IMPLICIT DIVESTITURE AND THE SUPREME COURT'S (RE)CONSTRUCTION OF THE INDIAN CANONS

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ABSTRACT

Taken together, the Indian canons of construction and the doctrine of implicit divestiture seem paradoxical. On the one hand, the Indian canons, rules of statutory construction originally developed to protect Indian tribes from unscrupulously drafted statutes and treaties, protect tribal sovereignty against non-Indian encroachment. On the other, the doctrine of implicit divestiture seeks to protect the rights of non-Indians by limiting Indian sovereignty according to a determination of whether certain tribal actions are contextually consistent with Indian "status." How is it, then, that the Supreme Court can interpret treaties and statutes in order to protect tribal sovereignty, while it is simultaneously charged with stripping such sovereignty if it unduly affects the rights of non-Indians? This Article attempts to answer this question by comparing the evolution of implicit divestiture with that of the Indian canons of construction. This analysis reveals that the Supreme Court has not remained faithful to the Indian canons' original purpose of protecting tribal sovereignty. Rather, the Court has selectively employed the canons in order to sequester tribal rights within "traditional" Indian activities such as hunting and fishing, areas where the Court is comfortable with Indian self-government. However, when tribes engage in activities that seem more "westernized," or when protecting tribal sovereignty would strongly affect the substantive rights of non-Indians, the Court often circumvents the canons altogether to further the Court's normative assessment of the status quo. This Article will help provide guidance and clarity to the relationship between the canons and implicit divestiture by examining the interplay between the doctrines in various contexts in which they collide.

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INTRODUCTION

"*Great nations, like great men, should keep their word*."[1]

Designed to protect tribal sovereignty and territorial integrity from non-Indian encroachment,[2] federal courts now employ three generally accepted "Indian canons" of statutory and treaty construction.[3] First, treaties between tribes and the federal government must be interpreted as the Indians would have understood them at the time they were drafted.[4] This canon recognizes that, while negotiating treaties, tribes often had "no written language and [were] wholly unfamiliar with all the forms of legal expression, and [their] only knowledge of the terms in which the treaty [was] framed [was] that imparted to them by the interpreter employed by the United States."[5] As a result, this canon protects the tribes, even today, from the ongoing ramifications of these almost inevitably one-sided treaties.

The second canon requires that ambiguities in the interpretation of treaties, statutes, regulations, and other tribal–federal agreements be construed in favor of the Indians.[6] While this "does not justify ignoring the plain meaning of words in order to prevent what appears to be an injustice to the Indians, it does mean that a court is bound to give to doubtful expressions that meaning least prejudicial to the interests of the Indians."[7] This second canon developed partly to further the federal policy of encouraging tribal

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1. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).
2. *But see* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 424–26 (1993) (arguing that this is a misinterpretation of the canons' original purpose, and that they are actually a product of federalism concerns).
3. *See, e.g.*, Kristin A. Carpenter, *Interpreting Indian Country in* State of Alaska v. Native Village of Venetie, 35 TULSA L.J. 73, 101 (1999).
4. *See, e.g.*, South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 527 (1986) (Blackmun, J., dissenting) ("In cases involving Indian treaties, for example, it has long been the rule . . . that the entire treaty must be interpreted as the Indians would have understood it."); Seufert Bros. Co. v. United States, 249 U.S. 194, 198 (1919) ("We will construe a treaty with the Indians as that unlettered people understood it, and as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection, and counterpoise the inequality by the superior justice which looks only to the substance of the right without regard to technical rules.") (citations and internal quotation marks omitted).
5. Jones v. Meehan, 175 U.S. 1, 11 (1899).
6. *See, e.g.*, Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992) ("When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'") (quoting Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985)); Choate v. Trapp, 224 U.S. 665, 675 (1912) ("The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.").
7. Nw. Bands of Shoshone Indians v. United States, 324 U.S. 335, 362 (1945) (Murphy, J., dissenting).

sovereignty and self-determination,[8] and partly due to the continued recognition that the drafting process for such documents was often "deaf to Indian input."[9]

The third and arguably most important canon states that absent express treaty, statutory, or regulatory directive to the contrary, Indians retain all of their rights, and tribal sovereignty may not be diminished.[10] This canon applies across a wide range of subjects, including tribal hunting and fishing rights,[11] restrictions on alienating Indian lands,[12] determining reservation boundaries,[13] state[14] and federal[15] taxation in Indian country, and civil[16] and criminal[17] jurisdiction over Indian country. This final canon protects tribal sovereignty against "backhanded"[18] erosion, as "the intention to abrogate or modify [tribal sovereignty] is not to be lightly imputed to the Congress."[19]

After the Indian Reorganization Act of 1934 authorized tribes to devise independent constitutions and judiciaries,[20] the Supreme Court faced a difficult question: whether the canons protected Indian tribal courts that apply culturally sensitive tribal law against non-Indians.[21] In the realm of criminal law, the Court quickly established a bright line rule that Indian tribal courts have no jurisdiction over non-Indians.[22] In so ruling, the Court stated in dicta

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8. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143–44 (1980).

9. Carpenter, *supra* note 3, at 73.

10. *See, e.g.*, Mattz v. Arnett, 412 U.S. 481, 504–05 (1973).

11. *See, e.g.*, Spalding v. Chandler, 160 U.S. 394, 405 (1896) (noting there is no express authority in federal law to set public lands apart for public use when those lands already have a designated purpose, like use as an Indian reservation).

12. Jones v. Meehan, 175 U.S. 1 (1899).

13. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

14. Bryan v. Itasca County, 426 U.S. 373, 390–91 (1976).

15. Squire v. Capoeman, 351 U.S. 1 (1956).

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

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

18. United States v. Dion, 476 U.S. 734, 739 (1986) (quoting Menominee Tribe v. United States, 391 U.S. 404, 412 (1968)).

19. *Id.* (quoting *Menominee*, 391 U.S. at 413); *see also*, Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 658 (2003) (arguing that the "Constitution itself has been interpreted to preserve inherent tribal sovereignty").

20. Indian Reorganization Act of 1934, 25 U.S.C. § 476 (2006).

21. *See generally* Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1050–51 (2005) (arguing that "the Supreme Court's nonmember decisions are shaped by two beliefs about justice . . . that jurisdiction over nonmembers should be limited because tribes will treat outsiders unfairly . . . [and] that jurisdiction over nonmembers and legal issues shaped by outside influence . . . have little to do with tribal self-government"); Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2004).

22. *Oliphant*, 435 U.S. at 195. This ruling was later extended to non-members altogether, Duro v. Reina, 495 U.S. 676 (1990), a case which Congress almost immediately abrogated. *See* Act of Nov. 5, 1990, Pub. L. NO. 101-511, § 8077(d), 104 Stat. 1893 (codified as amended at 25 U.S.C. §§ 1301–1303 (2006)). This statutory abrogation has since been upheld against challenges that it violates double jeopardy, United States v. Lara, 541 U.S. 193 (2004), as well as equal protection and due process, Means v. Navajo Nation, 432 F.3d 924, 932, 935 (9th Cir. 2005), *cert. denied*, 549 U.S. 952 (2006).

that "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status,'"[23] a phrasing later categorized as an "implicit divestiture of sovereignty."[24] Philip P. Frickey summarizes the doctrine of implicit divestiture as a case-specific judicial determination of "whether tribes have legitimate local interests implemented by appropriate lawmaking and law-applying procedures and institutions that transcend the interests of outsiders to be free from tribal authority."[25] The doctrine of implicit divestiture is usually raised in cases testing the jurisdictional limits of Indian tribal courts over non-members of the tribe.

Taken together, the Indian canons of construction and the doctrine of implicit divestiture seem paradoxical. The canons are meant to protect tribal sovereignty against non-Indian encroachment, yet the doctrine of implicit divestiture seeks to protect the rights of non-Indians against *tribal* encroachment by *limiting* Indian sovereignty based on a determination of whether certain tribal actions are contextually consistent with Indian "status." How can courts interpret treaties and statutes to protect tribal sovereignty while they are simultaneously charged with *abrogating* tribal sovereignty if such treaties and statutes unduly affect the rights of non-Indians?[26]

This Article proffers an answer by comparing the evolution of implicit divestiture with that of the Indian canons of construction. It ultimately argues that implicit divestiture jurisprudence has developed as an "anti-canon,"[27] directly reversing *Worcester* to protect non-Indians from subjection to tribal law and custom.[28] Post-*Oliphant*, the Supreme Court has led an expansive attack on tribal sovereignty, meant to isolate Indian authority within reservations and protect non-Indians from the unfamiliarity of tribal government. This often involves the Court blatantly ignoring clear statutory or treaty language to arrive at its preferred normative conclusions, thus avoiding the application of the canons at the expense of tribal self-governance.

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23. *Oliphant*, 435 U.S. at 208 (emphasis and citation omitted).

24. United States v. Wheeler, 435 U.S. 313, 326 (1978).

25. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Non-Members*, 109 YALE L.J. 1, 71 (1999) [hereinafter Frickey, *Common Law*].

26. *See id.* at 58 ("The canons of interpretation that once seemed to influence strongly, if not control, outcomes in federal Indian law cases have lost their force in the context of significant nonmember interests.") (citations omitted).

27. For an argument that the doctrine of implicit divestiture has been legally flawed since its inception, see Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court Sovereignty Over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553, 593–98 (2009).

28. Worcester v. Georgia, 31 U.S. (5 Pet.) 515, 559 (1832) ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights. . . .").

I. IMPLICIT DIVESTITURE

The doctrine of implicit divestiture is predicated on the notion that tribes have necessarily lost some of their inherent sovereign powers in light of the overarching, preemptory authority of the United States.[29] In determining whether tribal sovereignty can survive this presumption, courts will weigh the interests involved and find "implicit divestiture of tribal powers whenever they [are] deemed 'inconsistent' with the interests of the United States."[30]

This judicial determination gives the Supreme Court an undue amount of influence over Indian sovereignty.[31] This Article's first task is to trace the development of implicit divestiture from its inception and to scrutinize the actual considerations employed by the Court in implicit divestiture cases, whether express or implied. What emerges is a sad truth: the Court has essentially stripped tribal sovereignty beyond intra-tribal relations and "has transformed itself from the court of the conqueror into the court as the conqueror."[32] In so doing, the Court has further abandoned the Indian canons in the name of protecting the rights of non-Indians.

A. Criminal Jurisdiction

In the late nineteenth and early twentieth centuries, the Court generally applied the Indian canons of construction to criminal cases arising in Indian country. Perhaps the most notable case was *Ex Parte Crow Dog*, in which the Dakota territorial court sentenced an Indian to death for murdering another Indian on the reservation. The condemned Indian petitioned for habeas corpus, asserting that applicable treaties reserved exclusive criminal jurisdiction with the tribe.[33] The Court agreed, reasoning that absent explicit

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29. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 323 (1978) ("Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised."); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823) ("In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired.").

30. Bethany R. Berger, *"Power Over this Unfortunate Race": Race Relations, Politics, and Indian Law in* United States v. Rogers, 45 WM. & MARY L. REV. 1957, 2047 (1994) (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (emphasis omitted)).

31. *See* Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413, 445 (2007) ("Even when policy reasons may arguably weigh overwhelmingly in favor of applying some federal laws, such as environmental laws, to Indian tribes, Congress is perfectly capable of deciding whether to do so. And the choice should be for Congress alone, not administrative or judicial bodies that may be tempted to usurp legislative powers.").

32. Frickey, *Common Law*, *supra* note 25, at 73; *but see id.* at 69 ("In many respects, the dormant Commerce Clause methodology seems analogous to the implicit-divestiture approach of *Oliphant* and its progeny.").

33. *Ex parte* Kan-gi-shun-ca (Crow Dog), 109 U.S. 556, 556 (1883).

language to the contrary, crimes committed by one Indian against a member of the same tribe remained within tribal jurisdiction so as to preserve "the maintenance of order and peace among their own members by the administration of their own laws and customs."[34]

Another illuminating case is *United States v. Quiver*, in which the state of South Dakota attempted to criminally prosecute an Indian in state court for committing adultery with another Indian on the reservation.[35] In holding that tribal courts had exclusive jurisdiction, the Supreme Court noted the consistency of its ruling with "the policy reflected by the legislation of Congress and its administration for many years, that the relations of the Indians, among themselves—the conduct of one toward another—is to be controlled by the customs and laws of the tribe."[36] Again, the Court predicated its reasoning on the canon that tribal sovereignty must not be diminished absent a clear expression of congressional intent to the contrary.

Both *Crow Dog* and *Quiver* involved Indians of the same tribe. The Court's reasoning in both instances, while ostensibly protecting tribal sovereignty and self-governance, carried with it a strong patriarchal notion of the civilizing role of intra-tribal criminal justice systems, at least when Indians dealt with Indians.[37] The Court's paternalism was stated perspicaciously in *United States v. Kagama*,[38] which upheld the constitutionality of the Indian Major Crimes Act, passed in response to *Crow Dog*.[39] In reasoning that the dependent status of the tribes rendered them under Congress's legislative auspices, the Court held "[t]he power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell."[40] This trilogy of early criminal jurisdiction cases established two baselines that pervade modern implicit divestiture jurisprudence. First, they establish the idea that Indian and non-Indian sovereignty must necessarily remain separate from one

34. *Id.* at 568. Public outrage over the holding of this case led Congress to pass the Indian Major Crimes Act, providing federal jurisdiction for a variety of major crimes, such as murder, on the assumption that tribal courts were unfit for such adjudication. Indian Major Crimes Act, 18 U.S.C. § 1153 (2006).

35. United States v. Quiver, 241 U.S. 602 (1916).

36. *Id.* at 605–06.

37. *See Crow Dog*, 109 U.S. at 569 (reasoning that such criminal justice systems could transform tribes from "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 a self-supporting and self-governed society").

38. United States v. Kagama, 118 U.S. 375 (1886).

39. Indian Major Crimes Act, 18 U.S.C. § 1153 (2006) (vesting the federal government with jurisdiction over an enumerated list of crimes committed by Indians in Indian country, including murder).

40. *Kagama*, 118 U.S. at 384. *But see* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 35 (1996) (arguing that "[*Kagama*'s] apparent inconsistency with the most fundamental of constitutional principles—the *McCulloch* understanding that Congress ordinarily possesses only that authority delegated to it in the Constitution—is an embarrassment of constitutional theory.").

another. Second, they affirmed the primacy of the federal government as the determinative arbiter of when tribal criminal jurisdiction must be curtailed for the safety of non-Indians.[41]

Following these two themes, the Court delivered one of the most criticized decisions in all of federal Indian law: *Oliphant v. Suquamish Indian Tribe*.[42] In *Oliphant*, Suquamish tribal authorities arrested two non-Indians for disorderly conduct on the reservation. When the Suquamish tribal court asserted criminal jurisdiction, the two men petitioned for habeas corpus in federal court by arguing that the limited nature of tribal sovereignty precluded Indian tribes from criminally prosecuting non-Indians.[43] The Court, in an opinion by Justice Rehnquist, examined various historical sources and determined that tribes were deprived of any powers "inconsistent with their status" as domestic, dependent nations.[44] Criminal jurisdiction over non-Indians, the Court reasoned, was inconsistent with tribal status due to the liberty interests at stake and thus precluded; implicit divestiture was born.[45]

Justice Rehnquist's approach to the case remains monumentally consequential. To begin, the Court never identified any specific statute or treaty indicating that tribes did not have inherent criminal jurisdiction over non-Indians.[46] This should have immediately ceased debate and led to a ruling in favor of the tribes: according to the canons, Indian tribes retain all

41. *See* Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 631–32 (2009) (explaining the Court was "[s]tripped of a legal basis to differentiate [Indians] from other Americans" and turned to stereotypes which affirmed principles that continue to protect tribal rights today but did so in "ways consistent with a vision of tribes as inferior groups"). *Cf.* Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self Government*, 33 STAN. L. REV. 979, 990–91 (1981) ("[B]oth the tribes and the federal government recognized . . . that tribal self-government required both a geographic and a political separation of the tribes and its members from the states.").

42. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). For criticism of the *Oliphant* decision, see Russell Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 610 (1979) ("A close examination of the Court's opinion reveals a carelessness with history, logic, precedent, and statutory construction that is not ordinarily acceptable from so august a tribunal."); Frickey, *Common Law*, *supra* note 25, at 34–39; Geoffrey C. Heisey, Comment, Oliphant *and Tribal Criminal Jurisdiction Over Non-Indians: Asserting Congress's Plenary Power to Restore Territorial Jurisdiction*, 73 IND. L.J. 1051 (1998).

43. *Oliphant*, 435 U.S. at 194.

44. *Id.* at 208–09. For more on the Court's initial formulation of implicit divestiture, see generally Anna Sappington, *Is* Lara *the Answer to Implicit Divestiture? A Critical Analysis of the Congressional Delegation Exception*, 7 WYO. L. REV. 149, 172–75 (2007) (noting the importance of the Oliphant decision in the Court's implicit divestiture jurisprudence).

45. *See* Frickey, *Common Law*, *supra* note 25, at 37 ("Although this theory makes sense of *Oliphant*, it lacked precedential support.").

46. Indeed, the majority itself noted that at the time of the trial, almost three dozen Indian tribal courts representing about twenty-five percent of total Indian judiciaries were actively criminally prosecuting non-Indians. *Oliphant*, 435 U.S. at 196.

sovereign rights not explicitly diminished by Congress.[47] Instead, Justice Rehnquist invented an entirely new conception of tribal sovereignty: that "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress."[48] This idea, grounded in the notion that tribes lack inherent sovereign rights over non-Indians absent congressional grant, is a startling departure from Chief Justice Marshall's statement that "Indian nations [have] always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by [the federal government]."[49]

To be fair, however, it is true that historical sources examined in Indian law cases must be evaluated in light of "the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence."[50] Perhaps, then, the historical sources that the Court interpreted contained such manifest congressional intent to preclude tribal court criminal jurisdiction that they could legitimize the doctrine of implicit divestiture. This, however, is manifestly not the case, and the Court's reasoning abandoned the canons so as to protect exclusively non-Indian interests.[51]

For example, the Court relied upon the proposed 1834 Western Territory bill that was intended to abrogate tribal courts of criminal jurisdiction over non-Indians.[52] The measure, however, was never enacted because "many Congressmen felt that the bill was too radical a shift in United States–Indian relations,"[53] and attempts to reintroduce this bill throughout the nineteenth century repeatedly failed.[54] Nevertheless, the Court was persuaded that tribal courts had been divested of criminal jurisdiction over non-Indians because the Suquamish could "point to no

47. *See, e.g.*, City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 226 (2005) (Stevens, J., dissenting) ("[O]nly Congress may abrogate or extinguish tribal sovereignty."); *see also* Frickey, *Common Law*, *supra* note 25, at 34–35 ("Justice Rehnquist's majority opinion identified no treaty in which the tribe had ceded away its authority nor any federal statute that abrogated the tribe's police power. Under the traditional constructs, that should have ended the matter—the tribe retained its inherent territorial sovereignty.").

48. *Oliphant*, 435 U.S. at 208.

49. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

50. Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M., 458 U.S. 832, 838 (1982) (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144–45 (1980)).

51. For an in-depth treatment of the *Oliphant* Court's problematic use of sources, see Barsh & Henderson, *supra* note 42, at 616–31 ("[T]he *Oliphant* opinion exhibits an unusual propensity for the selective use of history, assuming conclusions, and even according greater weight to defeated bills than enacted law.").

52. *Oliphant*, 435 U.S. at 201–02. *See also* H.R. REP. No. 23-474, at 36 (1834).

53. *Oliphant*, 435 U.S. at 202 n.13.

