

# TREATING TRIBES AS STATES UNDER FEDERAL STATUTES IN THE ENVIRONMENTAL ARENA: WHERE LAWS OF NATURE AND NATURAL LAW COLLIDE

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## INTRODUCTION

America's relationship with its natural environment implores the fullest understanding of American constitutionalism and law. Private property rights may be affected, individual liberties may be denied, subtle nuances of due process may be determinative, and the resulting inter-sovereign conflicts raise every inherent tension of federal republican democracy. When environmental issues arise in Indian Country, they assume an almost unimaginable complexity.<sup>1</sup> For example: private property may be an anomaly; individual liberties may be subordinate to the tribe's interests; governance may be exercised over those who may not participate; the tribe, surrounding states, and the Union of those states may hold entirely different views.

Today, such disputes in Indian Country often arise under a set of federal environmental statutes, particularly those in which Congress has authorized the Environmental Protection Agency (EPA) to treat "Tribes as States" (TAS).<sup>2</sup> Equally important, these statutes evoke questions about tribes' inherent powers to govern their natural environments in Indian Country, irrespective of or at least beyond the federal statutory scheme. States and their citizens challenge the tribes' inherent authority, especially to govern nonmembers and their property within Indian Country.<sup>3</sup> Consequently, in the TAS context, states and their citizens also challenge the EPA's authority to recognize tribal governance over them and their property. These disputes have given rise to renewed conflicts between states and tribes, and between states and the Union, in the federalism context. The disputes raise fundamental concerns about the most basic

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1. "Indian Country," with a codified definition at 18 U.S.C. § 1151 (1994), is a term of art in Indian Law denoting the "territoriality" that lies at the heart of this article's main theme. The term is generally synonymous with all lands within the exterior boundaries of an Indian reservation.

2. See, e.g., Safe Drinking Water Act, 42 U.S.C. § 300j-11 (1988); Clean Water Act, 33 U.S.C. § 1377 (1988); Clean Air Act, 42 U.S.C. § 7474 (1988); Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9626 (1988).

3. The process by which non-Indians and their property came to be in Indian Country is addressed *infra* Part III.B.

principles of American constitutionalism, as well as environmental concerns.

This article focuses on one set of issues of singular difficulty in the TAS arena: those issues arising when Indian tribes would govern persons and their property within Indian Country who are not members of the tribe.<sup>4</sup> First, in recent years, federal courts have seriously undermined the territorial nature of tribes, especially when it comes to governing non-Indians in other contexts.<sup>5</sup> Second, federal courts seem to hold tribes to the highest standards of due process concerns, in criminal and civil matters, adjudicatory and regulatory, even when the infringed substantive right would not invoke the same level of protection if the Union or the states were doing the infringement.<sup>6</sup> Third, relevant Supreme Court precedent, seemingly against the tribes' interests, leave more room for pro-tribe, fact-based arguments than the Court itself and commentators seem to suggest.<sup>7</sup>

This article makes three contentions. First, an accurate reading of early legal precedent supports a greater vision of tribes' territorial sovereignty than courts and some commentators have espoused. Second, Indian Law precedent, particularly *Montana v. United States*, provides greater protection of both tribes' sovereignty and non-Indians' individual rights than recent developments suggest.<sup>8</sup> Third, "due process" is not a constant under American law. Some rights are more substantive than others. As a result, the requisite level of "process" is commensurate with the level of substantive right being infringed. Therefore, tribes should be allowed to provide "process" commensurate with the substantive right

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4. See, e.g., James M. Grijalva, *Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters*, 71 N.D. L. REV. 433, 443 (1995).

5. See *Hagen v. Utah*, 510 U.S. 399, 414 (1994) (concluding that the reservation was diminished by Congress when it was opened to non-Indian settlers at the turn of the century). See also *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993) (concluding that Congress abrogated Tribe's rights under the Fort Laramie Treaty to regulate non-Indian hunting and fishing on lands taken by the United States for construction of the Oahe Dam and Reservoir).

6. See generally *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986); *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408, 437 (1989) (Stevens, J. concurring) ("Although it is inconceivable that Congress would have intended that the sale of a few lots would divest the Tribe of the power to determine the character of the tribal community, it is equally improbable that Congress envisioned that the Tribe would retain its interest in regulating the use of vast ranges of land sold in fee to nonmembers who lack any voice in setting tribal policy.").

7. Much of the land where Tribes' jurisdiction is being challenged was originally acquired by non-Indians in such a manner as would fit under the "Montana consensual relations" test. *Montana v. United States*, 450 U.S. 544, 565 (1981). See *infra* Part III.B. and accompanying text.

8. *Montana*, 450 U.S. 544.

involved, without being held to the highest standard of "process" in every instance.

This article concludes that if tribes are to govern Indian Country on a territorial basis, including property owned by non-Indians, they must meaningfully address the basic due process concerns of the United States, the several states, and their citizens. Finally, this article is not intended to provide a survey or summary of all relevant statutory and case law. Others have ably navigated the rather complex federal statutory framework and administrative processes, leaving in their wake practical roadmaps for interested parties to follow.<sup>9</sup> Rather, this article will endeavor to measure these statutes and cases, in terms of both policy and law, against political and legal theory of American constitutionalism. The final effort is to interject into the discussion how tribes might meaningfully address non-Indians' basic due process concerns while maintaining the tribes' basic cultural values.

