in *Confederated Tribes of the Colville Indian Reservation*). But both cases also held that the authority to tax non-Indians and nonmember Indians also included the authority to require the Indian retailers to collect taxes on behalf of the state.

Justice Rehnquist's opinion for the Court in *Moe* said that requiring an Indian retailer to collect tax for the state was just a "minimal burden" that neither "frustrates tribal self-government" nor "runs afoul of any congressional enactment dealing with the affairs of reservation Indians."[131] Justice White's opinion for the Court in *Confederated Tribes of the Colville Indian Reservation* rejected the tribe's arguments that federal statutes preempted the state sales tax and that the state sales taxes failed the infringement test of *Williams v. Lee*, even though the state tax effectively prevented the tribe from

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[126] *McClanahan*, 411 U.S. at 165, 172. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973), which the Court decided on the same day that it decided *McClanahan*, held that the State of New Mexico could apply its gross receipts tax to the revenue of a tribal enterprise conducted outside the boundaries of the tribe's reservation.

[127] *See*, *e.g.*, Robert N. Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D. L. REV. 434 (1981). For an argument that the Supreme Court in fact has used a preemption analysis consistently since *Worcester*, see Earl Mettler, *A Unified Theory of Indian Tribal Sovereignty*, 30 HASTINGS. L.J. 89, 112–23 (1978).

[128] Canby, *supra* note 21, at 7; *see also* Clinton, *supra* note 74, at 1191–96.

[129] Moe v. Confederated Salish & Kootenai Tribes of the Flathead Rsrv., 425 U.S. 463, 480–83 (1976).

[130] Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 161–62 (1980).

[131] *Moe*, 425 U.S. at 483.

imposing its own tax and thus deprived tribal governments of revenue.[132] White's opinion allowed the state not only to require the tribes to collect state taxes on cigarettes sold to anyone other than a member of the tribe; it also allowed the state to impose recordkeeping requirements on the tribe to distinguish nontaxable sales from taxable sales.[133]

The Supreme Court further refined the law on state authority in *White Mountain Apache Tribe v. Bracker*,[134] decided in 1980. Although the outcome was favorable to tribal interests—the Court held that federal law preempted Arizona state taxes on a non-Indian company's timber-harvesting activities within the Fort Apache Reservation—the analysis was problematic. In his opinion for the Court, Justice Marshall wrote that the Supreme Court had "[l]ong ago" turned away from the *Worcester* rule about state law having "no force" in Indian country and that "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members."[135] In trying to make sense of *Williams v. Lee*, *Warren Trading Post Co.*, and *McClanahan*, Marshall described the preemption test and the infringement test as "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members."[136] He elaborated on the preemption test, arguing that "[t]he unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law."[137] Thus, preemption of state law within Indian country does not require "an express congressional statement to that effect."[138]

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[132] *Confederated Tribes*, 447 U.S. at 150–62.

[133] *See also* Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9, 10 (1985); Dep't of Tax'n and Fin. of N.Y. v. Milhelm Attea & Bros., Inc,, 512 U.S. 64, 65–78 (1994). *Cf.* Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla., 498 U.S. 507, 508–14 (1991).

[134] White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

[135] *Id.* at 141–42.

[136] *Id.* at 142.

[137] *Id.* at 143.

[138] *Id.* at 144; *see also id*. at 150–51. Philip Frickey reads *Bracker* as identifying three, not two, "potential bars" to the application of state law within Indian country. Philip P. Frickey, *Scholarship, Pedagogy, and Federal Indian Law*, 87 MICH. L. REV. 1199, 1202 n.19 (1989). Specifically, according to Frickey: "State authority to regulate in Indian country within the state may be barred by comprehensive federal statutes and treaties that leave no room for the exercise of state authority, by less explicit federal laws read generously to preserve tribal sovereignty, or by federal common law designed to protect the right of reservation Indians to self-government." *Id*. at 1201–02. *See also* Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1169 (1990) ("When no federal statute or treaty provides a state with authority to govern Indian country, the tribe seeking to avoid

But Marshall then strayed into a harmful analysis of "interests"—tribal interests, federal interests, and state interests.[139] With respect to activities taking place within Indian country involving only Indians, Marshall said that the state's interest in regulation is usually minimal but that the federal government has a strong interest in facilitating tribal self-government.[140] By contrast, with respect to activities taking place within Indian country that involve non-Indians—such as the timber-harvesting activity at issue in *Bracker*—the state has a stronger claim to regulation.[141] Marshall wrote:

> This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.[142]

Marshall's opinion is more menacing to tribal sovereignty than it appears. It effectively consigns to the past the *Worcester* prohibition on the operation of state law within Indian country; it accepts the narrow interpretation of the infringement test generally followed in the cases after *Williams v. Lee*; and most harmfully, it reduces the preemption analysis to a comparison (a "particularized inquiry") of state, federal, and tribal interests.[143] Under *Bracker*, a strong enough state interest in regulating activity within Indian country, such as the state's interest in taxing cigarette sales in *Moe*, is sufficient to justify application of the state's authority within Indian country.[144]

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state regulation may invoke two lines of precedent."). The Restatement incorporates a similar reading of the Court's decisions, stating as a black letter rule: "States have civil regulatory authority over nonmembers in Indian country, except when the state regulation: (a) conflicts with an express federal statutory prohibition, (b) is impliedly preempted by federal law, or (c) infringes on tribal self-governance." RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 29.

[139] *Bracker*, 448 U.S. at 145.

[140] *Id.* at 144.

[141] *Id.* at 144–45.

[142] *Id*. at 145.

[143] Chief Justice Roberts, with good reason, recently referred to *Bracker* as setting out a "nebulous balancing test." McGirt v. Oklahoma, 140 S. Ct. 2452, 2501 (2020) (Roberts, C.J., dissenting).

[144] David Getches argues that, despite later interpretations of the decision by the Supreme Court, *Bracker* itself does not call for the balancing of tribal, federal, and state interests. Getches, *supra* note 48, at 1608, 1626–30. *But see* Canby, *supra* note 21, at 11–12. Even after *Bracker*, the rules for state taxation of Indians and Indian tribes remain different. Indians and Indian tribes within Indian country remain exempt from state taxation unless Congress shows an "unmistakably clear" intention to allow such taxation. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 765 (1985); *see also* Okla. Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993); Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995).

The Court's application of the preemption approach during the first several years after *Bracker* generally was not hostile to the tribes, with the Court holding that several different attempts to assert state regulatory and taxing authority within Indian country were preempted by federal law.[145] But this changed in 1989 with *Cotton Petroleum Corp. v. New Mexico*.[146] In that case, both the Jicarilla Apache Tribe and the State of New Mexico imposed severance taxes on Cotton Petroleum, a non-Indian company engaged in the production of oil and gas on the Jicarilla Apache Reservation.[147] Cotton Petroleum challenged the application of the state severance tax and lost in the Supreme Court by a split decision.[148] Writing for the majority, Justice Stevens purportedly applied the *Bracker* approach—an approach, he said, that is "flexible" and "sensitive to the particular state, federal, and tribal interests involved."[149] But in effect, Stevens said that the mere presence of a state interest was sufficient to defeat preemption.

Stevens reasoned that, unlike the state taxes in *Bracker* and other cases, which were imposed even though the state provided no services or benefits with respect to the activity that was taxed, the taxes in *Cotton Petroleum Corp*. were imposed in connection with services provided by the State of New Mexico, including regulation of the "spacing and mechanical integrity" of the wells that produced the oil and gas.[150] And so, Stevens said,

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[145] In *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 165 (1980), decided the same day as *Bracker*, the Court held that federal law preempted state taxation of a non-Indian company's sale of farming equipment to an Indian tribe on the Gila River Reservation. In *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 846–47 (1982), the Court held that federal law preempted state taxation of the gross receipts of a non-Indian company that constructed a school for Indian children within the lands of the Navajo Nation. In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 325 (1983), the Court held that federal law preempted the application of state conservation laws to nonmembers hunting and fishing on the reservation of the Mescalero Apache Tribe. And in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221–22 (1987), the Court held that federal law preempted state regulation of gaming by nonmembers on the lands of the Cabazon and Morongo Bands of Mission Indians. By contrast, in *Rice v. Rehner*, 463 U.S. 713, 715 (1983), the Court held that federal law did not preempt the application of California liquor-licensing laws to a non-Indian trader selling alcohol on the Pala Reservation. *See generally* Arvo Q. Mikkanen, Rice v. Rehner*: A Limitation on the Exercise of Tribal Governmental Powers Based on Historical Factors?*, 9 AM. INDIAN J. 2 (1986); *see also* Mary Beth West, *Natural Resources Development on Indian Reservations: Overview of Tribal, State, and Federal Jurisdiction*, 17 AM. INDIAN L. REV. 71, 83–85 (1992).

[146] Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 184 (1989). For a thorough, nuanced, and thoughtful argument that *Cotton Petroleum* represents a watershed development in federal Indian law, see generally Clinton, *supra* note 74.

[147] *Cotton Petroleum Corp.*, 490 U.S. at 166–68.

[148] *Id.* at 170, 191.

[149] *Id.* at 184.

[150] *Id.* at 185–86.

even though "the federal and tribal regulations in this case are *extensive*, they are not *exclusive*."[151] This was not a balancing of federal, tribal, and state interests at all; it was not even a proper comparison of tribal and federal interests on one side and state interests on the other. Instead, the Court in *Cotton Petroleum* said that the simple presence of a state interest—*any* state interest—was sufficient to overcome preemption and to justify the application of state authority within Indian country.[152]

3. *Castro-Huerta* and State Criminal Jurisdiction

Castro-Huerta, which holds that a state may exercise jurisdiction over a crime committed within Indian country by a non-Indian against an Indian, effectively overrules *Worcester*.[153] *McBratney* and *Draper* had allowed state jurisdiction over a crime committed within Indian country by a non-Indian against another non-Indian, but the Supreme Court never before authorized state jurisdiction for such a crime against an Indian victim.[154] Felix Cohen had said in 1942 that "[w]ith respect to all offenses committed by whites against Indians on an Indian reservation, state jurisdiction yields to federal jurisdiction."[155]

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[151] *Id.* at 186 (emphasis added).

[152] *Cf.* Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999, 1007–08 (2020). In cases after *Cotton Petroleum Corp.*, the Supreme Court determined that it sometimes could dispense with the *Bracker* preemption approach entirely and follow what amounts to the traditional preemption analysis used outside federal Indian law. In *Arizona Department of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 34 (1999), the Court upheld the application of Arizona taxes imposed on a company that built and improved roads on several Indian reservations in Arizona under contracts with the federal government. Although the company was owned by a member of the Blackfeet Tribe in Montana, the Court, in an opinion written by Justice Thomas, treated the company as non-Indian because its construction work was performed on the lands of other tribes. The Court held that federal law did not preempt the Arizona taxes, and it specifically stated that it had "never employed [the *Bracker*] balancing test in a case such as this one where a State seeks to tax a transaction between the Federal Government and its non-Indian private contractor." *Id.* at 34, 37. And in *Wagnon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95, 99 (2005), the Court, in another opinion written by Justice Thomas, again held that the *Bracker* approach did not apply to determine whether federal law preempted state taxes imposed on the off-reservation receipt of fuel by non-Indian distributors that subsequently delivered the fuel to an on-reservation gas station owned by the Prairie Band Potawatomi Nation. For an argument that the Court should follow a traditional preemption analysis even within federal Indian law, see Stephen M. Feldman, *Preemption and the Dormant Commerce Clause: Implications for Federal Indian Law*, 64 OR. L. REV. 667, 695–99 (1986).

[153] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2504–05 (2022).

[154] United States v. McBratney, 104 U.S. 621, 624 (1881); Draper v. United States, 164 U.S. 240, 247 (1896).