54. *See generally* ROY GITTINGER, THE FORMATION OF THE STATE OF OKLAHOMA (1803-1906) (1917).

statute, in comparison . . . where Congress has intended to give Indian tribes jurisdiction today over non-Indians residing within reservations."[55]

In light of the Indian canons' clear directive for interpreting historical sources, Justice Rehnquist's treatment of this material verges on fraudulence. First, from a general perspective, there are hundreds of bills each session that Congress introduces but does not enact, none of which are given precedential value. Second, even assuming the bill provided some measure of insight into congressional thinking at the time, why should it have been dispositive that Congress neglected to expressly counter a non-existent statute? Finally, prior to *Oliphant*, the Court had repeatedly emphasized "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."[56] In reading congressional silence as proof that tribes lacked inherent sovereignty, Justice Rehnquist did just that.

The Court also placed great weight on *Ex Parte Kenyon*,[57] an 1878 case where a federal district court in Arkansas held that the Cherokee tribal court did not have criminal jurisdiction over a white larcenist.[58] The presiding judge held that "to give [the Cherokee tribal] court jurisdiction of the person of an offender, such offender must be an Indian, and the one against whom the offence is committed must also be an Indian."[59] The *Oliphant* Court pointed to this statement as further proof of the "unspoken assumption" that tribes lack criminal jurisdiction over non-Indians.[60]

However, this statement was pure dicta, as the *Kenyon* decision turned entirely on the fact that the defendant's offense had not been committed within Indian country, thus precluding any Cherokee jurisdiction.[61] Even the state of Washington, filing an amicus brief in *Oliphant* in favor of abrogating tribal court jurisdiction over non-Indians, conceded that *Kenyon* was not controlling.[62] Still, Justice Rehnquist relied on the *Kenyon* decision because of the involvement of its judge. Rehnquist was apparently swayed by the fact that the judge was "thoroughly acquainted with and sympathetic to the Indians and Indian tribes"[63] and because at the funeral of Judge

55. *Oliphant*, 435 U.S. at 202 n.13.

56. Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 241 (1970) (quoting Girouard v. United States, 328 U.S. 61, 69 (1946)).

57. *Ex parte Kenyon*, 14 F. Cas. 353 (W.D. Ark. 1878).

58. *Oliphant*, 435 U.S. at 199–200 (citing *Kenyon*, 14 F. Cas. at 355).

59. *Kenyon*, 14 F. Cas. at 355.

60. *Oliphant*, 435 U.S. at 203.

61. *Id.*

62. *See* Brief of Attorney General of the State of Washington as Amicus Curiae in Support of Jurisdictional Statement at 10–11, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (No. 76-5729), 1976 WL 181226.

63. *Oliphant*, 435 U.S. at 200 n.10.

Parker, the "chief of the Choctaws, Pleasant Porter, came forward and placed a wreath of wild flowers on the grave."[64] It is unnecessary to employ the Indian canons (or to be a lawyer) to recognize the wild inappropriateness in such an egregious line of argument.[65]

The *Oliphant* Court relied upon several other sources that were so ambiguous that they should have been considered unpersuasive in light of the canon that ambiguous interpretations must be resolved in favor of the tribes. One source was an opinion from the Solicitor of the Department of the Interior issued in 1970, which reasoned that "Indian tribes do not possess criminal jurisdiction over non-Indians, such jurisdiction lies in either the state or Federal governments."[66] This opinion, however, was similarly predicated on the non-dispositive *Kenyon* case, and, as even Rehnquist noted, was withdrawn without explanation in 1974.[67]

Another ambiguous source relied upon by the *Oliphant* Court was the Senate report for a bill, introduced in 1960, that would have made non-Indian poaching on tribal territory a federal crime.[68] The report stated "Indian tribal law is enforcible [sic] against Indians only; not against non-Indians."[69] However, just like the 1834 Western Territory bill, the anti-poaching bill was not enacted. Moreover, a few years later, a separate congressional report opined "[t]here is an established legal basis for tribes to exercise jurisdiction over non-Indians."[70] Despite this manifest ambiguity in the legal status of Indian criminal jurisdiction, Justice Rehnquist placed the entirety of his faith in the 1960 language, reasoning that the contradictory report "does not deny that for almost 200 years . . . the three branches of the Federal Government were in apparent agreement that Indian tribes do not have jurisdiction over non-Indians."[71] Once again, even passing aside the canon pertaining to ambiguous interpretations, Justice Rehnquist oddly required Congress to explicitly repudiate an assumption that had no legal standing to begin with.

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64. *Id.* (quoting HOMER CROY, HE HANGED THEM HIGH 222 (1952)).

65. *See* Barsh & Henderson, *supra* note 42, at 631 ("It is obvious that biography has no place in the resolution of important legal questions. A case must be followed if persuasive and on point, not because the presiding judge was a nice fellow. At best, Justice Rehnquist's discussion of Judge Parker is an embarrassment.").

66. Criminal Jurisdiction of Indian Tribes over Non-Indians, 77 Interior Dec. 113, 115 (1970). *See also* Oliphant, 435 U.S. at 201 n.11.

67. *Oliphant*, 435 U.S. at 201 n.11.

68. *Id.* at 204–05.

69. S. REP. No. 86-1686, at 2 (1960).

70. AM. INDIAN POL'Y REV. COMM'N, 95TH CONG., FINAL REPORT, Vol. 1, at 112, 117, 154 (Comm. Print 1977).

71. *Oliphant*, 435 U.S. at 205 n.15.

In light of the fact that so many of the sources relied upon by the *Oliphant* Court should have been interpreted in favor of tribal sovereignty, how should the doctrine of implicit divestiture be understood?[72] Answering this question requires consideration of the subtle, extra-judicial factors that the Court relied upon in its decision, factors which led Philip P. Frickey to describe *Oliphant* as being "as bad a test case as one could imagine from the tribal perspective."[73] For example, at the time of *Oliphant*'s disposition in federal district court, approximately fifty tribal members lived on the reservation, compared to more than 2,900 non-Indians.[74] Along these lines, the state of Washington apparently wholly owned and operated many highways, schools, utility companies, and other structures within the reservation.[75] The Court's possible extension of tribal court criminal jurisdiction over the reservation would have therefore had widespread consequences for non-Indian interests.[76]

Beyond demographics, the *Oliphant* Court appeared primarily concerned with protecting non-Indians from the jurisdiction of the Suquamish tribal court system. For example, the Court implicitly criticized the Suquamish for excluding non-Indians from tribal juries,[77] reasoning that "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress"[78] due to the fact that "Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice.'"[79]

This analysis ignores the Indian Civil Rights Act of 1968 (ICRA), which applied the majority of the Bill of Rights onto tribal court adjudications,[80] wherein Congress prescribed the accepted procedure for the

72. *See also* Robert Laurence, Martinez*,* Oliphant*, and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 10 CAMPBELL L. REV. 411, 420–21 (1988) (arguing that the *Oliphant* decision actually subverted congressional intent by acting as a de facto abrogation of the Indian Civil Rights Act).

73. Philip P. Frickey, *Transcending Transcendental Nonsense: Towards a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 658 (2006).

74. *Oliphant*, 435 U.S. at 193 n.1.

75. *Id.*

76. *See also* Charlene Koski, Comment, *The Legacy of* Solem v. Bartlett: *How Courts Have Used Demographics to Bypass Congress and Erode the Basic Principles of Indian Law*, 84 WASH. L. REV. 723, 761–62 (2009) ("The Court, by using demographics as an interpretive tool, has undermined that clearly expressed intent . . . to reach results more in line with the goals of assimilation than self-government.").

77. *Oliphant*, 435 U.S. at 194.

78. *Id.* at 210.

79. *Id.* (quoting H. REP. NO. 23-747 (1834)).

80. Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303 (2006). Absent affirmative congressional action to the contrary, tribes were not subject to the Bill of Rights. Talton v. Mayes, 163 U.S. 376, 383–84 (1896).

trial of non-Indians. Aside from the ICRA's lack of a jury requirement, the *Oliphant* Court failed to highlight a single constitutional shortcoming in the Suquamish criminal system, even admitting that "defendants are entitled to many of the due process protections accorded to defendants in federal or state criminal proceedings."[81] The Court essentially argued that the Suquamish erred by not enacting their own set of procedural safeguards in full accordance with the Bill of Rights, despite explicit statements by Congress on the superfluity of convergence.[82]

The disposition of the *Oliphant* Court toward criminal adjudications in tribal courts is perhaps best inferred from a seemingly irrelevant demographical footnote. This footnote stated that "unlike many other Indian tribes, [the Suquamish] did not consent to non-Indian homesteading of unallotted or 'surplus' lands within their reservation . . . [i]nstead, the substantial non-Indian population on the Port Madison Reservation is primarily the result of the sale of Indian allotments to non-Indians by the Secretary of the Interior."[83] Suquamish resistance to the arrival of non-Indians substantiated prejudice against foreign populations and, in the eyes of the Court, represented an inherent bias that could not manifest in tribal court criminal jurisdiction over non-Indians.[84]

This review of extra-judicial factors responsible for the *Oliphant* Court's legal reasoning denotes the complete abandonment of the Indian canons that led to the Court's development of the doctrine of implicit divestiture. First, the reservation demographics were such that ruling in favor of the tribes would have subjected the majority non-Indian reservation residents to the criminal jurisdiction of the minority tribal members.[85] Second, despite the fact that Suquamish tribal practices were in accordance with ICRA, criminal jurisdiction was not fully protected as under the

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81. *Oliphant*, 435 U.S. at 194.

82. *See* Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 836 (2007) (arguing that such a requirement would lead tribal courts to merely "become mirror images of the dominant society").

83. *Oliphant*, 435 U.S. at 193 n.1.

84. *See, e.g.*, Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUST. L. REV. 701, 713–16 (2006) (arguing that the Supreme Court's assumed fears over the fundamental fairness of tribal courts indicates a blatant lack of understanding of the realities of tribal court practice).

85. On this point, scholars have argued that "[t]he facts of the situation make the Indian argument not only moot but demonstrate that it was based on an idea of sovereignty having little relation to actual reality" and that "[w]hen attorneys and scholars come to believe that doctrines have a greater reality than the data from which they are derived, all aspects of the judicial process suffer accordingly." Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 215 (1989). *See also* James M. Grivalja et al., *Diminishment of Indian Reservations: Legislative or Judicial Fiat?*, 71 N.D. L. REV. 415, 422 (1995) ("If the demographics are unfavorable to Indians, they will lose. And I'm hard put to see how that could ever be a principled decision.").

American system of non-discriminatory jury selection.[86] Third, due to Suquamish resistance towards non-Indian homesteading, the Court was skeptical of the Suquamish tribal court's ability to convene fair and impartial trials for non-Indians.

If *Oliphant* espoused a veiled concern for the fundamental fairness and legitimacy of tribal courts, this was taken to an extreme through the development of the "consent theory" in *Duro v. Reina*.[87] In *Duro*, the question before the Court was whether the *Oliphant* jurisdictional preclusion ceased at non-Indians or extended to all non-members of a tribe.[88] In holding that tribal court criminal jurisdiction was solely restricted to tribal members, Justice Kennedy's majority opinion focused on the absence of participation by non-members in the intra-tribal body politic. Accordingly, non-members had not "consented" to tribal court jurisdiction. In particular, non-member consent was critical due to "[t]he special nature of the tribunals at issue": the tribal courts were "influenced by the unique customs, languages, and usages of the tribes they serve"; and, "their legal methods may depend on 'unspoken practices and norms.'"[89]

First seen in *Oliphant*, this extension of implicit divestiture was tied to the Court's normative beliefs about the legitimacy of tribal court adjudication and its desire to protect non-members from the allegedly arbitrary practices of tribal courts. The Court's reasoning, however, is problematic. From the perspective of the canons, the majority relied almost entirely on abstract discussions of sovereignty and "consent," and devoted a mere paragraph in the nineteen-page opinion to consider whether applicable treaties or statutes spoke to tribal court jurisdiction.[90] The majority therefore ignored the fact that "Congress has consistently exempted Indian-against-Indian crimes from the reach of federal or state power"[91] and that nearly

86. Taylor v. Louisiana, 419 U.S. 522, 528–29 (1975). *See also* 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, 804 (1996) ("Tribes have the right 'to make their own laws and be ruled by them.' If those rules are the same as the dominant society's rules, then there are few problems in their application. If those rules are applicable only to tribal members, then, likewise, most of the problems disappear, or at least can be handled internally. New problems arise when the tribe has different ways of doing things and wishes to apply those different ways against the interests of non-members.").

87. Duro v. Reina, 495 U.S. 676, 693 (1990).

88. *Id.* at 679.

89. *Id.* at 693 (citing F. COHEN, HANDBOOK ON FEDERAL INDIAN LAW 334–35 (2005 ed.)). *See also* 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, 297–98 (2001) ("This rhetoric suggests that some members of the Court question the competence and fairness of Indian courts and governments, are troubled by the separatism and special rights of Indians and their impact on non-Indians, or see the operation of tribal governments as anomalous in a federal system.").

90. *Duro*, 495 U.S. at 691–92.

91. *Id.* at 703 (Brennan, J., dissenting).

every existing statute at the time either implicitly or explicitly included non-member Indians as falling within tribal court criminal jurisdiction.[92] The Court further ignored the fact that unlike the statutory ambiguities and "unspoken assumption" that the Court had manufactured in *Oliphant* regarding tribal court jurisdiction over non-Indians, it was (or should have been) clear in *Duro* that tribes had consistently extended criminal jurisdiction over non-member Indians for years.[93]

Second, by stripping tribal courts of criminal jurisdiction over non-member Indians, the Court precluded tribes from exercising "not only self-governance but also community-building that the tribal court had the opportunity to arrive at its legal conclusion by reference to its tribe's particular cultural values."[94] This runs directly counter to the purpose of the Indian Reorganization Act, which was "to revitalize [tribal] self-government through the adoption of constitutions and bylaws,"[95] including tribal courts. It is therefore unclear why the canons could not have been applied here to support the Indian Reorganization Act as having *affirmatively granted* tribal courts criminal jurisdiction over non-member Indians. Presumably, had Congress intended to limit tribal court jurisdiction in the Indian Reorganization Act, it would have done so expressly.[96] In either case, under the canons, the legislative silence should favor tribal jurisdiction.[97]

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92. *Id.* at 702–03. *See also* Frickey, *Common Law*, *supra* note 25, at 77 (arguing that in *Duro*, "the Court adopted a new constitutionally inspired common-law rule—that tribes had no criminal jurisdiction over nonmember Indians—in the face of a pattern of federal statutes suggesting that Congress had long assumed tribes had such jurisdiction and that, far from promoting a coherent harmonization of criminal jurisdiction in Indian country, produced a serious gap in it").

93. *See* Brief for Rosebud Sioux Tribe et al. as Amici Curiae in Support of Respondents at 5–7, Duro v. Reina, 495 U.S. 676 (1990) (No. 88-6546), 1989 WL 1126953, at *4–7 ("A review of the factors considered in *Oliphant* reveals that tribes historically exercised jurisdiction over intra-Indian offenses and that the federal government has not divested such authority.").

94. Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 515 (2000).

95. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151 (1973).

96. *See* Fisher v. Dist. Ct., 424 U.S. 382, 390 (1976) (per curiam) ("The tribal ordinance conferring jurisdiction on the Tribal Court was authorized by § 16 of the Indian Reorganization Act. Consequently, it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians." (citation omitted)).

97. *See, e.g.*, Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 17 (1987) (refusing to read federal diversity jurisdiction statute as precluding tribal court jurisdiction because the "diversity statute . . . makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government. Tribal courts in the Anglo-American mold were virtually unknown in 1789 when Congress first authorized diversity jurisdiction . . . and the original statute did not manifest a congressional intent to limit tribal sovereignty"); Washington v. Confederated Tribes and Bands of the Yakima Indian Nation, 439 U.S. 463, 506–07 (1979) (Marshall, J., dissenting) ("Had Congress intended to condone exercise of limited subject-matter jurisdiction on a random geographical basis, it could have easily expressed this purpose. . . . I am unwilling to presume that Congress' failure in 1953 to sanction piecemeal jurisdiction in similar terms was unintentional.").

With regard to the alleged "consent of the governed" theory, the Court has never held "that participation in the political process is a prerequisite to the exercise of criminal jurisdiction by a sovereign."[98] Instead, the *Duro* Court created special rules for Indian criminal jurisdiction, separate from those of state or federal sovereigns.[99] While this can be attributed to the fact that tribal "rights to complete sovereignty, as independent nations, [are] necessarily diminished,"[100] it is also fundamentally inconsistent with the Court's alleged support for Indian tribal courts[101] and the fact that the canons require that diminishing tribal sovereignty be done explicitly.

Further, the concern of prejudice towards non-tribal members is no different from those faced by any party to local court adjudication,[102] as evidenced, for example, by the practice of forum shopping in diversity jurisdiction cases.[103] Further, empirical studies of tribal courts have all concluded that tribal court proceedings are as fair and impartial towards both Indians and non-Indians as their state and federal counterparts.[104] In

98. *Duro*, 495 U.S. at 707 (1990) (Brennan, J., dissenting). *See also* 8 U.S.C. § 1227(a)(2) (2006) (giving the federal government jurisdiction to deport aliens convicted of a variety of crimes, thus implicitly recognizing that non-resident aliens are subject to the criminal jurisdiction of the federal government); Heath v. Alabama, 474 U.S. 82, 83, 88 (1985) (authorizing both Alabama and Georgia courts to prosecute Georgia residents who committed a crime in Alabama); Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 472 (2003) ("Any sovereign—Canada, another state in the union, a distinct municipality—would have recognized interest and authority to protect the safety and security of all persons within its boundaries. . . . This regulatory and possibly criminal prosecution is not a matter of race, citizenship, political membership, or consent in the political entity within whose boundaries a non-member acts in prohibited ways.").

99. For an in-depth analysis of the Court's reasoning in so differentiating between state and tribal courts, see Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 477–80 (2005).

100. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

101. *See, e.g.*, *Iowa Mut. Ins. Co.*, 480 U.S. at 14; Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 855–56 (1985); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.").

102. *See* Berger, *Justice and the Outsider*, *supra* note 21, at 1120 ("A potential criticism of tribal legal systems is that the small size of tribal communities and the importance of clan relationships among community members present an obstacle to objective resolution of legal disputes. This obstacle may not be significantly greater than it is in small towns, in which judges, lawyers, and parties typically know each other well."); *see also* Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 710–11 (2006) (pointing out that an Indian would likely face a much more foreign setting in state or federal court than a non-Indian in tribal court).

103. *See* Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 246–47 (1970) (emphasizing the necessity of federal jurisdiction over certain claims to avoid forum shopping in state courts); *see also* Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114, 123–24 (2009) (arguing that diversity jurisdiction exists at least in part to account for localized bias in *state* courts).

104. *See generally* U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT (1991); Berger, *Justice and the Outsider*, *supra* note 21, at 1051 ("A . . . comprehensive review of decisions . . . reveals a similar effort to decide issues fairly . . . ."); Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 487 (1998); Rosen, *supra* note 94, at 579; Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 240 (1994).

any event, after *Duro* was announced, Congress immediately abrogated the decision by amending ICRA, reaffirming the inherent criminal jurisdiction of tribal courts over non-member Indians.[105]

The doctrine of implicit divestiture is a product of the Court's willful disregard of the Indian canons of construction, reliance upon unpersuasive sources, and a revision of two hundred years of settled legal assumptions about inherent tribal sovereignty. This results from the Court's faulty presumptions towards the idea of tribes as the "other," the concept of Indian sovereignty as limited to reservations, that tribal jurisdiction is uniquely suitable to its members, and notions of "traditional" aspects of tribal life.[106] Cumulatively, this represents an attempt to Americanize tribal sovereignty not by the allegedly prerequisite congressional action, but by judicial fiat from a Court increasingly hostile towards tribal interests.[107]

B. Civil Jurisdiction

While implicit divestiture was unapologetically explicit in extinguishing tribal criminal jurisdiction over non-Indians after *Oliphant*, tribal civil jurisdiction has been diminished over time more gradually.[108] The first prominent examination in the civil realm was *Williams v. Lee*, where the Court reviewed whether Arizona or Navajo courts had jurisdiction over an on-reservation civil dispute between a Navajo couple and a non-Indian Arizona resident.[109] In direct contravention of the principles guiding the *Oliphant* decision, the Court vested the Navajo tribal courts with jurisdiction after inquiring whether "absent governing Acts of Congress . . . the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[110] In holding that it did in this case, the Court reasoned that:

105. Act of Nov. 5, 1990, Pub. L. NO. 101-511, § 8077(d), 104 Stat. 1893 (codified as amended at 25 U.S.C. §§ 1301–1303 (2006)).