## I. THE SETTING

When Indians and the environment intersect, the most mundane legal and political arguments evoke deep emotional charges. On the environmental side, the Indian bears the redoubtable image of the noble savage, the romantic naturalist in harmony with nature, and the steward of the land. On the political side, recent scholarship casts the Iroquois, Algonquin, and similar Indian confederacies as the crafters of America's most fundamental constitutional principles—pure democracy, separation of powers, and federalism.<sup>10</sup> Yet, as we all learned in grammar school chantings, from national anthems and pledges of allegiances, to revolution-era battle-cries such as "No taxation without representation," America casts itself as the true purveyor of modern enlightenment, particularly in its form of republican democracy. Today, the United States is assuming the role, partially self-proclaimed and partially earned, of protector of the

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9. See GOVER ET AL., NATIONAL INDIAN POLICY CENTER: SURVEY OF TRIBAL ACTIONS TO PROTECT WATER QUALITY AND THE IMPLEMENTATION OF THE CLEAN WATER ACT (1994); Grijalva, *supra* note 4, at 433; Dean B. Suagee and Christopher T. Stearns, *Indigenous Self-Government, Environmental Protection, and the Consent of the Governed: A Tribal Environmental Review Process*, 5 COLO. J. INT'L. ENVTL. L. & POL'Y 59 (1994); David F. Coursen, *Tribes as States: Tribal Authority to Regulate and Enforce Federal Environmental Laws and Regulations*, 23 ENVTL. L. REP. (Envl. L. Inst.) 10,579, 10,580 (1993).

10. See generally BRUCE E. JOHANSEN, FORGOTTEN FOUNDERS: BENJAMIN FRANKLIN, THE IROQUOIS AND THE RATIONALE FOR THE AMERICAN REVOLUTION (1982); DONALD A. GRINDE, JR. AND BRUCE E. JOHANSEN, EXEMPLAR OF LIBERTY: NATIVE AMERICA AND THE EVOLUTION OF DEMOCRACY (1991); GREGORY SCHAAF, WAMPUM BELTS AND PEACE TREES: GEORGE MORGAN, NATIVE AMERICANS, AND REVOLUTIONARY DIPLOMACY (1990).

natural environment in an increasingly high-tech world. Somehow, it was inevitable that in this arena, irony and Indians would meet again.

Irony and Indians met in the sweltering heat of the American Southwest—where clean water is precious and filthy water nearly useless—in a relatively inauspicious, mostly overlooked, environmental dispute in New Mexico. In the early 1980s, the State of New Mexico, while administering a federally-funded environmental program, exempted from its water quality regulations a stretch of the San Juan River which flowed through several mining and industrial areas, and then into Indian Country, particularly Acoma and Isleta Pueblos.<sup>11</sup> In response to the State's dereliction, the Tribes lobbied Congress to authorize the EPA to treat "Tribes as States" for purposes of such federally-funded environmental programs so that tribes could administer their own water quality programs. To tribes, being treated as states meant at least being treated fairly. After all, TAS provisions were not included in federal statutes simply because someone had a bright idea. Like most legislation, they were a reaction to a real and growing problem. As a result, Congress amended the Safe Drinking Water Act (SDWA) in 1986 and the Clean Water Act (CWA) in 1987, providing the EPA with the authority to treat "Tribes as States" for certain programs.<sup>12</sup>

In 1992, the EPA recognized one of the first applicants, the Isleta Pueblo Tribe, under its new TAS authority in the CWA.<sup>13</sup> The Tribe was situated along the San Juan River and the Rio Grande, downstream from the City of Albuquerque.<sup>14</sup> The EPA approved the Tribe's water quality standards, which were more stringent than the State's and the City's.<sup>15</sup> Consequently, Albuquerque sued the EPA, in 1993, but the federal district court upheld the EPA's approval of the Tribe's water quality standards.<sup>16</sup> Significantly, the City did not focus its challenge on the statute or the EPA's treatment of the Tribe as a State; rather, the City challenged the EPA's procedural handling of the matter.<sup>17</sup> Nonetheless, this case helps

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11. Interview with Mr. Leigh Price, Esq., Assistant Regional Administrator for Indian Affairs, Environmental Protection Agency, in Denver, Colo. (Oct. 17, 1995).

12. Safe Drinking Water Act at § 300j-11; Clean Water Act at § 1377.

13. *City of Albuquerque v. Browner*, 865 F. Supp. 733, 736 (D.N.M. 1993).

14. *Id.*

15. *Id.*

16. *Id.* at 742.

17. *Id.* at 736. The challenge was primarily whether the EPA had adhered to the Administrative Procedure Act, 5 U.S.C. §§ 500, 572 (1994), and the Act's own State/Tribe dispute resolution mechanisms as well as the Tribe's substantive findings regarding water quality, Clean Water Act § 1377(e).

set the stage regarding the territorial nature of a tribe's governance over non-Indians and their private property.