[155] COHEN, *supra* note 24, at 120. The only exception noted by Cohen was the Supreme Court's 1858 decision in *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366 (1858), which upheld a New York state statute that prohibited non-Indians from

The current version of Cohen's treatise makes the same point in somewhat more detailed terms: "The Major Crimes Act and the Indian Country Crimes Act . . . create federal criminal jurisdiction that is exclusive of the states; that is, if federal jurisdiction exists under one or both of those two statutes, the states lack concurrent criminal jurisdiction to prosecute the same conduct."[156] Although Justice Gorsuch argued in his dissent that *Castro-Huerta* is a radical departure from the Court's longstanding precedents, the holding can also be seen as the natural extension—unfortunate and unwelcome, to be sure—of the steady encroachment of state authority within Indian country allowed by the Court after *Worcester*.[157]

The background to *Castro-Huerta* all but set up an outcome unfavorable to tribal interests. Two years earlier, the Supreme Court held in *McGirt v. Oklahoma* that Congress had never disestablished the reservation of the Muscogee Nation.[158] That ruling meant that an area of roughly three million acres in eastern Oklahoma, including the City of Tulsa, remains Indian country, which in turn meant that Oklahoma had no jurisdiction over any crime there involving either an Indian offender or an Indian victim.[159] Four members of the Court were plainly distressed by that result. In his *McGirt* dissent, Chief Justice Roberts (joined by Justices Thomas, Alito, and Kavanaugh), argued that the Court's ruling would "hobble[]" Oklahoma's "ability to prosecute serious crimes" and that "decades of past convictions could well be thrown out."[160] Roberts added that the case would "profoundly destabilize[] the governance of eastern Oklahoma."[161]

Before *McGirt*, Castro-Huerta, a non-Indian, was convicted in Oklahoma state court of criminal neglect of his Indian stepdaughter.[162] On appeal, he argued that, under *McGirt*, the federal government had exclusive jurisdiction in his case because the neglect had occurred within the Muscogee reservation.[163] The Oklahoma Court of Criminal Appeals agreed and vacated his conviction.[164] The US Supreme Court, in an

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settling on or residing in the lands of an Indian tribe. COHEN, *supra* note 24, at 120–21, 308–09.

156 NEWTON ET AL., *supra* note 5, at 763.

157 *Castro-Huerta*, 142 S. Ct. at 2521 (Gorsuch, J., dissenting).

158 McGirt v. Oklahoma, 140 S. Ct. 2452, 2468 (2020).

159 *Id.*; *see also id.* at 2482 (Roberts, C.J., dissenting).

160 *Id.* at 2482 (Roberts, C.J., dissenting).

161 *Id.*

162 *Castro-Huerta*, 142 S. Ct. at 2491.

163 *Id.* at 2491–92.

164 *Id.* at 2492.

opinion written by Justice Kavanaugh (and joined by Chief Justice Roberts and Justices Thomas, Alito, and Barrett), held that the federal government and Oklahoma have concurrent jurisdiction over Castro-Huerta's offense.[165] For good measure, Kavanaugh's opinion added that the ruling applied not only to Oklahoma and the reservation of the Muscogee Nation, but to all Indian country throughout the United States.[166] Unless Congress specifically provides otherwise, Kavanaugh wrote, every state government has jurisdiction over every crime committed by a non-Indian within Indian country, whether the victim is Indian or non-Indian.[167]

As if to underscore how far the Court has moved from *Worcester*, Kavanaugh's analysis began with the proposition that "as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country."[168] Citing *Worcester*, Kavanaugh said that "[i]n the early years of the Republic, the Federal Government *sometimes* treated Indian country as separate from state territory,"[169] but quoting Frankfurter's opinion in *Organized Village of Kake*, Kavanaugh argued that the Court long ago stopped recognizing states and Indian country as distinct. "[T]he Court's precedents," he wrote, "establish that Indian country is part of a State's territory and that, unless preempted, States have jurisdiction over crimes committed in Indian country."[170] Kavanaugh perhaps should have read *Organized Village of Kake* more closely; as Frankfurter said very clearly, the dispute there concerned Indians for whom no reservation had ever been established.[171] *Organized Village of Kake* therefore could not and did not "establish" anything at all about the relationship of Indian country to "a [s]tate's territory" or to state jurisdiction.[172]

In one of several indications that he was out of his depth with federal Indian law, Kavanaugh said that "a State's jurisdiction in Indian country may be preempted (i) by federal law under ordinary principles of federal preemption, or (ii) when

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[165] *Id.* at 2504–05.

[166] *Id.*

[167] *Id.*

[168] *Id.* at 2493.

[169] *Id.* (emphasis added).

[170] *Id.* at 2494. For criticism of this point, see Michael D.O. Rusco, Oklahoma v. Castro-Huerta*, Jurisdictional Overlap, Competitive Sovereign Erosion, and the Fundamental Freedom of Native Nations*, 106 MARQ. L. REV. 889, 898–909 (2023).

[171] Organized Village of Kake v. Egan, 369 U.S. 60, 62, 75 (1962).

[172] Similarly, apart from the cases involving crimes committed by non-Indians against non-Indians, none of the cases cited by Kavanaugh as "examples" of this principle held that "Indian country is part of a State's territory and that, unless preempted, States have jurisdiction over crimes committed in Indian country." *Castro-Huerta*, 142 S. Ct. at 2494.

the exercise of state jurisdiction would unlawfully infringe on tribal self-government."[173] The first half of the statement is simply incorrect; from *Bracker* forward, the Court has consistently maintained that "ordinary principles of federal preemption" do not control questions of state authority within Indian country.[174] The second half of the statement is a conflation of the *Williams v. Lee* infringement analysis and the *Bracker* preemption analysis.

Looking first to the "ordinary principles of federal preemption," Kavanaugh rejected the proposition that either the Indian Country Crimes Act or Public Law 280 preempts state criminal jurisdiction within Indian country.[175] His reasoning here might be described, with charity, as unpersuasive. The Indian Country Crimes Act creates federal jurisdiction over any crime committed within Indian country that involves either an Indian offender or an Indian victim.[176] In an exercise of paint-by-numbers textualism, Kavanaugh reasoned that the Indian Country Crimes Act "does not say . . . [that] federal jurisdiction is exclusive in Indian country, or that state jurisdiction is preempted in Indian country."[177] This is nonsensical. Congress enacted the first iteration of the Indian Country Crimes Act in 1817 when, as confirmed fifteen years later by *Worcester*, state law had "no force" within Indian country.[178] Why would Congress have said that federal criminal jurisdiction under the Indian Country Crimes Act was exclusive of state criminal jurisdiction within Indian country at a time when the states had no jurisdiction of any kind within Indian country? Why would Congress have said that it was preempting state criminal jurisdiction within Indian country more than 150 years before the Supreme Court first said in *McClanahan* that state authority within Indian country should be considered as a question of preemption? Although Kavanaugh acknowledged that "Congress operated under a different territorial paradigm in 1817 and 1834" and therefore "had no reason at that time to consider whether to preempt . . . state criminal authority in Indian country,"[179] he stubbornly insisted on a flattened, simplistic reading of the statute: "For present purposes, the

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[173] *Id.*

[174] NEWTON ET AL., *supra* note 5 at 518–19; *see also* RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 29 cmt. a.

[175] *Castro-Huerta*, 142 S. Ct. at 2494.

[176] 18 U.S.C. §§ 1152–53.

[177] *Castro-Huerta*, 142 S. Ct. at 2495.

[178] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

[179] *Castro-Huerta*, 142 S. Ct. at 2497.

fundamental point is that the text of the [Indian Country] General Crimes Act does not preempt state law."[180] This is worthy of Justice Scalia's rebuke: "I'm an originalist; I'm a textualist; I'm not a nut."[181]

Kavanaugh's analysis of Public Law 280 is somehow even weaker. Public Law 280 gave specific states full criminal jurisdiction within Indian country but left all other states with only the criminal jurisdiction conferred by *McBratney* and *Draper*. Kavanaugh argued that "Public Law 280 does not preempt any *preexisting or otherwise lawfully assumed jurisdiction* that States possess to prosecute crimes in Indian country."[182] But there was no such "preexisting or otherwise lawfully assumed jurisdiction" before *Worcester*; there was no such "preexisting or otherwise lawfully assumed jurisdiction" under *Worcester*; and apart from *McBratney*, *Draper*, and a handful of specific situations in which Congress has devolved criminal authority within Indian country to particular states by statute,[183] there was no such "preexisting or otherwise lawfully assumed jurisdiction" when Congress enacted Public Law 280 in 1953. The Supreme Court made that clear in 1946 with *Williams v. United States*.[184] Kavanaugh's argument that "Public Law 280 does not preempt any preexisting or otherwise lawfully assumed jurisdiction" of the states to prosecute crimes in Indian country is therefore entirely misplaced.[185] Apart from *McBratney*, *Draper*, and the handful of situations covered by state-specific statutes, the "preexisting or otherwise lawfully assumed jurisdiction" described by Kavanaugh is a null set.[186]

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[180] *Id.*

[181] D.A. Jeremy Telman, *Explication du Texte: "I'm an Originalist; I'm a Textualist; I'm Not a Nut,"* 50 VAL. U. L. REV. 629, 629 (2016).

[182] *Castro-Huerta*, 142 S. Ct. at 2499 (emphasis added).

[183] *See id.* at 2508 (Gorsuch, J., dissenting).

[184] Williams v. United States, 327 U.S. 711, 714 (1946). Gregory Ablavsky very ably demonstrates that five other Supreme Court decisions also stated that states generally lack jurisdiction over crimes committed within Indian country by non-Indians against Indians. Ablavsky, *supra* note 92, at 297 n.23. Kavanaugh dismisses the Supreme Court's earlier determination in *Williams v. United States* and other cases that federal jurisdiction under the Indian Country Crimes Act excludes state jurisdiction over any crime within Indian country committed by or against an Indian—and its subsequent reiterations of that point—as "pure dicta." *Castro-Huerta*, 142 S. Ct. at 2498. He makes similar moves throughout the opinion, elevating what in certain cases were *dicta* to holdings and dismissing what in other cases had been holdings as *dicta*. There is of course nothing new about this in the common law method, even if it does evoke Orwell's observation: "Who controls the past controls the future. Who controls the present controls the past." GEORGE ORWELL, NINETEEN EIGHTY-FOUR 313 (1949).

[185] *Castro-Huerta*, 142 S. Ct. at 2499.

[186] Kavanaugh's conclusion is inconsistent with earlier decisions of the Supreme Court that found preemption of state jurisdiction by Public Law 280. *See*, *e.g.*, Lynaugh, *supra* note 103, at 74–75; Goldberg, *supra* note 87, at 573–75.

Kavanaugh then turned to what he refers to as "the *Bracker* balancing test,"[187] but it is not really *Bracker* preemption at all. Kavanaugh wrote that, under *Bracker*, "this Court has recognized that even when federal law does not preempt state jurisdiction under ordinary preemption analysis, preemption may still occur if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government" and that, in making this determination, "the Court considers tribal interests, federal interests, and state interests."[188] This is a sloppy reading of the law. *Bracker* said clearly that the infringement test of *Williams v. Lee* and the preemption analysis introduced by *McClanahan* are "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members."[189] Kavanaugh carelessly ran the two together.

Kavanaugh looked first to tribal interests. He reasoned that allowing states to prosecute non-Indians for crimes within Indian country would not infringe on tribal self-government because the tribes themselves lack criminal jurisdiction over non-Indians. But the reason that tribes lack criminal jurisdiction over non-Indians is that the Supreme Court itself took that jurisdiction away in 1978.[190] Next, Kavanaugh said that allowing states to prosecute non-Indians for crimes within Indian country would not undermine "the federal interest in protecting Indian victims" because concurrent state jurisdiction would supplement rather than supplant federal jurisdiction, presumably leading to more prosecutions of crimes against Indian victims.[191] This is rather like saying that giving the Supreme Court of Oklahoma concurrent appellate jurisdiction with the US Supreme Court over all cases and controversies arising under the US Constitution would not undermine any federal interest because it would increase the number of constitutional cases that could be heard and decided each year.[192]

Having determined that there was no tribal interest at stake and that no federal interest would be undermined by state jurisdiction, Kavanaugh let the hammer fall. The State of Oklahoma, he wrote, "has a strong sovereign interest in ensuring public safety and criminal justice within its territory, . . . in protecting all crime victims[,] [and] in ensuring

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[187] *Castro-Huerta*, 142 S. Ct. at 2500.

[188] *Id.* at 2500–01.

[189] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

[190] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 203–04 (1978).

[191] *Castro-Huerta*, 142 S. Ct. at 2501.