106. On this point, see *United States v. Wheeler*, 435 U.S. 313, 331–32 (1978), reasoning that the fact that "[t]ribal laws and procedures are often influenced by tribal custom and can differ greatly from our own" was evidence that tribal law should be allowed to flourish among tribal members so long as it did not extend to that of non-Indians.

107. *See* Getches, *Beyond Indian Law*, *supra* note 89, at 280 (finding that Indian tribes have lost 77% of cases brought before the Supreme Court between 1986 and 2001). While the merits of the cases obviously play a large role in this statistic, it is difficult to believe that tribes would so often be on the short end of the constitutional analysis absent some normative judgment on the part of the Court.

108. For a useful, more abbreviated timeline of the implicit divestiture of tribal court civil jurisdiction over non-Indians, *see generally* Jesse Sixkiller, Note, *Procedural Fairness: Ensuring Tribal Civil Jurisdiction After* Plains Commerce Bank, 26 ARIZ. J. INT'L & COMP. L. 779 (2009).

109. Williams v. Lee, 358 U.S. 217, 217–18 (1959).

110. *Id.* at 220.

> [T]o allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.[111]

Williams exemplifies the Court's analysis of tribal court jurisdiction prior to the development of implicit divestiture.[112] First, the Court adhered to the canon that congressional action is necessary to *diminish* tribal sovereignty, rather than to *create* it (as the Court held in *Oliphant*). Second, *Williams* exhibits the territorial relationship between tribal court jurisdiction and sovereignty in that the plaintiff's non-Indian status was immaterial because the transaction occurred on the reservation.

However, fidelity to Indian territorial sovereignty abruptly ceased in *Montana v. United States*, the first major case to examine tribal civil jurisdiction over non-Indians after *Oliphant* and *Wheeler* outlined the doctrine of implicit divestiture.[113] In *Montana*, the Crow Tribe of Indians sought to prohibit hunting and fishing by non-Indians on non-Indian fee lands within the reservation.[114] The tribe argued in the first instance that it was entitled to jurisdiction over the Big Horn River because it possessed treaty rights that held as much.[115] In the alternative, the Tribe sought to assert its inherent sovereignty to regulate non-Indian activities within the reservation.[116] After holding that the tribe did not, in fact, own title to the Big Horn River,[117] the Court examined the state of Indian civil jurisdiction in light of *Oliphant*.

The Court closely tracked the language from *Oliphant* as supporting the general jurisdictional baseline that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[118] Unlike *Oliphant*, however, the Court did not adopt a unilateral preclusion of

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111. *Id.* at 223.

112. *See* Fisher v. Dist. Ct., 424 U.S. 382, 387–88 (1976) (per curiam) (citations omitted) ("State-court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court. It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves. As the present record illustrates, it would create a substantial risk of conflicting adjudications affecting the custody of the child and would cause a corresponding decline in the authority of the Tribal Court.").

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

114. *Id.* at 547.

115. *Id.*

116. *Id.*

117. *See infra* Part II-A-2.

118. *Montana*, 450 U.S. at 565.

tribal jurisdiction over non-members. Rather, the Court qualified its ruling by recognizing:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[119]

Even in light of these considerations, now known as the "*Montana* exceptions," the Court determined that non-member hunting and fishing on non-Indian fee land within the reservation did not fall into any of the aforementioned categories, and thus the tribe lacked regulatory jurisdiction over these activities.[120]

The *Montana* exceptions remain the standard for determining tribal civil jurisdiction over non-Indians.[121] The Court's reasoning, however, was based on the argument that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[122] Thus, the Court essentially adapted the doctrine of implicit divestiture to fit the civil realm. In support of this assumption, the Court relied on three cases:[123] *Williams v. Lee*,[124] *Mescalero Apache Tribe v. Jones*,[125] and *McClanahan v. Arizona State Tax Commission*.[126] Closer inspection, however, reveals that Justice Stewart's opinion in *Montana* misapplied all three cases and unduly narrowed the scope of tribal regulation.

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119. *Id.* at 565–66 (citations omitted).

120. *Id.* at 566–67. *But see* Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L.R. 85, 122–23 (1991) (arguing that this test allows judges to make subjective political determinations of what infringes upon tribal self-government).

121. *But see* Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267, 271 (2000) (noting the "almost schizophrenic incongruity between *Montana*'s general rule of no jurisdiction and the potentially broad phrasing of its second exception.").

122. *Montana*, 540 U.S. at 564 (citations omitted).

123. *Id.*

124. Williams v. Lee, 358 U.S. 217 (1959).

125. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 147 (1973) (rejecting "the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes").

126. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973) ("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 Government.").

Williams denied the state of Arizona civil jurisdiction over an on-reservation dispute between tribal and non-tribal parties, reasoning that "absent governing Acts of Congress . . . the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[127] Both *Mescalero*[128] and *McClanahan*,[129] citing this statement in *Williams*, held that state income taxes do not apply on Indian reservations. All three of these cases are determinative of *state* jurisdiction within *Indian* reservations: unless specifically authorized by Congress, state law does not apply where it infringes upon tribal self-governance.

In *Montana*, the Court twisted the logic of *Williams* into the proposition that *Indians* cannot exercise jurisdiction over *non-Indians* unless *affirmatively authorized* by Congress. The three cases cited by the Court in support of this proposition are inapposite: they simply cannot be read to *diminish* Indian rights when they were all decided in the context of securing tribal sovereignty against state encroachment. The *Montana* Court took precedent that had prohibited the intervention of state law *absent* congressional authorization, and interpreted it to *require* congressional authorization for tribes to regulate within their own territory.[130] This divergence from *Williams* and its progeny further subordinated the canons in light of the Court's normative vision of shielding non-Indians from tribal regulation.[131] In the immediate aftermath of *Montana*, tribes hoped to retain jurisdiction through the apparent safeguards of the *Montana* exceptions. For a time, it seemed as if this would work: only a year after deciding *Montana*, the Court applied the exceptions and held in *Merrion v. Jicarilla Apache Tribe* that "Indian tribes enjoy authority to finance their governmental services through taxation of non-Indians who benefit from those services"

127. *Williams*, 358 U.S. at 220.

128. *Mescalero*, 411 U.S. at 148 ("[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation. . . .").

129. *McClanahan*, 411 U.S. at 165 ("[T]he State has interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves.").

130. *See* County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 266–67 (1992) (noting the legal distinction between tribal power to regulate and state power to impose its laws in rejecting the *Montana* exception as a defense against the imposition of state taxes on the reservation). In *Yakima*, Justice Scalia emphatically rejected a tribe's attempt to protect itself against state taxation by using the *Montana* ruling. *Id.*

131. *But see* Skibine, *Applicability of Federal Laws*, *supra* note 120, at 120 ("The Supreme Court in *Montana* plainly differentiated between powers necessary to protect tribal self-government and those powers necessary to control internal relations. The *Montana* Court recognized that tribes need to control more than internal relations to preserve tribal self-government.").

and upheld a tribe's right to impose a mineral severance tax on an oil company drilling on the reservation.[132]

This lone victory, however, is an outlier to the steady use of *Montana* as a sword of implicit divestiture, rather than a shield against it. The Court's diminishment of *Montana* protections commenced with *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, in which the tribes brought suit to obtain a declaratory judgment to permit Yakima application of zoning and land use laws on fee lands owned by non-Indians within the reservation.[133] In holding against the tribes, the Court narrowed the second prong of the *Montana* exception by reasoning that because the clause was preceded by the word "may," this proved that "a tribe's authority need not extend to all conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,' but instead depends on the circumstances."[134] In its decision, the Court split into several pluralities and concurrences, essentially holding that *Montana* allowed the tribes to zone non-Indian trust land closed off to non-members if the planned land use posed a "threat to the Closed Area's cultural and spiritual values."[135] However, the tribes were precluded from zoning areas of the reservation that had been opened to the general public by the Allotment Act and were held in fee simple by non-Indians.[136]

By restricting tribal authority based upon the "Indianness" of the lands in question, the Court openly predicated its holding as necessary to avoid "undue interference with state sovereignty and providing the certainty needed by property owners."[137] Indeed, the Court was unapologetic in this analysis, buttressing its reasoning on the facts that tribal members were a minority on the reservation, non-members held a significant portion of the reservation in fee, and non-members were precluded from participating in tribal elections[138]—the same concerns shaping implicit divestiture in *Oliphant* and *Duro*. The Court's territorial-based distinctions even within the *Montana* exceptions coalesce to protect non-Indian property interests at the expense of tribal sovereignty.[139]

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132. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 140 (1982).

133. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (plurality opinion).

134. *Id.* at 428–29 (citation omitted).

135. *Id.* at 443 (Stevens, J., concurring) (citation omitted).

136. *Id.* at 432 (plurality opinion).

137. *Id.* at 431.

138. *Id.* at 445–47 (Stevens, J., concurring).

139. *Accord* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001) (holding that "tax upon nonmembers on non-Indian fee land within the reservation is . . . presumptively invalid"); South Dakota v. Bourland, 508 U.S. 679, 695 n.15 (1993) ("[A]fter *Montana*, tribal sovereignty over nonmembers

The Court attacked tribal sovereignty from a second angle in *Strate v. A-1 Contractors*.[140] In *Strate*, two non-Indians were involved in a car accident on a public highway maintained by the state of North Dakota pursuant to a federally granted right-of-way over Indian reservation trust land. The plaintiff brought suit for damages in tribal court, and the defendant asserted that the court lacked the jurisdiction to hear the case, citing *Montana*.[141] In response, the plaintiffs contended that *Montana* only applied to regulatory jurisdiction (i.e., the tribe's ability to pass laws or ordinances regulating non-member property and conduct), and not adjudicative jurisdiction (i.e., the tribal courts' ability to hear cases involving non-Indians).[142]

The Court greatly diminished tribal court civil jurisdiction over non-members when it ruled that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction"[143] and that as a result "[s]ubject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'do[es] not extend to the activities of nonmembers of the tribe.'"[144] Since the tribe lacked the ability to regulate non-member activity on the highway,[145] it could not adjudicate causes of action arising thereon.[146] In so reasoning, the Court announced a "general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to [the *Montana*] exceptions."[147] The "general rule" fails to differentiate between regulatory and adjudicatory jurisdiction, exceeding the *Montana* decision (which made no mention of restricting adjudicative jurisdiction) and extending the presumption of tribal non-jurisdiction over non-members.

This reasoning, specifically that adjudicative jurisdiction must necessarily track legislative jurisdiction, is unheard of under the precepts of federalism. For example, although federal preemption doctrine precludes

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'cannot survive without express congressional delegation,' and is therefore *not* inherent.") (quoting Montana v. United States, 450 U.S. 544, 565 (1981)).

140. Strate v. A-1 Contractors, 520 U.S. 538 (1997).

141. *Id.* at 442–44.

142. *Id.* at 447–48.

143. *Id.* at 453.

144. *Id.* (citing *Montana*, 450 U.S. at 565).

145. The Court further determined that because the state's right-of-way over the reservation amounted to an alienation or an easement, the highway did not count as Indian country and therefore *Montana* applied in its entirety. *Id.* at 454–56.

146. The Court also held that retaining this jurisdiction did not fall into either of the two *Montana* exceptions. *Id.* at 456–59.

147. *Id.* at 446.

state legislatures from regulating in certain areas,[148] state courts still have jurisdiction over claims arising under the preemptory federal laws.[149] The *Strate* Court's reasoning, then, was peculiar to the nature of tribal jurisdiction and openly deviates from the Court's federalism jurisprudence, a fact implicitly recognized in a case involving the Indian canons just two years later.[150]

So, in order to divest tribes of their civil adjudicatory jurisdiction, the *Strate* Court violated the rules of federalism, categorized Indian trust land as being open to the public, and disavowed settled precedent. Ironically, these legal calisthenics resulted in the preclusion of tribal court jurisdiction over a case voluntarily filed in tribal court by a non-Indian plaintiff.[151] In this unwarranted extension of implicit divestiture, the Court further exhibited its extra-judicial perspective; in *Strate*, the Court openly expressed a preference for state court over tribal court.[152] *Strate* is another example of the selective use of implicit divestiture by the Court to isolate tribal civil jurisdiction to the tribe alone.[153]

The Court's next foray into extending *Montana* as a tool of implicit divestiture came in the form of arguably the most controversial federal Indian law decision since *Oliphant*: *Nevada v. Hicks*.[154] Hicks, who lived on tribal trust land, was suspected of illegally poaching endangered bighorn sheep outside the reservation. Nevada state game wardens executed a search warrant at his home, failed to find any contraband, and allegedly damaged Hicks' personal property in the process. In response, Hicks filed an action in the tribal court alleging a host of constitutional violations and the State challenged tribal court jurisdiction.[155] Hicks argued that because the search had taken place on tribally owned land, tribal civil regulation was territorially inherent. This reasoning follows the general consensus from *Brendale*, which drew a sharp distinction in the *Montana* analysis between

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148. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 220–21 (1947).

149. Tafflin v. Levitt, 493 U.S. 455, 458–59 (1990).

150. *See* El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 485 n.7 (1999) ("Under normal circumstances, tribal courts, like state courts, can and do decide questions of federal law, and there is no reason to think that questions of federal preemption are any different."); *see also* Testa v. Katt, 330 U.S. 386, 393 (1947) (holding that state courts are required to hear cases brought under federal law to vindicate federal rights, presumably even if the state is preempted from so legislating).

151. *Id.* at 443.

152. *Id.* at 459.

153. *See* Wallace Coffee & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 194 (2001) ("The subtext [in *Strate*] is identical to that in *Oliphant*: the Supreme Court feared subjecting the defendant to an unfamiliar court and potentially 'alien' system of law merely by his decision to drive on a state highway, without any conscious consent to such jurisdiction.").

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

155. *Id.* at 356–57.

land open to the public and land privately owned by the tribe.[156] However, the *Hicks* Court not only disregarded this territorial distinction, but held it inapposite and, for the first time, used *Montana* to diminish tribal civil jurisdiction *over the tribe's own lands*. In the relevant part of an extensive opinion, the Court reasoned that "ownership status of land[ ]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[,]'"[157] and that "the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers."[158] Absent any briefs on this particular point,[159] the Court took a dangerous step towards extinguishing any tribal claim whatsoever to civil jurisdiction over non-Indians on the reservation, regardless of land status.[160]

This case is typical of the extra-judicial considerations that permeate implicit divestiture jurisprudence. Had the Court not extended *Montana*'s presumption of non-jurisdiction, the tribal court would have retained inherent jurisdiction because the search took place on tribal lands. Hicks would then have been able to sue state agents in tribal court, a situation with which the Court was manifestly uncomfortable.[161] In order to avoid establishing this precedent, and because the "State's interest in execution of process is considerable,"[162] the Court made a clear, normative choice and denied Indian jurisdiction rather than subject state officials to the "vagaries" of tribal court.

The majority opinion, in fairness, was limited to its facts. In a footnote, the Court wrote that the "holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general."[163] Even so, applying *Montana* to tribal lands was an extreme step

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156. *See* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 430–48 (1989).

157. *Hicks*, 533 U.S. at 360 (citation omitted).

158. *Id.* at 360.

159. The State of Nevada had only invoked *Montana* in the context of arguing that because *Strate* announced a general presumption of state civil jurisdiction over non-Indian conduct on the reservation absent affirmative congressional delegation to the contrary, and because there was no such delegation here, jurisdiction did not exist. At no point did the State argue to extend *Montana* so as to apply to Indian tribal land as well. Brief of Petitioner at 36, Nevada v. Hicks, 533 U.S. 353 (2001) (No. 99-1994), 2000 WL 1784132.

160. As was the case in *Strate*, once the Court had held that there was no inherent tribal jurisdiction and that only the *Montana* exceptions could confer tribal court jurisdiction, it quickly ruled that neither applied. *Hicks*, 533 U.S. at 360–65.

161. *Id.* at 364–65. The *Nevada* Court precluded such suits from another angle when it held that tribal courts were courts of limited jurisdiction and therefore could not entertain § 1983 claims in the first instance. *Id.* at 366–69.

162. *Id.* at 364.

163. *Id.* at 358 n.2.

to take, and although all nine Justices concurred in the result, the Court divided deeply over the majority's decision to do so. In a separate concurrence, Justice Ginsburg emphasized that both *Strate* and *Hicks* should be limited to their facts and that neither case definitively answered whether *Montana* applied to Indian trust land.[164] Justice O'Connor, joined by Justice Stevens and Justice Breyer, castigated the majority for issuing a "sweeping opinion [that], without cause, undermines the authority of tribes to 'make their own laws and be ruled by them,'"[165] and referred to the extension of *Montana* as being "unmoored from our precedents."[166] In these Justices' minds, the entire case should have focused on the qualified immunity of state agents acting in their official capacity, rather than on any question of inherent tribal sovereignty.[167]

In the aftermath of *Hicks*, scholars bemoaned the Court's reasoning[168] and argued for Congress to pass a "*Hicks* Fix,"[169] much as Congress had passed the so-called "*Duro* Fix" to reaffirm tribal court criminal jurisdiction over non-member Indians.[170] These scholars saw the writing on the wall and argued that *Montana* would soon be extended to apply unconditionally to all reservation territory.[171] Others, however, pointed to Justice Scalia's qualifying footnote and argued that *Hicks* truly would be limited to its facts.[172] Some simply did not know what to make of the case.[173] If nothing else, there was one clear consequence of *Hicks*: the Court discounted tribal land status in a *Montana* determination for the first time, and three Justices (Souter, Thomas, and Kennedy) urged the Court to abandon this

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164. *Id.* at 386 (Ginsburg, J., concurring).

165. *Id.* at 387 (O'Connor, J., concurring) (citing Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997)).

166. *Id.*

167. *Id.* at 397.

168. *See* Getches, *Beyond Indian Law*, *supra* note 89, at 330 (accusing the *Hicks* Court of having "catapulted fragments of dicta from a few cases into sweeping rules that limit tribes' sovereignty over their reservations").

169. *See, e.g.*, Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 801–02 (2004); Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1, 34 (2003).

170. Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(d), 104 Stat. 1893 (codified as amended at 25 U.S.C. §§ 1301–1303 (2006)).

171. *See, e.g.*, Judith V. Royster, Montana *at the Crossroads*, 38 CONN. L. REV. 631 (2006).

172. *See, e.g.*, Edwin Kneedler, *Indian Law in the Last Thirty Years: How Cases Get to the Supreme Court and How They Are Briefed*, 28 AM. INDIAN L. REV. 274, 283 (2003–2004); Alex Tallchief Skibine, *Making Sense out of* Nevada v. Hicks*: A Reinterpretation*, 14 ST. THOMAS L. REV. 347, 348–49 (2001).