Also in 1992, the Confederated Salish and Kootenai Tribes applied to the EPA for TAS status under the Clean Water Act.<sup>18</sup> In response, Montana filed comments with the EPA and a complaint in federal district court.<sup>19</sup> Montana's primary concern differed from Albuquerque's in that its challenge was not merely procedural. Montana directly challenged the statute and the EPA's authority to treat the Tribe as a State. Specifically, Montana challenged the Agency's potential finding that the Tribe may have territorial jurisdiction, as do States, even over the property of nonmembers within Indian Country.<sup>20</sup>

Thus, to reiterate two important points: (1) the *Isleta Pueblo* case deals with a tribe's water quality standards being applied outside the tribe's territory (extra-territorial), and being upheld by the federal district court, as compared to the *Salish-Kootenai* case, which deals with a tribe's water quality standards being applied inside the tribe's territory (intra-territorial); and (2) Albuquerque's challenge is merely procedural, while Montana's is a substantive challenge to either the statute's TAS provisions or to the EPA's reading of them. A juxtaposition of these two cases sets up this article's first theme and conclusion: that the tribes' inherent sovereignty within this federal system best supports their extra-territorial powers over adjacent sovereigns rather than their intra-territorial powers over nonmembers. In other words, tribes are more likely to succeed under the *Isleta/New Mexico* scenario, than under the *Salish-Kootenai/Montana* scenario. However, the outcome would be virtually the same. After all, if those nonmembers living on the reservation are not subject to the tribe's governance, they are subject to the neighboring county's governance. Thus, even under the *Isleta/New Mexico* scenario the tribes still impose their environmental standards on nonmembers within their territory, albeit indirectly, through the nonmembers' adjacent sovereigns, rather than directly from tribe to nonmember.

To determine the extent of a tribe's intraterritorial jurisdiction over non-Indians and their private property, Indian Law has fashioned several "tests" which serve as the basis for analysis in the dispute between the *Salish and Kootenai Tribes* and the State of Montana.<sup>21</sup> Under the EPA's

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18. Clean Water Act § 1377.

19. *Montana v. EPA*, No. 95-56-M-CCL, 1996 WL 498123 (D. Mont. Mar. 27, 1996).

20. *Id.* at \*2. See *infra* notes 21-23 and accompanying text.

21. These are, along with the two *Montana* tests discussed herein, the "infringement test" of *Williams v. Lee*, 358 U.S. 217, 220 (1959), and the "preemption test" of *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 (1973).

regulations, the Agency's decision to treat a "Tribe as a State" must be based primarily on a test developed in a 1981 case, *Montana v. United States*.<sup>22</sup> In *Montana*, the Court held that tribes may have jurisdiction over nonmembers and their private property within Indian Country under two circumstances: (1) if the dispute arises out of "consensual relations" between nonmembers and the tribe; or (2) if nonmembers' use of property substantially impacts the health, welfare or political integrity of the tribe.<sup>23</sup> The EPA's application of this test lies at the heart of Montana's disagreement with the EPA and the Tribe, as evidenced in a letter written by the State's governor.<sup>24</sup>

In a 1994 letter to the United States House of Representatives, the Governor of Montana challenged "the scope of inherent tribal regulatory jurisdiction over nonmembers."<sup>25</sup> The Governor argued that while recent Supreme Court decisions seemed to have fashioned a presumption against the Tribes' jurisdiction over nonmembers, the EPA seems to have fashioned a presumption in favor of it.<sup>26</sup> In his letter, the Governor quoted a recent Supreme Court opinion, arguing that "[t]he basis for the Court's reasoning lies . . . partially in perhaps the most basic tenet of our democracy: antipathy to the extension of governmental authority, here tribal governmental authority, 'over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system.'"<sup>27</sup> Borrowing from yet another Supreme Court opinion, the Governor wrote, "it is equally improbable that Congress envisioned that the Tribe would retain its interest in regulating the use of

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22. *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

23. *Id.* See also FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 256 n.119 (1982) (citing *Montana v. United States*, 450 U.S. at 565-66). The second tier of the *Montana* test was significantly modified in *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408, 431 (1989), so that now the impact must be "demonstrably serious and must imperil" tribes' interests. The EPA's regulations have yet to account for the stronger language in *Brendale*, a point which may prove critical in the final analysis.

24. Letter from Mark Racicot, Governor, State of Montana to Sherwood L. Boehlert, Chairman, Subcommittee on Water Resources and the Environment (Mar. 8, 1995) (on file with author) [hereinafter Racicot Letter].

25. *Id.* at 1-2.

26. *Id.* at 2.

27. *Id.* (quoting *Duro v. Reina*, 495 U.S. 676, 694 (1990)). *Duro* held against the Tribes' inherent criminal authority over an Indian from another Tribe. Congress reversed the Court's holding in *Duro*, subjecting the individual liberty of nonmember Indians to another Tribe's authority. See 25 U.S.C. § 1301(4) (1994) (defining "Indian" in reference to criminal actions). The environmental arena primarily implores whether the courts and Congress will recognize tribal authority over non-Indians and nonmember Indians with regard to a subject matter which is generally less protected than individual liberty—property. Or is it that the individual liberty of nonmember Indians is less important than the property interests of non-Indians?

vast ranges of land sold in fee to nonmembers who lack any voice in setting tribal policy."<sup>28</sup> In other words, the State's Governor would oppose the Tribes' taxation power, or virtually any other power, over nonmembers, in the absence of nonmembers receiving full representation at every step in tribal government.<sup>29</sup>