[192] *But see Remarks of Kevin Washburn in* Oklahoma v. Castro-Huerta—*Rebalancing Federal-State-Tribal Power*, 23 J. APP. PRAC. & PROCESS 47, 80–81 (2023).

that criminal offenders—especially violent offenders—are appropriately punished and do not harm others in the State."[193] Thus, despite *Worcester*, *Williams v. United States*, the Indian Country Crimes Act, and Public Law 280, Kavanaugh said that federal law never denied state governments criminal jurisdiction over crimes committed by non-Indians against Indians within Indian country.[194] Apparently, all ideas to the contrary over the previous 190 years—including the Court's own *holdings* in *Worcester* and *Williams v. United States*—had been some great misunderstanding.[195]

With a final twist of the knife, Kavanaugh insisted that the states have jurisdiction within Indian country unless and until Congress provides otherwise. Citing only the Tenth Amendment—and ignoring precedents reaching as far back as *The Kansas Indians* and *The New York Indians* and as far forward as *Cotton Petroleum Corp.*—Kavanaugh said that the "[s]tates do not need a permission slip from Congress to exercise their sovereign authority."[196] With this cheap rhetoric, the Supreme Court's repudiation of *Worcester* and the entire doctrinal line derived from it concerning state authority within Indian country reached a new high-water mark. Little, if anything, now remains of the foundational principle that state law "can have no force" within Indian country, unless and until Congress provides otherwise.[197] The subtle transformation of *Worcester* into its opposite is all but complete.

C. The Primacy of State Interests

To summarize, the development of the law regarding state authority within Indian country falls into three phases. During the first phase, starting with *Worcester* in 1832 and ending just before *Williams v. Lee* in 1959, the Supreme Court generally relied on categorical rules to set the boundaries of state criminal and civil authority. Kavanaugh's revisionism notwithstanding, *Worcester* was nothing if not categorical; state law, Marshall said without qualification, "can have no force" in Indian country. Although the Court later recognized exceptions to this in *McBratney*, *Draper*, and *Martin*, it did so through

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193 *Castro-Huerta*, 142 S. Ct. at 2501–02.

194 *Id.* at 2504–05.

195 Kavanaugh in fact dismisses Chief Justice Marshall's opinion in *Worcester* as having "rested on a mistaken understanding of the relationship between Indian country and the States." *Id.* at 2502.

196 *Id.* at 2503.

197 Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

additional categorical rules. But then *Williams v. United States* said, again categorically, that a crime committed within Indian country by a non-Indian against an Indian remained outside the authority of the state. Under *Worcester*, *McBratney*, *Draper*, *Martin*, and *Williams v. United States*, there was no balancing of interests or assessing the relative importance of permitting one sovereign rather than another to exercise jurisdiction. Similarly, the Court, during this first phase, dealt largely in categorical rules on the civil side. *The Kansas Indians* and *The New York Indians*, both decided in 1866, flatly declared that tribal property is beyond the reach of state taxation.

During the second phase, starting with *Williams v. Lee* and ending just before *Cotton Petroleum* in 1989, the Court moved away from categorical rules and tried to devise a more indeterminate framework. In *Williams v. Lee*, the Court did not rely on the categorical rule from *Worcester* that state law "can have no force" within Indian country—a rule that would have barred the Arizona state court from exercising jurisdiction. Instead, the Court settled on the infringement test, which, as Frankfurter observed three years later in *Organized Village of Kake*, implies that certain state laws *can* have force within Indian country.

But in 1965, *Warren Trading Post* rejected state taxation of a non-Indian retailer—not because of the infringement test but because, as Black wrote, the federal government had taken the business of regulating Indian trade "so fully in hand that no room remains for state laws imposing additional burdens upon traders."[198] This suggested that the limits of state authority should be defined by federal preemption rather than (or at least in addition to) the infringement of Indian self-government. The Court made exactly that move in *McClanahan*. Then, in *Bracker*, the Court tried to reconcile the infringement approach of *Williams v. Lee* and the preemption approach of *McClanahan* as "two independent but related barriers"[199] to the application of state law within Indian country. And the preemption approach, the Court said in *Bracker*, generally requires a "particularized inquiry into the nature of the state, federal, and tribal interests at stake."[200] With that, the Court moved as far as it would from categorical rules.

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[198] Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685, 690 (1965).

[199] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

[200] *Id.* at 145. The leading treatise on federal Indian law maintains that "[a]part from circumstances in which regulation of the tribe is tantamount to regulation of non-Indians, state authority does not apply to tribes and tribal members in Indian country, and courts are not expected to consider states' asserted countervailing interests."

During the third phase, starting with *Cotton Petroleum* and continuing through *Castro-Huerta*, the Court has moved back toward categorical rules—in particular, a categorical rule that state interests trump considerations of tribal sovereignty. In *Cotton Petroleum*, Justice Stevens honored the "particularized inquiry" of *Bracker* and its progeny in the breach. He read those cases as applicable only when the state had no interest in taxing or regulating within Indian country. *Cotton Petroleum* involved "extensive" tribal and federal interests, but Stevens said that it did not involve "*exclusive*" tribal and federal interests.[201] The import was clear. If the state has *any* interest that supports asserting its law within Indian country, the state may assert its law within Indian country.[202] In that respect, *Castro-Huerta* is just an extension on the criminal side of what *Cotton Petroleum* did on the civil side. Although Kavanaugh in *Castro-Huerta* purported to look at tribal and federal interests, he defined those interests in such a way so as to make them inconsequential. His opinion ultimately turned on the determination that the state "has a strong sovereign interest in ensuring public safety and criminal justice within its territory, and in protecting all crime victims" and "in ensuring that criminal offenders—especially violent offenders—are appropriately punished and do not harm others in the State."[203]

Final resolution of the law on state authority within Indian country has not yet been reached, but the likely endpoint

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NEWTON ET AL., *supra* note 5, at 517. This is perhaps too optimistic. As a general matter, state regulation of matters involving both Indians and non-Indians often defies clear categorization as state regulation of Indians or state regulation of non-Indians. And as a specific matter, the Supreme Court has considered "states' asserted countervailing interests" in regulating Indians, as in *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation.,* 425 U.S. 463 (1976); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980); and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). NEWTON ET AL., *supra* note 5, at 517. The Cohen treatise attempts to validate the use of a balancing test in *Cabazon Band of Mission Indians* on the ground that the state there *could* have regulated the conduct of the non-Indians who participated in tribal gaming activities on tribal lands. *Id*. But that similarly would justify the use of a balancing test in almost any case involving interactions between Indians and non-Indians. Nonetheless, it remains true that the Court at times has insisted on a higher level of state interest to justify the application of state law to Indians within Indian country. *See* RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 31(a)(2).

[201] Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 186 (1989) (emphasis added).

[202] Alex Tallchief Skibine was inclined to a more measured view. He argued that "the tests used by the Court to determine if a state has regulatory and civil jurisdiction in Indian country . . . have evolved into a doctrine which privileges the interests of the states at the expense of the tribes' right to self-government." Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. C.L. & C.R. 1, 10 (2003). *Cf.* West, *supra* note 145, at 86 (reading *Cotton Petroleum* to imply that "minimal state interests might be sufficient to support state regulatory jurisdiction" in Indian country).

[203] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2501–02 (2022).

is coming into view. The two most recent cases, *Cotton Petroleum* and *Castro-Huerta*, give primacy to state interests. In the absence of express preemption by Congress, the Supreme Court now allows a state to assert its civil or criminal authority within Indian country if the state has any interest at stake.[204] Countervailing tribal and federal interests—including the interest of tribal sovereignty—no longer crowd out state interests. Long past are the days when Carole Goldberg could accurately say that "the model for federal Indian policy seems to be changing from one favoring state power with minimum protection for Indian interests to one favoring tribal autonomy with minimum protection for state interests."[205]

In short, the trend line of the Court's decisions points to the emergence of a new categorical rule. With *Cotton Petroleum*, the Court signaled an end—in substance, if not yet in form—to the "particularized inquiry" of tribal, federal, and state interests in determining whether federal law preempts state law within Indian country.[206] *Castro-Huerta* purported to take tribal and federal interests into account, but the putative balancing of state interests against federal and tribal interests in that case was *pro forma*. By ignoring tribal sovereignty, the Court found that the tribes have no interest in excluding state criminal jurisdiction from Indian country; and by defining federal interests narrowly, the Court found that those federal interests aligned with state interests. Remarkably, the categorical rule of *Worcester* that state law "can have no force" in Indian country has been all but transformed into a new categorical rule that, absent a federal statute to the contrary or the lack of any state interest, state law has full force against non-Indians in Indian country.[207]

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[204] There is an important exception here: states cannot tax tribes or tribal members within Indian country unless Congress specifically authorizes such taxation. *See* RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 32.

[205] Goldberg, *supra* note 87, at 539.

[206] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980). *Cf.* RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 29(c).

[207] David H. Getches, writing in 2001, identified the Court's growing tendency to favor state interests in federal Indian law cases with the Rehnquist Court's general orientation to the vindication of states' rights. *See* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 320–21 (2001). Other scholars who are also sympathetic to the cause of tribal sovereignty offer different interpretations of the Supreme Court's contemporary decisions on state authority within Indian country. Writing not long after *Cotton Petroleum*, Philip Frickey argued that the decisions are best explained as nothing more than "ad hoc judicial judgments" that reflect a "deep[]" and "troubling incoherence." Frickey, *Congressional Intent*, *supra* note 138, at 1137, 1174; *see also id.* at 1168–75, 1186–89; Frickey, *supra* note 19, at 399–400. Alex Tallchief Skibine argued that the Court's approach (including the nominal balancing of tribal, federal, and state interests) effectively merges tribal interests into federal interests, which in turn often

II. RESTRICTING TRIBAL AUTHORITY WITHIN INDIAN COUNTRY

Part I showed how the symmetry of *Worcester* broke down on one side when the Supreme Court, at first gradually and then more rapidly, expanded state authority within Indian country. Matters broke down on the other side as well, although this took longer to play out. For nearly a century and a half after *Worcester*, the Supreme Court saw no reason to reduce tribal authority over individuals and activities within Indian country. As late as 1975, the Court, in *United States v. Mazurie*,[208] upheld the federal conviction of two non-Indians who had "introduce[ed] spirituous beverages into Indian country" in violation of a tribal regulation.[209] Writing for a unanimous Court, Justice Rehnquist said that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."[210] *Williams v. Lee*, Rehnquist said, had recognized "that the authority of tribal courts could extend over non-Indians, insofar as concerned their transactions on a reservation with Indians."[211] Thus, even after it had begun to allow the states to encroach on Indian country, the Supreme Court still defined tribal authority primarily in terms of territory.

But this soon changed, first as to criminal matters and then as to civil matters. Just three years after *Mazurie*, *Oliphant Suquamish Indian Tribe v. United States*[212] introduced the implicit divestiture doctrine, under which the Court determined that certain powers of tribal government have been implicitly divested by tribal submission to the overriding authority of the federal government.[213] In the Court's hands, the implicit divestiture doctrine has denied tribes authority over crimes committed by non-Indians and nonmember Indians, even when committed against tribal members.[214] Similarly, the Court has used the implicit divestiture doctrine to deny tribes general civil authority over non-Indians and nonmember Indians in most (but

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yield to state interests under the Court's contemporary approach to federalism. Skibine, *supra* note 202, at 14–15.

[208] United States v. Mazurie, 419 U.S. 544 (1975).

[209] *Id.* at 545.

[210] *Id.* at 557.

[211] *Id.* at 558.

[212] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211–12 (1978).

[213] For an argument that the Supreme Court has grounded the implicit divestiture of tribal authority in different (even inconsistent) theories, see NEWTON ET AL., *supra* note 5, at 227. *Cf.* RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 27(a).

[214] The Court held in *Duro v. Reina*, 495 U.S. 676, 688 (1990), that tribes may not exercise jurisdiction over nonmember Indians who commit crimes within Indian country. Congress promptly reversed that result by statute. *See* 25 U.S.C. § 1301(2).

not all) situations involving nontribal lands within Indian country.[215] And the Court has come to the cusp of using the implicit divestiture doctrine to deny tribes general civil authority over non-Indians and nonmember Indians even on tribal lands within Indian country.[216]

The result is an unexpected parallel between the contemporary cases concerning tribal authority within Indian country and the contemporary cases concerning state authority within Indian country. To be sure, the considerations that have moved the Court to expand state authority within Indian country are different from those that have moved the Court to reduce tribal authority within Indian country. On the former, the Court aimed to protect the primacy of state interests; on the latter, as I argued in an earlier article,[217] the Court looked to protect the primacy of the individual fundamental rights that it has recognized, developed, expanded, and incorporated since the end of World War II. But even with different underlying motivations, the end points stand in a rough symmetry. As a general matter, in the absence of a treaty provision or a federal statute to the contrary, state law now applies to both non-Indians and nonmember Indians within Indian country, and tribal law now applies only to member Indians within Indian country. It has been a second remarkable transformation since *Worcester*.