173. *See, e.g.*, Elizabeth Burleson, *Tribal, State, and Federal Cooperation to Achieve Good Governance*, 40 AKRON L. REV. 207, 217 (2007) ("*Hicks* exemplifies the degree of confusion that exists regarding Indian law generally, and tribal criminal jurisdiction in particular.").

qualification and to apply *Montana* as a per se rule over *any* claim of tribal civil jurisdiction over non-Indians.[174]

Although the exact reach of *Hicks* remains uncertain, the Roberts Court's first foray into tribal civil jurisdiction over non-Indians, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, offers little hope for advocates of tribal sovereignty.[175] This case involved the Longs, an Indian family that had financed its on-reservation business through the off-reservation, non-Indian Plains Commerce Bank. When the Longs defaulted on several loans, the Bank sold most of their land to non-Indians. The Longs brought suit in tribal court to enjoin the sale, also alleging a host of discriminatory lending practices by the Bank that they claimed precipitated their default.[176] The Bank fully litigated the case in the tribal court at both the trial and appellate level and lost; it then brought suit in federal court, claiming that the tribal court had no jurisdiction over the sale of bank-owned fee land to non-Indians.[177] The Court was called to decide whether the on-reservation dealings between the Longs and the Bank amounted to the type of "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" that would give the tribe jurisdiction.[178]

Predictably, the Court found that the tribal court lacked jurisdiction over both the sale of the land and the Long's discrimination claims. In so ruling, the Court made two startling claims. First, a twenty year, consensual, on-reservation relationship between Indians and a non-Indian bank, including a long-term contract for the lease and sale of land, was neither a consensual relationship that would satisfy the *Montana* standard, nor a commercial dealing, contract, or lease. After the sale of land to non-Indians, the Court reasoned, the Bank no longer had any relationship with the Longs, and so Indian interests did not exist.[179] Second, the tribe did not have any jurisdiction over the discrimination claim. Following the *Strate* distinction that adjudicative jurisdiction cannot exceed legislative jurisdiction (a distinction that, as noted, violates the basic precepts of federalism),[180] the fact that the tribe had no regulatory jurisdiction over the sale of the land meant that they had no adjudicative jurisdiction over the accompanying discrimination claims.[181]

174. Nevada v. Hicks, 533 U.S. 353, 374 (2001) (Souter, J., concurring).
175. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008).
176. *Id.* at 319.
177. *Id.* at 322.
178. Montana v. United States, 450 U.S. 544, 565 (1981).
179. *Plains Commerce*, 554 U.S. at 338–39.
180. *See supra* notes 163–67 and accompanying text.
181. *Plains Commerce*, 554 U.S. at 330.

Chief Justice Roberts' majority opinion, his first in Indian law, made several questionable assertions in support of the premise that neither of the *Montana* exceptions applied, assertions that, as noted by Frank Pommersheim, arrived without any "attempt to provide any legal authority to support its conclusion."[182] First, the Court asserted that *Montana* only regulated non-member "conduct" on tribal lands, and that the sale of land was not conduct.[183] Rather than provide any support for this peculiar characterization, the Chief Justice merely categorized the difference between conduct and a sale as "readily understandable" and moved on.[184] Second, addressing the prong of the *Montana* test that examined whether a non-member's "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,"[185] the Court explained that in order to rise to this level, "tribal power must be necessary to avert catastrophic consequences."[186] In this case, the Court characterized the bankruptcy of an on-reservation business and the eviction of tribal members from their home as being "quite possibly disappointing to the tribe, but [not] 'catastrophic' for tribal self-government."[187]

Although it was practically impossible to assert tribal jurisdiction under the *Montana* exceptions even before this case,[188] *Plains Commerce Bank* begs the question of how *anyone* could conceivably fulfill these requirements as interpreted by the Chief Justice. If an on-reservation contract between an Indian and a bank to lease and purchase land is not a consensual agreement about contracts or leases, what is?[189] Further, it is extremely likely that not a single case in the history of the post-*Montana* jurisprudence would have risen to the level of "catastrophic consequences" such that it would have granted tribal jurisdiction.[190] This latter standard is particularly offensive, as the

182. Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48, 64 (2010).

183. *Plains Commerce*, 554 U.S. at 334–35.

184. *Id.* at 334 n.1. Dissenting in part, Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, expressed their own strong skepticism over this distinction. *Id.* at 345–47 (Ginsburg, J., concurring in part, concurring in the judgment, and dissenting in part).

185. Montana v. United States, 450 U.S. 544, 566 (1981).

186. *Plains Commerce*, 554 U.S. at 341 (citing F. COHEN, HANDBOOK ON FEDERAL INDIAN LAW, 232 n.220.

187. *Id.* (citation omitted).

188. *See* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989). For all its seeming promise, in the nearly three decades since *Montana* was decided, the Court has expressly upheld Indian jurisdiction under the exceptions only one single time. *Id.*

189. *Cf.* Laurence, *Judicial Reluctance*, *supra* note 86, at 797 ("A tribe's—or for that matter, *any* government's—interest in 'political integrity, economic security, health and welfare' is strong and broad. What does a government do that is *not* connected to those four items, broadly read?").

190. Cullen D. Sweeney, Note, *The Bank Began Treating Them Badly:* Plains Commerce Bank*, The Supreme Court, and the Future of Tribal Sovereignty*, 33 AM. INDIAN L. REV. 549, 573 (2009). As commentators have noted, this extraordinarily elevated standard falls somewhere between "the two *Montana* exceptions" being very narrowly construed and "an absurdly high standard for the exception's

applicability of tribal sovereignty should be inherent, and should certainly not be limited to "catastrophic" situations (as determined by inevitably non-Indian judges).

Plains Commerce Bank continues the Court's "death march toward implementing a *de facto* (soon to be *de jure*?) complement to the *Oliphant* decision on the civil side of the tribal court docket."[191] Although the future of tribal civil jurisdiction over non-members is still undetermined, *Hicks* and *Plains Commerce Bank* stand as twin pincers ready to decapitate civil jurisdiction in an *Oliphant*-esque bright line divestiture of sovereignty: *Hicks* to apply *Montana* to the entirety of Indian reservations, and *Plains Commerce Bank* holding tribes to an impossible standard under *Montana*. Indeed, the situation is so dire that in 2001, and in direct response to *Hicks*, the Native American Rights Fund developed a project specifically to monitor any Indian law cases that might make it to the Supreme Court and to argue against certiorari for unfavorable cases.[192]

Thus, the history of implicit divestiture in both the criminal and civil realms has involved open contravention of the Indian canons, unprovoked revocation of tribal sovereignty, and repeated departures from otherwise settled doctrines of federal law. While purporting to respect some semblance of tribal jurisdiction with respect to non-Indians, the Court extinguished such jurisdiction in the criminal realm and seems poised to follow in the civil realm. Whether motivated by outright bias against the legitimacy of tribal courts, a manifest goal of shielding non-Indians (no matter how culpable) from tribal authority, or a mere disregard of both the Indian canons and stare decisis, the Court has proven itself hostile towards the very notion of tribal sovereignty.

This Article turns now to the possible counter to implicit divestiture: the Indian canons. These rules of interpretation and tribal sovereignty are judicial creations targeted towards maintaining tribal sovereignty in the face of legislative or executive silence or ambiguity. For this reason, they seem like the natural defense for Indian tribes when faced with state or federal attacks on their rights.

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application, essentially vitiating the possibility of its use." *Id.*

191. Pommersheim, *At the Crossroads*, *supra* note 182, at 63.

192. Tracy Labin, *We Stand United Before the Court: The Tribal Supreme Court Project*, 37 NEW ENG. L. REV. 695, 695–96 (2003); Marcia Coyle, *Indians Try to Keep Cases Away From High Court*, NAT'L L. J., Mar. 30, 2010, *available at* http://www.law.com/jsp/article.jsp?id=1202447092378.

II. THE INDIAN CANONS OF CONSTRUCTION

As discussed above, there are three primary Indian canons of construction. First, treaties between tribes and the federal government must be interpreted as the Indians would have understood them at the time of negotiation.[193] Second, any ambiguities in the interpretation of treaties, statutes, regulations, or executive orders must be interpreted in favor of the tribes.[194] Third, tribal sovereignty may not be diminished absent express legislative or executive directive to the contrary.[195] In combination, the three canons seem like a formidable bulwark against state or federal encroachment into Indian country.

However, as is so often the case in federal Indian law, the application of the canons has been both haphazard and controversial.[196] Indeed, Supreme Court jurisprudence since *Worcester* is rife with majority and dissenting opinions accusing the other side of misinterpreting or misapplying the canons.[197] Even so, in his widely accepted assessment of the canons, Scott C. Hall asserts that "the Supreme Court has required congressional intent to diminish Indian rights, and the legitimacy of such diminishment rests squarely on that intent."[198] In light of the ambiguity inherent in statutory

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193. Seufert Bros. Co. v. United States, 249 U.S. 194, 198 (1919) ("We will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules.'") (quoting Choctow Nation v. United States, 119 U.S. 1, 28 (1886)).

194. Choate v. Trapp, 224 U.S. 665, 675 (1912) ("The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.").

195. Oneida County v. Oneida Indian Nation, 470 U.S. 226, 247–48 (1985) ("'Absent explicit statutory language,' this Court accordingly has refused to find that Congress has abrogated Indian treaty rights. The Court has applied similar canons of construction in nontreaty matters. Most importantly, the Court has held that congressional intent to extinguish Indian title must be 'plain and unambiguous,' and will not be 'lightly implied.'") (internal citations omitted).

196. *See, e.g.*, David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1621 (1996) ("While the Court may continue to cite the canons, it is difficult to attribute any significance to them in many recent cases.") [hereinafter Getches, *Cultural Frontier*].

197. *See, e.g.*, Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 256 (1985) (Brennan, J., dissenting) ("[T]he Court wholly ignores these canons and boldly pronounces its own revisionist interpretation of the statute that goes far beyond even the Government's current reading."); DeCouteau v. Dist. Cnty. Court, 420 U.S. 425, 447 (1975) ("A canon of construction is not a license to disregard clear expressions of tribal and congressional intent."); Choctaw Nation v. Oklahoma, 397 U.S. 620, 649 (1970) (White, J., dissenting) ("I find it difficult to conclude from such murky [treaty] language that the United States intended to reject its historic policy with respect to beds of navigable rivers in executing these treaties and patents.").

198. Scott C. Hall, *The Indian Law Canons of Construction v. The* Chevron *Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 CONN. L. REV. 495,

interpretation and the Court's checkered history with Indian law cases, it seems disingenuous to accept the Court at its word that congressional intent is clear when it comes to Indian treaties and statutes.[199] If congressional intent were so easily discerned, then *Chevron U.S.A., Inc. v. Natural Resources Defense Council*[200] would not be the most cited case in Court history.[201]

This section ventures beyond the naiveté of assuming that the Court faithfully tracks congressional intent in employing the Indian canons, or that such feat is even possible. Instead, it compares two general categories of federal Indian law: determining the boundaries of a reservation (with the accompanying consequences for state territorial sovereignty) and Indian hunting and fishing rights.[202] This comparison examines the normative factors, beyond the alleged congressional intent behind relevant statutes and treaties, which shape the Court's use of the Indian canons. These considerations include the nature of the rights at issue, the parties involved, state, federal, or other non-Indian interests, and the role of the "traditional" view of Indians within American society.

A. Determining the Boundaries of a Reservation

Courts most frequently employ the canons when reviewing statutes and treaties in order to determine reservation boundaries. This is a particularly telling area of the law. Given that tribal rights depend upon the territorial integrity of the reservation,[203] and the existence of a reservation inherently strips states of territorial sovereignty, extrajudicial normative factors can

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565 (2004). To be fair, Hall does acknowledge that there are many instances of rather dubious "finding" of congressional intent. *Id.* at 542. Nevertheless, further analysis is needed to get to the root of the factors considered by the Court in finding intent, legitimate or otherwise.

199. *See* Getches, *Cultural Frontier*, *supra* note 196, at 1621–22 (1996) ("When construing legislation opening Indian country to non-Indian occupancy, the Court has generally resisted diminishing reservation boundaries absent clear evidence that Congress intended to divest the tribe not only of parcels of land but the power to govern the area. The Court now dismisses the canons by declaring that no true ambiguity exists.").

200. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

201. RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.2, at 140 (4th ed. 2002).

202. I concede that these are imperfect categorizations and that the issues in these cases inevitably overlap. There are also many important cases within the field of federal Indian law that do not fit quite so neatly into any of these categories. However, my goal here is to spot broad patterns within the Supreme Court's reasoning when applying or withholding the canons, and the categories I have chosen, paired with the analysis of civil and criminal jurisdiction in the realm of implicit divestiture and the inevitably self-referential nature of the cases at issue, offer a representative portrait of the Court's thinking. Further, since 1959 alone, the Supreme Court has heard over 135 federal Indian law cases. *See Supreme Court*, TURTLE TALK, http://turtletalk.wordpress.com/resources/supreme-court-indian-law-cases/ (last visited Apr. 1, 2011) (listing all Indian law cases decided by the Supreme Court since 1959). Some streamlining is necessary in order to concisely examine the relevant case law.

203. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148–49 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non discriminatory state law otherwise applicable to all citizens of the State.").

easily influence judicial opinion and the subsequent application of the Indian canons of construction. These factors, and their consequences, are examined below.

1. Rights Implicit in Reservation Existence: Land Use

An early case analyzing tribal territorial rights under the canons is *Alaska Pacific Fisheries v. United States*.[204] In *Alaska Pacific Fisheries* the Court considered whether a treaty establishing a reservation for the Metlakhatla Indian tribe included the submerged lands and seas surrounding the reservation and, as a consequence, precluded the non-Indian appellant from fishing in those waters.[205] In holding for the tribe, the Court focused on two key factors. First, the reservation was created to encourage the Metlakhatla's self-sufficiency and "their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life."[206] Second, due to "the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians," the Court reasoned that the tribe would have understood the reservation as including the surrounding seas and submerged lands that provide for their economic livelihood.[207]

In this case, there was no clear congressional intent regarding the inclusion of seas and submerged lands, and the Court was forced to hypothesize that "Congress intended to conform its action to [the tribe's] situation and needs."[208] Instead, the Court turned to the canons in order to artificially determine that Congress would not have intended to preclude the tribe from "civilizing" itself through industry and self-reliance.

This paternalistic, if effective, use of the canons was employed in other early cases addressing whether particular land use rights were implicit in the creation of a reservation. For example, in *Winters v. United States*,[209] the Court held that a reservation-creating treaty that was otherwise silent on water rights implicitly included all riparian access necessary to "change [the Indian's nomadic] habits and to become a pastoral and civilized people."[210] The Court rejected the argument that congressional silence stripped the tribes of their water rights, holding that "[b]y a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the

204. Alaska Pac. Fisheries v. United States, 248 U.S. 78 (1918).
205. *Id.* at 87.
206. *Id.* at 89.
207. *Id.* at 89–90 (citing Choate v. Trapp, 224 U.S. 665, 675 (1912)).
208. *Id.* at 89.
209. Winters v. United States, 207 U.S. 564 (1908).
210. *Id.* at 576.

standpoint of the Indians."[211] Accordingly, the Court determined that Congress and the tribe would not have negotiated a treaty to establish a desolate, arid tract of land that was unsuitable for grazing absent irrigation.[212] As with *Alaska Pacific Fisheries*, although the Court utilized the canons on behalf of the tribes, its motive was to encourage the tribe to become settled and "civilized" according to the agrarian norms of the day.

Thus, in both *Alaska Pacific Fisheries* and *Winters*, the Court applied the canons to further the self-sufficiency and the civilizing effects of reservation-based tribal industry. Of note is the fact that in these two cases, the non-Indian parties were private individuals, lacking the gravitas of a state protecting its territorial sovereignty.[213] A pattern emerges in the Court's use of the canons: when holding for the tribe could further Indian self-reliance in a way that seems "American" according to the contemporaneous commercial norms, the Court is extremely receptive towards applying the canons. This is particularly true in cases where the opposing party's interests seem less pressing by comparison, such as those of an individual or a private enterprise. By comparison, where the Court is forced to choose between faithfully applying the canons and intruding upon state sovereignty to further a seemingly "non-essential" attribute of tribal life, the Court often contravenes clear congressional language to further its normative goal of maintaining state sovereignty. This is discussed further below.

2. Reservation Existence v. State Territorial Sovereignty

The Court does not necessarily disregard the canons when the opposing party is a state. For example, in *Choctaw Nation v. Oklahoma*,[214] the Cherokee Nation, joined by the Chickasaw and Choctaw tribes, petitioned against Oklahoma to recover royalties for mineral extractions from a riverbed. The tribes claimed that the riverbed was Indian territory under the governing treaties, while Oklahoma argued that the territorial rights to navigable waters were incidents of state sovereignty.[215] In holding for the

211. *Id.*

212. *Id.*

213. *See* Frickey, *Domesticating Federal Indian Law*, *supra* note 40, at 73 ("[T]he current Court has badly depreciated the canons, reducing them from clear statement requirements to be considered at the outset of the interpretive analysis to mere tiebreakers that apply only if the court [sic] would otherwise flip a coin. No such tie ever emerges in its analysis of these disputes because the current Court venerates state sovereignty and has little respect for tribal independence. Consequently, the canons have lost most of their influence.").

214. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

215. *Id.* at 647–48 (White, J., dissenting) ("Conveyance of a river bed would not be implied and would not be found unless the grant 'in terms embraces the land under the waters of the stream.' Such

Cherokee, the Court reasoned that because the treaty at issue granted the tribes a single, undivided tract of land, and the river was situated entirely within that tract, then the balance between state and tribal sovereignty had to be resolved in favor of the tribes under the canons.[216] The Court noted that the treaty did not expressly exclude the riverbed from the reservation, and placed special emphasis on the fact that it guaranteed that "no part of the land granted them shall ever be embraced in any Territory or State."[217]

Writing in dissent, Justice White would have trumped the Indian canon with another canon: absent explicit congressional intent to the contrary, all navigable rivers are conveyed at statehood,[218] a presumption which prevailed in *Montana v. United States*.[219] Although *Montana* is perhaps more famous for the *Montana* exceptions, the original issue was whether the title to the bed of the Big Horn River passed to the state of Montana upon its admission to the Union.[220] The applicable treaty provision stated that the reservation "shall be . . . set apart for the absolute and undisturbed use and occupation" of the Crow Tribe, and that no non-Indians, except agents of the Government, "shall ever be permitted to pass over, settle upon, or reside in" the reservation.[221]

Although this mirrors the treaty language from *Choctaw Nation* that the Court held swung in favor of the tribe under the canons, the *Montana* Court ignored the canons in favor of semantic calisthenics to find a way to rule in favor of the state. In *Montana*, the Court held that retaining a riverbed for Indian use in a treaty required clear expression to that effect, and could not be assumed through application of the Indian canons, as the Court had done in *Choctaw Nation*.[222] The Court distinguished *Choctaw Nation* as having been "based on very peculiar circumstances not present in this case," including clear language that the state was forever barred from jurisdiction over the tribal lands.[223] The Court found no such compelling provisions in *Montana* and accordingly held for the state.

The juxtaposition between *Choctaw Nation* and *Montana* illustrates the extra-legal considerations that the Court used to trump the canons, and the *Montana* Court's distinction of *Choctaw Nation* does not withstand

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disposals by the United States 'during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.'") (citations omitted).

216. *Id.* at 628.
217. *Id.* at 625 (quoting Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333, 334).
218. *Id.* at 652 (White, J., dissenting).
219. Montana v. United States, 450 U.S. 554, 556–57 (1980).
220. *Id.* at 547.
221. Second Treaty of Fort Laramie, art. 2, Feb. 16, 1868, 15 Stat. 649, 650.
222. *Montana*, 450 U.S. at 552–54.
223. *Id.* at 555 n.5.

scrutiny. First, the *Montana* Court took great stock in the fact that the treaty in *Choctaw Nation* was clearly aimed at removing state jurisdiction over the territory forever due to the United States having repeatedly broken treaties with the tribes.[224] The treaty in *Montana*, however, was signed after the Crow tribe had engaged in territorial warfare with surrounding tribes, and the Crow reservation had been reduced in size by the United States.[225] The *Montana* majority enumerated reasons for the Crow reservation's establishment, such as to "assure safe passage for settlers across the lands of various Indian Tribes; to compensate the Tribes for the loss of buffalo, other game animals, timber, and forage; to delineate tribal boundaries; to promote intertribal peace; and to establish a way of identifying Indians who committed depredations against non-Indians."[226] However, the actual nature of the treaty examined in *Montana* was disputed, and so using that dispute *against* the tribes does not seem to comport with the Indian canons' purpose to resolve ambiguities in favor of the tribes.[227]

Second, the original Indian canon, as articulated in *Worcester v. Georgia*, was that "[t]he language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import . . . they should be considered as used only in the latter sense."[228] The *Montana* Court expressly discarded this canon when it wrote that "whatever [the treaty's terms] seem to mean literally, [they] do not give the Indians the exclusive right to occupy all the territory within the described boundaries."[229] It is hard to see a farther departure from the canons, or a more "back-handed way of abrogating the hunting and fishing rights of these Indians,"[230] than blatantly ignoring the treaty's language in order to strip the Crow Tribe of territorial sovereignty.

