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Tribal Sovereignty: Them and Us

A central theme in federal Indian law focuses on the inherent sovereign power of tribes to regulate the activities of non-tribal members who enter Indian country.[1] Chief Justice Marshall addressed this issue 170 years ago in *Worcester v. Georgia*,[2] one of the foundational cases[3] in federal Indian law. *Worcester* did not end the matter, and tribal sovereignty issues have persisted over the past two centuries. These sovereignty claims have assumed contemporary importance as tribes increasingly engage in various forms of economic development. The current economic activities create additional opportunities for interaction between tribes and non-tribal members,[4] thereby expanding the potential for disputes that test the limits of tribal sovereign authority.

For the past three decades, Congress and the Bureau of Indian Affairs have recognized the importance of sovereignty in promoting tribal economic development and self-sufficiency.[5] Al-

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1 "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 Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1994). Although § 1151 is concerned with criminal jurisdiction, it has been applied by the Court to questions of civil jurisdiction. *See* DeCoteau v. Dist. County Court, 420 U.S. 425, 427 n.2 (1975).

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

3 *See id.*; Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). These three cases are often referred to as the "Marshall trilogy."

4 *See infra* text accompanying notes 264-82.

5 *See, e.g.*, Indian Tribal Economic Development and Contract Encouragement

though the legislative and executive branches have taken steps to enhance tribal sovereign powers, the Supreme Court has moved in precisely the opposite direction. In a series of cases, culminating most recently in *Nevada v. Hicks*,[6] the Court has severely curtailed tribal authority over nonmembers. Part I of this Article traces the Court's treatment of issues related to inherent tribal sovereignty over nonmembers, describing the doctrinal shift that has occurred in the time between *Worcester* and *Hicks*.[7] This Article intentionally focuses on the judicial, rather than the legislative or executive, understandings of inherent sovereignty be-

Act of 2000, 25 U.S.C.A. § 81 (2001); Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-1168 (1994), 25 U.S.C. §§ 2701-2721 (1994); Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1453, 1461-1469, 1481-1497, 1497a, 1498, 1499, 1511, 1512, 1521-1524, 1541-1544 (1994); Indian Self-Determination and Education Assistance Act, 25 U.S.C.A. §§ 13a, 450, 450a-450c-1, 450f, 450h-450j, 450j-1, 450k-450m, 450m-1, 450n, 455-58, 458a-458c, 458aa-458hh, 458aaa, 458aaa-1-458aaa-18, 458bbb, 458bbb-1, 458bbb-2 (2001); 42 U.S.C. § 20046 (1994). In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), the Court commented on "Congress' desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.'" *Id.* at 510 (quoting California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987)).

[6] Nevada v. Hicks, 533 U.S. 353 (2001).

[7] Others have documented the Court's retreat from *Worcester*, and it is not my purpose to repeat that discussion. *See*, *e.g.*, FRANK POMMERSHEIM, BRAID OF FEATHERS (1995); DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE (1997); Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians: An Examination of the Basic Framework of Inherent Tribal Sovereignty Before and After* Duro v. Reina, 38 FED. B. NEWS & J. 70 (1991); Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law,* 110 HARV. L. REV. 1754 (1997); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1 (1999) [hereinafter Frickey, *Common Law*]; Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) [hereinafter Frickey, *Marshalling Past and Present*]; 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 (2001) [hereinafter Getches, *Beyond Indian Law*]; David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996) [hereinafter Getches, *Conquering the Cultural Frontier*]; L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001); Robert Laurence, *The Dominant Society's Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography and the Indian Civil Rights Act*, 30 U. RICH. L. REV. 781 (1996); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995); 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 (1986).

cause the recent restrictions are the product of the Court's activism.[8]

While the shift from *Worcester* to *Hicks* is significant, Part II argues that a common theme is found in the earlier and modern cases. Underlying the Court's approach to inherent tribal sovereignty since *Worcester* and to the present is an implicit understanding of Indian peoples as the "other,"[9] as "them" rather than "us." The use of the them/us construction leads the current Court to its conclusion that inherent tribal sovereignty should be limited to instances when Indian peoples are behaving in a distinctive fashion and only to the extent of governing themselves.

In this respect, the Court's modern approach calls to mind an incident that occurred while President Ronald Reagan was traveling in Moscow in 1988. A student asked President Reagan how the United States justifies its Indian policy. "'Maybe we made a mistake,' Reagan answered, in trying to maintain Indian cultures. Maybe we should not have humored *them* in wanting to stay in that kind of primitive life-style. Maybe we should have said, 'No, come join *us*. Be citizens along with the rest of *us*.'"[10]

As Barbara Atwood noted, "debates about tribal sovereignty quickly become debates about Indian identity."[11] The Court's tribal sovereignty jurisprudence illustrates this proposition, relying on implicit views of Indian identity to resolve disputes over tribal adjudicative and regulatory power.[12] The cases treat tribal sovereignty issues against a backdrop that uses a Reagan-type portrayal of Indians as either *them* or *us*. As Rennard Strickland observed in another context, however, Indians "are not behaving

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[8] Robert Williams has described more generally the discourses used by federal judges, the executive branch, members of Congress, and white society to constrain tribalism. All of these, he concluded, "share in their unquestioned reliance on law and legal discourse as the principal tool for mediating and controlling tribalism's perceived difference from the values of the dominant society." Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law,* 31 ARIZ. L. REV. 237, 262 (1989).

[9] *See* Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 732-33 (1989) (noting the Court's treatment of Indian tribes as the "other").

[10] NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT, 1492-1992 405 (Peter Nabokov ed., 1991) (emphasis added).

[11] Barbara Ann Atwood, *Identity and Assimilation: Changing Definitions of Tribal Power over Children*, 83 MINN. L. REV. 927, 937 (1999).

[12] *See infra* Part II.

in the forms that white society has historically defined as the appropriate Indian form."[13] However, many tribes are acting like dominant groups by engaging in a variety of economic development activities.[14] In such circumstances, tribal sovereignty is critical even though Indian peoples are not performing in some preconceived, different manner.

The conclusion explains that by relying on a them/us understanding of Indians to resolve sovereignty disputes, the Court ignores the possibility that Indian peoples might choose to be both: they might choose to behave like dominant groups, but at the same time desire to maintain their distinctiveness. Indeed, one of the central challenges for Indian peoples is to engage in activities that will promote self-sufficiency while also maintaining their separate political and cultural identities. As Pulitzer Prize winner N. Scott Momaday observed, "The major issues we now face are survival—how to live in the modern world. Part of that is how to remain Indian, how to assimilate without ceasing to be an Indian."[15] Tribal sovereignty[16] is an essential component of that survival, enabling Indian peoples to live in the modern world while at the same time maintaining their distinct identities.

I
The Erosion of Tribal Sovereignty

The current disputes over tribal sovereignty have their historical roots in *Worcester v. Georgia*,[17] which led to one of the most serious constitutional crises in our nation's history.[18] The clash arose out of governmental attempts to force the eastern Indian tribes to move west. Soon after his election in 1828, President Andrew Jackson decided "it was farcical to treat the Indian tribes

[13] Rennard Strickland, Tonto's Revenge 105 (1997).

[14] *See infra* text accompanying notes 264-76.

[15] Native American Testimony, *supra* note 10, at 438.

[16] The legal disputes discussed in this article focus on political sovereignty over territory as well as people. Wallace Coffey and Rebecca Tsosie have argued that Indian peoples should construct a doctrine of cultural sovereignty as well. *See generally* Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Culture Sovereignty and the Collective Future of Indian Nations*, 12 Stan. L. & Pol'y Rev. 191 (2001).

[17] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). *See generally* Symposium, *Cultural Sovereignty: Native Rights in the 21st Century*, 34 Ariz. St. L. J. 1 (2002).

[18] *See* 1 Charles Warren, The Supreme Court in United States History 753-54 (rev. ed., Fred B. Rothman & Co. 1987) (1922).

as though they were sovereign and independent nations . . . ."[19] He opposed allowing the tribes to continue to exist as separate enclaves within the states and engaged in efforts to remove the Indians to west of the Mississippi.[20] Among other things, he recommended that the states exercise jurisdiction over Indians who did not move voluntarily.[21] Georgia responded with various laws designed to extend state laws to Cherokee territory, take the Cherokee Nation lands, and abolish its government.[22]

The Cherokee Indian Nation attempted to enjoin the enforcement of these laws by initiating a lawsuit against the State of Georgia in the Supreme Court.[23] The Nation alleged that execution of the Georgia laws would "annihilate the Cherokees as a political society, and . . . seize, for use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force."[24] The Cherokee Nation maintained that the Court had original jurisdiction under Article III of the Constitution[25] to entertain its claim because the suit was between a state and a foreign state.

Georgia officials elected to ignore the proceedings and did not appear to defend the lawsuit.[26] Nevertheless, the Court dismissed the suit, holding in *Cherokee Nation v. Georgia*[27] that an Indian tribe is not a foreign state within the meaning of Article III and that the Court, therefore, lacked original jurisdiction.[28] While no opinion had enough votes to constitute a majority of the Court, scholars often cite Chief Justice Marshall's opinion for its important dictum.[29] At the outset, Marshall noted that a majority of the justices agreed that the Cherokee Nation was a distinct political entity. He said, "So much of the [Cherokee Nation's] argument as was intended to prove the character of the

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[19] FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE & INTERCOURSE ACTS, 1790-1834 233 (2d ed. 1970).

[20] *Id.* at 235. The Indian Removal Act of 1830, ch. 148, 4 Stat. 411, authorized the President to trade western lands for eastern tribal lands. *See* FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 81 (Rennard Strickland et al. eds., Michie Bobbs-Merrill 1982) (1942).

[21] COHEN, *supra* note 20, at 81.

[22] *Id.*

[23] *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

[24] *Id.* at 15.

[25] *See* U.S. CONST. art. III, § 2.

[26] *See* 30 U.S. (5 Pet.) at 14.

[27] *Id.* at 20.

[28] *Id.*

[29] *See, e.g.*, COHEN, *supra* note 20, at 82.

Cherokees as a state, a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful."[30] He concluded, however, that because of the relation between the Indians and the United States, an Indian tribe cannot be a "foreign" state.[31] Specifically, he noted that all Indian territory is geographically within the United States and treaties acknowledge that the tribes are under the protection of the United States.[32] Moreover, the Constitution provides in the Commerce Clause that Congress has power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[33] Marshall noted that in this clause, tribes are clearly distinguished from foreign nations as well as states.[34] In dictum that later became the basis for one of the foundational principles of federal Indian law, Marshall characterized Indian tribes as "domestic dependent nations."[35]

One year later, in 1832, the Court had the opportunity to confront the merits of the issue it avoided in *Cherokee Nation*. As part of its effort to harass and remove the Cherokees, Georgia enacted a law that provided for punishment of all white persons who resided within the limits of the Cherokee nation without obtaining a license from the governor or his agent.[36] Samuel Worcester and other missionaries were convicted under this law and sentenced to imprisonment for four years.[37] They appealed to the Supreme Court, arguing that Georgia had no authority to regulate conduct on the tribe's land and that the state law was unconstitutional. In contrast to *Cherokee Nation*, there was no jurisdictional bar to the missionaries' challenge. Thus, Marshall was able to reach the merits of the underlying claim regarding

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[30] *Cherokee Nation*, 30 U.S. (5 Pet.) at 16.