A. Tribal Criminal Authority

The story here begins on the criminal side. The expansion of state criminal authority within Indian country took more than a century, from *McBratney* in 1881 through *Castro-Huerta* in 2022. By contrast, the restriction of tribal criminal authority within Indian country began abruptly with *Oliphant Suquamish Indian Tribe* in 1978 and unfolded rapidly in the following years.[218] The facts underlying *Oliphant* were simple enough. The Suquamish Indian Tribe, which inhabits the Port Madison Indian Reservation on Puget Sound, prosecuted two non-Indians for crimes against tribal members (including tribal police officers), and the defendants sought federal *habeas corpus* review.[219] The Supreme Court held that, absent authorization by Congress, an Indian tribe does not have jurisdiction over a crime

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[215] Montana v. United States, 450 U.S. 544, 564–66 (1981).

[216] Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 579 U.S. 545, 546 (2016) (per curiam).

[217] *See* Doran, *supra* note 40.

[218] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[219] *Id.* at 192–94.

committed by a non-Indian, even a crime committed against an Indian victim within Indian country.[220]

Before *Oliphant*, the Court had not specifically addressed tribal jurisdiction over non-Indian defendants since its recognition in *Worcester* that Indian tribes have authority over all persons and activities within Indian country. But writing for the *Oliphant* majority, Justice Rehnquist maintained that it had long been the understanding of the legislative and executive branches and the lower federal courts that tribes do not have criminal authority over non-Indians.[221] Rehnquist based his opinion primarily on *Johnson v. McIntosh*[222] and *Cherokee Nation v. Georgia*[223]—two of the three Indian-law opinions by Chief Justice Marshall that, along with *Worcester*, make up what is known as the "Marshall trilogy." *Johnson* held that Indian tribes cannot alienate their real-property rights to anyone other than the government of the United States.[224] *Cherokee Nation* held that Indian tribes are "domestic dependent nations" that cannot enter into foreign relations with any government other than the United States.[225] Rehnquist read *Johnson* and *Cherokee Nation* to stand for the proposition that the submission of the Indian tribes to the overriding authority of the federal government implicitly divests the tribes of certain sovereign powers.[226] Among those divested powers, according to Rehnquist, is the power to prosecute non-Indians.[227] "[A]bsent affirmative delegation of such power by Congress," he wrote, "Indians do not have criminal jurisdiction over non-Indians."[228]

Oliphant was as unexpected as it was unprecedented. Felix Cohen, the father of federal Indian law, had set out the canonical account of tribal sovereignty in his 1942 treatise.[229] Drawing on the Marshall trilogy, Cohen argued that Indian tribes are inherently sovereign, and that because their sovereignty precedes the founding of the Republic, it is necessarily independent of the US Constitution.[230] Cohen acknowledged that contact between the Indian tribes and the European powers, colonization by those European powers, and

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220 *Id.* at 195, 212.
221 *Id.* at 203.
222 Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).
223 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
224 *Johnson*, 21 U.S. (8 Wheat.) at 568–70.
225 *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.
226 *Oliphant*, 435 U.S. at 209–10.
227 *Id.* at 210.
228 *Id.* at 208.
229 *See generally* COHEN, *supra* note 24.
230 *Id.* at 122–23.

the continued expansion of the United States necessarily affected and limited tribal sovereignty, but he maintained that this contact, colonization, and expansion did not eliminate tribal sovereignty.[231] Reasoning from the Marshall trilogy, Cohen said that tribes retain all the attributes of their sovereignty except those surrendered by treaty or other agreement with the United States and those taken away by federal statute.[232]

Oliphant turned away from this analytical framework. Where Cohen said that tribes retain all sovereign powers except those that they give up voluntarily or those that Congress takes away, Rehnquist's opinion said that certain aspects of sovereignty are simply inconsistent with the status of the tribes as subordinate to the federal government.[233] Rehnquist thus claimed for the judiciary the power to limit tribal sovereignty using a novel theory with no apparent limitations. And *Oliphant* also reversed the significance of congressional inaction. Cohen said that the tribes retain their sovereignty except to the extent that Congress actively takes certain attributes of sovereignty from them; *Oliphant* said that whatever attributes of tribal sovereignty the Court declares implicitly divested can be restored only by affirmative congressional action.[234] *Oliphant* was by any measure a stunning development in federal Indian law, a point widely noted in the extensive scholarly criticism that followed it.[235]

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[231] *Id.* at 123.

[232] *Id.* Even so, the specific holding of *Oliphant* likely would not have surprised Cohen, who, in discussing Indian country crimes in his treatise, said that the "attempts of tribes to exercise jurisdiction over non-Indians, although permitted in certain early treaties, have been generally condemned by the federal courts since the end of the treaty-making period, and the writ of habeas corpus has been used to discharge white defendants from tribal custody." *Id.* at 148; *see also Oliphant*, 435 U.S. at 199 n.9. The only case that Cohen cited in support of that proposition was *Ex parte Kenyon*, 14 F. Cas. 353 (C.C.W.D. Ark. 1878) (No. 7,720). This was also the only case cited by Rehnquist as being directly on point for *Oliphant*. *Oliphant*, 435 U.S. at 199–201.

[233] *Oliphant*, 435 U.S. at 209–10.

[234] *Id.* at 212.

[235] *See, e.g.*, Alexander Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV'T L. REV. 49, 53–54 (2017); Alexander T. Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77, 85–87 (2014); Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499, 1518, 1523–24, 1527, 1535, 1551, 1557 (2013); Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48, 49–51, 55, 63 (2010); Jacob T. Levy, *Three Perversities of Indian Law*, 12 TEX. REV. L. & POL. 329, 339, 342–50, 357 (2008); Bethany Berger, *Liberalism and Republicanism in Federal Indian Law*, 38 CONN. L. REV. 813, 820–21 (2006); John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the Cohen's Handbook Cutting-Room Floor*, 38 CONN. L. REV. 731, 733–43, 752, 754, 760–62, 776 (2006); Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 159, 171, 177–79 (2006); Bethany Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1049–50, 1055–60, 1107 (2005); Joseph William Singer, *Canons of*

A little over a decade after *Oliphant*, the Supreme Court decided that it had not gone far enough in restricting tribal criminal jurisdiction. In *Duro v. Reina*,[236] decided in 1990, the Court held that Indian tribes do not have jurisdiction over crimes committed by nonmember Indians, even if those crimes are committed against Indian victims within Indian country. Remarkably, this outcome left certain crimes committed by Indians within Indian country outside the jurisdiction of any government (federal, state, or tribal),[237] and Congress promptly overturned *Duro* with a statute recognizing the power of tribes to prosecute nonmember Indians and member Indians on the same terms.[238] The Court upheld the statute, which was known as the "Duro fix," in *United States v. Lara*.[239] Additionally, Congress has partially overturned *Oliphant* and has recognized tribal authority over a crime committed by a non-Indian within Indian country involving the assault of tribal justice personnel, child violence, dating violence, domestic violence, sexual violence, sex trafficking, stalking, obstruction of justice, or the violation of a protective order.[240]

B. Tribal Civil Authority

The restrictions imposed by the Supreme Court on tribal criminal authority were sudden and sharp. Matters were somewhat but not entirely different on the civil side. In 1981, just three years after *Oliphant*, the Court began to roll back

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Conquest: The Supreme Court's Attack on Tribal Sovereignty, 37 NEW ENG. L. REV. 641, 645, 650–53, 660 (2003); Skibine, *supra* note 202, at 15–17, 36–38; Getches, *supra* note 207, at 274, 282, 332–34; Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 34–39, 44–45, 49, 51–53, 59–60, 64–65, 67–68 (1999); Getches, *supra* note 48, at 1595–600, 1609, 1611–12, 1614, 1634; N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353, 366–73, 375–85, 387–89 (1994); 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, 25–34, 38–41, 43, 48, 50, 87–89 (1993); Peter C. Maxfield, Oliphant v. Suquamish Tribe*: The Whole is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 393–443 (1993); Frickey, *Congressional Intent*, *supra* note 138, at 1160–64, 1184–86, 1197–98, 1232; Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 265–74, 276, 278, 285–86 (1986); Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979); Richard B. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 479–84, 486–89, 491–93, 496, 499–503, 505–08, 511–13, 516–17, 519, 528–29 (1979).

[236] Duro v. Reina, 495 U.S. 676, 679 (1990).

[237] *Id.* at 696–97.

[238] 25 U.S.C. § 1301(2).

[239] United States v. Lara, 541 U.S. 193, 210 (2004).

[240] 25 U.S.C. § 1304.

tribal civil regulatory authority within Indian country, and in 1997, the Court did the same with tribal civil adjudicative authority over non-Indians and nonmember Indians.[241] Since then, the Court has continued to restrict tribal civil authority over non-Indians. At this point, the Court's desired outcome appears reasonably clear. It seems that the Court ultimately intends that, subject to narrow exceptions, the tribes will have no civil regulatory or civil adjudicative authority over non-Indians and nonmember Indians.[242]

The foundational case on the civil side is a 1981 decision, *Montana v. United States*.[243] The Crow Tribe had banned all hunting and fishing by nonmembers within the Crow Reservation, including on lands held in fee simple by non-Indians and nonmember Indians.[244] The Supreme Court applied the implicit divestiture doctrine from *Oliphant* to overturn the ban.[245] The Court's first move was to draw a distinction between tribal lands and nontribal lands within Indian country, a distinction not drawn in *Oliphant*.[246] The former included lands owned by the tribe and lands owned by the United States in trust for the tribe; the latter included lands owned in fee simple by non-Indians and nonmember Indians.[247]

The Court of Appeals had ruled that the Crow Tribe could prohibit hunting and fishing by non-Indians and nonmember Indians on all tribal lands, and the Supreme Court said that it could "readily agree" with that holding.[248] The more difficult question, then, was whether the tribe could prohibit hunting and fishing by non-Indians and nonmember Indians on nontribal lands, and on that question the Court applied the *Oliphant* implicit divestiture doctrine. "Though *Oliphant* only determined inherent tribal authority in criminal matters," Justice Stewart wrote for the majority, "the principles on which it relied support the general proposition that the inherent sovereign powers of an

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[241] *See* Montana v. United States, 450 U.S. 544, 557 (1981) (holding that the Tribe does not have "the power . . . to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe"); Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (holding "the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'does not extend to the activities of nonmembers of the tribe'").

[242] Matthew L.M. Fletcher offers a characteristically perceptive review of the principal cases on tribal civil jurisdiction within Indian country. *See* Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 792–98 (2014).

[243] *Montana*, 450 U.S. 544 (1981).

[244] *Id.* at 548–49.

[245] *Id.* at 566–67.

[246] *See id.* at 557, 565 n.14.

[247] *See id.* at 557.

[248] *Id.* at 557.

Indian tribe do not extend to the activities of nonmembers of the tribe."[249] Even so, the Court recognized two exceptions to this broad rule. First, Stewart wrote that "[a] tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[250] And second, Stewart said that a tribe has the authority to regulate the conduct of nonmembers if that "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[251]

Montana, then, was not a simple extension of *Oliphant*. *Oliphant* had said that a tribe may not exercise any criminal jurisdiction over any non-Indian within Indian country—whether or not the crime was committed on tribal lands and whether or not the crime could be said to fall within what the Court would later mark off as the two *Montana* exceptions.[252] By contrast, *Montana* never distinguished between non-Indians and nonmember Indians; the Court said that the limitations on tribal civil regulatory authority applied equally to both.[253] But *Montana* did distinguish between tribal lands and nontribal lands, with the Court categorically stating that a tribe may regulate the activities of nonmembers on tribal lands and that, subject to the two stated exceptions, a tribe may not regulate the activities of nonmembers on nontribal lands.[254]

Subsequent decisions generally have applied *Montana* to restrict further the application of tribal civil regulatory jurisdiction. In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,[255] a badly fractured Court could not agree on how to apply *Montana* to a tribal zoning ordinance that affected both tribal lands and nontribal lands within the Yakima Reservation. In a split decision, the Court ultimately determined that, with respect to the nontribal lands, the ordinance was valid under the second *Montana* exception as to "closed" portions of the reservation (those not open to development) but not as to the "open" portions of the reservation (those open to development).[256] In *South Dakota v. Bourland*,[257] Justice Thomas, writing for the

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[249] *Id.* at 565.