This is especially true given that the *Choctaw Nation* Court had applied the canons to substantially similar treaty language with the exact opposite result. While the Cherokee treaty, stating that "no part of the land granted [the Indians] shall ever be embraced in any Territory or State,"[231] provided clear congressional intent to convey the right to the riverbed, the Court found no such clear conveyance in a treaty stating that the "United States

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224. *Id.*
225. *Id.* at 547–48.
226. *Id.* at 557–58.
227. *See id.* at 572–73 (Blackmun, J., dissenting) (arguing that the actual purpose of the Treaty of Fort Laramie was to prevent hordes of white settlers from stripping Crow lands of natural resources).
228. Worcester v. Georgia, 31 U.S. (5 Pet.) 515, 582 (1832) (McLean, J., concurring).
229. *Montana*, 450 U.S. at 555.
230. Menominee Tribe v. United States, 391 U.S. 404, 412–13 (1968).
231. Treaty of Dancing Rabbit Creek, *supra* note 217, at 334.

now solemnly agrees that no persons, except those herein designated and authorized so to do . . . shall ever be permitted to pass over, settle upon, or reside in the territory [of the tribe]."[232] The dissent, which did not miss the extraordinary hair parsing between these two clauses, argued quite forcefully that "[the *Choctaw*] Court found that the 'natural inference' to be drawn from the grants to the Choctaws and Cherokees was that 'all the land within their metes and bounds was conveyed, including the banks and bed of rivers.' The Court offers no plausible explanation for its failure to draw the same 'natural inference' here."[233]

So what are we to make of the fact that strikingly similar treaties, situations, and claims came to diametrically opposite results? This Article argues that in *Montana* the Court subsumed the canons and manufactured its own idea of congressional intent in order to reach a specific normative result. The tribes in *Choctaw Nation* sued the state of Oklahoma in order to receive royalties from mineral extraction in a riverbed.[234] This amounted to a one-time payment and an injunction against future interference with the Cherokee Nation's property rights. This only resulted in a minimal burden on the state, and is consistent with the federal government's general willingness to protect the mineral rights of Indian tribes.[235]

By comparison, awarding the Crow Tribe jurisdiction over the riverbed in *Montana* would have given the Tribe regulatory jurisdiction over the hunting and fishing rights of large number of non-Indian reservation residents, as approximately twenty-eight percent of the reservation land was held in fee by non-Indians.[236] Unlike protecting the tribe's right to control its mineral resources, which seems akin to the "civilization through exploitation of reservation resources" line of reasoning employed in *Winters* and *Alaska Fisheries*, the Court seemed hesitant to use the canons in order to allow the Crow Tribe to overstep what, to the Court, seemed to be normatively outside the realm of "Indianness."[237] As was the case with

232. Second Treaty of Fort Laramie, *supra* note 221, at 650.

233. *Montana*, 450 U.S. at 575–76 (Blackmun, J., dissenting) (quoting Choctow Nation v. Oklahoma, 397 U.S. 620, 623 (1970)).

234. Choctaw Nation v. Oklahoma, 397 U.S. 620, 621 (1970).

235. *See, e.g.*, The Indian Mineral Development Act, 25 U.S.C. §§ 2101–2108 (2006) (permitting Indians to arrange agreements regarding tribal mineral resources); Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 200–01 (1985); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

236. *Montana*, 450 U.S. at 548.

237. *See* David J. Bloch, *Colonizing the Last Frontier*, 29 AM. INDIAN L. REV. 1, 36 (2004–2005) (arguing that submerged land jurisprudence in Indian law "runs counter to the oft repeated rule that a tribal reservation is a 'reservation' of rights not ceded by a tribe (instead of the sum of powers delegated to it by the federal government). In other words a tribe should not need to overcome the presumption against conveyance; its plenum of title ought to be assumed aprioristically.") (citing F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 504 n.260 (2005 ed.)).

the land use and self-sufficiency cases, this is another example of the Court applying the canons in favor of the tribes when doing so has a relatively minimal impact on non-Indian interests. While it is acceptable to exclude non-Indian businesses from exploiting minerals in their preferred location, the Court is much more hesitant to employ the canons when doing so furthers its viewpoint of the tribes' proper role of living off of the land, rather than as robust governmental entities in their own right.

This juxtaposition of "tribes as self-sufficient from the land" and "tribes as governments" was extended in later cases pitting state sovereignty against reservation existence. In *Idaho v. United States*, the Court considered whether various treaties and executive orders pertaining to the Coeur d'Alene tribe of Idaho gave them title to submerged lands within their reservation.[238] By the late 1800s, the United States and Coeur d'Alene tribe had undergone decades of negotiations over the reservation's boundaries, including debate as to whether the reservation included various submerged lands in the Coeur d'Alene Lake and St. Joe River.[239] Although there was strong evidence that the executive branch at the time did consider the submerged lands to be part of the reservation,[240] and the statute ratifying these executive agreements contained the language that "the Coeur d'Alene Reservation shall be held forever as Indian land[,]"[241] there was nothing in the final reservation statute specifically vesting the tribe with title to the submerged lands. Complicating the situation was the fact that the State of Idaho had been admitted to the United States before the passage of the act granting the Coeur d'Alene a reservation.[242] This does not seem to satisfy the *Montana* Court's requirement that a treaty-based grant of navigable waters "by its terms formally convey any land to the Indians."[243]

In *Idaho*, however, the Court held that applicable executive orders had conveyed the submerged lands to the tribe.[244] The Court implicitly based its reasoning on the canons: it found that Congress was not trying to "pull a fast one"[245] on the Indians by surreptitiously vesting the submerged lands to

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238. Idaho v. United States, 533 U.S. 262, 265 (2001).

239. *Id.* at 265–72.

240. *See id.* at 268 ("The Secretary responded in February 1888 with a report of the Commissioner of Indian Affairs, stating that 'the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation,' and that '[t]he St. Joseph River also flows through the reservation.'"); *id.* at 270 ("The new boundary line, like the old one, ran across the lake, and General Simpson, a negotiator for the United States, reassured the Tribe that 'you still have the St. Joseph River and the lower part of the lake.'").

241. Act of Mar. 3, 1891, ch. 543, §§ 19, 20, 26 Stat. 1027, 1028.

242. Idaho Statehood Act, ch. 656, 26 Stat. 215 (1890).

243. Montana v. United States, 450 U.S. 544, 553 (1981).

244. *Idaho*, 533 U.S. at 281.

245. *Id.* at 278.

Idaho, but rather that Congress and the tribe understood that reservation's establishment inherently included rights to the submerged lands.[246]

However, the language of the treaty in this case is essentially indistinguishable from that in *Montana*, as neither treaty explicitly conveyed submerged land. Instead, the difference between *Choctaw Nation* and *Idaho,* and *Montana* is the Court's normative balance between tribal sovereignty and non-Indian rights. In *Montana*, the Crow tribe wanted to exercise regulatory jurisdiction over the hunting and fishing of non-members on the reservation; the Court, however, found that "at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life."[247] By comparison, the Court in *Idaho* went to great lengths to emphasize the importance of fishing to Coeur d'Alene tribe's traditional way of life.[248]

Although state territorial integrity was nominally at issue in both cases, the tribe was portrayed as a private landowner in *Choctaw Nation* and as a self-reliant band of hunters in *Idaho*, both in accordance with the Supreme Court's preferred viewpoint of tribes behaving as "civilized" Americans or acting within the traditional vision of what Indian sovereignty should look like:[249] what Charles Wilkinson refers to as "measured separatism."[250] The Indian canons were therefore applied to find the necessary congressional intent to further tribal self-reliance, geographic isolation, and land-based governmental integrity.[251] In *Montana*, however, the Crow tribe wanted to

246. *Id.* at 277.

247. *Montana*, 450 U.S. at 556.

248. *Idaho*, 533 U.S. at 265 ("Tribal members traditionally used the lake and its related waterways for food, fiber, transportation, recreation, and cultural activities. The Tribe depended on submerged lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored in riverbeds and banks."); *id.* at 266 ("When the Tribe petitioned the Commissioner of Indian Affairs a second time, it insisted on a reservation that included key river valleys because 'we are not as yet quite up to living on farming' and 'for a while yet we need have some hunting and fishing.'"); *id.* at 276–77 ("[A] surveyor on the scene had warned the Surveyor General that '[s]hould the fisheries be excluded there will in my opinion be trouble with these Indians.'") (citation omitted).

249. *See* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 434 (1989) (Stevens, J., concurring) ("An Indian tribe's power to exclude nonmembers from a defined geographical area obviously includes the lesser power to define the character of that area."); Alaska Pac. Fisheries v. United States, 248 U.S. 78, 88 (1918) ("[The Metlakatlans] were largely fishermen and hunters, accustomed to live from the returns of those vocations, and looked upon the islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development.").

250. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 14, 16 (1987); *see also* Riley, *supra* note 82, at 800.

251. Chief Justice Rehnquist's dissent castigated the majority for finding "congressional intent to withhold submerged lands from the State from what are best described as inchoate prestatehood proceedings" and for relying upon unratified bills and agreements. *Idaho*, 533 U.S. at 284–85 (Rehnquist, C.J., dissenting). It is interesting in that this was *exactly* what then-Justice Rehnquist did in the *Oliphant* opinion in order to preclude tribal criminal jurisdiction over non-Indians altogether. In so doing, he relied upon much less authoritative sources than the ones at issue in *Idaho*.

assert regulatory jurisdiction over non-Indians; surely, reasoned the Court, Congress never would have intended such a shift in the balance of power (despite clear treaty language to the contrary) and the canons were thus inapplicable.

These extra-judicial applications of the Justices' personal values pervade Indian law jurisprudence and undercut the legitimacy of the Indian canons. When tribes wield a "civilizing" power—such as furthering economic interests or acting as a private landowner—or when it fits with the view of Indians as the guardians of nature who live off of the land, the tribes are much more likely to prevail under the canons. If, however, tribes assert their rights as governmental entities against non-Indians, the Court views this power as having been implicitly divested.

3. Reservation Diminishment

In early years, the Court was often quite protective of Indian sovereignty in diminishment cases.[252] For example, in *Minnesota v. Hitchcock*,[253] the Chippewa Indians had ceded their lands to the federal government to be held in trust and allotted,[254] though they were still treated as an Indian reservation.[255] A second statute some years later provided for certain tracts of land within the reservation boundaries to be surveyed by the state of Minnesota for the purposes of establishing public schools;[256] between the cession and the land grant, Minnesota argued that the reservation had been diminished and that the surveyed lands had reverted to the state upon their admission to the Union.[257]

The Court rejected Minnesota's claim, applying the canons and reasoning that the tribe would have understood the cession agreement as transferring title to the government to hold in trust for the tribe, not depriving them of their territory altogether.[258] Further, the Court held that the "purpose of the legislation and agreement was to fit them for citizenship by allotting them lands in severalty and providing a system of public

252. *See* Frickey, *(Native) American Exceptionalism*, *supra* note 99, at 443 (arguing that in the early canons cases, by "aggressively reading Indian treaties to protect against all but clear tribal cessions, the Court appeared to be moderating the positivist and normative deficits existing at the constitutional level by providing a legalistic, more normatively attractive approach at the subconstitutional level of treaty interpretation").

253. Minnesota v. Hitchcock, 185 U.S. 373 (1902).

254. *Id.* at 387 (citing Act of Jan. 14, 1889, ch. 24, 25 Stat. 642 ("An act for the relief and civilization of the Chippewa Indians in the State of Minnesota")).

255. *Minnesota*, 185 U.S. at 376–77.

256. Act of Feb. 28, 1891, ch. 384, 26 Stat. 794, 796.

257. *Minnesota*, 185 U.S. at 380–81.

258. *Id.* at 395–96.

schools,"[259] reasoning that the acts in their entirety were designed to civilize and educate the Chippewa, not to destroy their reservation.[260]

This application of the canons is indicative of the recurring view of Indians as the "other."[261] By employing the canons for the Indians' benefit in order to "civilize" them, the Court espoused a patriarchal view of the treaty's purpose. The tribe likely signed the agreements in order to cling to any possible vestige of territorial sovereignty, rather than agreeing to give up its culture and become "fit for citizenship" in the eyes of whites.[262] Still, the Court nevertheless rejected diminishment in light of purported congressional intent to educate and assimilate the tribes.

However, cases rejecting reservation diminishment are not necessarily patriarchal. Indeed, sometimes they expressly bolster tribal sovereignty, such as *Seymour v. Superintendent of Washington State Penitentiary*.[263] In *Seymour*, an enrolled member of the Colville Indian Tribe was convicted of burglary in Washington state court. He then brought a habeas claim asserting that the state had no jurisdiction over his case because the crime occurred in Indian country. The state argued that the area of the reservation had been diminished and that the area where the crime was committed had reverted to state control. In support, it pointed to an 1892 statute that "vacated and restored to the public domain" the northern half of the reservation [264] and a 1906 allotment act that allotted the remaining southern half of the reservation to tribal members while providing for mineral leases and non-Indian settlement on the surplus lands.[265] The Washington Supreme Court had interpreted the allotment act as restoring the southern half of the reservation to the public domain; as that was where the crime had occurred, it held for the state.[266]

Applying the canons, the Supreme Court rejected this argument. The Court found no "language similar to that in the 1892 Act expressly vacating the South Half of the reservation and restoring that land to the public

259. *Id.* at 402.
260. *Id.* at 401–02.
261. *See, e.g.*, Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 732–33 (1989) ("[A]s both the *Santa Clara Pueblo* and *Oliphant* opinions insist (albeit drawing different conclusions), Indian tribes are 'other.' Their culture and norms are not federal culture and norms; their rules are theirs. Given the possible divergences in culture between tribal modes of governance and federal norms, the use of jurisdiction as means of control is more apparent than the claimed interference when federal courts preclude state court decision making.").
262. *See, e.g.*, United States v. Santa Fe Pac. R.R., 314 U.S. 339, 357–58 (1941) (reporting that the Hualapai tribe had voluntarily ceded lands to the U.S. in order to gain a reservation in the face of encroaching white settlement).
263. Seymour v. Superintendent, 368 U.S. 351 (1962).
264. Act of July 1, 1892, 27 Stat. 62, 63.
265. Act of March 22, 1906, Pub. L. No. 59-61, 34 Stat. 80.
266. *Seymour*, 368 U.S. at 354–55.

domain,"[267] and, absent clear congressional language to diminish, the Court refused to assume Congress intended for the land to revert to the state. Rather, the 1906 act merely provided a way for non-Indians to purchase land within the reservation rather than diminishing the reservation altogether.[268] Per the Court's reasoning, "when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress."[269]

Seymour might not appear particularly controversial in light of the clear distinction between the outright diminishment of the northern half and the qualified approach to the southern half. But, the ultimate holding transferred criminal jurisdiction of a tribal member into tribal court and out of state court.[270] This strengthened tribal sovereignty over tribal members, a longtime goal of federal Indian law and a position the Court has almost always strongly supported. Notably, this goal is not at odds with any of the implicit divestiture jurisprudence: which is towards precluding tribal jurisdiction over *non*-Indians. Finally, the burden on the state is minimal: losing criminal jurisdiction over one man for a burglary charge pales in comparison to losing sovereign title to a riverbed. By applying the canons in favor of the tribe, the Court affected a pro-inter-tribal result with practically no consequences for state sovereignty or territorial rights. This is precisely the type of situation in which we see the Court happily uphold tribal sovereignty in the face of minimal competing interests.[271]

The Court is also less likely to find diminishment where the result would strip tribes of hunting and fishing rights, which, as discussed above, fit the Court's vision of what tribal sovereignty "should" look like. For example, in *Mattz v. Arnett*, California state courts had upheld the confiscation of an Indian's fishing equipment by a state game warden, reasoning that the Klamath River Reservation had been diminished by act of Congress and the tribe's fishing rights extinguished accordingly.[272] As had been the case in *Seymour*, the 1892 act in question had opened the

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267. *Id.* at 355.

268. *Id.* at 356.

269. *Id.* at 359 (quoting United States v. Celestine, 215 U.S. 278, 285 (1909)).

270. The criminal jurisdictional rules over Indian country are extraordinarily complicated and are beyond the scope of this paper. For perhaps the most comprehensive assessment of the situation, *see* Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 554 (1976). For a more recent assessment, *see* Ennis, *supra* note 27, at 558–64.

271. *Accord* Solem v. Bartlett, 465 U.S. 463, 473 (1984) (unanimously refusing to find diminishment in a statute authorizing the government to "sell and dispose" of Indian lands, thus reversing state criminal jurisdiction over a rape committed by an enrolled member of the Cheyenne River Sioux Tribe); United States v. Mazurie, 419 U.S. 544 (1975) (unanimously upholding congressional ability to delegate to a tribal council jurisdiction over a non-Indian's on-reservation violation of federal liquor laws).

272. Mattz v. Arnett, 412 U.S. 481, 483–85 (1973).

Klamath River Reservation to non-Indian homesteading and the sale of timber and mineral rights, stating:

> That all of the lands embraced in what was Klamath River Reservation in the State of California . . . are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands. . . . *Provided further*, that the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children.[273]

The state argued, and the California courts agreed, that this language acted as a de facto termination of the reservation.[274]

Echoing its analysis in *Seymour*, however, the Court unanimously refused to find diminishment. Applying the canons, the Court compared the 1892 act to contemporary Indian bills and reasoned that "Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the 1892 Act. This being so, we are not inclined to infer an intent to terminate the reservation."[275] The Court then reemphasized the canon that "congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."[276]

In searching the "surrounding circumstances and legislative history" when it failed to find intent to diminish, the Court examined a series of failed statutes introduced in the late 1800s that would have expressly abolished the reservation.[277] Because none of the bills ever passed, and because the language of the 1892 act did not incorporate the express termination language of the unenacted proposed legislation, the Court reasoned that this was evidence that those in Congress who had wanted to expressly terminate the reservation had failed and that the tribe retained its rights.[278]

Recall that in *Oliphant*, Justice Rehnquist examined similarly unenacted legislation that would have stripped tribes of all criminal jurisdiction over non-Indians but that had never been passed (in one

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273. Act of June 17, 1892, ch. 120, 27 Stat. 52, 52–53.
274. *Mattz*, 412 U.S. at 495–96.
275. *Id*. at 504.
276. *Id.* at 505.
277. *Id.* at 499–505.
278. *Id.* at 503–06.

instance, specifically because Congress thought such an action was unwarranted).[279] The Court should have concluded that this was evidence that tribes retained such jurisdiction: for if not, why would Congress have to take it away? Instead, the *Oliphant* Court used it to manufacture an "unspoken assumption" that tribes had been implicitly divested of jurisdiction.[280] By comparison, the issue in *Mattz*, decided only five years before *Oliphant* involved the retention of Indian tribal fishing rights; to the Court, this was certainly a much less chilling proposition than subjecting non-Indians to "foreign" tribal court practices. As a result, the evidentiary methodology unfolds in a markedly different manner.