[31] *Id.* at 17.

[32] *Id.*

[33] U.S. CONST. art. I, § 8, cl. 3.

[34] 30 U.S. (5 Pet.) at 18.

[35] *Id.* at 17. The principle that the federal government has plenary power over Indian affairs is well established but much criticized. *See, e.g.*, Frickey, *Marshalling Past and Present*, *supra* note 7; Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75 (2002); WILKINS, *supra* note 7; Williams, *supra* note 7. Recently, Robert Clinton challenged the underlying assumptions of the plenary power doctrine, concluding that it lacks constitutional support and cannot be reconciled with constitutional theory. Robert Clinton, *There is No Federal Supremacy Clause for Indian Tribes,* 34 ARIZ. ST. L.J. 113 (2002).

[36] *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542 (1832).

[37] *Id.* at 536-37.

the relationship between the states and Indian tribes. Writing for a majority of the Court in *Worcester*, he stated:

> The Cherokee nation . . . is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.[38]

He added, "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the Union."[39]

In concluding that Georgia's power does not extend to Indian territory within state borders, the Court relied on a variety of sources. First, it stated that the Constitution confers on Congress, rather than the states, the power to make war and peace,[40] to regulate commerce with the Indian tribes,[41] and to enter into treaties.[42] Second, the Court relied on the Treaty of Hopewell negotiated in 1791 between the United States and the Cherokee Nation.[43] That treaty acknowledged that the Cherokee Nation is under the protection of the United States and no other power, a provision found in Indian treaties generally.[44] Third, the Court pointed to a number of federal laws that "manifestly consider the several Indian nations as distinct political communities . . . ."[45] Finally, throughout the opinion,[46] Marshall referred to the Indian tribes' inherent right of self-government, which was part of the "actual state of things"[47] before the Revolutionary War and which was recognized by the Treaty of Hopewell and by congressional acts.[48]

The Supreme Court reversed the state court judgment and issued an order directing the state superior court to release

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[38] *Id.* at 561.

[39] *Id.* at 557.

[40] *Id.* at 559. It is important to recall that relations with the Indian tribes often were considered a matter of war and peace. *See* Oneida Indian Nation v. New York, 860 F.2d 1145 (2d Cir. 1988).

[41] *Worcester*, 31 U.S. (6 Pet.) at 559.

[42] *Id.*

[43] *Id.* at 554-55.

[44] *See id.* at 551.

[45] *Id.* at 557.

[46] *See id.* at 536-97.

[47] *Id.* at 543.

[48] *Id.* at 556.

Worcester and the other prisoners.[49] Georgia officials (who again did not appear to argue the case before the Court) refused to comply with the mandate, announcing that they would not accept the determination that Georgia lacked jurisdiction over the tribe.[50] There was widespread fear that President Jackson would not take steps to enforce the Supreme Court's judgment.[51] Indeed, President Jackson reportedly made the following infamous statement about the *Worcester* decision: "Well, John Marshall has made his decision, now let him enforce it."[52] A direct constitutional clash was avoided, however, when in 1833 the Governor of Georgia pardoned the missionaries.[53]

For purposes here, the importance of the Cherokee cases is twofold. First, *Worcester* recognized that Indian tribes had inherent powers of self-government that predated the Constitution and continued to exist after its ratification. The Court observed that the "settled state of things when the war of our revolution commenced"[54] was that tribes were considered as "nations capable of . . . governing themselves . . . ."[55] *Worcester*, thus, provided the foundation for "the most basic principle of all Indian law,"[56] that the "powers of Indian tribes are, in general, '*inherent powers of a limited sovereignty which has never been extinguished.*' "[57] The Court later stated that Indian tribes are much more than voluntary organizations; they "are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . ."[58]

Second, *Worcester* established that as "distinct, independent political communities,"[59] Indian tribes are not subject to state

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[49] *Id.* at 561-63.

[50] COHEN, *supra* note 20, at 83.

[51] WARREN, *supra* note 18, at 757-59.

[52] Charles Warren has written that it is a "matter of extreme doubt" whether Jackson actually made this statement. *Id.* at 759.

[53] *See* COHEN, *supra* note 20, at 83. The pardon did not diminish Georgia's efforts to remove the Cherokees, who were forced to move west on what is known as the "Trail of Tears." *Id.* at 92. The forced removal of the Cherokees was part of a much larger effort to remove eastern tribes. *Id.*

[54] *Worcester*, 31 U.S. (6 Pet.) at 549.

[55] *Id.* at 548.

[56] COHEN, *supra* note 20, at 231.

[57] United States v. Wheeler, 435 U.S. 313, 322-23 (1978) (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (Gov't Printing Office 1945) (1942)).

[58] United States v. Mazurie, 409 U.S. 544, 557 (1975). *See also* Talton v. Mayes, 163 U.S. 376 (1896).

[59] 31 U.S. (6 Pet.) at 559.

regulation. It is noteworthy that the Court reached that result in a case in which the state was attempting to regulate non-Indians entering onto Indian country. To be sure, the earlier *Cherokee Nation* decision determined that tribes do not have the sovereign status of foreign nations and have relinquished some aspects of their sovereignty. The two Cherokee Nation cases together, however, made clear that any relinquishment of tribal sovereignty is a matter for the federal government, not the individual states. As "domestic dependent nations," tribes may be forced to surrender some of their sovereignty to the United States but they did not cede any of their independence to the states.

The Cherokee cases served as the foundation for federal Indian law. The Court frequently relied on these cases in affirming the dual principles that Indian tribes retain inherent sovereignty and that this sovereignty is not subject to restriction by state governments.[60] The 1978 decision of *United States v. Wheeler*[61] is a more recent illustration of the Court's recognition of the inherent sovereignty of Indian tribes. The defendant in *Wheeler* was an Indian who had pled guilty to disorderly conduct in the Navajo Tribal Court.[62] The United States subsequently indicted him for rape arising out of the same incident and attempted to prosecute him in federal court under the Major Crimes Act.[63] The issue before the Court was whether the Double Jeopardy Clause of the Fifth Amendment barred the federal prosecution.[64] The Ninth Circuit Court of Appeals ruled that Indian tribes derive their power to punish from the federal government, which has plenary power over the tribes.[65] As a result, the Court of Appeals held that the dual sovereignty concept[66] did not apply and that the Double Jeopardy Clause precluded the federal prosecu-

[60] *Worcester* is among the most often cited Supreme Court decisions. It is reported that of the pre-Civil War Supreme Court opinions, only three (Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), and United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824)) have been cited more during the 1970s and 1980s. David Getches et al., Cases and Materials on Federal Indian Law 125 (4th ed. 1998).

[61] United States v. Wheeler, 435 U.S. 313 (1978).

[62] *Id.* at 314-15.

[63] *See* 18 U.S.C. § 1153 (1994).

[64] *Wheeler*, 435 U.S. 313, 316.

[65] United States v. Wheeler, 545 F.2d 1255, 1257 (9th Cir. 1976).

[66] The dual sovereignty concept provides that successive prosecutions under the laws of separate sovereigns do not subject the defendant to double jeopardy. *See* Bartkus v. Illinois, 359 U.S. 121, 137 (1959).

tion.[67] In reversing, the Supreme Court determined that the lower court should have applied the dual sovereignty concept and, thus, the Double Jeopardy Clause did not bar the federal prosecution for rape.[68] The Court observed that the power to punish offenses committed by tribal members, "which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly . . . . It follows that when the Navajo Tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government."[69] The Court further explained that "until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[70]

The Court also relied on the Cherokee Nation cases in resolving a dispute over jurisdiction to entertain a claim by a non-Indian against a Navajo Indian who lived on the Navajo Reservation. In *Williams v. Lee*,[71] the non-Indian plaintiff, who operated a general store on the Reservation, sued the Indian defendant and his wife in state court to collect for goods sold on credit.[72] The defendants moved to dismiss the state court action on the ground that only the tribal court had power to hear the case.[73] The Arizona Supreme Court concluded that the state court had jurisdiction, ruling that state courts can exercise jurisdiction in civil suits by a non-Indian against an Indian unless federal law directs otherwise.[74] The Supreme Court reversed, holding that the Navajo Tribal court has jurisdiction exclusive of the state courts.[75] In so doing, it recognized that over the years the principles of the Cherokee cases had been modified where essential tribal relations were not involved and the rights of Indians were not jeopardized.[76] Justice Black's opinion for a unanimous Court, however, stressed that the "basic policy of

[67] *Wheeler*, 545 U.S. at 1258.
[68] *Wheeler*, 435 U.S. at 332.
[69] *Id.* at 328.
[70] *Id.* at 323.
[71] *Williams v. Lee*, 358 U.S. 217 (1959).
[72] *Id.* at 217-18.
[73] *Id.* at 218.
[74] *Id.*
[75] *Id.* at 223.
[76] *Id.* at 219.

Worcester has remained."[77] He specifically noted that the Court reached its determination despite the fact that plaintiff was not an Indian: "He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations."[78] Moreover, Justice Black noted in *Williams* that Congress and the Court have consistently assumed that the states have no power to regulate the affairs of Indians on the reservation.[79] The Court, thus, rejected the Arizona court's presumption that state courts have power in such circumstances unless divested by Congress. Instead, it adopted the "infringement test" to determine whether a state has the power to regulate affairs on a reservation.[80] Absent congressional acts, a court must determine whether state action would infringe on the right of reservation Indians to self-government.[81] At another point in the opinion, the Court even suggested that if there is any presumption it would be against state court jurisdiction unless Congress expressly granted such power.[82]

Wheeler and *Williams* represent the trend during the three decades before the Rehnquist Court, a period in which the Court recognized the continuing vitality of the Cherokee Nation cases.[83] The principles that emerged from the Cherokee cases did not remain static but rather evolved over time.[84] As the Court noted in *Williams*, these principles were modified where tribal relations were not involved and where Indian rights were not endangered.[85] The restriction on state power, for example, did not apply in cases where Indians were no longer on the reservation.[86] Moreover, those cases that supported limits on state authority appeared at times to rely on federal preemption rather than on the idea of inherent sovereignty.[87]

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77 *Id.*

78 *Id.* at 223 (citation omitted).

79 *Id.* at 220.

80 *See id.* at 223.

81 *Id.*

82 *See id.* at 221. ("Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which Worcester v. Georgia had denied.")

83 *See generally* Getches, *Beyond Indian Law*, *supra* note 7, at 272.

84 McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 171 (1973).

85 358 U.S. at 219-20.

86 *See* 411 U.S. at 171 (citing Oklahoma Tax Comm'n v. United States, 319 U.S. 598 (1943)).

87 *See* 411 U.S. at 172.