[250] *Id.*

[251] *Id.* at 566.

[252] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

[253] *Montana*, 450 U.S. at 565–66.

[254] *Id.* at 557–65.

[255] Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 444 (1989) (opinion of Stevens, J.); *see id.* at 432 (opinion of White, J.).

[256] *Id.* at 444 (opinion of Stevens, J.); *id.* at 432–33 (opinion of White, J.).

[257] South Dakota v. Bourland, 508 U.S. 679, 694–96 (1993).

Court, read *Montana* as denying the possibility of inherent tribal sovereignty with respect to non-Indians and nonmember Indians. In a footnote, he said that "[a]fter *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' . . . and is therefore *not* inherent."[258] And in *Atkinson Trading Co. v. Shirley*,[259] the Court held that, under *Montana*, a tribe may not tax the guest of a hotel located on nonmember reservation land. But in *United States v. Cooley*,[260] the Court reinvigorated the second *Montana* exception by holding that tribal police officers have the authority to detain and search non-Indian criminal suspects on nontribal lands within Indian country in order to protect the health and welfare of the tribe.[261]

With time, the Court also extended *Montana* and the implicit divestiture doctrine to limit tribal civil adjudicative authority. In *Strate v. A-1 Contractors*,[262] decided in 1997, the Court held that a tribe has jurisdiction over a civil lawsuit between nonmembers arising out of activity on nontribal land within the reservation only to the extent permitted by the two *Montana* exceptions. Justice Ginsburg, writing for a unanimous court, said that, "[a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."[263] In 2008, reading the two *Montana* exceptions narrowly, the Court held in *Plains Commerce Bank v. Long Family Land and Cattle Co.*, *Inc.* that a tribal court did not have jurisdiction over a suit against a nonmember bank following the bank's sale of nontribal land, even though the bank had a consensual commercial relationship with tribal members.[264]

Again, *Montana* (unlike *Oliphant*) distinguished between tribal authority over activities on tribal lands and tribal authority over activities on nontribal lands, with Stewart unambiguously saying that a tribe may regulate activities by non-Indians and nonmember Indians on tribal lands.[265] And so for two decades

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[258] *Id*. at 695 n.15 (quoting *Montana*, 450 U.S. at 564).

[259] Atkinson Trading Co. v. Shirley, 532 U.S. 645, 654–56 (2001).

[260] United States v. Cooley, 141 S. Ct. 1638, 1643 (2021).

[261] *Cooley* is somewhat anomalous in applying *Montana* to a question of tribal criminal authority.

[262] Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997). In a unanimous decision after *Montana* but before *Strate*, the Supreme Court had strongly implied that a tribal court has civil adjudicative jurisdiction over nonmembers for activities taking place on nonmember land within the tribe's reservation. *See* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856–57 (1985). *Cf.* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).

[263] *Strate*, 520 U.S. at 453.

[264] Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 330 (2008).

[265] Montana v. United States, 450 U.S. 544, 557 (1981).

after *Montana*, it seemed clear that tribal civil jurisdiction over non-Indians and nonmember Indians was restricted with respect to activities on nontribal lands within Indian country. But this was thrown into doubt with the Court's 2001 decision in *Nevada v. Hicks*.[266] In that case, Hicks, a member of the Fallon Paiute-Shoshone Tribe, sued a Nevada state police officer in tribal court for property losses that Hicks suffered during the execution of a search warrant at his home, which was located on tribal land within the tribe's reservation. Although the question for the Court was whether the tribal court had jurisdiction over Hicks's civil suit, *Strate* said that the analysis should turn on *Montana*. Under *Montana*, the outcome should have been clear. *Montana* says that tribes have civil regulatory authority over non-Indians and nonmember Indians for activities on tribal lands, and the execution of the search warrant had been conducted on such lands.[267] The tribal court, then, should have had jurisdiction over the lawsuit brought by Hicks.

But Justice Scalia, writing for the Court, disagreed. Even though *Montana* treated the location of nonmember activities as dispositive, Scalia said that the status of the land as tribal or nontribal is simply "one factor" in determining whether the tribe has civil authority.[268] "[T]ribal ownership" of the land where the nonmember activity occurred, he said, "is not alone enough to support . . . jurisdiction over nonmembers."[269] Three concurring members of the Court—Justices Souter, Kennedy, and Thomas—would have pushed the matter still further. They urged the Court to revise the analysis of tribal civil authority to "make it explicit that land status within a reservation is not a primary jurisdictional fact, but is relevant only insofar as it bears on the application of one of *Montana*'s exceptions to a particular case."[270] Instead, Scalia cautiously wrote that the holding was "limited to the question of tribal-court jurisdiction over state officers enforcing state law," and that *Hicks* left "open the question of tribal-court jurisdiction over nonmember defendants in general."[271]

The Court had occasion to revisit this point within the last decade. *Dollar General Corp. v. Mississippi Band of*

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266 Nevada. v. Hicks, 533 U.S. 353 (2001).
267 *See Montana*, 450 U.S. at 557–65.
268 *Hicks*, 533 U.S. at 360.
269 *Id.*
270 *Id.* at 375–76 (Souter, J., concurring).
271 *Id*. at 358 n.2 (majority opinion).

Choctaw Indians,[272] a case out of the Fifth Circuit Court of Appeals, concerned a tribal court's civil jurisdiction over a nonmember for activity on tribal lands. There was no involvement of state law enforcement, and so the case pressed directly on Scalia's caveat that *Hicks* was limited to that context. The Court heard arguments in December of 2015, but split 4-4 and issued no opinion after Scalia's death in February of 2016.[273] Apparently, four justices were willing to hold that, despite *Montana*, a tribal court generally does not have jurisdiction over a civil lawsuit against a non-Indian or a nonmember Indian even for conduct on tribal land.[274] Even the limited tribal civil jurisdiction over non-Indians and nonmember Indians allowed by the Supreme Court remains very precarious.

C. The Primacy of Fundamental Rights

As shown in Section I.C, the Supreme Court's contemporary decisions concerning state authority within Indian country tend toward categorical rules—although these categorical rules are very different from the *Worcester* holding that state law "can have no force" within Indian country. After *Cotton Petroleum*, a state has almost unlimited civil authority over non-Indians and nonmember Indians within Indian country, as long as the state can identify an interest at stake in asserting that authority, and after *Castro-Huerta*, a state has apparently unlimited criminal authority over non-Indians within Indian country. The principal remnant of *Worcester* in this doctrinal line is that, at least so far, states may not assert full civil or criminal authority over member Indians themselves.[275]

Similarly, the Court's contemporary decisions concerning tribal authority within Indian country also tend toward categorical rules—although these categorical rules are very

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[272] Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014), *aff'd by an equally divided court sub nom*, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 579 U.S. 545 (2016) (per curiam).

[273] *Dollar Gen. Corp.*, 579 U.S. at 546.

[274] In contrast to tribal civil regulatory and civil adjudicative jurisdiction over non-Indians and nonmembers, the Supreme Court has generally left tribal taxing authority over non-Indians and nonmember Indians undisturbed and unrestricted. Tribal taxing authority of non-Indians and nonmembers within Indian country is longstanding. *See, e.g.*, Morris v. Hitchcock, 194 U.S. 384, 393 (1904). Contemporary decisions have upheld this authority as a matter of retained, inherent sovereignty, without any reference to the *Montana* analysis. *See, e.g.*, Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

[275] Each of those categorical rules yields if federal law provides otherwise, even if the Court has been increasingly reluctant to conclude that federal law in fact provides otherwise.

different from the *Worcester* holding that tribal authority is "exclusive" within Indian country. After *Montana* and *Strate*, a tribe has limited civil regulatory and civil adjudicative authority over non-Indians and nonmember Indians for activities on nontribal lands. After *Hicks*, a tribe has only tenuous civil regulatory and civil adjudicative authority over non-Indians and nonmember Indians on tribal lands. And after *Oliphant*, a tribe has no criminal jurisdiction at all over non-Indians (subject only to the narrow exceptions recognized by Congress).[276]

Although these two doctrinal lines both start with *Worcester*, they have followed very different paths. The motivation for the first line of decisions has been to promote the primacy of state interests; the motivation for the second line of decisions has been to protect individual fundamental rights. As I have argued elsewhere, the implicit divestiture cases represent the Court's preferred solution of what I have called the "tribal-sovereignty trilemma."[277] This trilemma is the function of a conflict among foundational principles of federal Indian law and foundational principles of US constitutional law.

During the late twentieth century, the Court began to see, however imperfectly, that this tension is most acute when an Indian tribe asserts authority over non-Indians and nonmember Indians. The first milestone was the Suquamish Tribe's attempt in *Oliphant* to prosecute two non-Indians for crimes committed on the Port Madison Reservation. Rehnquist's majority opinion pointed to a latent conflict between federal Indian law and constitutional law:

> [F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested [a] . . . great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.[278]

The concern expressed in embryonic form there is that tribal governments are not bound by the restrictions of the US Constitution, either as to their own members or as to non-

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[276] Again, federal law might vary any of these rules, as when Congress restored the tribal criminal jurisdiction over nonmember Indians that the Court took away in *Duro*. 25 U.S.C. § 1301(2) (amendment to the Indian Civil Rights Act of 1968, made in 1991, restoring tribal criminal jurisdiction over nonmember Indians).

[277] Doran, *supra* note 40, at 95.

[278] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

Indians and nonmember Indians, and that, for this reason, tribal governments are not required to observe individual fundamental rights.

The tribal-sovereignty trilemma consists of three different legal-policy objectives, of which only two can be implemented simultaneously. The first is the preservation of traditional tribal sovereignty as conceptualized in *Worcester*. Prior to contact with European colonizers, an Indian tribe obviously had governmental authority over any person within its territory, whether that person was or was not a member of the tribe. Chief Justice Marshall recognized this when he wrote in *Worcester* that "the several Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive."[279] And a member of the Court pointed out during oral arguments for *United States v. Lara* that "if you go back a couple hundred years, they [the tribes] clearly had their own inherent power to try non-members."[280] Contact between a tribe and one of the European colonizing powers affected the scope of the tribe's sovereignty only insofar as the tribe and the colonizing power so agreed or the colonizing power so provided through force or the threat of force.[281] Thus, in the case of the tribes located within lands claimed by the United States, tribal sovereignty persisted, subject to the overriding authority of the federal government.[282]

Although the Supreme Court held in *United States v. Kagama* that Congress has plenary power over Indians and Indian tribes,[283] the Court continued to recognize that tribes retain their sovereignty unless and until Congress acts to extinguish it. During the same term that it decided *Oliphant*, the Court affirmed inherent tribal sovereignty in two leading cases—*Santa Clara Pueblo v. Martinez*, which held that tribal court interpretations of the Indian Civil Rights Act of 1968 generally cannot be reviewed by federal courts,[284] and *United States v. Wheeler*, which held that tribal governments are separate sovereigns for purposes of the Fifth Amendment

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[279] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832).

[280] Transcript of Oral Argument at 36, United States v. Lara, 541 U.S. 193 (2004) (No. 03–107).

[281] COHEN, *supra* note 24, at 206–11.

[282] RESTATEMENT OF THE LAW OF AMERICAN INDIANS §§ 14–15.

[283] United States v. Kagama, 118 U.S. 375, 383–84 (1886).