Thus, *Mattz* acts as another example of the Court's selective application of the canons to protect traditional tribal activities. Even the Court's introductory paragraphs themselves exemplify this mentality by referring to the petitioner as "a Yurok, or Klamath River, Indian, who since the age of nine, regularly fished, as his grandfather did before him, with dip, gill, and trigger nets."[281] Of what necessity is it to the opinion that the petitioner had fished the river "as his grandfather did before him," a fact completely irrelevant to the disposition of the case, if not to portray this as a part of the Court's protection of the traditional Indian way of life? In direct opposition to the logic of implicit divestiture, the Court here used the canons to preserve the reservation and "Indianness" by refusing to abrogate Indian fishing rights.[282]

However, the Court's tendency to view state sovereignty as obviating the application of the canons is manifest. For example, in *DeCouteau v. District County Court of the Tenth Judicial District*, the Court considered whether South Dakota had jurisdiction over child protective proceedings initiated against an Indian mother, which turned on whether the Lake Traverse reservation had been diminished.[283] In the treaty language at issue, the tribe agreed to "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation."[284]

The Court held that this language conveyed clear congressional intent to diminish the reservation. In so holding, it reasoned that the act in question was analogous to the 1892 act expressly terminating the northern

279. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 201–06 (1978).
280. *Id.* at 203.
281. *Mattz*, 412 U.S. at 484.
282. *Accord* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 176 (1999) (holding that neither executive orders removing the tribe from their lands previously ceded nor the equal-footing doctrine terminated previously treaty guaranteed tribal fishing rights).
283. DeCouteau v. Dist. Cnty. Ct., 420 U.S. 425, 427–28 (1975).
284. Sioux Land Agreement of 1889, U.S.-Sioux, art. I, Dec. 12, 1889, 26 Stat. 1036.

half of the Colville Indian reservation in *Seymour*, rather than the 1906 act opening the reservation to non-Indian settlement.[285] The Court similarly distinguished *Mattz* as having been a unilateral congressional action made against the will of the tribe, whereas here, the tribe had actively negotiated the agreement with the federal government and been compensated for the cessation of territory.[286] As a result, the tribe presumably had the opportunity to negotiate this language, or at least knew and understood the terms.[287] While the majority acknowledged the canons, they ultimately did not apply them, reasoning that "[a] canon of construction is not a license to disregard clear expressions of tribal and congressional intent."[288]

In dissent, Justice Douglas accused the majority of manufacturing congressional intent in flagrant violation of the canons. He pointed to the fact that the actual purpose of the cession was to sell unallotted lands within the reservation in order to "lure white settlers onto the reservation whose habits of work and leanings toward education would invigorate life on the reservation," and that there had been no mention made whatsoever about reservation boundaries.[289] The dissent then contrasted the language of the statute at issue with several similar articles within the same act that diminished other tribes' reservations, but which included language such as "cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character in and to a described tract" of country.[290] Justice Douglas argued that under the canons, the fact that the same act that purportedly diminished the Lake Traverse reservation contained much more ambiguous statements of diminishment as applied to other tribes had to be read to retain the tribe's territorial integrity.

How is it that *Mattz*, decided only two years earlier by the exact same Justices who heard *DeCouteau*, unanimously rejected the diminishment argument, whereas *DeCouteau* sparked such a fragmented response? This situation is especially odd given that the statutes in *Mattz* and *DeCouteau* were nearly identical, as well as the fact that both were extremely similar to the statute in *Hitchcock* that was held not to diminish the reservation.

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285. *DeCouteau,* 420 U.S. at 448–49.

286. *Id.* at 447–48.

287. This assumption seems rather dubious, however, given that one of the fundamental purposes of the canons was to address the inevitable imbalance of power between the government and the tribes during the treaty negotiation process. *See, e.g.*, Jones v. Meehan, 175 U.S. 1, 10–11 (1899) (elaborating the imbalance of power during treaty negotiations).

288. *DeCouteau*, 420 U.S. at 447.

289. *Id.* at 462 (Douglas, J., dissenting). It bears noting that this is *precisely* the analysis that the Court employed in *Minnesota v. Hitchcock*, where the cession of unalloted lands for the purposes of establishing an educational fund was held not to diminish the reservation. Minnesota v. Hitchcock, 185 U.S. 373 (1902).

290. *DeCouteau*, 420 U.S. at 463–64 (citations omitted).

However, as is part of the emerging pattern within Indian law, there are several extra-judicial factors at work here. First, as was the case in *Oliphant*, the demographics of the reservation were extremely unfavorable for the tribe: tribal members owned only fifteen percent of the reservation land and were outnumbered by non-Indians at a rate of ten to one.[291] Thus, just as the demographics in *Oliphant* made it a "horrible test case from the tribal perspective,"[292] upholding the reservation boundaries in *DeCouteau* would have immediately placed a tremendous amount of non-Indians in tribal territory, something that the Court is generally hesitant to do.[293] As commentators note, however, it is simply inapposite to use modern racial demographics in order to divine congressional intent from almost one hundred years prior.[294]

Second, the reservation diminishment issue in *DeCouteau* involved determining jurisdiction over a child welfare proceeding, an area of the law with a long and tumultuous history. Essentially, the U.S. government took Indian children from their families and placed them into federally administered boarding schools where they were forced to dress, talk, and act "white." This was geared towards alienating them from their tribal culture and, in the government's eyes, making them fit for civilized society.[295] At the time that *DeCouteau* was decided, research showed that twenty-five to thirty-five percent of all Indian children lived in non-Indian foster care, adoptive homes, or group homes.[296] Only three years after *DeCouteau*, Congress passed a comprehensive act designed to keep Indian

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291. *Id.* at 428.

292. Frickey, *Marshalling Past and Present*, *supra* note 2, at 420 n.162.

293. *See, e.g.*, Hagen v. Utah, 510 U.S. 399, 421 (1994) ("The current population of the area is approximately 85 percent non-Indian. . . . This 'jurisdictional history,' as well as the current population situation in the Uintah Valley, demonstrates a practical acknowledgment that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area."). *But see* Frickey, *Common Law*, *supra* note 25, at 26 ("The real culprit is not the non-Indians, but Congress, which established the policy creating the incentives for non-Indian settlement and then abandoned it, leaving the non-Indians high and dry while doing little to undo the damage caused to tribal interests.").

294. *See* Lauren Natasha Soll, *The Only Good Indian Reservation is a Diminished Reservation? The New and Diluted Canons of Construction in Indian Law*, 41 FED. B. NEWS & J. 544, 548 (1994) ("In other words, the Court took the modern presence of a large white population in the area as an indication of congressional intent to diminish the reservation in 1905. As an initial matter, the consideration of this factor at all is wholly incompatible with the very purpose and effect of these statutes.").

295. *See, e.g.*, Sarah Deer, *Relocation Revisited: Sex Trafficking of Native Women in the United States*, 36 WM. MITCHELL L. REV. 621, 665–69 (2009) (describing history of forced assimilation in the context of sexual exploitation of Indian women and girls); Maire Corcoran, Note, *Rhetoric Versus Reality: The Jurisdiction of Rape, the Indian Child Welfare Act, and the Struggle for Tribal Self-Determination*, 15 WM. & MARY J. WOMEN & L. 415, 428–30 (2008) (describing the history of federal policy governing Indian children with respect to the Indian Civil Rights Act).

296. Indian Child Welfare Program, Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs, 93d Cong. 3, 15 (1974) (statement of William Byler).

family law and custody issues specifically within the tribes and tribal courts.[297]

This case represents the continued assimilationist underpinnings of the American legal institutions that necessitated the Indian Child Welfare Act. With implicit divestiture essentially urging tribal courts to "Americanize," and cases such as *Minnesota v. Hitchcock* turned on a finding of congressional intent to settle Indians into an agrarian, commercially sustainable lifestyle, it is unsurprising that the Court shied away from a normative result that would have given the tribe control over Indian children (in contradiction of what was then federal policy).[298] Regardless, it seems that the only substantive difference between *Mattz* and *DeCouteau* were the competing interests in play and the Court's preferred normative solution.[299]

This accords with the general ebb and flow of diminishment cases. In cases involving seemingly-ambiguous treaties or statutes where the canons should have been dispositive, the Court will nevertheless diminish reservations if there is a heavy non-Indian presence in the area,[300] when reservation existence would force a state to pay high amounts of damages for trespass,[301] transfer the title of navigable waters to the tribe,[302] or place an entire town within tribal territory.[303] In short, when the state or non-Indian interest involved is particularly weighty, the Court will ensure that the reservation is diminished, just as it did when it crafted the doctrine of implicit divestiture.

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297. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2006).

298. Minnesota v. Hitchcock, 185 U.S. 373, 390–92 (1902).

299. *See* Frickey, *Common Law*, *supra* note 25, at 78 ("In the diminishment cases, the Court seems to have jettisoned the canonical approach to the interpretation of statutes and treaties in favor of a fact-based analogical process.").

300. *See* City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 211–12 (2005) (affirming that past reservation land lost tax-exempt status when sold privately, and status was not regained despite land being reacquired by Indian owners; area in question ninety-nine percent non-Indian); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 356–57 (1998) ("[T]he area remains 'predominantly populated by non-Indians with only a few surviving pockets of Indian allotments,' and those demographics signify a diminished reservation.") (citing Solem v. Bartlett, 465 U.S. 463, 471 n.12 (1984)); Hagen v. Utah, 510 U.S. 399, 414 (1994); South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 499 (1986) (stating disputed land had 27,000 claimants to the parcels); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604–05 (1977) (noting the area was over ninety percent non-Indian).

301. *See, e.g.*, *South Carolina*, 476 U.S. at 505 (stating the tribe was seeking trespass damages for the time it was dispossessed).

302. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 286–87 (1997).

303. *Hagen*, 510 U.S. at 420–21. Commentators have referred to the Court's approach in *Hagen* as having "diluted its traditional strict standard of statutory construction, but it also has generated unimaginable jurisdictional chaos in Utah that will hamper and frustrate the efforts of the federal, state, and tribal governments charged with local responsibility to exercise valid criminal and civil jurisdiction." Soll, *supra* note 294, at 544.

By comparison, tribes win when the reservation still looks "Indian,"[304] or when the only issue is jurisdiction over a tribal member[305] or hunting and fishing rights,[306] both of which are comparatively much less onerous to state and non-Indian rights and expectations. In essence, these ideological distinctions subsume the canons under the legacy of implicit divestiture and the thinking that created it: that tribal sovereignty must not infringe upon the rights and expectations of non-Indians.

4. Federal Takings and the Use of Eminent Domain Within Indian Country

In light of the rather sordid historical relationship between the United States and tribal lands, takings and eminent domain as applied to Indian reservations are an excellent weathervane for the application, or lack thereof, of the Indian canons. In perhaps unsurprising fashion, the Court has disregarded the canons and created a view of tribal land rights as existing at the sufferance of the federal superior.[307]

For example, in *Cherokee Nation v. Southern Kansas Railway*,[308] the Cherokee Nation claimed that the 1866 Treaty of Washington, which guaranteed that the tribe "retain[ed] the right of possession of and jurisdiction over all of [their territory],"[309] precluded the United States from exercising eminent domain over a portion of that territory to create a right of way for the Southern Kansas Railway.[310] The United States claimed that the statutory language enabling the right of way gave them clear authority to take the land.[311] In a startling departure from both the canons that a "congressional determination to [diminish Indian reservations] must be expressed on the face of the Act or be clear from the surrounding

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304. Solem v. Bartlett, 465 U.S. 463, 480 (1984) ("As a result of [the] small number of homesteaders who settled on the opened lands and the high percentage of Tribal members who continue to live in the area, the population of the disputed area is now evenly divided between Indian and non-Indian residents. Under these circumstances, it is impossible to say that the opened areas of the Cheyenne River Sioux Reservation have lost their Indian character.").

305. *Id.* at 465.

306. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 175–76 (1999).

307. *See* Frickey, *Domesticating Federal Indian Law*, *supra* note 40, at 80–87 (arguing that the Indians' special relationship with the land, in light of the history of federal–tribal relations, renders normal takings jurisprudence inapplicable to Indian country).

308. Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 651 (1890).

309. Treaty of Washington, Aug. 11, 1866, 14 Stat. 799, 804.

310. *S. Kan. Ry. Co.*, 135 U.S. at 651.

311. The disputed language of the statute read in its entirety:

> [t]hat, before said railway shall be constructed through any lands held by individual occupants according to the laws, customs, and usages of any of the Indian nations or tribes through which it may be constructed, full compensation shall be made to such occupants for all property to be taken, or damage done by reason of the construction of such railway.

Act of July 4, 1884, ch. 179, 23 Stat. 73.

circumstances and legislative history,"[312] and that statutes must be interpreted as the Indians would have understood them,[313] the Court upheld the taking, reasoning that "[i]t is not necessary that an act of Congress should express, in words, the purpose for which it was passed. The court will determine for itself whether the means employed by Congress have any relation to the powers granted by the Constitution."[314]

It seems doubtful that the Cherokee Nation would have assumed that a guarantee to "the right of possession" over their territory was implicitly limited by the looming threat of the Takings Clause. This is particularly true when the government planned to turn the condemned land over to a non-Indian railroad for the purposes of bringing non-Indians onto the reservation. Again, the fact that the Court held that Congress need not explicitly diminish tribal jurisdiction seemingly violates both the Treaty of Washington and the canons.

Southern Kansas Railway is thus a prime example of the Court's selective employment of the canons in adjudicating land use cases. The canons would have required interpreting both the treaty, which clearly retained tribal use and occupancy rights, and the takings statute, which contained no language explicitly reducing the reservation to create the right-of-way, in favor of the tribe. Instead, the Court held that Congress's power under the Indian Commerce Clause[315] necessarily trumped the Cherokee's claim of title, reasoning that "facilities for travel and commerce are a public necessity."[316] By neglecting to employ the canons at all, the Court indicated that it was willing to read an ambiguous congressional intent in order to facilitate state and federal intrusion into Indian country.

Similarly, in *Northwestern Bands of Shoshone Indians v. United States*, the Shoshone tribe brought suit in the Court of Claims alleging that they were entitled to damages due to violation by the United States of their land rights under the Treaty of Box Elder.[317] The treaty language at issue read that "[t]he country claimed by Pokatello for himself and his people is bounded on the west by Raft River and on the east by the Porteneuf Mountains"[318] and that "[n]othing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of

312. Mattz v. Arnett, 412 U.S. 481, 505 (1973).
313. Jones v. Meehan, 175 U.S. 1, 11 (1899).
314. *S. Kan. Ry. Co.,* 135 U.S. at 657.
315. U.S. CONST. art. I, § 8, cl. 3.
316. *S. Kan. Ry. Co.*, 135 U.S. at 658.
317. Nw. Bands of Shoshone Indians v. United States, 324 U.S. 335, 336 (1945).
318. Treaty with the Shoshonee Indians, July 30, 1863, 13 Stat. 663, art. 4 [hereinafter Treaty of Box Elder].

Indians than existed in them upon the acquisition of said territories from Mexico."[319] The tribes argued that this language gave them vested property rights that required recompense by the government under the Takings Clause.

The Court, however, reasoned that this treaty did nothing but recognize the tribes' aboriginal title, and, because this did not constitute a right arising out of the treaty, the tribe lacked standing to sue altogether.[320] The Court held that the quoted statutory language amounted to nothing more than federal acknowledgment that the territory in question was where the Indians *thought* that they asserted title.[321] As a result, because contemporary evidence showed that the federal negotiators of the treaty had been instructed to bargain for federal access through the Indian territory, and not for the land rights itself, this was merely an example of non-compensable aboriginal title.[322]

Under the Indian canons, however, the majority's reasoning was flawed in several respects. First, the Indian canons require all treaties to be read in the manner in which the Indians would have understood them.[323] Given that the majority acknowledged that the Indians negotiated the treaty assuming that they were being given compensable title, this alone should have been controlling.[324] Further, "[by] negotiating for and securing rights of passage and communication, the United States indicated its recognition and acknowledgment of Indian title to the land,"[325] a fact which the Court ignored outright. Finally, as Justice Douglas (perhaps somewhat paternalistically) admonished the Court in dissent:

> no counsel sat at the elbow of Pokatello when the treaty was drafted. It was written in a language foreign to him. He was not a conveyancer. He was not cognizant of distinctions in title . . . [b]ut he knew the land where he lived and for which he would fight.[326]

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319. *Id.* art. 5.

320. *Nw. Bands of Shoshone Indians*, 324 U.S. at 338–39.

321. *Id.* at 350–51.

322. *Id.* at 346–47.

323. Jones v. Meehan, 175 U.S. 1, 10–11 (1899).

324. In dissent, Justice Murphy made this very argument, reasoning that "The placing of these descriptions in a bilateral treaty is at least consistent with the conclusion that the United States recognized title to the extent of the lands claimed. And under the rule that ambiguities are to be resolved in favor of the Indians, we must adopt that conclusion." *Nw. Bands of Shoshone Indians*, 324 U.S. at 368 (Murphy, J., dissenting).

325. *Id.* at 367.

326. *Id.* at 360 (Douglas, J., dissenting).

By failing to implement the canons to protect against this informational disjunction, the Court allowed the Shoshone's lands to be lost "in the fine web of legal niceties."[327]

As was the situation in other land use cases, the Court embraced its own pragmatic normative values rather than applying the Indian canons. In this instance, it did so by literally reinventing the canons, and creating a new canon of construction that has not since been used: that Indian treaty language "should be construed in accordance with the tenor of the treaty."[328] This inquiry, however, opens and shuts with congressional intent, bypassing the required evaluation of how the Indians would have read or understood the agreement. This allows for exactly the type of backdoor circumvention of Indian rights that the canons were created to protect against. Perhaps the majority's sentiment was best expressed in Justice Jackson's concurrence, when he wrote of the Indians that "[o]wnership meant no more to them than to roam the land as a great common . . . . Acquisitiveness, which develops a law of real property, is an accomplishment only of the 'civilized.'"[329]

Tee-Hit-Ton v. United States is perhaps one of the worst examples of the Court's denial of compensation to the tribes in usurpation of statutory directives.[330] In this case, the Tee-Hit-Ton Indians argued that the following statutory language entitled them to compensation for the government's sale of timber from their ancestral territory: "the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."[331] The Court held that rather than actually convey the tribe any tangible property rights, this language merely established the Tee-Hit-Ton's right of occupation on the land until such time as Congress could readdress the situation.[332] Moreover, the Court predicated its holding in part on the fact that the Tlingit's (to whom the Tee-Hit-Tons belonged) were an uncivilized, communal group that was more concerned with occupancy than sovereignty, thus indicating that the lands "actually in their use or occupation" at the time of the Organic Act were not actually held in title.[333]

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327. *Id.* at 361.

328. *Id.* at 353.

329. *Id.* at 357 (Jackson, J., concurring). *See also* Clinton, *Defense of Federal Protection*, *supra* note 41, at 1040–41 (arguing that Indian country takings jurisprudence fails to account for the fact that tribes view land in a spiritual and cultural sense that transcends western notions of private property).

330. Tee-Hit-Ton v. United States, 348 U.S. 272 (1955).

331. Organic Act for Alaska, May 17, 1884, ch. 53, 23 Stat. 24, 26.

332. *Tee-Hit-Ton*, 348 U.S. at 279.

333. *Id.* at 278 n.10. "The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognized as ownership by action authorized by

By predicating the holding on an openly racist evaluation of the Tee-Hit-Ton's lifestyle, the majority opinion, which later referred to Indians as "the savage tribes of this continent,"[334] clearly violated the canons. As Justice Douglas pointed out in dissent, "[n]o report was available showing the nature and extent of any claims to the land. No Indian was present to point out his tribe's domain. Therefore, Congress did the humane thing of saving to the Indians all rights claimed; it let them keep what they had. . . ."[335] Indeed, some scholars argue that the Court did not even consider tribal rights in light of the massive financial concessions that would have been owed to the tribe had a taking occurred.[336] Regardless, by using evidence of the Tee-Hit-Ton's "uncivilized" lifestyle as proof that Congress could not have possibly intended to grant them possessory rights to the timber, the Court erred in several ways.