These modifications, however, did not obscure the underlying foundational principles. Indeed, in *McClanahan v. Arizona Tax Commission*, the Court emphasized the significance of tribal sovereignty "with its concomitant jurisdictional limit on the reach of state law"[88] when striking down Arizona's attempt to impose an income tax on a Navajo Indian whose income was derived from reservation activities. The Court's comments in this regard deserve repeating:

> It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens. They have the right to vote, to use state courts, and they receive some state services. But it is nonetheless still true, as it was in the last century, that "(t)he relation of the Indian tribes living within the borders of the United States . . . (is) an anomalous one and of a complex character . . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but *as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided*."[89]

This fundamental understanding of Indian sovereignty and the limits on state power stands in sharp contrast to the approach of the Rehnquist Court during the past two decades. Recent cases[90] have seriously eroded tribal sovereignty. To accomplish this shift, the Court "has forsaken not only [the] foundational cases, but it has ignored most of the intervening 150 years of decisions, including nearly all of its approximately eighty modern era decisions."[91] Rather than relying on the *Worcester* and *Cherokee Na-*

[88] *Id.* at 171.

[89] *Id.* at 172-73 (quoting United States v. Kagama, 118 U.S. 375, 381-82 (1886)) (emphasis added) (footnotes omitted). While *McClanahan* involved state taxation of Indians, its analysis and strong endorsement of tribal sovereignty might support a similar ruling if the state attempted to impose an income tax on non-Indians for income derived from reservation activities. *See* Getches, *Conquering the Cultural Frontier*, *supra* note 7, at 1591.

[90] *See*, *e.g.*, Nevada v. Hicks, 533 U.S. 353 (2001); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); Strate v. A-1 Contractors, 520 U.S. 438 (1997); Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997); Seminole Tribe v. Florida, 517 U.S. 44 (1996); Hagen v. Utah, 510 U.S. 399 (1993); South Dakota v. Bourland, 508 U.S. 679 (1993); Blatchford v. Native Vill., 501 U.S. 775 (1991). Sarah Krakoff reported that since 1991, the Court has decided twenty-nine Indian law cases, and twenty-three of them were decided against the tribe or tribal litigants. Krakoff, *supra* note 7, at 1178.

[91] Getches, *Beyond Indian Law*, *supra* note 7, at 274. "Since the 1992 Term, only

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tion line of cases, the current Court relies heavily on the relatively recent decisions in *Oliphant v. Suquamish Indian Tribe*[92] and *Montana v. United States*[93] to determine the extent of tribal sovereignty. Indeed, the Court appears to have simply disregarded *Worcester* and instead designated *Montana* as the "pathmarking case"[94] in this area.

In both *Oliphant* and *Montana*, the Court confronted the issue of tribal authority over nonmembers of a tribe. The question in O*liphant* was whether tribal court could exercise criminal jurisdiction over non-Indians who commit offenses on the reservation.[95] The Tribe argued that tribal power in such circumstances is an essential component of its inherent sovereignty.[96] The Ninth Circuit Court of Appeals agreed, ruling that the "power to preserve order on the reservation . . . is a sine qua non of the sovereignty that the Suquamish originally possessed."[97] The Supreme Court, however, reversed, concluding that tribes do not have inherent authority to exercise criminal jurisdiction over non-Indians.[98] The Court first determined that Congress had not affirmatively authorized tribal court jurisdiction over non-Indians.[99] It then found that, although not conclusive, the "commonly shared presumption of Congress, the Executive Branch, and lower federal courts" was against such jurisdiction.[100] Finally, the Court conceded that tribes retain elements of quasi-sovereigns but noted that under *Cherokee Nation* they cannot exercise powers that are inconsistent with their dependent status.[101] The Court explained that Indian tribes come under the territorial sovereignty of the United States and relinquish their

two majority opinions of the Supreme Court in Indian law have cited any of the Marshall trilogy cases for support." *Id.*

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

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

[94] *Strate*, 520 U.S. at 445.

[95] *Oliphant*, 435 U.S. at 195.

[96] *Id.* at 195-96.

[97] Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976).

[98] *Oliphant*, 435 U.S. at 212. In *Duro v. Reina*, 495 U.S. 676, 688 (1990), the Court extended *Oliphant* and held that tribal courts could not exercise criminal jurisdiction over Indians who were not members of the tribe. Congress overturned *Duro*, making clear that tribal courts have criminal jurisdiction over Indians even if they are not members of the tribe. *See* 25 U.S.C. § 1301(4) (1994). *See also* Deloria & Newton, *supra* note 7.

[99] 435 U.S. at 195.

[100] *Id.* at 206.

[101] *Id.* at 208.

power to the extent it might conflict with federal interests.[102] In the criminal context, the United States has an overriding interest to ensure basic procedural and substantive protections to its citizens, some of which are not required in tribal courts.[103]

In *Montana*,[104] the Court relied on *Oliphant* in deciding whether the Crow Tribe had power to regulate fishing and hunting by non-Indians on the reservation. Both the Tribe and the State asserted authority to regulate these activities of non-Indians. The United States sued Montana to resolve the dispute, seeking a declaratory judgment that the Tribe and United States have sole regulatory authority within the reservation and an injunction directing Montana to obtain tribal permission to issue hunting and fishing licenses within the reservation.[105] At the outset, the Court agreed that the Tribe had authority to regulate, and even prohibit, nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe.[106] It ruled, however, that the Tribe had no authority to regulate nonmembers who hunt or fish on reservation land owned in fee by nonmembers of the Tribe.[107] In so doing, it cited *Oliphant* for the general proposition that inherent tribal sovereignty does not extend to the activities of nonmembers.[108] The Court then recognized two exceptions to this general principle. First, a tribe has inherent power to regulate the activities of nonmembers who "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or

102 *Id.* at 209. The relinquishment of power is not voluntary but is part of the colonial process. *See* Frickey, *Common Law*, *supra* note 7, at 37. As Frickey argues, *Oliphant* represents an extension of the Marshall Court cases, which

> considered tribes subservient to clear assertions of authority deemed necessary to the colonizing government to conduct the colonial process efficiently. *Oliphant* involved no conflict of this sort. Congress had never outlawed tribal criminal jurisdiction over non-Indians, and such tribal conduct did not threaten to undermine Congress's authority over Indian affairs.

Id. at 38.

103 *See* Talton v. Mayes, 163 U.S. 376, 382-85 (1896). The Indian Civil Rights Act, 25 U.S.C. §§ 1301-03 (1994), extends some constitutional provisions to Indian tribes.

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

105 *Id.* at 549.

106 *Id.* at 557.

107 *Id.* at 565-67.

108 *Id.* at 565. The Court used "nonmember" and "non-Indian" interchangeably. *See id.*

other arrangements."[109] Second, a tribe retains inherent sovereign power to regulate the conduct of non-Indians on fee land within the reservation "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[110] The Court found that neither exception applied in this case.[111] The non-Indian fishermen and hunters did not enter any kind of consensual relationship with the Tribe.[112] Additionally, there was no evidence that non-Indian hunting and fishing on fee lands threatened the Crow Tribe's economic or political security.[113]

The significance of *Oliphant* and *Montana* lies not only in the results but also in the method for finding restriction on tribal sovereignty. In both cases, the Court found that tribal sovereign power was divested despite the absence of any explicit federal legislation authorizing that determination. It assumed a role for the judiciary that had been reserved for Congress, thereby ignoring its previous conclusion in *Lone Wolf v. Hitchcock*,[114] 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."[115]

In some respects, the decision in *Montana* is more significant than *Oliphant* in its departure from the Cherokee cases. *Montana* limits the civil regulatory power of the tribe, rather than

[109] *Id.* The Court cited *Williams v. Lee*, 358 U.S. 217, 223 (1959), as an example of this exception.

[110] *Montana*, 450 U.S. at 566.

[111] *See id.*

[112] *Id.*

[113] *Id.*

[114] Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

[115] *Id. See also* United States v. Mazurie, 419 U.S. 544, 554 (1975), in which the Court held that Congress had power to delegate to a tribe the authority to regulate the distribution of liquor by non-Indians on fee land within the reservation. The Court concluded:

> It is immaterial that respondent is not an Indian. He was on the reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.

Id. at 558 (quoting *Lone Wolf*, 187 U.S. at 564). David Getches has argued that in recent years the Court has assumed the role previously played by Congress in deciding the scope of tribal powers. *See* Getches, *Conquering the Cultural Frontier*, *supra* note 7.

criminal court jurisdiction, and thus has broader application. More important, while citing *Oliphant*, the Court in *Montana* abandoned the rationale underlying that decision. *Oliphant* was based on the articulated notion that tribes, as "domestic dependent nations," lost some of their inherent sovereignty, but only to the federal government. In later explaining *Oliphant*, the Court was careful to note that tribal powers are not implicitly divested by virtue of a tribe's dependent status.[116] Rather, the Court has found such divestiture only in cases "where the exercise of tribal sovereignty would be inconsistent with the *overriding interests of the National Government*, as when the tribes seek to . . . prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights."[117] In *Montana*, there was no overriding federal interest that would justify a loss of tribal sovereignty. Indeed, the United States brought the lawsuit on behalf of the Crow Tribe, advocating that the Tribe had inherent authority to regulate nonmember fishing and hunting, even on fee held lands.[118] In a subtle but important way, the Court redefined the meaning of a tribe's dependent status. It announced that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes. . . ."[119] In this brief statement, the Court eliminated the previous requirement of defining that status in terms of the tribe's relationship with the federal government.

It is possible to read *Montana* narrowly as restricting tribal sovereignty only over lands that are within the reservation and held in fee by nonmembers. Justice Stewart, writing for the Court in that case, explicitly observed that the issue was a "narrow one."[120] To be sure, this reading excludes a large amount of land from the reach of a tribe's inherent sovereign powers. During the Allotment Period, which began in 1887 with the passage of the Dawes Act[121] and ended in 1934 with the enactment of the Indian Reorganization Act,[122] the federal government engaged in a massive effort to force assimilation of Indians by dividing

116 *See* Washington v. Confederated Tribes, 447 U.S. 134, 153 (1980).
117 *Id.* at 153-54 (emphasis added).
118 Montana v. United States, 450 U.S. at 544, 564 (1981).
119 *Id.*
120 *Id.* at 557.
121 25 U.S.C. §§ 334, 339, 341, 342, 348, 349, 354, 381 (1994).
122 25 U.S.C. §§ 461-79 (1994).

and allotting reservation lands. Individual Indians received parcels of land, and the remaining surplus reservation land was then opened to non-Indians.[123] President Theodore Roosevelt described the Dawes Act as "a mighty pulverizing engine to break up the tribal mass."[124] The Act produced its intended results, reducing the Indian land holdings from 138 million acres in 1887 to 52 million acres when the allotment policy ended forty-seven years later.[125] It also produced the checkerboard aspect of reservations with some land held by the tribes or by the United States in trust for the tribes, and other land held in fee by nonmembers of the tribe. This is a source of the problem in *Montana*, where the Tribe attempted to regulate nonmember activities on fee held land within the reservation borders.