[284] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 67 (1978). The only exception is in 25 U.S.C. § 1303, which provides that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

prohibition on double jeopardy.[285] In *Wheeler*, the Court specifically said that "[t]he sovereignty that the Indian tribes retain is of a unique and limited character," that "[i]t exists only at the sufferance of Congress and is subject to complete defeasance," but that "until Congress acts, the tribes retain their existing sovereign powers."[286] Subsequent Supreme Court cases have repeatedly acknowledged the retained inherent sovereignty of Indian tribes.[287]

The second legal-policy objective in the tribal-sovereignty trilemma is the continued placement of tribal governments outside the federalist structure. Although tribes are sometimes referred to as the "third sovereign,"[288] they are not governed by or subject to the US Constitution. The tribes were not created by the Constitution; they did not ratify the Constitution; and they are not part of the federalist system under the Constitution. The only reference to Indian tribes in the Constitution is the Indian Commerce Clause in Section 8 of Article I, which confers on Congress the power "[t]o regulate Commerce . . . with the Indian Tribes."[289] Thus, in holding more than a century ago that the requirements of the Fifth Amendment do not apply to a criminal prosecution by the Cherokees, the Supreme Court stated unequivocally that "the powers of local self government enjoyed by the Cherokee nation existed prior to the constitution [and] . . . are not operated upon by the [F]ifth [A]mendment."[290]

The tribes, then, occupy a special legal position. Although they are subject to the plenary power of Congress, the tribes are not the federal government, they are not subdivisions of the federal government, and they are not agencies or instrumentalities of the federal government. Although tribal lands are located within individual states, and although the Supreme Court increasingly allows state laws to apply within tribal lands, the tribes are not state governments, they are not subdivisions of state governments, and they are not agencies or instrumentalities of state governments. This special position is, in fact, critical to the self-determination of the tribes. By standing outside the federalist structure, the tribes can choose

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[285] United States v. Wheeler, 435 U.S. 313, 329–30 (1978).

[286] *Id.* at 323.

[287] *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014); Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 754–55 (1998); Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 198 (1985); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982).

[288] *See, e.g.*, Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. J. 1 (1997).

[289] U.S. CONST. art. 1, § 8, cl. 3.

[290] Talton v. Mayes, 163 U.S. 376, 384 (1898).

their own form of government and the content of their own laws without the strictures of a Constitution that they did not choose and to which they never gave consent.

The third legal-policy objective underlying the tribal-sovereignty trilemma is the protection of individual fundamental rights against governmental authority. For most of its first century and a half, the Supreme Court showed only a limited interest in the individual rights set out in the Bill of Rights or, once it was ratified, the Fourteenth Amendment.[291] There were exceptions, of course, such as the Court's protection of liberty of contract during the *Lochner* era and of free speech after World War I, but the Court did not really enter into the business of protecting individual rights until the second half of the twentieth century.[292] Beginning with the school desegregation cases of the 1950s, the Court began the aggressive recognition, creation, and expansion of individual rights and—no less importantly—the aggressive incorporation of fundamental rights against the states.[293]

But because Indian tribes are outside the federalist order and are not subject to the Bill of Rights or the Fourteenth Amendment, the rights revolution that the Supreme Court started in the 1950s has never reached into Indian country. Thus, for example, a criminal defendant in tribal court cannot assert rights under the Fourth, Fifth, Sixth, or Eighth Amendments; an individual who wants to criticize a tribal government cannot assert rights under the First Amendment; an individual who wants to own or carry a firearm in Indian country cannot assert rights under the Second Amendment; and an individual who objects to uneven treatment by a tribal government cannot assert rights under the Fourteenth Amendment. Although Congress applied certain provisions of the Bill of Rights and of the Fourteenth Amendment to tribal governments under the Indian Civil Rights Act of 1968,[294] the Supreme Court has determined that only tribal courts may determine whether a tribal government has violated any of those statutory provisions.[295] It is settled law, then, that the *constitutional* protection of individual fundamental rights stops where tribal governmental authority begins.

The difficulties presented by these three inconsistent legal-policy objectives—the preservation of traditional tribal

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[291] Doran, *supra* note 40, at 111–12.

[292] *Id.*

[293] *Id.* at 112–15.

[294] 25 U.S.C. § 1302.

[295] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55–56 (1978).

sovereignty, the continuation of tribal governments' placement outside the federalist framework, and the protection of individual fundamental rights—emerged in the second half of the twentieth century. By that point, Congress had long abandoned its nineteenth-century policies of maintaining the physical, cultural, and political separation of Indians and non-Indians, and the decades long allotment policy had turned many reservations into "checkerboards" of mixed Indian and non-Indian ownership and residency. Although Congress repudiated allotment in the Indian Reorganization Act of 1934,[296] the dramatic changes of land tenure and demographics within Indian country remained.

Today, the population of many reservations is predominantly Indian, but the population of others is predominantly non-Indian.[297] And during the 1960s and the 1970s, the tribes began to assert their own economic and political development and their right to self-determination more aggressively than they had in many years.[298] The result of all this was that, by the late 1970s, many tribes had the resources, capacity, and inclination to exercise traditional governmental functions directly over all persons and activities within Indian country. That, in turn, meant more contact between tribal governments and persons living or otherwise present in Indian country without the mediation of federal officials. Yet many of those persons living or otherwise present in Indian country were non-Indians or nonmember Indians.

Thus, the tribal-sovereignty trilemma, previously latent, started to come into focus for the Supreme Court when the Suquamish Tribe pursued the criminal prosecution of two non-Indian defendants for crimes committed on the reservation. Even now, decades after the *Oliphant* decision and the extension of the implicit divestiture doctrine to the civil side, the Court itself has never identified or described the tribal-sovereignty trilemma as such. But without question, the Court has

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[296] Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984 (codified at 25 U.S.C. §§ 5101–29). Section 1 of the act provides as follows: "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian." 25 U.S.C. § 5101.

[297] For example, more than 95 percent of the residents of the Navajo Nation Reservation are Indians, *My Tribal Area*, U.S. CENSUS BUREAU, https://www.census.gov/tribal/?aianihh=2430 [https://perma.cc/WPZ8-NMXM], but fewer than 10 percent of the residents of the Port Madison Reservation are Indians, *My Tribal Area*, U.S. CENSUS BUREAU, https://www.census.gov/tribal/?aianihh=2925 [https://perma.cc/4K5N-JCFG].

[298] NEWTON ET AL., *supra* note 5, at 99.

perceived, however imperfectly, the impossibility of achieving all three legal-policy objectives simultaneously. The Court has gradually come to understand that it cannot recognize traditional tribal sovereignty over all persons within Indian country and maintain the placement of tribal governments outside the federalist order without allowing for the possibility that tribal governments may not observe the fundamental rights of non-Indians and nonmember Indians.

One of the three legal-policy objectives that form the trilemma must give way, and ever since *Oliphant*, the Court's resolution has been to restrict the authority of tribal governments over non-Indians and nonmember Indians. This has effected a redefinition of tribal sovereignty. The Court has replaced the traditional territorial-based conception of tribal sovereignty in *Worcester* with a membership-based understanding of tribal sovereignty in the implicit divestiture cases, so that a tribe has full sovereign powers only with respect to those persons within Indian country who are themselves members of that tribe. The purpose and the result of this move have been to give primacy to the fundamental rights of non-Indians and nonmember Indians.[299]

Consider first the criminal side of the implicit divestiture cases. In *Oliphant*, the Court noted that, "from the formation of the Union and the adoption of the Bill of Rights," the federal government "has manifested [a] . . . great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty" and that "[t]he power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty."[300] For this reason, the Court said, the tribes have been implicitly divested of "their power to try non-Indian citizens of the United States except in a manner acceptable to Congress"[301]—a manner that, presumably, would require full protection of the constitutional rights of criminal defendants.

In *Duro*, which held that tribes do not have criminal jurisdiction over nonmember Indians who commit crimes within Indian country, the Court specifically noted the defendant's "status as a citizen of the United States" and, quoting *Oliphant*,

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[299] As Alex Tallchief Skibine said of the implicit divestiture decisions: "Taken together, these inherent sovereignty cases indicate that the Court is no longer an impartial arbiter . . . and is instead more concerned about protecting the property or civil rights of non-members from what it perceives to be potentially arbitrary tribal action." Skibine, *supra* note 202, at 15–16.

[300] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

[301] *Id.*

remarked that "Indians like other citizens are embraced within our Nation's 'great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty.'"[302] Tribal courts, the Court said, "are influenced by the unique customs, languages, and usages of the tribes they serve" and are not subject to the Bill of Rights.[303] The Court reasoned that tribes may exercise criminal jurisdiction over their own members because of "the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent."[304] Thus, a tribe's exercise of criminal jurisdiction over a member Indian in a manner not consistent with the constitutional rights of the accused is not necessarily problematic; but the tribe's exercise of criminal jurisdiction over anyone "who ha[s] not given the consent of the governed that provides a fundamental basis for power within our constitutional system" is inconsistent with the protection of the individual's constitutional rights.[305]

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[302] Duro v. Reina, 495 U.S. 676, 692 (1990) (alteration in original) (quoting *Oliphant*, 435 U.S. at 210).

[303] *Id.* at 693.

[304] *Id.* at 694.

[305] *Id.* Taking the Court's rhetoric perhaps too much at face value, Grant Christensen argues that tribal governments can reclaim criminal jurisdiction over non-Indians by obtaining their "affirmative consent" to tribal criminal prosecution. Specifically, he says: "Tribes should be able to seek the affirmative consent of non-Indians to assert criminal jurisdiction over them for crimes that occurred within the jurisdictional territory of the tribal government." Grant Christensen, *Using Consent to Expand Tribal Court Criminal Jurisdiction*, CALIF. L. REV. (forthcoming 2023) (manuscript at 25), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4217127 [https://perma.cc/F6HF-M3A5]. But Christensen cannot satisfactorily explain why a potential defendant would give affirmative consent to a criminal prosecution by a tribal government. He suggests two reasons: "If a non-Indian who is believed to have committed a crime in Indian country refuses to consent to tribal criminal jurisdiction[,] then the tribe has two powerful alternatives to explore[:] 1) it can exclude the non-Indian from the reservation, potentially cutting them off from family, friends, property, and employment and/or 2) the tribe can turn the non-Indian over to state and federal authorities who have criminal jurisdiction to prosecute the offense." *Id.* at 26. The first reason is problematic. Either the potential defendant cares about the threat of exclusion from the tribe's lands, or the potential defendant does not. If the potential defendant does not care, the threat of exclusion will not induce consent to a tribal prosecution. If the potential defendant does care, the threat of exclusion is inconsistent with genuine consent to the prosecution and to the waiver of any constitutional rights that such consent otherwise would entail. The second reason is completely puzzling. Neither federal nor state criminal jurisdiction depends on a tribe "turn[ing] over" a non-Indian defendant for prosecution, and a tribe's prosecution of a non-Indian defendant does not shield that non-Indian defendant from federal or state criminal jurisdiction. In any event, Christensen's argument is grounded in an incorrect premise. He maintains that if tribes began to exercise criminal jurisdiction over non-Indians through the non-Indians' consent to prosecution, the balancing-based preemption analysis used by the Supreme Court in *Castro-Huerta* would come out against state jurisdiction. *Id.* at 39–40. But when the Court in *Castro-Huerta* balanced tribal and federal interests on the one side against state interests on the other side, it specifically said that concurrent federal and state jurisdiction did not undermine federal interests because concurrent

Even on the civil side of the implicit divestiture doctrine, members of the Court have emphasized the importance of limiting tribal jurisdiction to tribal members in order to protect the rights and interests of non-Indians and nonmember Indians. Writing in a concurring opinion in *Hicks*, Justice Souter said that tribal courts are "differ[ent] from traditional American courts in a number of significant respects."[306] He noted that tribal courts are not subject to the Bill of Rights or the Fourteenth Amendment, that some tribal law is unwritten, and that some tribal judges are not independent of the legislative or executive arms of tribal government.[307] Similarly, Chief Justice Roberts, writing for the majority in *Plains Commerce Bank*, said that the implicit divestiture cases were important to protect the "liberty interests" of non-Indians and nonmember Indians, and he reiterated that non-Indians and nonmember Indians "have no part in tribal government—they have no say in the laws and regulations that govern tribal territory."[308]

As with the cases concerning state authority within Indian country, the cases concerning tribal authority within Indian country tend toward the emergence of new categorical rules. Under *Worcester*, the categorical rule was that, barring a treaty concession or a federal statute to the contrary, a tribe had plenary power over all persons, both Indian and non-Indian, within its lands.[309] Under *Oliphant*, a tribe has no criminal authority over non-Indians within Indian country, and under *Montana*, *Strate*, and *Hicks*, a tribe has civil authority over non-Indians and nonmember Indians only in exceptional circumstances.[310] To the extent that the Court has not yet actually arrived at these new rules, they certainly seem to be the endpoints toward which it is moving.