First, even assuming that the majority was correct about the Tee-Hit-Ton's focus on occupancy, the taking of timber would have almost certainly fallen into the category of activities that the Tee-Hit-Ton, dependent as they were on the land for survival, would have considered to violate their rights. Second, there is little more ambiguity than a statute claiming to reserve questions of occupancy for Congress to address at a later date, which it never did.[337] As such, the interpretation should have employed the canons, as the dissent argued, and held that both the federal government and the tribe understood that the Tee-Hit-Ton's retained their territorial rights. Instead, the Court focused on the illiberal assumption that a culture seemingly devoid of fixed property rights could not have any concept of compensability and takings,[338] and as such would have readily agreed at the time of the Organic Act that their rights were completely defeasible.[339]

Congress, may be extinguished by the Government without compensation." *Id.* at 288–89.

334. *Id.* at 289.

335. *Id.* at 294 (Douglas, J., dissenting).

336. *See* Daniel G. Kelly, Jr., Note, *Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial*, 75 COLUM. L. REV. 655, 671 (1975) ("By declining to extend constitutional protection to the Indians' non-treaty lands, the Court achieved what it saw as a fiscally responsible result and left to Congress the responsibility for compensating tribes for the taking of their Indian title lands.").

337. *Tee-Hit-Ton*, 348 U.S. at 294 (Douglas, J., dissenting) ("The conclusion seems clear that Congress in the 1884 Act recognized the claims of these Indians to their Alaskan lands. What those lands were was not known. Where they were located, what were their metes and bounds, were also unknown.").

338. For a powerful argument in favor of a robust viewpoint of tribal conceptions of property, see Kristin A. Carpenter, Sonia K. Katyal, & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022 (2009).

339. This is indeed the attitude that the Court has repeatedly espoused in denying just compensation to Indian tribes under the theory that they do not retain actual possessory rights in their territory. *See, e.g.*, Nw. Band of Shoshone Indians v. United States 324 U.S. 335, 357 (1945) (Jackson, J., concurring) ("Acquisitiveness, which develops a law of real property, is an accomplishment only of the 'civilized.'").

The Court's habit of ignoring the Indian canons in takings cases in the name of public expediency was further displayed in *Federal Power Commission v. Tuscarora Indian Nation*.[340] This case arose over the Federal Power Commission's planned condemnation of 1,383 acres of the Tuscarora Indian Tribe's ancestral lands in order to flood them and create a reservoir for a hydroelectric plant.[341] In opposition, the Tuscarora put forth two arguments that seemed fail-proof under the Indian canons. First, in 1794, the United States government entered into a treaty with the Six Nations of Indians, including the Tuscarora Indians.[342] In this treaty, the United States "acknowledge[d] all the land within the [reservation] boundaries, to be the property of the Seneka nation; and the United States will never . . . disturb the Seneka nation, nor any of the Six Nations . . . in the free use and enjoyment thereof."[343] In this case, this unambiguous grant of exclusive territorial jurisdiction should have required clear authorization by Congress in order to affect a taking of the reservation.

The second argument was that the government's alleged authority to flood the reservation was the Federal Power Act.[344] The Federal Power Act, however, precluded the taking of any reservation unless the Commission determined that it would "not interfere or be inconsistent with the purpose for which such reservation was created or acquired."[345] The Commission had determined that the proposed reservoir would have flooded twenty-two percent of the Tuscarora's total land, manifestly interfering with any purpose that involved actually living on the territory.[346] However, the Commission argued that the Tuscarora's territory did not fall into the Federal Power Act's definition of "reservation;" in relevant part, this definition included "national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States."[347]

Because the land at issue was both tribal and within a reservation, even if its status was ambiguous, the canons dictate that such ambiguities must be read in favor of the Indians. Further, allowing ambiguous intent to affect a taking in Indian country is precisely the type of underhanded diminishment that the canons are meant to protect. Between the treaty and

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340. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 103–04 (1960).
341. *Id.*
342. Treaty of Canadaigua, U.S.-Six Nations, art. III, Nov. 11, 1794, 7 Stat. 44.
343. *Id.* at 45.
344. Federal Power Act of 1935, 16 U.S.C. §§ 791(c)–828(c) (2006).
345. *Id.* at § 797(e).
346. Tuscarora Indian Nation, 362 U.S. at 124–26 (Black, J., dissenting).
347. 16 U.S.C. § 796(2) (2006).

the statute, it seemed as if *any* application of the canons tilted heavily in favor of the tribe.

However, the Court held that the 1794 treaty was solely negotiated with the Seneca Indians, and that the Tuscarora were merely squatters on the Seneca's lands; thus, any effects of the treaty did not protect the Tuscarora.[348] The Court further determined that the Federal Power Act's reservation clause did not apply to the Tuscarora's territory.[349] This was because the Act's residual clause, which stated "*and* other lands and interests in lands owned by the United States,"[350] meant that an "Indian reservation" under the terms of the Act only applied to lands owned by the United States. Since the Tuscarora owned their lands in fee simple, rather than the United States holding their land in trust, it was unprotected by the Act.[351] Despite the fact that all three Indian canons militated finding for the tribe, the Court held instead that ambiguous statutory language should be read in favor of the government, that clear treaty directives were to be ignored, and that all of this was to be done so as to allow the permanent flooding of nearly a quarter of the Tuscarora's ancestral territory.[352]

The holding in *Tuscarora* fits into the overall deference towards non-Indian public interest that permeates the Court's Indian takings jurisprudence. The reservoir at issue was built as an emergency response to a rockslide that destroyed a power plant, and the Court referred to a "critical shortage of electric power in the Niagara community."[353] Rather than employ the canons, the Court circumvented clear statutory language to provide the non-Indian Niagara community with a public commodity. Now, from a general standpoint, power plants are arguably a paramount public necessity, and the Tuscarora's loss of land was a necessary by-product of the emergency response. However, this ignores the fact that Congress had *already* weighed these interests and come out in favor of protecting tribal lands; had they not, Congress would not have forbidden the Commission from taking Indian reservations in the statute. The fact that the Court overstepped the canons and held against the tribes is a classic example of their extra-judicial balancing that inevitably divests the tribes of sovereignty in light of a significant non-Indian interest.

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348. Tuscarora Indian Nation, 362 U.S. at 121–22 n.18, 124.

349. *Id.* at 115.

350. 16 U.S.C. § 796(2) (emphasis added).

351. *Id.* at 114–15.

352. *See* Skibine, *Applicability of Federal Laws*, *supra* note 120, at 109–10 (arguing that the *Tuscarora* approach relied on antiquated precedent that had come about during the age of the federal government's official policy of assimilation, and that it ignored the shift to tribal self-determination).

353. *Tuscarora Indian Nation*, 362 U.S. at 103.

By comparison, *United States v. Sioux Nation of Indians*[354] represents a departure from the Court's general hostility towards applying the canons in takings cases. In 1868, the federal government signed the Treaty of Fort Laramie with the Sioux Nation[355] that parted the Black Hills of South Dakota for "the absolute and undisturbed use and occupation of the Indians."[356] To encourage a sedentary, agrarian lifestyle amongst tribal members, Congress also provided for four years worth of farming materials and subsistence rations.[357] Upon the discovery of gold in the Black Hills, however, the federal government unilaterally breached the treaty and allowed miners unlimited access within the reservation.[358] When the Sioux refused to sell their land, federal troops sequestered the Sioux on the reservation in an attempt to force a sale, which, in turn, required the government to feed starving tribal members who had been deprived of their ability to hunt.[359] Finally, the government legitimized its taking of the Black Hills when it signed a backdoor agreement to that effect with ten percent of the tribe—in violation of a treaty provision requiring three-fourths of all adult male Sioux to sign subsequent agreements infringing upon the Treaty of Fort Laramie.[360] This agreement was eventually statutorily codified and removed the Black Hills from Sioux jurisdiction.[361]

In light of governmental concession that it had taken the Black Hills from the Sioux Nation under the Takings Clause, the question presented to the Court was "whether Congress was acting under circumstances in which that 'taking' implied an obligation to pay just compensation, or whether it was acting pursuant to its unique powers to manage and control tribal property as the guardian of Indian welfare, in which event the Just Compensation Clause would not apply."[362] In so determining, the Court examined whether Congress had made a "good faith effort to give the Indians the full value of the land,"[363] by looking "to the objective facts as revealed by Acts of Congress, congressional committee reports, statements submitted to Congress by government officials, reports of special commissions appointed by Congress to treat with the Indians, and similar evidence relating to the acquisition."[364] After examining the record, the

354. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).
355. Treaty with the Sioux Indians, U.S.-Sioux, Apr. 29, 1868, 15 Stat. 635.
356. *Id.* at art. II.
357. *Id.* at art. II, 639.
358. *Sioux Nation*, 448 U.S. at 378–79.
359. *Id.* at 379–81.
360. Second Treaty of Fort Laramie, *supra* note 221, art VI.
361. Act of Feb. 28, 1877, ch. 72, 19 Stat. 254, 255.
362. *Sioux Nation*, at 409 n.26.
363. *Id.* at 389 (quoting Sioux Nation of Indians v. United States, 220 Ct. Cl. 442, 452 (1979)).
364. *Id.* at 416 (quoting *Sioux Nation*, 220 Ct. Cl. at 451).

Court dismissed the government's argument that the starvation rations given to the Sioux constituted good faith compensation, reasoning instead that "[t]he critical inquiry is what Congress did—and how it viewed the obligation it was assuming—at the time it acquired the land, and not how much it ultimately cost the United States to fulfill the obligation."[365] As such, it awarded damages to the Sioux Nation.[366]

From the perspective of the canons, this case is interesting in several respects. The Court discussed at length the necessity of fashioning this "good faith" standard for Indian takings cases in light of congressional plenary power, which had been used to justify unilateral governmental treaty abrogation in the past.[367] Indeed, this determination expressly contradicts the standard created in *Northwestern Bands of Shoshone Indians v. United States* that focused entirely on congressional intent, rather than a holistic examination of the relevant factors at issue.[368] Even so, it is unclear why this new standard focused on whether *the government* believed that it was acting in good faith when it provided compensation, rather than what the Indians believed that they received in kind. For example, in rejecting the government's argument that the rations provided to the Sioux constituted fair value for the Black Hills, the Court emphasized that the government never actually considered these rations to be compensatory in nature; the rations had been authorized to ensure the very survival of the Sioux.[369] What if the government *had* considered starvation rations to be a fair exchange? Would the Court's analysis have differed? It is unclear why the subjective belief of the government, rather than that of the Indians, should take precedence in this analysis.[370] This is especially true when, under the canons, such agreements are to be read in favor of the tribes.[371]

365. *Id.* at 420–21 (quoting *Sioux Nation*, 220 Ct. Cl. at 462).

366. Justice Rehnquist's dissent essentially blamed the entire situation on the Sioux's warlike tendencies, and would have found that the rations did count as compensation for the tribe, arguing that "[t]he majority's view that the rations were not consideration for the Black Hills is untenable. What else was the money for?" *Id.* at 434–37 (Rehnquist, J., dissenting).

367. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 564–66 (1903) (allowing the federal government to unilaterally breach an Indian treaty under the auspices of its plenary power over Indian affairs).

368. Nw. Bands of Shoshone Indians v. United States, 324 U.S. 335 (1945).

369. *Sioux Nation*, 448 U.S. at 418–19.

370. *See* Frickey, *Common Law*, *supra* note 25, at 39 ("One is left wondering whether there is anything more substantial than a judicial gut instinct at work in these cases.").

371. Moreover, as Philip P. Frickey points out, "[non-Indian] property owners get just compensation whenever land is taken, without an inquiry concerning whether the government has acted in good faith by providing offsetting benefits." Frickey, *(Native) American Exceptionalism*, *supra* note 99, at 448. *But see* Resnik, *Dependent Sovereigns*, *supra* note 261, at 696 ("[F]ederal Indian law throws into doubt some of the standard assumptions made by the legal academy in federal courts' jurisprudence.").

B. Hunting and Fishing

As discussed earlier, hunting and fishing rights are particularly emblematic of the Court's view on tribal sovereignty. Hunting and fishing cases often exempt Indians from generally applicable state game laws, a direct affront to state sovereignty. Like the creation of a reservation, these rights were often a specific reason for treaty creation.[372] Further, hunting and fishing often assumes religious significance to the tribes.[373] This significance can be problematic in light of overarching state or federal regulations governing, for example hunting endangered species.[374]

Analytically, dividing hunting and fishing cases into two categories is helpful. The first set includes those where tribal hunting and fishing rights conflict with the private property rights of individuals. The second includes cases where such rights clash with state territorial sovereignty or regulatory jurisdiction.

1. Hunting and Fishing Rights in Opposition to Individuals

Early cases involving hunting and fishing rights generally employ the reasoning seen in *Alaska Pacific Fisheries*.[375] First, Indian tribes are dependent upon the land for their economic and physical sustenance. Second, such activities have a civilizing effect on the tribes when converted into industry. Third, under the canons, treaties guaranteeing hunting and fishing rights would have been understood by the tribes as an absolute guarantee. For example, in *United States v. Winans*,[376] the federal government entered into a treaty with the Yakima Indian Nation guaranteeing the tribe "[t]he exclusive right of taking fish in all the streams, where running through or bordering said reservation . . . as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory" along the Columbia River.[377] A non-Indian fishing company received a Washington state permit to operate a mass fishing device called a fish wheel on part of the territory governed by the treaty and subsequently

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372. *See* Kristin A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1105–06 n.271 (2005) (listing treaties that specifically protect the right to hunt and fish).

373. *See, e.g.*, Washington v. Wa. State Commercial Passenger Fishing Ass'n, 443 U.S. 658, 665–66 (1979).

374. *See, e.g.*, United States v. Dion, 476 U.S. 734 (1986) (finding that the Endangered Species Act and Bald Eagle Protection Act abrogated Indian treaty hunting rights).

375. Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918).

376. United States v. Winans, 198 U.S. 371 (1905).

377. Treaty with the Yakamas, June 9, 1855, art. III, 12 Stat. 951.

attempted to exclude the Yakima.[378] The company argued that the treaty language granting tribes the right to fish "*in common* with citizens of the Territory" subjected Indian fishing rights to common law rules of private property and the fish wheel license barred the Indians from their fishing grounds.[379]

The Court rejected the claim and upheld the Indian fishing rights under the treaty, reasoning that the state land grant was necessarily subservient to the binding federal treaty with the Yakima under the Supremacy Clause.[380] As was the case in *Alaska Pacific Fisheries*, the Court predicated its reasoning on the fact that "[t]he right to resort to the fishing places in controversy was . . . not much less necessary to the existence of the Indians than the atmosphere they breathed."[381] Employing the canons, the Court construed

> [The] treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise[d] the inequality "by the superior justice which looks only to the substance of the rights without regard to technical rules."[382]

The notion that the Yakima inherently depended on fishing and their "primitive" existence was tied to the land specifically motivated the Court to apply the canons and rule in favor of the tribe.

In general, the Court has been very protective of inherent tribal hunting and fishing rights, particularly in comparison to its handling of diminishment cases. For example, recall the series of statutes concerning the Colville tribe and the federal government examined in the diminishment context: specifically, the 1892 act that "vacated and restored to the public domain" the northern half of the Colville reservation.[383] In both *Seymour v. Superintendent of Washington State Penitentiary*[384] and *DeCouteau v.*

378. DAVID MONTGOMERY, KING OF FISH: THE THOUSAND YEAR RUN OF SALMON 53 (2004).

379. *Winans*, 198 U.S. at 379.

380. *Id.* at 381–82.

381. *Id.* at 381.

382. *Id.* at 380–81 (citations omitted). The Court's reasoning was extended in *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919), in which the same treaty provision was extended to the south bank of the Columbia River, in Oregon. Despite the fact that the tribal lands in *Winans* lay entirely on the north bank of the Columbia, the Court held that under the canons, it had to interpret the treaty to reflect the traditional Indian practice to use the banks interchangeably. *Suefert Bros.,* 249 U.S. at 198–99. *Accord* Worcester v. Georgia, 31 U.S. (5 Pet.) 515, 553 (1832) (discussing the full use of "hunting grounds" and inability to assume such restrictions on that land).

383. Act of July 1, 1892, 27 Stat. 62, 63.

384. Seymour v. Superintendent of Wa. Penitentiary, 368 U.S. 351, 355 (1962).

District County Court of the Tenth Judicial District,[385] the Court analyzed this language and considered it to have expressly terminated the northern half of the Colville reservation. In *Antoine v. Washington*, however, two Indians were convicted of hunting deer off-season in the same diminished half of the reservation.[386] In their defense, the petitioners pointed to language in the 1892 act that assured that "the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged."[387] The State of Washington contended that because the 1892 Act was not a treaty, but was rather a statute concerning federal–tribal relations, it was not the supreme law of the land and was not binding on the state.[388]

The Court held for the Indians in an opinion predicated mainly on the fact that unilateral state abrogation of the 1892 Act violated the Supremacy Clause.[389] The Court did, however, employ the canons in rejecting a second argument by the state that the 1892 Act had never formally been ratified.[390] The Court reasoned that any ambiguity in the ratification process had to be resolved in favor of the Indians.[391] In a peculiar case, the Court employed the Indian canons to protect tribal hunting rights in territory expressly diminished from the reservation.[392]

This reasoning runs counter to the entirety of jurisprudence dealing with diminished or "non-Indian" lands within a reservation. In such areas, the state has primary criminal jurisdiction[393] and can impose taxes on Indians.[394] Further, tribal civil regulatory and adjudicatory authority is subject to the *Montana* exceptions.[395] Instead, we see here the Court's faithfulness to upholding tribal hunting and fishing rights under the canons despite the fact that in other areas that did not "look Indian," such as taxation or tribal court jurisdiction, the Court was quick to extinguish tribal rights through implicit divestiture. This logic continues the Court's pattern of employing the canons to selectively protect the rights it attributes to

385. DeCouteau v. Dist. Cnty. Ct., 420 U.S. 425, 448–49 (1975).
386. Antoine v. Washington, 420 U.S. 194, 195–96 (1975).
387. *Id.* at 197 n.4 (quoting May 9, 1891 Agreement with the Colville Tribe, art. 6.)
388. *Id.* at 200–01.
389. *Id.* at 205.
390. *Id.* at 199–200 (citing Choate v. Trapp, 224 U.S. 665, 675 (1912)).
391. *Id.*
392. As was the case in *Sioux Nation*, Justice Rehnquist filed a dissent arguing that the statute at issue had not been properly ratified and should not have applied to the states. *See id.* at 213. For a second time, we see Justice Rehnquist arguing that the exact evidentiary methodology that he employed in *Oliphant* was not legitimate when it resulted in a protection of tribal rights.
393. DeCouteau v. Dist. Cnty. Ct., 420 U.S. 425, 427–28 (1975).
394. Minnesota v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 106 (1998).
395. Montana v. United States, 450 U.S. 544 (1981).

traditional viewpoints of Indian sovereignty, and not those that would infringe upon state sovereignty or subject non-Indians to tribal authority.

So far, this Article has examined relatively simple cases of hunting and fishing: the rights of individual Indians to hunt and fish in ancestral territories free from state impediments. The more difficult cases are those in which tribal rights directly challenge state sovereignty. In the State of Washington, this tension led to almost eight decades of litigation regarding the Treaty of Medicine Creek. This treaty was the focus of a series of attempts by the state of Washington and various non-Indian groups to restrict tribal fishing rights on the Columbia River.[396] An uneasy compromise granted the state of Washington limited regulatory authority over tribal fishing so long as any regulations served a legitimate conservation purpose, did not discriminate against the tribes, and were narrowly tailored to be as unrestrictive as possible.[397] However, the regulations could not determine where or when the tribes could fish.