Recent cases indicate that the Court does not intend to read *Montana* narrowly and that it has emerged as the governing case in resolving claims of inherent tribal sovereignty. In *Strate v. A-1 Contractors*,[126] the Court addressed the issue of whether a tribal court had power to entertain a civil action brought against nonmembers for injuries resulting from a car accident that occurred on a public highway within the reservation. The Court relied on *Montana* to resolve this issue even though *Strate* involved a tribe's adjudicative powers, rather than its legislative authority.[127] The Court announced that "[a]s to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."[128] It also ruled that *Montana* governs notwithstanding the fact that the land involved in *Strate* was not fee land but was land held by the United States in trust for the Tribe.[129] On this point, the Court concluded that the right-of-way that North Dakota acquired for the highway renders the land "equivalent, for nonmember governance purposes, to alienated, non-Indian land."[130]

Having concluded that the *Montana* rule applies, the Court

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123 For a detailed discussion of Allotment, *see* COHEN, *supra* note 20, at 612-28.

124 POMMERSHEIM, *supra* note 7, at 19 (quoting STEVEN TYLER, A HISTORY OF INDIAN POLICY 104 (1973)).

125 *Id.* at 20.

126 Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997).

127 *See id.*

128 *Id.* at 453. In *Nevada v. Hicks*, 533 U.S. 353, 358 (2001), the Court noted that this "formulation leaves open the question whether a tribe's adjudicative jurisdiction over nonmember defendants *equals* its legislative jurisdiction."

129 *Id.* at 456.

130 *Id.* at 454.

held that the tribal courts lack power to entertain the lawsuit.[131] It found that the exercise of authority did not fall within either of the *Montana* exceptions.[132] It determined that the dispute does not fit within the exception that allows tribal authority where nonmembers have entered into a consensual commercial relationship with the tribe.[133] This case arose out of a highway accident that did not involve the Tribe or any consensual relations with the Tribe.[134] The dispute, the Court concluded, also did not threaten the political integrity, economic security, or health and welfare of the Tribe.[135] With respect to this exception, the Court noted that those who drive negligently on highways running through a reservation certainly might jeopardize the safety of tribal members.[136] However, the second exception does not extend to this kind of interest.[137] Construing the exception narrowly, the Court held that it applies only where the tribal interest relates directly to self-government: "what is necessary to protect tribal self-government or to control internal relations."[138] Tribal court jurisdiction in this matter, it concluded, is not necessary to protect the right of self-government.[139] As a result, the plaintiffs were forced to take their case to state court, which would resolve the dispute that arose on Indian country.

Montana also served as the basis for the Court's determination in *Atkinson Trading Co. v. Shirley*[140] that the Navajo Nation lacked authority to impose an occupancy tax on nonmembers who stay at a hotel that is located on fee land within the Navajo reservation.[141] Relying on the general proposition adopted in *Montana*, the Court concluded without difficulty[142] that the Nation had no inherent[143] authority to impose the tax because the

[131] *Id.* at 453.

[132] *Id.* at 459. The Court recognized that Congress could authorize the exercise of tribal power but did not do so in this case. *See id.* at 453.

[133] *Id.* at 457.

[134] *Id.*

[135] *Id.* at 459.

[136] *Id.* at 458.

[137] *Id.*

[138] *Id.* at 459 (quoting Montana v. United States, 450 U.S. 544, 564 (1981)).

[139] *Id.*

[140] Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

[141] *Id.* at 659. With respect to the scope of tribal authority to tax activities on the reservation, see generally Washington v. Confederated Tribes, 447 U.S. 134 (1980).

[142] The Court stated that, "as in *Strate*, we apply *Montana* straight up." *Atkinson*, 532 U.S. at 654.

[143] Congress had not authorized the tax by statute or treaty. *Id.* at 659.

nonmember activity occurred on non-Indian fee land.[144] The significance of the status of the land was underscored when the Court in *Atkinson* distinguished *Merrion v. Jicarilla Apache Tribe*,[145] which upheld a severance tax imposed by the Tribe on non-Indian lessees who extracted oil and gas from tribal lands. The difference between *Atkinson* and *Merrion* lies in the fact that the latter involved activity occurring on tribal lands.[146]

The Navajo Nation could prevail in *Atkinson* only if it established that the activity fell within one of the *Montana* exceptions. The Nation argued that the hotel proprietor, who was required to collect and remit the tax to the Navajos, and the guests have entered into a consensual relationship with the Nation.[147] The hotel and its guests benefit from police, fire, and medical services provided by the Navajos, thus justifying imposition of the tax.[148] The Court determined, however, that the availability of tribal services does not create the requisite connection between the Tribe and the nonmember and, thus, is insufficient to sustain tribal civil authority over nonmembers on fee land.[149] Similarly, it failed to see how the operation of the hotel threatens the political integrity, economic security, or health and welfare of the Nation.[150]

The Court's most recent treatment[151] of tribal power exposes the extent of the judicially imposed erosion of Indian tribal sovereignty. In *Montana*, the Court "readily" agreed that the Tribe could regulate the activities of nonmembers on land that belongs to the Tribe or is held in trust for the Tribe.[152] *Montana* addressed the narrow question of the scope of tribal power over nonmember activity on reservation land owned in fee by nonmembers.[153] Moreover in *Strate*, the Court was careful to stress that the stretch of highway was similar to nonmember fee land.[154]

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144 *Id.*

145 *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

146 *Atkinson*, 532 U.S. at 653.

147 *Id.* at 654.

148 *Id.* at 654-55.

149 *Id.* at 655. The Court also rejected the suggestion that the hotel proprietor consented to the tax. *Id.* at 656.

150 *Id.* at 657.

151 Nevada v. Hicks, 533 U.S. 353 (2001).

152 Montana v. United States, 450 U.S. 544, 557 (1981).

153 *Id.*

154 *See* Strate v. A-1 Contractors, 520 U.S. 438, 454 (1997).

In the recent decision of *Nevada v. Hicks*,[155] the Court abandoned even this pretense regarding the status of the land.

In *Hicks*, the issue was whether the tribal court had power to entertain a civil action brought by a tribal member against state game wardens who entered tribal land to execute a search warrant for evidence of a crime committed off the reservation.[156] Although the precise issue concerned the tribal court's power, the Court treated the inquiry as whether the tribe had regulatory authority over state officers who enter tribal lands, noting that a tribe's adjudicative jurisdiction does not exceed its regulatory power.[157] Hicks and the United States as amicus argued that because the activity occurred on tribal land, the Tribe could exercise regulatory authority over nonmembers as part of its inherent sovereignty.[158] In a rather cryptic fashion, Justice Scalia's majority opinion responded: "Not necessarily."[159] He stated that *Montana's* general rule of no inherent authority over nonmembers applies to both Indian and non-Indian land.[160] The status of the land is not a dispositive factor in deciding whether to apply *Montana*'s general rule but is "only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'"[161]

The shift here is significant. While the previous opinions were not models of clarity,[162] they seemed to support the proposition that the status of the land triggered the application of a presumption regarding tribal authority over nonmembers. A tribe was presumed to have inherent powers over nonmember activities

155 Nevada v. Hicks, 533 U.S. 353 (2001).

156 *Id.* at 355. The search warrant that was the subject of the suit was issued by the state court and was authorized by the tribal court as well. *Id.* at 356. Tribal officers and state wardens searched Hicks' home but found no evidence to support the claim that he had illegally killed bighorn sheep. *Id.* Hicks sued the Tribal Judge, the tribal officers, the Tribe, the state wardens, and the State asserting tortuous conduct as well as constitutional violations by the defendants. *Id.* at 356-57. When the case reached the Supreme Court, the only remaining claims were against the state wardens in their individual capacities. *Id.* at 357.

157 *Id.* at 357-58. While the Court cited *Strate* for the proposition that a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction, *id.*, it left open the question whether the two are equal, *see id.* at 374.

158 *Id.* at 359.

159 *Id.*

160 *Id.* at 360.

161 *Id.*

162 *See*, *e.g.*, Brendale v. Confederated Tribes & Bands, 492 U.S. 408 (1989).

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occurring on tribal land or land held in trust for the tribe unless such authority was divested by Congress or by virtue of the tribe's dependent status. Conversely, in the absence of congressional authorization, a tribe was presumed to have no inherent authority over nonmember activities on fee held land within the reservation unless the activities are consensual or relate directly to tribal self-government. Under *Hicks*, the presumption is against inherent tribal sovereignty over nonmembers regardless of the status of the land.[163] To prevail, a tribe must establish that the exercise of inherent[164] sovereignty fits within one of the *Montana* exceptions, and the status of the land is relevant only in determining the applicability of the exceptions.

It is possible that *Hicks* will be read narrowly in the future and applied only in instances where the tribe attempts to exercise authority over state officials on tribal land. The majority stated that the holding is limited to the issue of jurisdiction over state officials, and that it leaves open the general question of tribal jurisdiction over nonmembers.[165] Moreover, there is some language in the majority opinion suggesting that the Court was especially concerned about subjecting state officers to tribal regulatory or adjudicative authority. Justice Scalia stated, for example, that tribal ownership of the land was not dispositive when weighed against the "State's interest in pursuing off-reservation violations of its laws."[166] At another point in the opinion, he observed that self-government and internal relations were not at issue because the issue concerned the application of tribal authority over a "narrow category of outsiders."[167] Similarly, he noted that when *Montana* referred to consensual arrangements it meant private arrangements and "did not have in mind States or state officers acting in their governmental capacity . . . ."[168] Also, in response to Justice O'Connor's concurring opinion, Scalia wrote that the majority does not say that state officers cannot be regulated by the tribe but only that "they cannot be regulated in the performance of their law-enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of

[163] *Hicks*, 533 U.S. at 376.

[164] The *Hicks* Court recognized that Congress could confer regulatory power. *See id.* at 359.

[165] *Id.* at 358 n.2.

[166] *Id.* at 370.

[167] *Id.* at 371.

[168] *Id.* at 372.

Montana analysis."[169]

Despite such limiting language, there is good reason to fear that Justice O'Connor is correct in warning that the majority issued a broad holding that substantially altered the principles governing tribal sovereignty.[170] Justice Scalia's opinion quoted *White Mountain Apache Tribe v. Bracker*[171] for the proposition that the Court long ago departed from Chief Justice Marshall's view that state law has no force within the reservation.[172] However, in so doing, he omitted that *Bracker* followed this proposition with the statement that "[a]t the same time we have recognized that the Indian tribes retain 'attributes of sovereignty over both their members *and* their territory.'"[173]

The majority's treatment of *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*[174] provides a further sign that Justice O'Connor's concern in *Hicks* was legitimate. *National Farmers Union*, a case decided sixteen years before *Hicks*, involved a federal court action by nonmembers challenging the power of a tribal court to hear a civil action against them.[175] The Court adopted a prudential rule requiring the federal court in such circumstances to "stay its hand" until the tribal court has an opportunity to determine its own jurisdiction.[176] Two years later, in explaining the *National Farmers Union* exhaustion rule, the Court explicitly recognized that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty" and that tribal courts presumptively have civil jurisdiction over cases arising from these activities.[177] *Hicks*, however, appears to modify the *National Farmers Union* rule by

[169] *Id.* at 373.

[170] *See id.* at 401 (O'Connor, J., concurring). Although Justice O'Connor, joined by Justices Stevens and Breyer, concurred in the result on the basis of official immunity, her opinion dissented from much of the majority's reformulation of *Montana*. *See id.*

[171] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980).