Set against the emerging categorical rule on state authority within Indian country, a new symmetry between the two doctrinal lines emanating from *Worcester* becomes apparent. It seems likely that, left to its own, the Court eventually will hold that states have as much authority over non-Indians and nonmember Indians within Indian country as the states have

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jurisdiction would only lead to more prosecutions, thereby furthering the federal interest in "protecting Indian victims." Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2501 (2022). Surely the Court would also say that concurrent federal, state, and tribal jurisdiction does not undermine tribal interests because it too would only lead to more prosecutions, thereby furthering the tribal interest in "protecting Indian victims."

306 Nevada v. Hicks, 533 U.S. 353, 383 (2001) (Souter, J., concurring).

307 *Id.* at 383–84.

308 Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 334, 337 (2008).

309 Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

310 *See supra* Section II.B.

over such persons outside Indian country. Similarly, it seems likely that, left to its own, the Court eventually will hold that tribes have little or no authority over non-Indians and nonmember Indians within Indian country, just as tribes have no such authority over such persons outside Indian country. And it seems likely that the Court will continue to hold that the states have only limited civil and criminal authority over member Indians within Indian country, and that the tribes have plenary power over their own members within Indian country.

In short, the division between state and tribal authority within Indian country apparently no longer turns, as it did under *Worcester*, on the simple fact of a person being present within Indian country; instead, it seems that the division depends on the political status of the person who is present within Indian country—on whether the person is or is not a member of the tribe. The new border between state authority and tribal authority is not, as in *Worcester*, the physical boundary of Indian country; instead, it is the political boundary of tribal membership.

III. A RETURN TO CONGRESSIONAL SUPREMACY

By expanding state authority and restricting tribal authority within Indian country over the past half century, the Supreme Court has assumed for itself the principal role in defining tribal sovereignty. As other scholars have noted, that assertion of judicial dominance is inconsistent with the historical allocation of power over Indian law and policy within the federal government.[311] Traditionally, the Supreme Court has recognized that Congress takes the lead in matters concerning Indians and Indian tribes; at one point in the early twentieth century, the Court even declared matters of federal Indian policy to be nonjusticiable.[312] As Congress pursued various and diverse approaches to federal-tribal relations—sometimes pushing and pulling Indian policy in sharply different directions from one generation to the next—the Court consistently deferred to the legislative branch.

But the contemporary Court's cases have effected a momentous change. As David Getches observed, the Court, in effect, has aggressively reset the parameters of tribal

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[311] *See, e.g.*, Kirsten Matoy Carlson, *The Democratic Difficulties of* Oklahoma v. Castro-Huerta, 45 NEW POL. SCI. 39 (2023); Kirsten Matoy Carlson, *Bringing Congress and Indians Back into Federal Indian Law: The Restatement of the Law of American Indians*, 97 WASH. L. REV. 725, 742–744 (2022).

[312] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

sovereignty.[313] This is problematic for two reasons. First, there is the usual—but still valid—objection that the Court lacks the institutional competence to make the policy and political judgments that arise in defining tribal sovereignty.[314] The terms of the government-to-government relationship between the United States and each of the Indian tribes has always been an intensely controversial matter that implicates a broad range of political, cultural, economic, sociological, and other considerations. As scholars such as Michalyn Steele and Matthew L.M. Fletcher have argued regarding this and other questions in federal Indian law, the Court simply lacks the institutional capacity to take all the relevant interests into account.[315]

Second, the current members of the Supreme Court have shown that, generally, their ideas about tribal sovereignty are inconsistent with the contemporary ethos of the self-determination era. Just when Congress began to pursue a robust version of tribal sovereignty—committing substantial federal resources to promote and protect tribal governments, tribal economies, and tribal values—the Supreme Court began to chisel away at tribal sovereignty, both from the outside (by expanding state authority within Indian country) and from the inside (by restricting tribal authority within Indian country). For the most part, the current members of the Supreme Court endorse only a weak version of tribal sovereignty at precisely the time when Congress has endorsed a strong version of tribal sovereignty.[316]

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[313] *See generally* Getches, *supra* note 48.

[314] On the notion of institutional competence (which is generally associated with the Legal Process School but which traces at least as far back as Lon Fuller), see generally NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 257–62 (1995) and BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 275–76 (5th ed. 2009).

[315] Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759, 779–815 (2014); Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 538–44 (2020).

[316] Judge Canby argued as early as 1987 that, although "the tribes are still sovereign with inherent powers of self-government, . . . the Supreme Court no longer regards that fact as central to the resolution of disputes between the tribes and the states." Canby, *supra* note 21, at 2. To similar effect is the view of Joseph Singer: "At the same time the Court has stripped tribes of governmental powers they had previously held in Indian country, it has increased the powers of state governments in Indian country. This transfer . . . contradicts both congressional and executive policy which, in recent years, has strongly supported the revitalization of tribal governments." Singer, *supra* note 235, at 643. Philip Frickey maintained that "the Court has engaged in aggressive institutional and doctrinal revisionism, essentially displacing Congress as the federal agent with front-line responsibility for federal Indian policy." Philip Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 436 (2005). And Matthew L.M. Fletcher, referring to "the increasing tendency of the Court to make policy in the field of federal Indian law," said that "[t]he Court's entrance into the field of federal Indian policy is unwelcome, largely because the Court's policy choices are frequently uneducated in terms of their on-the-ground impacts, but also because they

This judicial self-aggrandizement might be less objectionable if Congress engaged in active dialogue with the Court. Even as it expands state authority and restricts tribal authority, the Court claims continued deference to Congress as the final arbiter of federal Indian policy. But Congress has largely absented itself from the Court's decades-long project of reshaping tribal sovereignty. With three exceptions—two that partially repudiated *Oliphant* and one that fully repudiated *Duro*—Congress has left standing the Court's decisions about governmental authority within Indian country. This is precisely the wrong posture.[317]

A. Tribal Sovereignty as Policy and Politics

From the earliest days of federal Indian law, it has been a black letter rule that Congress defines the relationship between the federal government and the Indian tribes.[318] The Supreme Court at times has treated tribal sovereignty as a policy question, and at other times it has treated tribal sovereignty as a political question lying entirely beyond judicial review. Either way, tribal sovereignty has never been a strictly legal question, much less a strictly constitutional question. As the Court itself has repeatedly observed, the sovereignty of Indian tribes does not derive from the US Constitution, and it certainly does not derive from the common law or from federal statutory law.[319]

The tribes existed before contact with the European colonizing powers, and their status as autonomous sovereigns is independent of European law generally and Anglo-American law specifically. The repeated instances of contact between the United States and the Indian tribes forced, in the first instance, a simple policy choice for the federal government: whether to recognize or to extinguish tribal sovereignty. In most cases and most of the time, the United States chose the former. The Constitution grants Congress the power "[t]o regulate Commerce . . . with the Indian Tribes,"[320] and one of the first acts of the first Congress was to pass the Trade and Intercourse Act

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are in direct contravention of explicit congressional and Executive Branch policy choices." Fletcher, *supra* note 235, at 128 (emphasis omitted).

[317] Maggie Blackhawk also argues for congressional supremacy in federal Indian law, although on a somewhat different basis. *See generally* Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205 (2023).

[318] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

[319] *See, e.g.*, Talton v. Mayes, 163 U.S. 376, 384 (1896); United States v. Wheeler, 435 U.S. 313, 322–23 (1978).

[320] U.S. CONST. art. I, § 8, cl. 3.

of 1790, which implicitly recognized the independence of the Indian tribes as sovereigns.[321] During the westward expansion of the United States, certain tribes, after suffering losses from disease and warfare, either ceased to exist or merged into other tribes. But until the Termination Era, which ran from roughly 1945 through roughly 1970, it was never formal congressional policy to abolish tribal sovereignty as such; even during the Termination Era, Congress pursued the abolition of tribal sovereignty only on a selective basis.[322]

Having made the fundamental choice to recognize tribal sovereignty, the overarching question of federal Indian policy for more than two centuries has been to work out the implications of that recognition. This in turn has been heavily affected by the assertion of US governmental authority over all persons within the territorial boundaries of the United States. The law has resolved this tension—the assertion of comprehensive US sovereignty and the simultaneous recognition of tribal sovereignty—through a nuanced understanding of tribal sovereignty as subordinate to US sovereignty. Chief Justice Marshall first articulated the point by calling the Indian tribes "domestic dependent nations" in *Cherokee Nation v. Georgia*,[323] although the contemporary Court prefers to speak of the "quasi-sovereign" status of the tribes.[324]

The critical point is that it is for Congress to decide the terms of this bounded sovereignty. In *Worcester*, Marshall wrote of the Constitution that it "confers on [C]ongress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes*" and that "[t]hese powers comprehend all that is required for the regulation of our intercourse with the Indians."[325] That power of regulating commerce with the Indian tribes, Marshall said, is vested "exclusively . . . in [C]ongress."[326] A little more than a half century later, in *United States v. Kagama*,[327] the Court, in upholding the constitutionality of the Major Crimes Act, determined that the federal government has plenary power over Indians and Indian tribes. Although it

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321 Trade and Intercourse Act, Pub. L. No. 1-33, 1 Stat. 137 (1790).
322 NEWTON ET AL., *supra* note 5, at 84–93.
323 Cherokee Nation v. Georgia, 30 U.S. (5. Pet.) 1, 17 (1831).
324 *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 554 (1974).
325 Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (emphasis in original).
326 *Id.* at 580.
327 United States v. Kagama, 118 U.S. 375, 378–79 (1886).

rejected the Indian Commerce Clause as the basis for that power,[328] the Court said:

> The power of the [federal] Government [over the Indian tribes] . . . must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.[329]

Judicial deference to congressional supremacy in federal Indian policy reached its high water mark with the Court's 1903 decision in *Lone Wolf v. Hitchcock*.[330] In upholding a federal statute that imposed allotment on the Kiowa, Comanche, and Apache, despite the terms of an earlier treaty with those tribes, the Court said that "[p]lenary 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."[331] Matters of Indian policy, the Court said, are so fully committed to the legislative branch as to be nonjusticiable:

> [A]s Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned . . . by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts.[332]

The contemporary Court no longer considers Indian law questions to be nonjusticiable.[333] But the Court has still deferred in most instances to Congress as the principal authority in the formation of Indian policy. Thus, when it first announced the implicit divestiture doctrine in *Oliphant*, the Court acknowledged that Congress has the final word on tribal criminal authority over non-Indians: "By submitting to the overriding sovereignty of the United States," the Court said, "Indian tribes . . . necessarily give up their power to try non-Indian citizens of the United States *except in a manner acceptable to Congress*."[334] When Congress in fact reversed the Court's later decision in *Duro* that tribes do not have criminal authority over nonmember Indians, the Supreme Court upheld the reversal.[335]

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328 *Id.*
329 *Id.* at 384–85.
330 Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
331 *Id.* at 565.
332 *Id.* at 568.
333 Seminole Tribe of Florida v. Florida, 517 U.S. 44, 53 (1996).
334 Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) (emphasis added).
335 United States v. Lara, 541 U.S. 193, 197–98 (2004).

And Congress, in fact, has exercised wide discretion in defining the relationship between the tribes and the federal government and between the tribes and the states. During the early years of the nineteenth century, Congress pursued a policy of removing the tribes that historically had lived east of the Mississippi River to lands west of the Mississippi River.[336] Such removal, it was thought, would preserve as much tribal independence and sovereignty as possible in the face of the westward expansion of non-Indian settlement after the Revolutionary War.[337] During the middle years of the nineteenth century, as non-Indian settlement pushed beyond the Mississippi River and began also to move eastward from the Pacific Coast, Congress changed from this removal policy to a reservation policy.[338] Here, the expectation was a strained mixture of preserving tribal independence in the short term and preparing individual Indians for assimilation into the mainstream of US society in the long term.[339]

Congressional impatience with the pace of Indian economic development and the eagerness of non-Indians to acquire Indian lands led Congress to adopt yet another policy in the late nineteenth and early twenties centuries—the policy of allotment and assimilation—which had both the purpose and the effect of undermining tribal sovereignty.[340] Allotment of tribal lands into individual freeholdings, as President Theodore Roosevelt said in 1901, served as "a mighty pulverizing engine to break up the tribal mass" and advanced the goal of "recogniz[ing] the Indian as an individual and not as a member of a tribe."[341] By the late 1920s and the early 1930s, Congress came to regret the allotment policy and tried to reinvigorate tribal sovereignty and Indian self-government through what was known as the Indian New Deal.[342] But the pendulum would swing twice more. After World War II, Congress adopted a series of termination acts that ended the government-to-government relationships between the United States and more than a hundred individual Indian tribes.[343] Then, in 1970, President Nixon asked Congress to make

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[336] NEWTON ET AL., *supra* note 5, at 41–60.