Disagreement persisted over how to best strike this balance, and the situation finally came to a head in *Washington v. Washington State Commercial Passenger Fishing Association*.[398] The interests here were multifold: there were over 6,600 non-Indians and about 800 Indians working in the State of Washington as commercial fishermen, as well as around 280,000 licensed sport fishers.[399] As this heavy presence had seriously diminished the amount of fish in Columbia River, the question arose as to exactly what substantive fishing rights the treaty conferred upon the tribes. The state of Washington argued that tribal fishing rights were limited to the previously recognized right of access to traditional fishing grounds and an exemption from state licensing fees.[400] The tribes countered that they were entitled to take as many fish as required for subsistence, commercial, and cultural needs, free of any state restrictions.[401]

The Treaty with the Yakamas did not specify the substantive nature of the Indians' fishing rights, it merely granted the "right of taking fish, at all

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396. *See also* Puyallup Tribe v. Dep't of Game of Wash., 433 U.S. 165, 174–77 (1977) (vacating a Washington Supreme Court decision allowing fishing regulation on reservations); Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44 (1973); Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392, 401–03 (1968) (allowing the state to regulate the manner in which tribes could collect fish); Tulee v. Washington, 315 U.S. 681 (1942).

397. *Puyallup*, 391 U.S. at 398. For a narrative of this litigation from one of the key tribal lawyers in the *Puyallup* saga and its aftermath, *see* ALVIN J. ZIONTZ, A LAWYER IN INDIAN COUNTRY: A MEMOIR 49–58, 92–126 (2009) (describing the experience as a "clash between cultures and between state power and, ultimately, federal law").

398. Washington v. Wa. State Commercial Passenger Fishing Ass'n, 443 U.S. 658 (1979).

399. *Id.* at 664.

400. *See id.* at 670–71 (citing Seufert Bros. Co. v. United States, 249 U.S. 194 (fishing rights); United States v. Winans, 198 U.S. 371 (fishing rights); Tulee v. Washington, 315 U.S. 681 (license fee exemption)).

401. *Id.* at 670.

usual and accustomed places, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing."[402] This ambiguity was the case's difficulty. Signed in 1854, the matter was further complicated by the fact that all negotiations transpired in pidgin English that proved impossible to accurately translate.[403] As a result, there was no way of accounting for the tribe's original understanding, let alone how modern commercial fishing practices and demographics were to be factored into the treaty. All that was left were the canons and the Court.

The Court began by framing the issue as a balance of the economic expectations and requirements of non-Indian fishermen and conservationists[404] against the commercial needs of the tribes.[405] Curiously, the Court included a rather extraneous discussion of the *religious* significance of the fish to the tribe.[406] Given this case focused on economic-based commercial fishing rights, even in terms of applying the canons, this puzzling reference seems to have no real necessity other than to invoke the vision of Indians as tied to the land and culturally distinct, factors which should not have had relevance but which nevertheless seem to permeate discussions of the canons.[407]

The Court reasoned that despite the imprecise language, Washington's extremely high Indian-to-white ratio, combined with the extraordinary abundance of fish at the time of drafting, it was likely that there had been no thought put into quantitative allocation within the treaty.[408] But, the Court then applied the canons, pointing to the fact that the federal government's superior negotiating and language skills at the time of drafting as well as the vital concern of protecting tribal fishermen from non-Indian commercial monopolies as proof that the treaty preserved the tribe's right "to take whatever quantity [of fish] they needed."[409] The Court applied the canons to find the tribes' original understanding as a right to *take* fish, rather than the *opportunity* to fish.[410]

At the same time, the Court refuted the tribes' contention that they had a priority right to all fish necessary for commercial and cultural subsistence

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402. Treaty with the Yakamas, *supra* note 377.
403. *Washington State Commercial*, 443 U.S. at 667 n.10.
404. *Id.* at 663–64.
405. *Id.* at 665.
406. *Id.*
407. *See* Mattz v. Arnett, 412 U.S. 481, 484 (1973) (beginning a diminishment analysis by reciting the familial tradition of Indian fishing in the disputed territory, a fact which had nothing to do whatsoever with the legal issues of the case).
408. *Washington State Commercial*, 443 U.S. at 669.
409. *Id.* at 675–76.
410. *Id.* at 677–79.

at the exclusion of all non-Indian fishermen. The Court reasoned that the treaty "does not give the Indians a federal right to pursue the last living steelhead [salmon] until it enters their nets."[411] Instead, it held that the language "in common with citizens of the territory,"[412] when combined with the Indians' cultural, commercial, and subsistence reliance on the fish, meant that the treaty intended for the Indians to take between forty-five and fifty percent of all fish that passed through Indian fishing grounds.[413] The rest were reserved for non-Indian commercial and sport fishermen.[414]

Washington is an incredibly compelling case with regard to the canons. The treaty language at issue said nothing about equitable division, and the phrase "in common with citizens of the territory" could have easily been interpreted as equally subjecting both Indians and non-Indians to state conservation laws. Instead, based on its application of the canons, the Court evenly allocated the contested quantity of fish between a huge number of non-Indians and a comparatively small number of Indians. This application of the canons granted an extraordinary economic windfall to the tribes and demonstrated the Court's willingness to protect the hunting and fishing rights of Indians.[415]

This deference to Indian hunting and fishing rights is even more surprising when comparing *Washington* to *Oliphant*, decided only one year earlier. In both cases, the primary sources that the Court examined were extremely ambiguous with regard to the issues contested in the case. For example, in *Washington*, the Court noted that because the Treaty of Medicine Lodge was drafted at a time when there was no need for conservation efforts, neither side would have considered the issue of equitable division. It then applied the canons to what the parties *would* have thought on the question had it been put to them and ultimately held in favor of retaining Indian rights. Similarly, in *Oliphant*, the vast majority of the sources speaking to tribal court criminal jurisdiction over non-Indians came from the mid-nineteenth century. At the time, tribal judiciaries were generally underdeveloped by western standards, and tribal court practices would have almost inevitably seemed alien or unconstitutional to non-Indians.[416] Only after the ICRA which "Americanized" tribal court practice

411. *Id.* at 684 (quoting Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44, 49).

412. *Id.* at 680.

413. *Id.* at 685.

414. *Id.* at 685–87.

415. Indeed, in dissent, Justice Stewart, joined by Justices Powell and Rehnquist, argued that this windfall unconstitutionally discriminated against non-Indians. *Id.* at 705–08 (Stewart, J., dissenting).

416. For example, the Coast Salish tribes in northwestern Washington allowed retributive killings if a murderer did not apologize to the victim's family. BRUCE G. MILLER, THE PROBLEM OF JUSTICE: TRADITION AND LAW IN THE COAST SALISH WORLD 65–67 (2001). Similarly, in 1820, the Cherokee tribe authorized public whippings for anyone who brought a white family onto the reservation

by applying the majority of the Bill of Rights onto tribal judiciaries, did the possibility of tribal criminal jurisdiction over non-Indians become widespread.[417]

In *Oliphant*, however, the Court interpreted silence not to protect tribal rights and sovereignty, as required by the canons, but as proof that such sovereignty did not exist. When faithfully applying the canons would have subjected non-Indians to tribal courts—a situation normatively troubling to the Justices—the Court circumvented the situation by creating the doctrine of implicit divestiture. When, as in *Washington*, applying the canons would safeguard traditional tribal hunting and fishing, this was sufficient to sway members of the *Oliphant* majority (Justices Stevens, White, and Blackmun), to apply the canons in favor of the tribes even in light of similarly murky historical sources. *Washington*, therefore, acts as one of the most significant victories for tribes in Supreme Court jurisprudence. It is a prime example of the Court's use of the canons to support traditional Indian activities when those activities coincide with the Court's view of Indian sovereignty.

2. Hunting and Fishing Rights In Opposition to State Sovereignty

Kennedy v. Becker is a 1916 case in which three Indians claimed that game laws in the State of New York did not govern a strip of land that the Seneca had ceded to the state.[418] The Indians pointed to language in the cession treaty that reserved "the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed" and argued that this granted them exemptions from otherwise applicable state law.[419]

The Supreme Court disagreed. Notably, it framed the issue in the case as hunting and fishing rights "sought to be maintained in derogation of the sovereignty of the State" rather than "vindication of a right of private property."[420] Turning to the canons, the Court, as would later be the case in *Washington*, recognized that at the time of the treaty, game was so plentiful that none of the parties had considered the need for conservation efforts in the future. As a result, and in direct contrast to the approach in *Washington*, the Court did not apply the canons and instead read the treaty as granting the Seneca an easement. However, so as not to infringe upon "sovereignty

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to work or rent land. RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 212 (1975).

417. 25 U.S.C. §§ 1301–1303 (2006).

418. New York *ex rel.* Kennedy v. Becker, 241 U.S. 556, 559 (1916).

419. Treaty of the Big Tree, Sept. 15, 1797, 7 Stat. 601, 602.

420. *Kennedy*, 241 U.S. at 562.

of the State over the lands where the privilege was exercised,"[421] state law still applied.

The facts in *Kennedy* were remarkably similar to those in *Washington*. In both instances, the Court was forced to apply modern conservation considerations to treaties whose drafters clearly had not considered such issues. In *Washington*, though, the Court framed the dispute as being between the rights of individual Indian fishermen and those of individual non-Indian fishermen, essentially leaving the state out of the equation. With the debate held to be between individuals, the Court applied the canons and held for the tribe. In *Kennedy*, however, when the Indian fishermen were challenging the rights inherent in state territorial sovereignty, the Court refused to apply the canons and held for the state.

This case stands in contrast to *Winters v. United States*, where the Court held that tribes retained rights over territory ceded to the government.[422] In *Winters*, the Court applied the canons to the treaty and reasoned that in ceding the lands, the tribe had not given up their access to the water necessary for proper irrigation of the new reservation. As would be the case later in *Washington*, the dispute in *Winters* was between the tribe and a private cattle rancher, and not a state sovereign. *Kennedy*, then, shows the Court's continued hesitance to apply the canons and infringe upon states' rights.

Kennedy is a case that stands alone within the body of hunting and fishing-related Supreme Court jurisprudence. Indeed, more than any other area of the law, the Court seems willing to use the canons to protect tribal hunting and fishing. For example, in *Menominee Tribe v. United States*, the Court applied the canons to a treaty phrase reserving the Menominee land "for a home, to be held as Indian lands are held" and ruled that even though the treaty was otherwise completely silent on the issue of Menominee hunting and fishing rights, these rights were implied in the treaty.[423] This was particularly surprising given that the Menominee tribe had been terminated by act of Congress and was no longer federally recognized.[424] Nevertheless, the Court held that hunting and fishing rights survived the termination, because, under the canons, they had not been specifically revoked by an act of Congress, and thus the state of Wisconsin had no jurisdiction to regulate tribal hunting and fishing on tribal lands.[425]

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421. *Id.* at 563–64.

422. Winters v. United States, 207 U.S. 564 (1908). It should be noted that *Winters*, too, involved the interests of individual Indians against those of individual non-Indians.

423. Menominee Tribe v. United States, 391 U.S. 404, 405–06 (1968).

424. Menominee Termination Act, June 17, 1954, 68 Stat. 250.

425. *Menominee Tribe*, 391 U.S. at 412–13.

Particularly telling in *Menominee Tribe* was the Court's rationale for why the words "held as Indian lands are held" necessarily included hunting and fishing rights: specifically, that "hunting and fishing [are] normal incidents of Indian life."[426] Reversing course from *Kennedy*, the Court in *Menominee Tribe* was willing to read unspecified hunting and fishing rights into a treaty seemingly because of its normative belief that hunting and fishing were "normal" Indian activities, and because of the assumption among early treaties that such rights existed for the tribes.[427] Compare this to *Oliphant*, where the Court referred to an "unspoken assumption"[428] that tribes had been implicitly divested of criminal jurisdiction over non-Indians: a decision which, as later cases indicate, was predicated on the fact that tribal courts seemed "different" from American courts.[429] The logic that the Court employs when applying the canons to support "traditional" Indian practices, and that used for implicit divestiture to block practices the Court deems as exceeding the proper role of the tribes in society, is clearly divided.

The Court extended this reasoning and authored a sweeping tribal victory in one of the most important hunting and fishing cases in recent years: *Minnesota v. Mille Lacs Band of Chippewa Indians*.[430] In *Mille Lacs*, the Chippewa claimed that an 1837 treaty with the United States, which guaranteed "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded,"[431] prevented the State of Minnesota from interfering with any of those activities in territory ceded to the government under the treaty.[432] The state countered that these rights were completely superseded by an 1850 executive order that expressly revoked these privileges and ordered the Chippewa off their lands, as well as an 1855 treaty in which the Chippewa agreed to:

> cede, sell, and convey to the United States all their right, title, and interest in, and to, the lands now owned and claimed by them, in the Territory of Minnesota, and . . . fully and entirely relinquish

426. *Id.* at 406 n.2.

427. *Id.*

428. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 203 (1978).

429. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353, 384 (2001) (Souter, J., concurring) (concurring in a limitation on tribal civil adjudicatory jurisdiction because "[t]ribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges"); Duro v. Reina, 495 U.S. 676, 693 (1990) (stripping tribal court criminal jurisdiction over non-member Indians in part because tribal courts "are influenced by the unique customs, languages, and usages of the tribes they serve").

430. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

431. Treaty with the Chippewa art. 5, July 29, 1837, 7 Stat. 536, 537.

432. *Mille Lacs*, 526 U.S. at 176–77.

> and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota.[433]

Despite the seemingly insurmountable language of cession and revocation in the sources cited by the state, the Court held that the later agreements did not abrogate the Chippewa's hunting and fishing rights. The Court first dismissed the executive order as invalid because it unconstitutionally failed to abide by the terms of an otherwise binding 1837 treaty.[434] Next, the Court applied the canons to the 1855 treaty and concluded that because it neither expressly revoked the hunting and fishing rights, nor even mentioned the 1837 treaty, the Chippewa retained these rights even if they no longer had title to or interest in their ancestral territory.[435] The Court reasoned that, taken in context, the purpose of the 1855 treaty was to convey the Chippewa's land title to the United States, and that hunting and fishing rights were not at issue.[436] As a result, because "[w]e have held that Indian treaties are to be interpreted liberally in favor of the Indians, and that any ambiguities are to be resolved in their favor," the Court refused to abrogate the tribe's usufructuary rights.[437]

This application of the canons is particularly striking when compared to reservation diminishment cases involving remarkably similar treaty language in which the Court had ruled against the tribes. For example, in *DeCouteau* treaty language in which the tribe agreed to "cede, sell, relinquish, and convey to the United States all the unallotted land within the reservation" was held to preclude tribal court jurisdiction over tribal territory.[438] Similarly, the Court held a reservation diminished in *Rosebud Sioux Tribe v. Kneip* based on the treaty agreement for the tribe to "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted."[439]

These cases underscore the powerful role that hunting and fishing plays within the Supreme Court's Arcadian vision of Indian sovereignty. Ambiguities in primary sources led to implicit divestiture of tribal authority over non-Indians in *Oliphant* and *Montana* and the diminishment of tribal

433. Treaty with the Chippewa, Feb. 22, 1855, 10 Stat. 1165, 1166.
434. *Mille Lacs*, 526 U.S. at 193–95.
435. *Id.* at 195–96.
436. *Id.* at 200–02.
437. *Id.* at 200 (citations omitted).
438. DeCouteau v. Dist. Cnty. Ct., 420 U.S. 425, 437 (1975).
439. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 597 (1977).

lands in *DeCouteau* and *Rosebud Sioux*.[440] However, the Court is still willing to wield the canons as a shield against state sovereignty in order to protect the traditional norm of tribes as the guardians of the land.[441] In stark contrast to the backbone of implicit divestiture, namely that tribal sovereignty over non-Indians is incompatible with modern society, hunting and fishing is the last vestige of tribal sovereignty upon which the Court has not systematically diminished tribal rights. In doing so, however, the Court is still "Americanizing" tribal sovereignty by confining tribes to a romanticized value system.[442]

CONCLUSION

The historical relationship between Indian tribes and the state and federal governments has been characterized by inequality, injustice, and betrayal. In recognition of this imbalance, Chief Justice Marshall established the Supreme Court's role as the last defender of tribal sovereignty and created the Indian canons of construction, seemingly precluding individuals, states, and the federal government from furthering this legacy of abuse.

In certain areas, the Court has remained faithful to Marshall's mandate: tribes enjoy broad protection from the abrogation of traditional hunting and fishing rights and from non-Indian interference with inter-tribal affairs. However, these cases display as much paternalism as they do protectionism. The Court often predicates its reasoning on notions of tribes as primitive hunters and gatherers, or as governments that are unfit to operate beyond their immediate members. As a result, the canons are ineffective when faithfully protecting tribal rights would impede upon state sovereignty, or would give the tribe "undue influence" over the rights and liberties of non-Indians. In this vein, implicit divestiture was born, and in this tradition, divestiture continues to trump the canons in cases where the Court is simply uncomfortable with tribal exercise of inherent sovereign rights.

Without minimizing the important legal victories the canons have given the tribes, the time has come for the Court to abandon its romanticized vision of the "noble savage" and to employ the canons as intended: to protect against *all* encroachment on tribal sovereignty, not just those with minimal effects on non-Indian rights. In an evolving American

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440. *See* Jared A. Goldstein, *Aliens in the Garden*, 80 U. COLO. L. REV. 685, 703–05 (2009).

441. *Id.*

442. *See* Riley, *supra* note 82, at 816 ("In this sense, these cases embody fears brewing since first contact between Europeans and Natives; namely, that Indian tribal governance is simply too far afield from Western liberalism to be tolerated.").

society, tribal hunting and fishing rights will soon be an afterthought in the determination of Indian sovereignty. For example, Indian gaming is already a multi-billion dollar industry[443] and seems poised as one of the Court's next confrontations about what seems "Indian" enough to determine the protection of the canons. The same can be said with regard to the application of federal labor laws to tribal businesses.

Moreover, as state populations expand, tribes can expect more state pressure to fight against the expansion of Indian country; indeed, in the recent case of *Carcieri v. Salazar*, the State of Rhode Island fought to prevent a tribe from becoming federally recognized and gaining a reservation within its boundaries.[444] In a decision that has been referred to as "the worst kind of judicial formalism," the Court ignored the canons altogether and violated the rules of *Chevron* deference to avoid infringing upon state territorial sovereignty.[445] Paired with *Plains Commerce Bank*, this is not a good sign for the future of the canons.

As one scholar has rightly noted, "contradiction is Indian law."[446] The Court's contradictory application of implicit divestiture and the Indian canons cannot continue if tribes shall endure as legitimate governmental entities, rather than as "slightly overgrown social clubs" contained within their reservations.[447] If the canons, and Indian law, are to have any coherence, the Court must recognize the place of tribal rights within the broader American legal framework and ensure their survival into the future.

The Court created both the canons and the doctrine of implicit divestiture and can direct both doctrines as it sees fit. As Philip P. Frickey notes, "[a]n appropriate first step would be a judicial acknowledgment of these realities."[448] If it wished, the Court could apply the Indian canons to protect tribal sovereignty as an intrinsic, positive goal, rather than a troublesome accessory to tribal existence. History, equity, and the Court's own precedent demand nothing less.

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443. *See* Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 427 (2001) (noting that in 2000, tribal gaming revenues approached $10 billion).

444. Carcieri v. Salazar, 129 S. Ct. 1058 (2009).

445. Matthew L.M. Fletcher, Op. Ed., *Decision's in. 'Now' begins work to fix* Carcieri, INDIAN COUNTRY TODAY, Feb. 25, 2009.

446. Reed C. Easterwood, *Indian Self-Determination: The Federal Government, New Mexico, and Tribes in the Wake of* Cheromiah, 38 N.M. L. REV. 453, 453 n.a1 (2008).

447. Carol Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123, 1144 (1994).

448. Frickey, *(Native) American Exceptionalism*, *supra* note 99, at 490.