[172] *Hicks*, 533 U.S. at 361.

[173] *Bracker*, 448 U.S. at 142 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)) (emphasis added). Justice Scalia explains *Worcester* as based on treaty language guaranteeing the Cherokees that they would not be subjected to state jurisdiction. *Hicks*, 533 U.S. at 361 n.4.

[174] Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985).

[175] *Id.* at 847.

[176] *Id.* at 857.

[177] Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987). For a discussion of *Iowa Mutual* and *National Farmers Union*, see Frank R. Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329 (1989).

finding that exhaustion is unnecessary if tribal sovereignty does not reach the activity that gives rise to the lawsuit.[178] The Court made clear in *Hicks* that *National Farmers Union* was not meant to expand the scope of inherent sovereignty conferred by the *Montana* line of cases.

Another indication of the breath of the majority opinion is the way it simply glossed over the fact that by the time the case reached the Supreme Court the only issue concerned tribal authority over state officials in their personal capacities. It is well settled that while state officials may not be sued for damages in their official capacities, they may be sued in their personal capacities, as such suits are not barred by the Eleventh Amendment.[179] In personal capacity suits, the state's interest is weaker because the public officials are held personally liable and any payment is not from public funds. Certainly, imposing liability on state officers even in their personal capacities may have an effect on the performance of public duties. This concern, however, is addressed not by dismissing the lawsuit but by allowing the officials to assert a qualified immunity.[180] In its haste to reach the underlying sovereignty issue, the *Hicks* majority ignored this body of law, stating that the distinction between personal and official capacity suits is "irrelevant."[181] By reaching out to decide the sovereignty question, the Court signaled that it may be focused on much more than the limited issue of tribal power over state officers.

Finally, three of the Justices in the *Hicks* majority—Justices Souter, Kennedy and Thomas—were prepared to make explicit that a tribe's inherent sovereign powers do not extend to *any* nonmembers, whether state officers or private parties, unless the activity falls within one of the *Montana* exceptions.[182] In all cases, under their view, the status of the land would simply be a factor in applying the exceptions.[183] The current Court has not

[178] *See Hicks*, 533 U.S. at 369. *See also* Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997).

[179] Hafer v. Melo, 502 U.S. 21, 31 (1991).

[180] *Id.*

[181] 533 U.S. at 365. The majority paraphrased an 1879 opinion, *Tennessee v. Davis*, 100 U.S. 257, 263 (1879), for the proposition that a state can act only through its officers and that to impose liability might interfere with governmental operations. It also mentioned that permitting damages suits might inhibit public officials. 533 U.S. at 365. These concerns, of course, were addressed in *Hafer*.

[182] *Id.* at 375 (Souter, J. concurring).

[183] *Id.* at 375-76.

yet addressed the issue but it appears ready to apply *Montana* to any nonmember activity even on land held by the tribe or by the United States in trust for the tribe.

It is noteworthy that in *Montana* and the more recent cases, the Court announced limitations on Indian sovereignty without finding any congressional support for its pronouncements.[184] In a related series of cases, the Court attempted to justify its restrictions on Indian sovereignty by finding that Congress intended the result. The Court found in some circumstances, for example, that Congress intended to diminish the reservation area and, thus, open it to state regulation.[185] Similarly, in other instances, the Court determined that Congress intended to abrogate specific treaty rights, thereby restricting the tribe's powers.[186]

Commentators have offered a variety of explanations for the Court's abandonment of the Cherokee cases, its erosion of tribal sovereignty, and the related elevated role for state authority. Frank Pommersheim suggested, for example, that the trend can be explained in terms of the role of private property rights.[187] The allotment period not only altered tribal jurisdiction but also granted individual property rights to nonmembers on fee lands. He argued that the Court appears to treat that "bundle of rights" as including the "'right' to be free from tribal regulation in certain activities that have a 'private' character (such as hunting and fishing or basic land use), unless such activities go too far, butting up against the concerns set out in the *Montana* proviso."[188] While Pommersheim does not mention it, such a concern for the individual property interests of non-tribal members is consistent with the more general private property rights theme reflected in takings clause cases.[189] Interestingly, the sovereignty cases reveal that the Court does not appear to have an equally high regard for the property interests of Indian tribes.[190]

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184 *See generally* Getches, *Conquering the Cultural Frontier*, *supra* note 7.

185 *See*, *e.g.*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 358 (1998). *See generally*, Laurence, *supra* note 7.

186 *See*, *e.g.*, South Dakota v. Bourland, 508 U.S. 679, 697 (1993).

187 POMMERSHEIM, *supra* note 7, at 151.

188 *Id.*

189 *See*, *e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992). *But see* Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

190 *See* Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 3 (1991) (stating that Indian law cases can "teach us a great deal about both the social

The recent Indian law developments are also consistent with the federalism jurisprudence that is a fundamental component of the Court's agenda.[191] Relying on the Tenth Amendment,[192] the Eleventh Amendment,[193] a narrow interpretation of congressional power,[194] and "postulates implicit in the constitutional design,"[195] the current Court has been a steadfast champion of states' rights. Two of the leading federalism cases arise in the Indian law context.[196] While the cases following *Montana* do not invoke federalism principles directly, the results in these cases are in harmony with the states' rights theme, not simply eroding tribal power but also expanding state jurisdiction in Indian country.

The *Montana* line of cases might also be viewed as another example of the current Court's renewed judicial activism at the expense of congressional power.[197] That activism is perhaps best represented in the recent cases striking down federal statutes as beyond the scope of congressional power under the Commerce Clause or the Fourteenth Amendment.[198] The recent tribal sovereignty cases have not directly addressed the scope of congressional power. The results, however, fit within the judicial activist trend. Historically, Congress regulated Indian affairs and restrictions on inherent tribal powers were matters for congressional,

meaning of property rights and about the just and unjust exercise of governmental power."); Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1298 (2001) (stating: "The Supreme Court's recent jurisprudence jeopardizes remaining tribal rights to land and political autonomy.").

191 *See* Getches, *Beyond Indian Law*, *supra* note 7.

192 U.S. CONST. amend. X. *See*, *e.g.*, New York v. United States, 505 U.S. 144 (1992).

193 U.S. CONST. amend. XI. *See*, *e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Seminole Tribe v. Florida, 517 U.S. 44 (1996).

194 *See, e.g.*, Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

195 Alden v. Maine, 527 U.S. 706, 729 (1999). *See also* Fed. Mar. Comm'n v. South Carolina State Ports Auth., 535 U.S. 743 (2002). *See generally* Daan Braveman, *Enforcement of Federal Rights Against the States:* Alden *and Federalism Non-Sense*, 49 AM. U. L. REV. 611 (2000).

196 *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997); Seminole Tribe v. Florida, 517 U.S. 44 (1996). *See generally* Martha A. Field, *The Seminole Case, Federalism, and the Indian Commerce Clause*, 29 ARIZ. ST. L.J. 3 (1997).

197 *See* Getches, *Beyond Indian Law*, *supra* note 7.

198 *See*, *e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000); Printz v. United States, 521 U.S. 898 (1997); United States v. Lopez, 514 U.S. 549 (1995).

not judicial, action.[199] As David Getches argues in reviewing the Indian law developments, the Court has now usurped that role for itself, "considering and weighing cases to reach results comporting with the Justices' subjective notions of what the Indian jurisdictional situation ought to be."[200]

In a separate attempt to explain the judicial trend, Scott Gould argues that the Court has moved from a concept of Indian sovereignty based on land to a notion premised on consent.[201] Under this model, inherent sovereignty extends to tribal members because they have implicitly or explicitly consented to the exercise of tribal power. Similarly, tribal sovereignty exists over those nonmembers who have entered into a consensual relationship with the tribe. Gould wrote: "This judicial shift from territory to consent suggests that a new paradigm, the consent paradigm, has substantially replaced inherent sovereignty."[202]

Finally, Philip Frickey, in his recent review of tribal sovereignty and the Court's divestiture of tribal power over nonmembers, concluded that there really is no coherent theory that can explain the trend.[203] He agreed that the Court has been assuming authority in an area previously thought to be within the scope of Congress' responsibilities.[204] Moreover, as he stated, "A half-millennium after the colonial process began, in our time of great skepticism concerning colonization, our least democratic branch has become our most enthusiastic colonial agent."[205] In the end, however, he found that the case law is "muddled" and is "more an unreflective judicial trend rooted in apparent uneasiness with tribal authority than a paradigmatic, entrenched doctrinal shift."[206]

II

Them and Us

Whether or not the trend can be explained by a consistent theory, it does signal a judicial retreat from earlier cases supporting inherent tribal sovereignty. This section explores the suggestion

199 *See* Cohen, *supra* note 20, at 217-20.
200 Getches, *Conquering the Cultural Frontier*, *supra* note 7, at 1573.
201 Gould, *supra* note 7, at 814.
202 *Id.*
203 Frickey, *Common Law*, *supra* note 7, at 81.
204 *Id.* at 7.
205 *Id.* (footnotes omitted).
206 *Id.* at 8.

that despite this retreat and the apparent shift in doctrine, a common theme is found in both the older and the modern cases. From the Marshall trilogy to the present, the Court's treatment of tribal sovereignty has been premised on an underlying conception of Indian identity that assumes Indian peoples are the "other." While the cases do not fit a pattern perfectly, they seem to incorporate an implicit understanding of Indians as "them" rather than "us," to use Reagan's terms.

The construction of "Indian-ness" embodied in the cases is more than simply a literal distinction between Indians and non-Indians. Rather, it is an understanding of Indians as either being different or assimilated. The Court appears more likely to recognize inherent tribal sovereignty when it views Indian peoples as different, and is less likely to do so when it perceives Indians as behaving like dominant groups by, for example, engaging in economic development activities. This view of Indian identity forecloses the possibility that Indian peoples might choose to be both, to behave like dominant groups in some respects while preserving their cultural and political differences.

The Marshall trilogy itself illustrates the Court's assumption of difference in resolving the sovereignty issues. While *Worcester* included a strong, perhaps the strongest, statement in support of Indian sovereignty, it was built on a foundation of racism and on conceptions of Indians as different. Only nine years before *Worcester*, Chief Justice Marshall wrote the opinion in *Johnson v. McIntosh*,[207] which held that Indian tribes did not have power to convey title to their own land. In *Johnson,* Marshall relied on the principle that discovery gave to the discovering nation the sole right to acquire the land from the native peoples and establish settlements.[208] The European nations used the discovery doctrine to take as much land as they could obtain and to avoid war with each other.[209] Marshall incorporated the discovery doctrine into the law of the United States, observing that the rights held by the British passed to the United States.[210] He concluded

[207] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 604-05 (1823).

[208] *Id.* at 572-73.

[209] *Id.* at 573.