[337] *Id.*

[338] *Id.* at 60–71.

[339] *Id.*

[340] *Id.* at 71–79.

[341] Theodore Roosevelt, *First Annual Message to Congress*, AM. PRESIDENCY PROJECT (Dec. 3, 1901), https://www.presidency.ucsb.edu/documents/first-annual-message-16 [https://perma.cc/W6K3-43BY].

[342] NEWTON ET AL., *supra* note 5, at 79–84.

[343] *Id.* at 84–93.

yet another change by adopting self-determination as the official US policy for the Indian tribes.[344]

The new policy of promoting Indian self-determination has involved a particularly robust commitment to tribal sovereignty. Several federal statutes enacted since the middle of the 1970s, such as the Indian Self-Determination and Education Assistance Act of 1975, actively devolve responsibility for federal assistance programs from the federal government to tribal government.[345] The Indian Gaming Regulatory Act of 1988 promotes economic development and pushes state governments to enter into their own government-to-government relationships with the tribes.[346] The Indian Child Welfare Act of 1978 recognizes the primacy of tribal courts in child-custody proceedings involving Indian children resident or domiciled within Indian country.[347] The Native American Graves Protection and Repatriation Act of 1990 protects the remains of Indians and the cultural patrimony of Indian tribes.[348] And contemporary amendments to the Indian Civil Rights Act of 1968 expand the criminal jurisdiction of tribal courts in an effort to address frightening levels of violence against Indian women.[349]

Throughout the meandering—sometimes drifting—course of federal Indian policy, the Supreme Court has recognized that the lead belongs to Congress. It is Congress that has determined whether the federal government recognizes and promotes tribal sovereignty or repudiates and destroys it; it is Congress that has determined the parameters of tribal sovereignty; and it is Congress that has defined the terms of the relationship between the tribes and the federal government, between the tribes and the state governments, and between the tribes and individual non-Indians. Thus, the announcement of the implicit divestiture doctrine in 1978 represented a significant departure from longstanding judicial deference. As the leading treatise on federal Indian law puts the point with exquisite understatement: "Judicial initiative in creating policy-

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[344] Special Message to the Congress on Indian Affairs, *supra* note 33.

[345] Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at scattered sections of 25 U.S.C.).

[346] Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at scattered sections of 25 U.S.C.).

[347] Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at scattered sections of 25 and 43 U.S.C.).

[348] Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (codified as amended at 25 U.S.C. §§ 3001–3013 and at scattered sections of 18 U.S.C.).

[349] 25 U.S.C. § 1304.

driven limitations on inherent tribal powers is in tension . . . with the federal courts' traditional deference to Congress with respect to policymaking in Indian affairs."[350] Or as Justice Gorsuch said in June of 2023, questions about the scope of tribal sovereignty—such as whether "to abrogate tribal [sovereign] immunity"—are "fundamentally political in nature" and therefore "belong[] to Congress."[351]

B. Tribal Sovereignty as Constitutional Law

The two lines of cases deriving from *Worcester* have changed the controlling understanding of tribal sovereignty. In place of the strictly territorial-based conception, the Supreme Court has substituted a membership-based conception of tribal sovereignty in its cases on state authority within Indian country and its cases on tribal authority within Indian country. But this redefinition has been without the benefit of a congressional mandate or, for that matter, congressional guidance. On the matter of state authority within Indian country, Congress in 1953 passed Public Law 280, which devolves certain authority from the federal government to specific state governments with respect to specific tribes.[352] Yet the Supreme Court has established a parallel track under which states may exercise governmental authority within Indian country entirely without regard to Public Law 280. And on the matter of tribal authority within Indian country, the Court simply invented the implicit divestiture doctrine in its 1978 decision in *Oliphant*. Working against a background of nearly complete congressional silence, the Court has used that doctrine to strip from the tribes one aspect of governmental authority after another.

The Court's approach has been not to challenge traditional congressional supremacy directly. Although the Court has repudiated the *Lone Wolf* position that controversies under federal Indian policy are nonjusticiable, the Court continues to say that Congress has final authority over the subject matter. At least on the surface, the cases on state authority and tribal authority still maintain a posture of deference to the legislative branch. Consistent with this, the Court has only once struck down a federal statute expanding tribal governmental authority.[353] Instead, the Court's approach has been to assume the power of

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[350] NEWTON ET AL., *supra* note 5, at 229.

[351] Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689, 1705 (2023) (Gorsuch, J., dissenting).

[352] *See supra* notes 87–89 and accompanying text.

[353] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 75–76 (1996).

defining tribal sovereignty indirectly by taking on questions that the Court regards as strictly legal or strictly constitutional. The Court has chiseled away at tribal sovereignty by ruling on the scope of state governmental authority and on the scope of individual fundamental rights—two matters that the Court regards as falling within its core institutional competence. State governmental authority implicates questions of federalism, the Interstate Commerce Clause, and the Tenth Amendment; individual fundamental rights implicate questions under the Bill of Rights and the Fourteenth Amendment. Those ostensibly non-Indian aspects of constitutional law thus provide the Court with points of oblique entry into the heart of federal Indian policy.

This is problematic. Determining the parameters of tribal sovereignty requires setting the exterior markers of what has long been a bounded sovereignty. That in turn requires making normative tradeoffs—tradeoffs, among many others, between the interests of tribal governments and state governments, between the interests of Indians and non-Indians, between the interests of member Indians and nonmember Indians, and between Indian economic interests and non-Indian economic interests. Making judgments about such tradeoffs is the quotidian work of the legislative branch; Congress regularly picks winners and losers on normative and policy grounds. Although legislative results are not necessarily principled or even necessarily correct, Congress is uniquely situated to take into account competing interests as they jostle in the political arena.

By contrast, the core work of the courts is to adjudicate disputes based on legal, rather than political, considerations. Policy and even political considerations often bleed into the legal considerations on which the courts base their decisions, but the point remains that the work of the courts is primarily in law, not policy or politics. Thus, when confronted with problems that sound overwhelmingly in policy or politics, the courts historically have stood down and deferred to the political branches. The Supreme Court followed precisely that path for nearly two centuries on the matter of tribal sovereignty. It is only when the Court began to broaden state authority within Indian country and to insist on the protection of individual fundamental rights within Indian country that it necessarily backed itself into taking on the inherently political question of defining tribal sovereignty.[354]

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[354] For an argument that the Supreme Court should take on political judgments about tribal, federal, and state interests, see Robert G. McCoy, *The Doctrine of Tribal*

Additionally, an overwhelming majority of the Court's members do not share the current congressional commitment to a robust conception of tribal sovereignty.[355] As others have noted, Justice Sotomayor and Justice Gorsuch are the signal exceptions.[356] Both demonstrate a full understanding of the importance of tribal sovereignty, the nuances and complexity of federal Indian law, and an apparent resolve to protect and to promote tribal sovereignty as much as possible.[357] In that respect, Sotomayor and Gorsuch are in step with the normative decisions made by Congress since the start of the self-determination era. By contrast, their colleagues have at best a commitment to only a weak conception of tribal sovereignty. To the rest of the Court, tribal sovereignty appears as a curiosity to be tolerated whenever it does not conflict with non-Indian policy and political values. But as soon as tribal sovereignty comes into tension with the interests of state governments or of non-Indians, tribal sovereignty gives way.

C. Congressional Supremacy Renewed

Perhaps the Court's trespassing across institutional boundaries would not be so problematic if Congress remained part of the dialogic process. After all, the Court so far has continued to defer to Congress as having the final word on tribal sovereignty. As long as Congress promptly corrects the Court, there should be only limited lasting harm from decisions that further erode tribal sovereignty. Unfortunately, Congress has largely absented itself from the conversation. As the Court has expanded state authority and restricted tribal authority within Indian country, Congress has intervened on only three occasions to protect tribal sovereignty. First, after the Court ruled in *Duro* that tribes cannot exercise authority over crimes committed within Indian country by nonmember Indians, Congress promptly restored that authority by statute.[358] Second, in response to intolerable levels of domestic violence against Indian women by non-Indian men, Congress partially overturned *Oliphant* in the Violence Against Women Reauthorization Act of

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Sovereignty: Accommodating Tribal, State, and Federal Interests, 13 HARV. C.R.-C.L. L. REV. 357, 398–99 (1978).

[355] Phillip Frickey noted this point shortly after the Supreme Court decided *Cotton Petroleum*. Frickey, *supra* note 8, at 422–24, 432–39.

[356] *See* Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads:* McGirt v. Oklahoma *and the Future of the Federal Indian Law Canon*, 51 N.M. L. REV. 300, 305–06, 331–32, 341–42 (2021).

[357] *See id.*

[358] 25 U.S.C. § 1301(2).

2013.[359] Third, in the Violence Against Women Act Reauthorization Act of 2022, Congress further superseded *Oliphant* to restore tribal criminal authority over non-Indians who commit assault of tribal justice personnel, child violence, dating violence, domestic violence, sexual violence, sex trafficking, stalking, obstruction of justice, or the violation of a protective order.[360]

These corrections are welcome but insufficient. Taken together, they restore only a small part of the tribal sovereignty that the Court has taken away. Congress should resume a more active role by revisiting the Court's decisions and, where appropriate, enacting corrective legislation.[361] The obvious first step is to restore the civil adjudicative and civil regulatory jurisdiction over non-Indians and nonmember Indians that the Court took from the tribes in *Montana*, *Strate*, *Hicks*, and other decisions. Tribal exercise of civil jurisdiction over non-Indians and nonmember Indians presents few constitutional problems; the issues here are almost entirely those of policy and politics.

The second step would be to restore more fully the criminal jurisdiction over non-Indians that the Court took from the tribes in *Oliphant*. Here, there are more sensitive constitutional questions. On the one hand, the Court stated in *Oliphant* that "Indian tribes . . . necessarily give up their power to try non-Indian citizens of the United States *except in a manner acceptable to Congress*"—plainly indicating that Congress may restore such jurisdiction however Congress determines proper.[362] On the other hand, the two statutory restorations of tribal criminal jurisdiction over non-Indians in the Violence Against Women Act reauthorizations generally have required tribes asserting such jurisdiction to observe the constitutional rights of criminal defendants.[363] It seems likely that Congress would do the same in the event that it made full restoration of tribal criminal jurisdiction over non-Indians (and it seems likely that, even if Congress did not, the Supreme Court might insist upon it).

The third step could prove the most difficult to navigate. In the past, the Court's expansion of state authority within Indian

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[359] *Id.* § 1304.

[360] *Id.*

[361] Matthew L.M. Fletcher proposes a different approach to the problem of tribal authority within Indian country—one grounded in federal adjudication rather than federal legislation. *See generally* Fletcher, *supra* note 242.

[362] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) (emphasis added).

[363] 25 U.S.C. § 1304.

country turned on the preemptive effect of federal law.[364] That approach implied that the questions about state authority within Indian country were for Congress to determine. But *Castro-Huerta* suggested a new complication. There, in addition to looking for a federal statute that preempted state criminal jurisdiction within Indian country, the Court also relied on the Tenth Amendment to validate the Oklahoma prosecution of a non-Indian for a crime committed against an Indian within Indian country.[365] An increased emphasis on a constitutional basis for state governmental authority within Indian country could narrow the congressional room to correct the Court's decisions.

CONCLUSION

The Supreme Court's 2022 decision in *Castro-Huerta* overrules the specific holding of *Worcester* and lays down the most recent marker in the Court's steady contraction of tribal sovereignty. But for most of the nation's history, the first-order decision whether to recognize tribal sovereignty and, if so, the second-order decisions about the scope of tribal sovereignty have been matters of policy and politics that lie within the exclusive province of the legislative branch. Congress should reassert its traditional role in federal Indian law and policy to correct the many errant rulings made by the Supreme Court over the last half century.

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[364] *Supra* Section I.B.

[365] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2490 (2022).