These two *Montana* tests are not unique to Indian Law; rather, they are derived from some of the most contentious areas of American constitutional law.<sup>30</sup> The "health, safety, and welfare" test is longhand for the "police power" analysis applied to all levels of government in the American system, going back to Chief Justice John Marshall's Court in 1827.<sup>31</sup> Likewise, the "consensual relations" test finds its constitutional counterpart in a line of cases dating as far back as 1945, with *International Shoe Co. v. Washington* and the "minimum contacts" test regarding state civil jurisdiction.<sup>32</sup> As one case in that line declared: "[T]he Due Process Clause 'does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.'"<sup>33</sup> In other words, "due process," or what constitutes fundamental fairness regarding state court jurisdiction, also underlies the Governor's argument against the Salish-Kootenai Tribe's jurisdiction—a lack of consensual relations or political representation.<sup>34</sup> As a result, the stage has been set for perhaps the most theoretical and contentious debate regarding the Union/State/Tribe political and legal relationship since America's earliest years.<sup>35</sup>

28. Racicot Letter, *supra* note 24 (quoting *Brendale*, 492 U.S. at 437).

29. *Id.* Note the irony that the Governor is writing not only individually, as a citizen of the United States, but collectively, as the Executive Officer of a political body with representation in the government he is soliciting. A Tribe's leader could write a similar letter, but perhaps only as a citizen of the United States; she could certainly write as an Executive Officer of a political body, but not one represented in the government she would be soliciting. In other words, unlike the Governor, the Tribe leader has no mechanism that ensures her consent, collectively. The irony is somewhat heightened by the fact that Montana is guaranteed a seat in the House even though its population falls short of the number upon which apportionment is based.

30. *Montana*, 450 U.S. at 565-66.

31. The constitutional meaning of the phrase, "health, safety and welfare," goes all the way back to when Chief Justice Marshall used it in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827).

32. *International Shoe Co. v. Washington*, 326 U.S. 310, 318-20 (1945); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

33. *World-Wide Volkswagen*, 444 U.S. at 294 (quoting *International Shoe Co.*, 326 U.S. at 319).

34. Racicot Letter, *supra* note 24.

35. An irony must be noted at this point in the article, but will be developed later. A rather liberal Supreme Court restricted the states' power in these cases. Obviously, a more conservative Court would be more inclined to abide state jurisdiction, even over those with whom the state has few

## II. STATES AND SOVEREIGNTY

Simply put, Montana and New Mexico perceive the Tribes' actions and the EPA's recognition of them as a threat to state sovereignty. Thus, before analyzing the "Tribe as State" concept and its effect on non-Indians and the environment in Indian Country, it may be useful to first examine what is meant by the words "state" and "sovereignty" in that context.

### A. States and Popular Sovereignty

In order to understand the dynamics of "state" and "sovereignty" in America, Professor Alexander Bickel has pointed out, in his book *The Morality of Consent*, two lines of political reasoning which shape America's tradition of political and legal thought. Professor Bickel wrote: "Two diverging traditions in the mainstream of Western political thought—one 'liberal,' the other 'conservative'—have competed, and still compete, for control of the democratic process and of the American constitutional system; both have controlled the direction of our judicial policy at one time or another."<sup>36</sup>

Professor Bickel identifies the liberal tradition with John Locke's ideas of social contract, although perhaps the American writings of Thomas Paine best illustrate the argument.<sup>37</sup> Paine argued that people, by logical necessity, preceded government.<sup>38</sup> Therefore, Paine believed that individual persons first entered into compacts with each other, being the only mode in which governments have a right to arise, and the only principle on which they have a right to exist.<sup>39</sup> Thus, the people must consent to government, for that is putting the effect before the cause.<sup>40</sup> The people must first authorize government, being government's only legitimate source of sovereignty. This is the essence of pure democracy. Taken a step further, the essence of libertarianism is that the government does not have the power to do anything the people have not authorized the government to do.<sup>41</sup>

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"relations." When it comes to the territoriality of Indian tribes, suddenly the most conservative of Courts becomes the staunch liberal protector of individual civil rights.

36. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 3 (1975).

37. *Id.*

38. THOMAS PAINE, *RIGHTS OF MAN* 186-87 (1958).

39. *Id.* at 186.

40. *Id.* at 186-87.

41. See generally DAVID BERGLAND, *AMERICA'S LIBERTARIAN HERITAGE: THE POLITICS OF FREEDOM* (1988).

Professor Bickel then identifies the conservative tradition with the writings of the English political thinker Edmund Burke, among others.<sup>42</sup> This tradition holds that while Paine's rendition—people preceding and thus authorizing government—is logical, it is also impractical and in fact improbable.<sup>43</sup> Rather, these thinkers argue that government necessarily arises out of shifting societal exigencies—geography, economy, religion—and emerges into the spontaneous “state.”<sup>44</sup> To justify its continued existence, the people need only provide their continued consent. That is the essence of republicanism. When the people do not consent, the state has acted as its own source of sovereignty, preceding and superseding that of its own people. The exercise of power without attaining authority, or prior to attaining consent, is the essence of the “state police power.”<sup>45</sup>

Both of these political traditions were involved in the formation of each state of this Union. Today, the extent to which each tradition prevails varies from state to state. However, regardless of which prevails at any point in time, the important point is that all the states jealously guard their right to determine which prevails free from outside influence.<sup>46</sup> That point is also important when we consider the sovereignty of Indian tribes. Do they, or should they, have the right to determine which tradition prevails within their spheres of sovereignty?