[210] *Id.* at 588. Marshall stated: "The British Government, which was then our government, and whose rights have passed to the United States, asserted title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the titles which occupancy gave to them." *Id.*

that "[c]onquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."[211] As Robert Williams has persuasively described, Marshall employed the language of conquest to legalize the "colonizing crusade against the American Indians . . . ."[212]

The *Johnson* Court explicitly invoked notions of difference in justifying its decision. Marshall observed that in the normal course, the conquering nations impose limits on themselves, recognizing that the conquered should not be oppressed because they are usually assimilated into the nation.[213] He explained: "The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and wise policy requires, that the rights of the conquered to property should remain unimpaired . . . ."[214] This general approach to the relations of the conqueror and conquered, however, could not apply to the Indians, according to Marshall.[215] He described Indians as "fierce savages"[216] and as a "people with whom it was impossible to mix . . . ."[217] Finally, in denying Indians the natural right to dispose of property, Marshall relied on their difference, which he described as part of the "actual state of things . . . ."[218] He conceded that the Court's decision denying Indians the right to transfer their property may be "opposed to natural right, and to the usages of civilized nations" but found such a determination is indispensable given the "actual condition of the two people . . . ."[219]

Marshall and the Supreme Court, of course, did not invent the Indian as the "savage" but rather continued a view traced from the very early European settlers. Rennard Strickland reported

[211] *Id.* As a result of *Johnson*, "Indian title," sometimes referred to as "aboriginal title," is a right of occupancy subject to the federal government's power to extinguish that right. COHEN, *supra* note 20, at 487.

[212] ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 317 (1990).

[213] *Johnson*, 21 U.S. (8 Wheat.) at 1589.

[214] *Id.*

[215] *Id.* at 590.

[216] *Id.*

[217] *Id.*

[218] *Id.* at 591.

[219] *Id.* at 591-92.

that woodcuts published in 1509 portray the Indian as a savage and that early sixteenth century settlers described the Indian in subhuman terms.[220] Strickland wrote:

> There is little distinction in these sixteenth-century accounts between the discussion of the "savage Indians" and the exotic birds and flowers of the New World. In truth, the Indian is seen as a different but equally strange variety of new fauna. . . . In this age, considerable time was spent among the ecclesiastics and academics debating the question: Are Indians really people?[221]

In *Johnson*, Marshall incorporated this portrait of the Indian into our law.

The difference theme also served as the justification for declaring in *Cherokee Nation* that Indian tribes are "domestic dependent nations" and that their relation to the United States resembles that of a "ward to his guardian."[222] Chief Justice Marshall noted that the relationship between the Indians and the United States is "unlike that of any other two people in existence" and "is marked by peculiar and cardinal distinctions which exist no where else."[223] Additionally, he noted that the Court could not disregard "the habits and usages of the Indians, in their intercourse with their white neighbors . . . ."[224] In his separate opinion, Justice Johnson described Indian tribes as "nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state."[225] At another point, he argued that the designation as a state could not be applied to "a people so low in the grade of organized society as our Indian tribes most generally are."[226]

In *Worcester* as well, the Court understood Indian tribes to be different and separate from any dominant group. Indeed, that distinctiveness was the very basis for concluding that Georgia laws had no force on Cherokee land. The Court observed that "Indian nations had always been considered as distinct, independent political communities. . . . The very term 'nation,' so gener-

220 STRICKLAND, *supra* note 13, 123-24.
221 *Id.* at 124.
222 Cherokee National v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).
223 *Id.* at 16.
224 *Id.* at 18.
225 *Id.* at 27-28.
226 *Id.* at 21.

ally applied to them, means 'a people distinct from others.'"[227] Similarly, the distinctive characteristic of Indian tribes was reflected in the fact that the United States entered into treaties with the Indians.[228] So too, the Court relied on congressional enactments that treated tribes as distinct communities as a basis for its decision.[229] One of the statutes mentioned by the Court was passed for the purpose of "'introducing among [the Indians] the habits and arts of civilization . . . .'"[230]

The concept of the reservation itself grew out of a desire to separate Indians from the rest of the population. The reservation was not unique to the United States but was used throughout the hemisphere to isolate native peoples with the intent of someday teaching them the ways of the dominant culture.[231] In the United States, the federal government used the reservation to separate Indians for the immediate purpose of preventing violence between the Indians and the settlers.[232] Initially, the Indians were removed to the West, outside of the states; but after the Civil War, federal policy established reservations as "jurisdictional islands"[233] within the states. In *Ex parte Crow Dog*,[234] the Court recognized the sovereignty of these jurisdictional islands when it held that the Sioux tribe had exclusive power to punish one of its members for the murder of another member on the reservation. For our purposes, it is instructive to note that in endorsing a relatively[235] broad view of tribal sovereignty, *Crow Dog*, like *Worcester*, invoked distinct images of the Indian. The Court observed that Indians were viewed as a "dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor, and by education, it was hoped might become

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[227] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

[228] *Id.* at 559.

[229] *Id.* at 556-57.

[230] *Id.* at 557.

[231] NATIVE AMERICAN TESTIMONY, *supra* note 10, at 171.

[232] POMMERSHEIM, *supra* note 7, at 165.

[233] Clinton, *supra* note 35, at 165.

[234] *Ex parte* Crow Dog, 109 U.S. 556, 572 (1883).

[235] The Court did not hold that Congress lacked power to limit tribal sovereignty but rather concluded that Congress had not done so. *See* COHEN, *supra* note 20, at 236. Two years later, in 1885, Congress enacted a law giving the federal courts power over major crimes committed on Indian country and over the murder of one Indian by another. *Id.* at 236-37; *see* 18 U.S.C. § 1153 (1994). *See generally* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (upholding congressional power to abrogate treaty rights and alter reservation boundaries).

a self-supporting and self-governed society."[236]

During the allotment period,[237] the federal government engaged in a program to dismantle the reservations and force assimilation of Indian peoples. "The ultimate goal of the allotment policy was the cultural extinction of tribalism, with the individualized Indians joining the broader American citizenry as self-supporting citizens."[238] Among other things, allotment opened reservation land to non-Indians and created the checkerboard pattern that mixes fee lands and tribal lands. As Philip Frickey points out, tribal sovereignty developed in a relatively simple context, when reservations were for Indians only.[239] Allotment, he observes, undermined the simple "'we/they'"[240] context of sovereignty issues by opening reservation lands to non-Indians.

Although the official allotment policy ended in 1934, the "legacy of allotment" is found in the modern day cases[241] finding congressional intent to diminish the boundaries of a reservation.[242] The controlling principle in these cases is that only Congress has power to diminish the boundaries of a reservation, and diminishment is not to be "lightly inferred."[243] The issue in each case is a matter of congressional intent. Interestingly, however, the Court does not rely simply on statutory language or contemporaneous understandings but also on events that transpired after the enactment of the law.[244] The Court recognized that such reliance on post-enactment events is "an unorthodox and potentially unreliable method of statutory interpretation."[245] Nevertheless, it resorts to Congress's own treatment of the affected land area in the years after the enactment as well as to subsequent demographic data to determine whether Congress intended to diminish the reservation area. The Court said that

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236 *Crow Dog*, 109 U.S. at 569.

237 *See supra* text accompanying notes 121-25.

238 WILKINS, *supra* note 7, at 281.

239 Frickey, *Common Law*, *supra* note 7, at 14.

240 *Id.* at 16.

241 *See*, *e.g.*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); Hagen v. Utah, 510 U.S. 399 (1994); Solem v. Bartlett, 465 U.S. 463 (1984). In the *Montana* line of cases, the Court limited tribal sovereignty by restricting power over nonmembers on reservation lands. In the diminishment cases, the Court limited sovereignty by reducing the land area of the reservation itself. *See* Laurence, *supra* note 7, at 796.

242 Royster, *supra* note 7.

243 *Solem*, 465 U.S. at 470.

244 *Id.* at 471.

245 *Id.* at 472 n.13.

"[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its *Indian character*, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred."[246]

Thus, in concluding that a 1902 congressional enactment intended to diminish the Unitah Indian Reservation, the Court relied in part on the fact that the current population of the area was eighty-five percent non-Indian.[247] Similarly, the Court relied on contemporary demographic data from the 1990s in holding that nearly 100 years earlier Congress intended to diminish the Yankton Sioux reservation.[248] The lesson of these cases is clear: the Court is more likely to find diminished reservation areas and to restrict tribal sovereignty when a geographic area looks more like "us" and less like "them."[249]

The them/us theme is repeated in the Court's discussion of tribal courts. In *Ex parte Crow Dog*,[250] the Court concluded that tribal courts had exclusive jurisdiction to try tribal members who commit crimes against other tribal members on reservation land. In doing so, the Court observed that it would be unfair to subject an Indian to federal court jurisdiction and to try him under federal law.[251] Although the decision supported tribal sovereignty, it did so by invoking notions of difference and images of Indians as savages. The Court stated:

> It is a case where . . . law . . . is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race,

246 *Id.* at 471 (emphasis added).

247 Hagen v. Utah, 510 U.S. 399, 421 (1994).

248 South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 349 (1998).

249 For a general critique of the diminishment doctrine, see Laurence, *supra* note 7.

250 *Ex parte* Crow Dog, 109 U.S. 556, 572 (1883). *Crow Dog* was decided before enactment of the Major Crimes Act, 18 U.S.C. § 1153 (1994), which now gives federal courts jurisdiction over such matters.

251 *Crow Dog*, 109 U.S. at 571.

> according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.[252]

Remarkably, nearly a century later, the Court relied on these very considerations in concluding in *Oliphant*[253] that tribal courts lacked criminal jurisdiction to try non-Indians who commit crimes on tribal lands. There, the Court cited the above passage from *Crow Dog* and then stated that "[t]hese considerations, applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondents' contention that Indian tribes . . . retain the power to try non-Indians according to their own customs and procedure."[254] Perhaps aware of the disturbing implications of relying verbatim on this passage, *Oliphant* omitted the references to "savage life" and "savage nature."[255] Nevertheless, the implication remains: just as it is unfair to subject "savages separated by race and tradition" to the laws of the United States, it is unfair to subject non-Indians to the laws of the "savage Indians." Whatever the appeal of this kind of symmetry, it is evident that in 1978 the Court continued to rely on a conception of the Indian as different in resolving a dispute over inherent sovereignty.

The Court exhibited this distrust of tribal courts again in *Duro*,[256] where it held that *Oliphant*'s restriction on tribal court sovereignty is not limited to non-Indians but also applies to all nonmembers.[257] The Court conceded that modern tribal courts have many features of non-tribal courts but noted that "they are influenced by the unique customs, languages, and usages of the tribes they serve."[258] Justice Souter, joined by Justices Kennedy and Thomas, subsequently adopted this theme in their concurring opinion in *Hicks*, stating that tribal courts are different from other American courts and from one another in structure, appli-

[252] *Id.*

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

[254] *Id.* at 211.

[255] *See id.* at 210-11.

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

[257] *Id.* at 688. Congress reversed this determination, providing that tribal courts have criminal jurisdiction over all Indians. *See* Criminal Jurisdiction over Indians, Pub. L. No. 102-137, 105 Stat. 646 (1991).

[258] *Duro*, 495 U.S. at 693. For an excellent discussion of tribal courts, see POMMERSHEIM, *supra* note 7.

cable substantive law, and independence of their judiciary.[259]

The Court's treatment of the second *Montana* exception is another example of an implicit reliance on the them/us construction. The exception authorizes tribal power over nonmembers when their conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[260] Such an exception is broad, and could be interpreted to justify, for example, tribal authority over nonmembers who drive recklessly on Indian country and thereby threaten the safety of tribal members. In *Strate*, however, the Court rejected a broad reading and instead concluded that the exception applies only when tribal authority is necessary to protect tribal self-government and internal affairs;[261] in other words, when necessary to govern "themselves." *Hicks* was rather explicit in this regard when it held that the second exception was inapplicable. The majority ruled that "*[s]elf*-government and *internal* relations are not directly at issue here, since the issue is whether the Tribes' law will apply, not to their own members, but to a narrow category of outsiders."[262]

A shared premise in *Worcester* and the modern cases is the

[259] Nevada v. Hicks, 533 U.S. 353, 383 (2001) (Souter, J., concurring). While it is beyond the scope of this article, it would be interesting to compare the recent developments in tribal court jurisdiction over nonmembers with the personal jurisdiction developments in state courts. A nonresident can be forced to defend a lawsuit in a distant state forum so long as the state's long arm statute authorizes personal jurisdiction and the exercise of such jurisdiction satisfies the minimum contacts and fairness requirements under the Due Process Clause. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). Moreover, the forum state could choose to apply its own law to resolve the dispute. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981). Thus, a New Yorker who negligently drives a car in Hawaii and causes an accident could be forced to defend himself in Hawaii. The New Yorker would be subject to Hawaii law despite the fact that the structure of the courts, the independence of the judiciary, and the substantive law may be different from New York. Additionally, the New Yorker has no input into the selection of those judges or the content of the substantive and procedural rules governing the outcome of his case. The nonresident defendant might have an opportunity to remove the case to federal court, depending on the amount in controversy. *See* 28 U.S.C. § 1441 (1994). And the state courts, unlike the tribal courts, are ultimately bound by the U.S. Constitution. *See* Talton v. Mayes, 163 U.S. 376 (1896). Nevertheless there are many practical considerations that are similar in considering the reach of tribal court jurisdiction and the extent of state court power. *See* Resnick, *supra* note 9 (urging expansion of federal court jurisprudence to include consideration of tribal courts).

[260] Montana v. United States, 450 U.S. 544, 566 (1981).

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

[262] *Hicks*, 533 U.S. at 371.

notion of Indian peoples as the "other." In some respects, tribal sovereignty issues are easy to resolve when Indians are viewed in this manner. As a general matter, "they" can exercise some degree of sovereignty only over "themselves."[263] The challenge for contemporary tribal sovereignty problems, however, is found in instances when Indians do not behave as the other.

Chief Justice Marshall may have viewed Indians as a "people with whom it was impossible to mix. . . ."[264] But his assessment, whether or not accurate at the time, is no longer so. Consider, for example, the area of economic development by Indian tribes. Recently, many tribes have engaged in a wide range of economic activities similar to those of the general public and involving substantial interaction with non-Indians. For example, the Mississippi Band of Choctow Indians operates a number of businesses, including manufacturing of auto parts and production of greeting cards.[265] The Gila River Indian Community has an industrial complex, a health care corporation, and a telecommunication company.[266] The White Mountain Apache Tribes operate a ski resort.[267] The Fort McDowell Yavapai Nation runs a gas station, a resort ranch, a concrete company, and a pecan farm.[268] The Cabazon Band of Mission Indians has bowling alleys, an export assistance center, and a printing and graphic design company.[269] The Seminole Tribe operates an aircraft company, an online shopping plaza, a broadcasting firm, a tour company, and an inn.[270] The Mashantucket Pequot Tribal Nation has the most profitable casino in the country.[271] The Keweenaw Bay Band In-

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[263] The Court, of course, does not usually view sovereignty in such limited terms. It allows states, for example, to exercise sovereign powers over citizens of other states. *See supra* note 259.

[264] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 590 (1823).

[265] *Overview of Tribal Business*, *at* http://www.choctaw.org/show.asp?durki=35 (last visited July 20, 2003).

[266] *Business Entities*, *at* http://www.gric.nsn.us (last visited July 20, 2003).

[267] *Tribal Enterprises*, *at* http://www.wmat.us/enterprises.shtml (last visited July 20, 2003).

[268] *Fort McDowell Yavapai Nation: Enterprises*, *at* http://www.ftmcdowell.org/ enterprises.htm (last visited July 20, 2003).

[269] *Enterprises*, *at* http://www.cabazonnation.com/cgi-bin/ducs/display.pl?o=content_cms&i=4 (last visited July 20, 2003).

[270] *Tourism/Enterprises: What We Do*, *at* http://www.seminoletribe.com/enterprises (last visited July 20, 2003).

[271] *See* Naomi Mezey, Note: *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. REV. 711, 725 (1996) (describing the profits of Foxwoods Casino, which had gross profits that were twice as much as any casino in Atlantic City or Las Vegas).

dian Community has a bath products manufacturing company, a fence company, mini-marts, and a radio station.[272] The Chickasaw Nation operates a chocolate company, a utility authority, and a lodge and restaurant.[273] The Oneida Indian Nation of New York runs a casino, a hotel, golf courses, smoke shops, and a textile company.[274] The Rosebud Sioux Indian Tribe has a wide range of businesses, including construction, dam building, landscaping, janitorial services, retail office equipment, electronics assembly, and roofing companies, as well as an engineering and surveying firm, and a wood products industry.[275] Finally, a number of tribes are involved in businesses related to the natural resources found on Indian country.[276] These are only a few examples of the kinds of tribal-run businesses currently in operation.

Such developments do not fit within an understanding of the Indian as "the other," and with Chief Justice Marshall's assessment that Indians will not "mix." There may be a temptation to conclude that tribes should lose their unique sovereignty when they behave like members of the dominant community.[277] Certainly, such sentiment exists among some members of the general public. In certain areas of the country, there has been intense opposition to tribal efforts to participate in economic development activities. The Mississippi Choctaws, for example, provoked an "uproar" when they purchased a car dealership in Carthage, Mississippi.[278] Other dealers complained even though the Nation agreed to pay all sales and property taxes.[279] These dealers apparently worried that the tribe could break its

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[272] *Tribal Owned Enterprises*, *at* http://www.ojibwa.com/tribal_biz.htm (last updated Feb. 2003).

[273] *Business*, *at* http://www.chickasaw.net/alivecity/servlet/NavForward?sid=97&appactive=yes&req=MHomePage_cn5 (last visited July 20, 2003).

[274] *Economic Enterprises*, *at* http://oneida-nation.net/erprises.html (last visited July 20, 2003).

[275] *See Rosebud Sioux Tribe: Community Environmental Profile*, *at* http://www.minisose.org/profiles/rosebud.html (last visited Sept. 5, 2003).

[276] *See* PAULA MITCHELL MARKS, IN A BARREN LAND 371-74 (1998).

[277] Barbara Atwood observed that "while most Indian tribes historically have resisted assimilation and struggled to retain a distinctive cultural and political identity, their growing power today had highlighted the anomaly of recognizing unique rights for tribal members in a larger society formally committed to equality." Atwood, *supra* note 11, at 939.

[278] Danny Hakim, *Off the Reservation, Onto the Dealer's Lot*, N.Y. TIMES, May 14, 2002, at C1.

[279] *Id.*

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promises and have an unfair competitive advantage.[280] Similarly, a New York group called the Upstate Citizens for Equality complained bitterly about the sovereign status of the Cayuga Indian Nation, stating that the Nation would have unfair business advantages and concluding that "[t]he establishment of a *self-proclaimed sovereign nation* within the counties and state threaten [sic] the very fabric of communities and the freedoms the United States is founded on."[281] In a very frightening example of opposition, a group calling itself the United States National Freedom Fighters announced that it would begin "blood shedding," shooting individuals who contribute to the Oneida Indian Nation of New York by supporting the casino or purchasing gas at the tribal-owned gas station.[282]

Notwithstanding such attacks, a strong case can be made that tribal sovereign powers are necessary, *especially* when tribes become involved in economic development. Stephen Cornell and Joseph Kalt have found in their studies that political sovereignty—"the extent to which a tribe has genuine control over reservation decision-making, the use of reservation resources, and relations with the outside world"[283]—is one of the key elements of successful tribal economic development. Their research at the Udall Center and the Harvard Project on American Indian Economic Development underscores the proposition that tribal control over tribal affairs is a necessary component of any successfully planned economic development by an Indian tribe. They concluded: "We have been unable to find a single reservation where major decisions are controlled by outsiders—the states, the federal government, or special interests—where successful economic development has taken root."[284] Cornell explained that tribal sovereignty is critical for economic development in three respects: (1) it ensures accountability; (2)

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280 *Id.*

281 Upstate Citizens for Equality, Inc., *Sovereignty*, *at* http://www.ucelandclaim.com/sovereignty.htm (last visited July 20, 2003).

282 *Assault on the Oneida*, *at* http://www.dickshovel.com/oneida2.html (last visited July 20, 2003).

283 STEPHEN CORNELL & JOSEPH P. KALT, HARVARD UNIV., RELOADING THE DICE: IMPROVING THE CHANCES FOR ECONOMIC DEVELOPMENT ON AMERICAN INDIAN RESERVATIONS 6 (1992), *available at* http://www.ksg.harvard.edu/hpaied/ docs/PRS92-1.pdf.

284 STEPHEN CORNELL & JONATHAN TAYLOR, UNIV. OF ARIZ., SOVEREIGNTY, DEVOLUTION, AND THE FUTURE OF TRIBAL-STATE RELATIONS 4 (2000), *available at* http://udallcenter.arizona.edu/publications/pdf/tribal%20state%20relations.pdf.

it offers opportunities such as reduced taxes and exemptions from some regulatory burdens; and (3) it ensures control over the tribe's resources and affairs.[285]

Tribal sovereignty not only serves as a catalyst for economic development but is also enhanced by that development. Successful economic initiatives provide tribal governments with the revenue necessary to perform a wide range of functions, including police, educational, housing, legal, and medical services for tribal members. This revenue is desperately needed. As one commentator recently reported, "American Indians suffer from the highest rates of poverty, unemployment and substandard housing of any group in the United States."[286] Economic activities provide tribes with an opportunity to escape from these impoverished conditions. Ray Halbritter, Nation Representative for the Oneida Indian Nation of New York, described that Nation's comprehensive uses of the new resources generated from its economic activities as follows:

> [T]he results of our actions have empowered us greatly. Our decision to establish gaming has allowed us to reacquire more than 2,600 acres of our ancient land for our people, the first lands ever reacquired in any manner by any of the Haudenosaunee nations. We feed our elders and are able now to conduct our ceremonies on a regular basis. The first building we built with our profits as a nation was a council house, which is our spiritual and governmental meeting place. We have since then built a cook house, a health services center, a cultural center and museum, a recreational center, a swimming pool, a bath house, a children's playground, a gymnasium, and a lacrosse box. Using our own money we also have established scholarship programs, medical, dental, and optical services, job training and legal assistance programs, Oneida language and song classes, mental health and substance abuse programs, elder meals programs, and other beneficial services for our people. We have established a police force, paved our roads, built a septic system, consecrated a burial ground, opened a youth center, and built housing for our people, and with the opening of the casino have become one of the major economic powers in Central New York State and one of the largest employers in the Central New York region.[287]

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[285] Stephen Cornell, *Sovereignty, Prosperity, and Policy in Indian Country Today*, *at* http://www.kc.frb.org/publicat/commrein/u97pers2.htm (last visited July 20, 2003) (quoted in GETCHES, *supra* note 60, at 722).