We know that certain factors have come to diminish the states' rights to determine their own governance.<sup>47</sup> Most obvious is that while the original thirteen states pre-existed the Union, upon forming that Union

42. See BICKEL, *supra* note 36, at 20-21.

43. *Id.* at 19-24.

44. *Id.* at 17-18.

45. See generally PAINE, *supra* note 38; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787* (1969).

46. The area where states do not entirely determine the extent of their power over their own territory is where the Supreme Court has held that the Fourteenth Amendment superimposed the Federal Bill of Rights on the states to protect those living within their boundaries. This area has provided the front lines for conflicts between the Union and states. Of course, the states vehemently oppose this infringement. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995); *United States v. Lopez*, 115 S. Ct. 1624 (1995). The point to bear in mind is that the states have similarly infringed on tribes, even without a Fourteenth Amendment to invoke as authority.

Of course, the tribes also vehemently oppose this development. See *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S. Ct. 2214 (1995); *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991); *Employment Div., Dep't. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990); *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408 (1989); *Rice v. Rehner*, 463 U.S. 713 (1983). Perhaps, ironically, the states often provide the impetus for infringing on tribes' territorial rights, such as proposing an amendment to a federal statute so that a tribe cannot be treated as a state. See *Racicot Letter*, *supra* note 24, at 1. See generally DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW*, 453-58 (3d ed. 1993).

47. Federal environmental statutes are an exercise of one such express delegation, namely the Interstate Commerce Clause. See, e.g., *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14 (1989).

they imbued it with certain governing powers.<sup>48</sup> In deciding which powers to grant to the Union, the states and their citizens grappled endlessly with whether America's divergent traditions would play a role in the Union's formation as they did in the formation of the several states.<sup>49</sup> If so, the extent of the Union's governance over the states and their citizens, and necessarily the extent of the states' own sovereignty, would depend in large part upon which tradition prevailed in the Union's formation.<sup>50</sup>

The Founders' concerns boiled down to one inevitable premise. If the sovereign spheres of the Union and states overlapped, as Chief Justice John Marshall would explain, "contests respecting power must arise."<sup>51</sup> The Founders proclaimed, "It is impossible there should be two independent [I] legislatures in the one and the same state."<sup>52</sup> They reasoned, "that two co-ordinate sovereignties would be a solecism in politics."<sup>53</sup> As one modern commentator colorfully agreed: "A single nation could not operate with two sovereigns any more than a single person could operate with two heads; some single supreme political will had to prevail."<sup>54</sup> When the contests respecting power arose, "one or the other would necessarily triumph in the fullness of dominion."<sup>55</sup> So the Founders struggled with a recipe for dispersing that power so that overlapping spheres of Union and state sovereignty would not usurp one another.<sup>56</sup>

Our "Federalism" was born. While many varieties of federative government exist in the world, our federal system differs from others because of what we deem to be the source of governing sovereignty.<sup>57</sup> While early American political thinkers disagreed whether the primary source of state sovereignty was the people or the state itself, both sides agreed that the Union—a confederation of those states and an aggregation of those peoples—would not, in and of itself, be a source of sovereignty.<sup>58</sup>

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48. *Id.*

49. *See, e.g.*, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 465 (Jonathan Elliot ed., 2d ed. 1941).

50. *Id.*

51. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 205 (1824).

52. DANIEL J. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 397 (1965).

53. THE ANTI-FEDERALIST 211 (Herbert J. Storing ed., 1985).

54. Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1430 (1987).

55. THE ANTI-FEDERALIST, *supra* note 53, at 211.

56. BOORSTIN, *supra* note 52, at 396-97.

57. *See, e.g.*, Arnold Brecht, *American and German Federalism: Political Differences*, in AMERICAN FEDERALISM IN PERSPECTIVE 185-86 (Aaron Wildavsky ed., 1967); William H. Riker, *Federalism: Origin, Operation, Significance*, in AMERICAN FEDERALISM IN PERSPECTIVE 51.

58. *See* U.S. CONST. amend X.

Rather, the Union would be a government of limited, granted powers.<sup>59</sup> In order to protect its limited powers, the Union would be fused with supremacy. However, as James Madison declared, "there must be one supreme power, and only one."<sup>60</sup> In order to protect states from the supremacy of the Union, their spheres of sovereignty would be fused with the vastness of inherency, extending beyond the reach of the Union's supremacy. Consequently, neither Union nor states would "triumph in the fullness of dominion" over the other.<sup>61</sup> This logic became embodied in the Tenth Amendment, which reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>62</sup> It also plays a peculiar role in our thinking in Indian Law.

### B. States and Territorial Sovereignty

Territory is the hallmark of the modern state, a prerequisite for political recognition as an independent sovereign on the international plane.<sup>63</sup> International law defines "states" as an entity with, among other things: (a) a permanent population; (b) a defined territory; and (c) a government.<sup>64</sup> On the international plane, complete sovereignty holds a state's territorial boundaries to be inviolable by any other sovereign.<sup>65</sup> But New Mexico and Montana are not on the international plane, even if theoretically they once were.

The early federalism debates were not conclusive on whether the original thirteen colonies preceded the Union as free and independent states with inviolable territories.<sup>66</sup> However, much of American jurisprudence depends on that premise.<sup>67</sup> Disputes over territory provided grist for early

59. U.S. CONST. art. I, § 8; U.S. CONST. amend. X; U.S. CONST. art. I, § 10; THE FEDERALIST 139-40 (Sherman F. Mittell ed., 1937); U.S. CONST. art. VI.

60. NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 29-30 (Adrienne Koch ed., 1987).

61. THE ANTI-FEDERALIST, *supra* note 53, at 211.

62. U.S. CONST. amend. X.

63. MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 53 (6th ed. 1987).

64. LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 13 (1995).

65. *Id.* at 12.

66. The Declaration of Independence proclaimed as fact, "Free and Independent States," but the Supreme Court has not always agreed. THE DECLARATION OF INDEPENDENCE para. 22 (U.S. 1776); See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 317 (1936).

67. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187 (1824) (explaining that the states "were sovereign, were completely independent."). See also *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878) ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its

federalism cases.<sup>68</sup> Such disputes were also the basis for conflicts between states when one state was carved out of another,<sup>69</sup> or when there were continuing conflicts over states' natural boundaries.<sup>70</sup> In the famous *Pennoyer v. Neff* case, the Supreme Court wrote that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."<sup>71</sup> Of course, the state's exercise of sovereignty must be limited to its territory, otherwise it would infringe on the territory and sovereignty of the adjacent state.<sup>72</sup> To that end, *Pennoyer v. Neff* then added: "[N]o State can exercise direct jurisdiction and authority over persons or property without its territory."<sup>73</sup>

One conclusion to be drawn from the foregoing is the importance of casting America's divergent political traditions in terms of territorial and popular sovereignty. Disputes may be interstate, pitting multiple adjacent states against each other over shared territorial boundaries.<sup>74</sup> Disputes may be intrastate, pitting notions of territorial sovereignty against popular sovereignty. In other words, intrastate disputes pit the powers of the government over its territory against the rights of all individuals within it, whether or not they are provided due process. The complexity of these conflicts is magnified when the Union plays a role in setting the balance between them.<sup>75</sup>

Therefore, at this stage, it is important to make the connection that, in the unitary state, whether on the international or domestic plane, complete territorial sovereignty reflects the conservative police power tradition. On the other hand, complete popular sovereignty reflects the more liberal, indeed libertarian, tradition. In other words, in the unitary state, the greater a government's territorial power, the less protected are the people. Conversely, the greater the people's protection, the less the government's power. Nevertheless, as long as that balance is completely

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territory.").

68. See generally *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (describing the great Yazoo land frauds where Georgia claimed the State virtually had no western boundary); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

69. When the State of Maine was carved out of the State of Massachusetts, the latter expressly reserved certain rights within the former. *Allen v. McKean*, 1 F. Cas. 489, 499 (C.C.D. Me. 1833) (No. 229).

70. See, e.g., *Houston v. Thomas*, 937 F.2d 247 (5th Cir. 1991).

71. *Pennoyer*, 95 U.S. at 722.

72. *Id.*

73. *Id.* Of course, the federal system itself may also affect the states' relationships with each other. The federalism factor supported the "minimum contacts" test of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

74. See, e.g., *Houston*, 937 F.2d 247.

75. See *infra* note 83 and accompanying text.

determined by that state's own citizenry, within that state's own territory, free from outside influence, its overall sovereign integrity remains intact.

Of course, the several states and their people do not always determine the ultimate balance between their respective spheres of sovereignty.<sup>76</sup> In a territorial dispute between adjacent states, the Union may side with one state against another state.<sup>77</sup> Indeed, in *Arkansas v. Oklahoma*, the Supreme Court upheld the EPA's interpretation of one state's environmental standards against another state's emissions, recognizing the state's extra-territorial power.<sup>78</sup> Also, subsequent to *Pennoyer v. Neff*, in *International Shoe*, the Supreme Court relaxed the notion that a state's sovereignty could not be effective outside its territory by allowing a state to exercise jurisdiction over absent defendants if they had "minimum contacts" with the state or its citizens.<sup>79</sup> This exercise of jurisdiction is yet another example of extra-territorial power.<sup>80</sup> Thus, while *Arkansas v. Oklahoma* seems more analogous to the Isleta/New Mexico case and *Pennoyer v. Neff* to Salish-Kootenai/Montana, both cases are cast in terms of extra-territorial power, the former over the adjacent sovereign directly and the latter over that sovereign's citizens indirectly.<sup>81</sup>

Likewise, in a wholly intra-territorial dispute, the Union may side with the state's unfettered governance over its territory at the expense of the people, or the Union may side with the state's people at the expense of the state's unfettered governance over its territory. At first glance, the former appears more to preserve the state's sovereignty, the latter to derogate it. But the very fact that the Union is playing a role in setting the balance, in and of itself, infringes the state's sovereignty.<sup>82</sup> As we all know, America's history provides many examples of the Union's permeating the states' territorial sovereignty in order to protect the peoples within its borders, such as the Civil War Amendments, civil rights statutes and case law.<sup>83</sup>

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76. The Fourteenth Amendment expressly authorized the Union to protect state territory, as well as to protect the people, even from the member state. U.S. CONST. amend XIV, § 1.

77. See *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).

78. *Id.* at 94-95.

79. *Pennoyer*, 95 U.S. 714; *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1980).

80. *International Shoe Co.*, 326 U.S. at 319.