[286] Robert J. Miller, *Economic Development in Indian County: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 758-59 (2001).

[287] Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT'L L.

As Halbritter succinctly stated: "We had tried poverty for 200 years, so we decided to try something else."[288]

Not all tribes, of course, are engaged in such economic activities. Within and among tribes, serious issues are arising regarding the appropriateness of these activities.[289] In his description of the Oneida's economic development, Halbritter noted that "[t]he big issue for the Oneida as a people was, of course, whether selling cigarettes or gaming was an 'Indian' thing to do. Was it a sell-out, a sacrifice of what we believed as traditional Houdenosaunee people?"[290] He concluded that the economic independence empowered the Oneida Indian Nation of New York, enabled it to reacquire ancestor land, renewed self-esteem among the members, and allowed the Nation to preserve its cultural heritage.[291]

Conclusion

It might be suggested that under the *Montana* exceptions tribes have sufficient inherent sovereignty to address issues arising from business activities. The first exception applies specifically to activities of nonmembers who enter consensual commercial relationships with tribes. As *Strate* illustrates, however, this exception does not reach nonmembers who enter Indian country, even for commercial business purposes, when the dispute does not involve the tribe directly.[292] Moreover, *Strate* demonstrates that the Court reads very narrowly the second exception, concerning conduct that threatens the political integrity, economic security, or welfare of the tribe, to apply only where the tribal interest relates directly to self-government.[293] Thus, the *Montana* exceptions support inherent tribal sovereignty only in the most limited circumstances.

& Pol. 531, 568-69 (1994). Tribal economic development also benefits state and federal governments by improving local economies. *See*, *e.g.*, *id.* at 569; Miller, *supra* note 286, at 848.

[288] Halbritter & McSloy, *supra* note 287, at 568.

[289] *See* Mezey, *supra* note 271.

[290] Halbritter & McSloy, *supra* note 287, at 566.

[291] *Id.* at 571-72. Other tribes might reach different conclusions about the appropriateness of economic development. To be sure, such decisions are for the tribes themselves, and I am not arguing that tribes should undertake these kinds of economic activities.

[292] *See supra* text accompanying note 128.

[293] In *Strate*, the Court described this exception as authorizing tribes to determine tribal membership, punish tribal members, regulate domestic relations, and prescribe rules of inheritance. Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997).

It also might be suggested that as a practical matter Congress could remedy some of the specific sovereignty problems created by the *Montana* line of cases. As it did with respect to *Duro*,[294] Congress could overrule these recent cases by enacting legislation that recognizes[295] tribal regulatory and adjudicative powers over nonmembers who engage in activities on Indian country. The cases discussed in this essay involve the Court's own articulation of inherent tribal powers and concede that Congress could recognize an expanded version of tribal sovereignty.[296] Congress, however, may have difficulty overruling the specific holding of *Hicks* that a tribal court lacks power to entertain an action for damages against state officers. Congress derives its power over Indian affairs from Article I, and the Court has refused to find that Article I grants Congress power to abrogate a state's immunity from suit in federal court,[297] in state court,[298] or before a federal agency.[299] Even recognizing Congress's plenary power over Indian affairs, the Court is unlikely to find congressional support for an abrogation of state sovereign immunity in tribal courts. Congress presumably could authorize a tribal court to award damages against state officers in their personal capacities.[300] But, whether there is political support for any kind of legislative solution is, of course, a separate matter. Moreover, as Philip Frickey warned, "Colonialism is a dangerous political game, and congressional considerations of these problems could go in a variety of directions, some of them devastating to tribes."[301]

More important, these suggestions miss the larger point. It is no exaggeration to conclude that the Court's repudiation of in-

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[294] Duro v. Reina, 495 U.S. 676 (1990); *see supra* note 98.

[295] I intentionally use the word "recognizes," rather than "authorizes," as a way to respond to the challenge that we should not simply accept as a given Congress's plenary power. *See* Porter, *supra* note 35.

[296] *See*, *e.g.*, *Strate*, 520 U.S. at 446 (providing: "*Montana* thus described a general rule that, *absent a different congressional direction*, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land, subject to two exceptions.") (emphasis added). *See also* United States v. Enas, 255 F.3d 662, 670 (9th Cir. 2001), *cert. denied*, 534 U.S. 1115 (2002) (upholding congressional power to recognize tribal criminal jurisdiction over nonmembers).

[297] *See* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

[298] *See* Alden v. Maine, 527 U.S. 706 (1999).

[299] *See* Fed. Mar. Comm'n v. South Carolina State Ports Auth., 535 U.S. 743 (2002).

[300] *See supra* text accompanying notes 179-80.

[301] Frickey, *Common Law*, *supra* note 7, at 85.

herent tribal sovereignty has created one of the most significant threats to tribes since the allotment period.[302] By suggesting that tribal power extends only to members and not to territory, the Court is "leaving tribes with no more governmental power than a club or a union or a church may exercise over its members."[303] Moreover, in separating sovereignty from land the Court disregards the centrality of land to Indian culture. As Paula Mitchell Marks observed:

> Whatever growth and changes do occur, it is primarily the land itself—the fragile, divided land—that supports and sustains Indian identity and culture. "Who we are is our land, our trees, and our lakes," says Winona LaDuke. Such pronouncements may occasionally sound like self-serving romanticism, but they are an expression of centuries of Indian reality.[304]

As described, the Court has created this threat to tribal sovereignty by continuing to rely on implicit assumptions about Indian identity, on whether Indians are behaving like dominant groups or as distinctive groups. It is not simply a problem that arises out of increased contact between Indians and non-Indians. Rather, it is a more fundamental one of viewing Indians as either "them" or "us" in resolving sovereignty disputes. This kind of either/or conception ignores the possibility that Indians could chose to be both; they could chose to maintain their distinctiveness and engage in modern day activities.[305] Filmmaker Zacharias Kunuk captured this idea quite vividly when he said:

302 John St. Clair, Chief Judge of the Shoshone and Arapahoe Tribal Court, warned that the recent trend in the Supreme Court "poses the greatest threat to tribes since the allotment era of the 19th century and congressional termination of the mid-20th century. . . ." *Rulings of the U.S. Supreme Court as They Affect the Powers and Authorities of the Indian Tribal Governments: Hearing Before the Senate Comm. on Indian Affairs*, 107th Cong. 29 (2002) (testimony of John St. Clair, Chief Judge of the Shoshone and Arapahoe Tribal Court) (*cited in* FEDERAL BAR ASSOCIATION, 27TH ANNUAL INDIAN LAW CONFERENCE: REAFFIRMING TRIBAL SOVEREIGNTY IN AN ERA OF JUDICIAL ACTIVISM: COURSE MATERIALS 200 (2002)). *See also* Royster, *supra* note 7.

303 *Rulings of the U.S. Supreme Court as They Affect the Powers and Authorities of the Indian Tribal Governments: Hearing Before the Senate Comm. on Indian Affairs*, 107th Cong. 48 (2002) (prepared statement of Hon. William Canby, Jr., Senior Judge, United States Court of Appeals for the Ninth Circuit) (*cited in* FEDERAL BAR ASSOCIATION, *supra* note 302, at 176).

304 MARKS, *supra* note 276, at 375.

305 In the first edition of her book, Patricia Hill Collins described the more general use of "either/or dichotomous thinking" to maintain oppression. PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 28-29, 225-27 (1st ed. 1990).

> If it were up to me, I would go back to the law of the Inuit, the law of nature. I would live like that while checking e-mail in the morning, calling halfway around the world to do business, watching wars in my living room on television. It is possible to do both in this day.[306]

Whether it is desirable to do both is a matter for tribes to resolve for themselves.[307] Some tribes may well conclude, for example, that economic development or similar assimilative activities pose threats to their cultural identity and sovereignty. Other tribes might decide that economic self-sufficiency is necessary to maintain their independence and cultural heritage. It is not my purpose in this Article to suggest that one of these approaches is more appropriate than the other. Indeed, it should not be surprising that tribes will select different approaches to such issues given the pluralism among Indian peoples. In this regard, it must be remembered that "Native America comprises hundreds of politically distinct, separately recognized communities, as well as a large intertribal urban population with many unique social and cultural institutions and practices and its own set of political issues and interests."[308]

Rather, my point is that the Court appears to be resolving tribal sovereignty issues based on preconceived assumptions about Indian identity. Carole Goldberg concluded in a somewhat different context, that courts deem Indians deserving of special consideration "only when they are acting in conformity with non-Indian conceptions of their culture, which typically requires that they 'must remain unchanged in order to be considered "Indian."' "[309] Similarly, Joane Nagel described the view that "Native Americans are somehow not really Indians unless they are living according to some putative nineteenth-century lifestyle."[310] This appears to be the Court's unarticulated assumption in

[306] Clifford Krauss, *Returning Tundra's Rhythm to the Inuit, in Film*, N.Y. TIMES, Mar. 30, 2002, at A4.

[307] *See* Porter, *supra* note 35, at 111-12.

[308] JOANE NAGEL, AMERICAN INDIAN ETHNIC RENEWAL 7 (1996). *See also* Porter, *supra* note 35, at 101 ("There are within the United States, over six hundred recognized and unrecognized Indigenous sovereigns . . . . By virtue of population, culture, geography, and the nuances of history, no two Indigenous peoples are the same.").

[309] Carole Goldberg, *Descent Into Race*, 49 U.C.L.A. L. REV. 1373, 1379 (2002) (quoting Jack D. Forbes, *The Manipulation of Race, Caste, and Identity: Classifying Afroamericans, Native-Americans, and Red-Black People*, 17 J. ETHNIC STUD. at 23 (1990)).

[310] NAGEL, *supra* note 308, at 71 (cited in Goldberg, *supra* note 309, at 1380).

resolving sovereignty disputes, recognizing inherent tribal sovereignty only when viewed as necessary to enable Indian peoples to behave in some distinctive fashion. On the other hand, the Court is reluctant to recognize sovereignty when tribes act like groups in the general population.

Is there a resolution of the problem? The Court, of course, could abandon its self-imposed, restricted view of tribal sovereignty. Specifically, when given the next opportunity it could read *Hicks* narrowly as applying only when state officials are sued in tribal court. It could hold as a general proposition that tribes have adjudicative and regulatory power over their members as well as nonmembers who enter tribal or trust-held lands. This outcome, however, is unlikely.[311] The slide down the sovereignty slope has gained momentum since *Montana*. A reversal of the current tribal sovereignty trend would require the Court to conceive of Indians, not as either them or us, but as peoples who might choose to be both and for whom tribal sovereignty is essential to their cultural and political survival.

[311] *See*, *e.g.*, Getches, *supra* note 7, at 361; Porter, *supra* note 35, at 110-11; Royster, *supra* note 7, at 76.