81. *Arkansas*, 503 U.S. at 94-95;

82. Analogous situations arise on the international plane as the United States pressures other nations, such as South Africa, to the point of infringing their territorial sovereignty in order to help protect the rights of certain peoples within their territories.

83. This encompasses virtually all civil rights cases, such as *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

Despite the outcome of the Civil War, the extent of the Union's permeation of the States' territorial sovereignty and protection of their peoples remains unsettled to this day. Likewise, America's history also provides many illustrations of tribes' territorial sovereignty being permeated, ostensibly to protect certain peoples within it. While tribes have attempted to exercise territorial sovereignty, or to exercise police powers, in order to protect their natural environments, states and their citizens have challenged tribes ostensibly to protect certain peoples who live within tribal territories.<sup>84</sup> That is precisely what Montana's Governor would have the federal court do for the State's citizenry within the Salish-Kootenai Tribe's territory.<sup>85</sup>

Of course, the states jealously guard their territory and principles of republican democracy; the Tenth Amendment's "reserved rights" logic helps protect the integrity of both their territorial and popular sovereignty.<sup>86</sup> Indeed, notions of territorial and popular sovereignty, with the Union playing a key role in the balance, provide the contours of what constitutes a state and its sovereignty in America. What principles and logic, then, if any, will determine the tribes' sovereign powers to sustain their own cultures, values, and environments? Will state territorial police powers that are subject to varying degrees of due process be recognized, so that tribes may govern not only their peoples but also their territories, subject to varying degrees of due process?

### III. TRIBES AND SOVEREIGNTY

The meaning of states and their sovereignty has greatly informed what courts have meant when speaking of tribes and their sovereignty.<sup>87</sup> Indeed, federal statutes treating Tribes as States compel us to at least cursorily analyze the latent analogy.<sup>88</sup> To begin the analogy, a recounting is helpful of a story that is often told about a young Indian activist who had grown weary of his own strained explanations to non-Indians of what Indians meant when they said "our sovereignty." So he asked a respected elderly Indian couple of the Tribe: "Just what do we mean when we say 'sovereignty'?" In response, the old man reached for his walking stick, drew a deep line in the dirt, pointed to one side and then the other, and said: "That's North Dakota. This is Turtle Mountain. And that's

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84. See *Montana v. United States*, 450 U.S. 544 (1981).

85. *Racicot Letter*, *supra* note 24, at 2.

86. U.S. CONST. amend. X.

87. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832).

88. Tribal Tax Status Act, 26 U.S.C. § 7871 (1994).

sovereignty." As the young man turned to the elderly woman she reposed her look in agreement, but subtly added, "this is sovereignty," as she pointed directly inside herself. The story's lesson is that sovereignty is a double-edged hatchet. To the young man it stood to reason that the old man, the warrior and protector of his people, would separate the homelands of his people from that of others, demarcating his territory. It also stood to reason that the old woman, matriarch and bearer of life, saw the ultimate power coming from within, running through the lives of the people. In other words, tribes also see their sovereignty as both territorial and popular, and the inherent tensions between the two lie at the heart of their governance, as well.

Because Indian tribes are subject, rightly or wrongly, to the overriding sovereignty of the United States, both of America's divergent traditions, territorial and popular, have also impacted upon tribes.<sup>89</sup> First, the territory of one tribe's sovereign sphere has grated against the territory of another.<sup>90</sup> More often, a tribe's territory grinds against the territory of a state.<sup>91</sup> Second, as with states, tribes' territorial police power often conflicts with the libertarian pure popular sovereignty of their citizenries.<sup>92</sup> Third, the Union has played a critical role in the balance of these traditions, as illustrated by the subject matter of this article.

For example, a recent land-use dispute in Indian Country revealed both the territorial and popular traditions of Western political thought in the tribe sovereignty context. Speaking to a *Los Angeles Times* reporter, one of the Tribe's members rendered the essential libertarian argument, the hallmark of popular sovereignty: "[N]obody can interfere with our right to do with [our property] what we want. . . . Some of us are worried that if the tribe can stop one individual from operating a business, what's to stop them from preventing others from doing the same? We treasure that

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89. Of course, none of this is to suggest that tribes are or should be precluded from deviating from the binary constructs of Western thought. Nevertheless, commentators seem generally to agree that "Federal Indian Law" was born of the Marshall Court and matured under the Warren Court when the liberal tradition held sway in the High Court. See, e.g., FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW vii (Rennard Strickland et al. eds., 1982). Perhaps as a result, Indian cases have tended to invoke those arguments most likely to be persuasive to a liberal Court. Today, however, the Court can no longer be characterized as liberal, and arguments from the liberal tradition are no longer as persuasive. Thus, tribes and their advocates must fashion arguments that will be persuasive in a Court bearing the flag of the more conservative tradition.

90. See, e.g., *Masayesva v. Zah*, 65 F.3d 1445, 1450 (9th Cir. 1995) (examining the infamous Navajo/Hopi land dispute).

91. *Hagen v. Utah*, 114 S. Ct. 958, 959 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585 (1977); *DeCoteau v. District County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 427 (1975).

92. See generally *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51 (1978).

freedom.”<sup>93</sup> In response, a spokesperson for the Tribe rendered the essential police power argument, the hallmark of territorial sovereignty, saying: “[I]ndividual freedom can only stretch so far before the tribe must step in.”<sup>94</sup> Appreciating this dichotomy—territorial police power versus popular libertarian freedoms—is necessary to construct a normative model of the Union/State/Tribe relationship. As with states, the Federal government will continue to play a weighty role in defining tribes’ sovereignty, particularly where tribes’ environmental regulations meet questions of “due process” for non-Indians.<sup>95</sup>

A. *Tribe Sovereignty: The Slippery Slope from Territorial to Popular in the United States Supreme Court*

Like the original thirteen American states, Indian tribes pre-existed the Constitution.<sup>96</sup> Like independent states on the international plane, tribes were described “as distinct political communities, having territorial boundaries, within which their authority is exclusive.”<sup>97</sup> The Supreme Court wrote, “[t]he acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.”<sup>98</sup> Their spheres of sovereignty were as inviolable as any other sovereign state, “territorial control [being a] fundamental component of inherent tribal sovereignty.”<sup>99</sup>

However, while tribes are still with us and may always be, their peoples and territories seem irrefutably subject to the Union’s governance, their reservations being “a part of the territory of the United States.”<sup>100</sup> While the United States recognizes the tribes as sovereigns, when it comes to full territorial sovereignty, the Supreme Court recently declared, “tribes can no longer be described as sovereigns in this sense.”<sup>101</sup> How and when did this loss of territorial sovereignty occur? Who decided when and if popular sovereignty would prevail over territorial sovereignty in Indian Country? What principles, rules, or logic did the decision-makers apply? Did the Tribes authorize or at least consent to the decision-makers’ power? Relatively recently, the Supreme Court proffered an explanation to some

93. Tom Gorman, *Neighbors Blockade Sludge Mountain*, L.A. TIMES, Oct. 21, 1994, at A3.

94. *Id.*

95. See *infra* notes 184-93 and accompanying text.

96. *Martinez*, 436 U.S. at 56.

97. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832).

98. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

99. *A-1 Contractors v. Strate*, No. 92-3359, 1994 WL 666051, at \*5 (8th Cir. Nov. 29, 1994).

100. *United States v. Rogers*, 45 U.S. (4 How.) 567, 571 (1846).

101. *Duro v. Reina*, 495 U.S. 676, 685 (1990).

of these questions, setting a precedent that lies at the heart of Montana's Governor's argument.<sup>102</sup>

In *Oliphant v. Suquamish Indian Tribe*, holding against the Tribe's assertion of criminal jurisdiction over a nonmember, the Court identified three ways tribes have lost all or some of their original sovereignty: (1) by voluntary relinquishment in treaty; (2) by express abrogation in federal statute; or (3) by being "inconsistent with their status."<sup>103</sup> While treaties were not always so voluntary and statutory abrogation not always entirely express, the third category—the "inconsistent with their status" dictum—has proven to be the most ill-definable. To illustrate, we may find it generally agreeable that tribes going to war against Israel or adopting the currency of Russia may be inconsistent with their status, however defined. Yet, that amorphous third category has become the primary basis for attacks on tribes' sovereignty in matters as basic as environmental protection and land-use planning in their own territories.

The tribes' "status" began to take form in some of the earliest Supreme Court cases, although in certain respects that status seems to depart radically from the status being attributed to them today.<sup>104</sup> In analyzing tribes' sovereignty, most surveys begin with three opinions written by Chief Justice John Marshall, generally called "the Marshall Trilogy."<sup>105</sup> However, in the territorial sovereignty context, a fourth Marshall opinion, *Fletcher v. Peck*, should prove to play a key role as well.<sup>106</sup>

In *Fletcher*, the Georgia Legislature made grants of property interests in the western fringes of territory claimed by both Georgia and several Indian tribes.<sup>107</sup> Neither the United States nor Georgia had yet attempted to acquire the territory by treaty from the tribes. The issue of the tribes' "title" to the territory inevitably surfaced.<sup>108</sup> Ironically, one of the grantees' attorneys provided the strongest statement *for* the tribes. He argued that, "[a] doubt has been suggested whether this power [of a State to issue title] extends to lands to which the Indian title has not been extinguished. What is the Indian title? . . . It is a right regulated by

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

103. *Oliphant*, 435 U.S. at 208 (emphasis omitted) (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976)).

104. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation*, 30 U.S. (5 Pet.) 1; *Worcester*, 31 U.S. (6 Pet.) 515; *Oliphant*, 435 U.S. 191.

105. See *Johnson*, 21 U.S. (8 Wheat.) 543; *Cherokee Nation*, 30 U.S. (5 Pet.) 1; *Worcester*, 31 U.S. (6 Pet.) 515.

106. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

107. *Id.* at 121.

108. *Id.*

treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right."<sup>109</sup> Even though the lawyers failed to emphasize that the territory had not yet been acquired by treaties under the law of nations, they recognized the territorial nature of tribes' sovereign spheres and the significance of having a treaty with them.<sup>110</sup>

The territorial issue resurfaces in the first case in the Marshall Trilogy, *Johnson v. M'Intosh*.<sup>111</sup> Mr. Johnson, an American citizen, purchased property in Indian Country directly from a tribe with which the United States had no treaty.<sup>112</sup> Some years later the Tribe sold land to the United States which contained the parcel which the Tribe had issued to Johnson.<sup>113</sup> The United States in turn issued a patent for property to Mr. M'Intosh which contained the parcel Johnson owned.<sup>114</sup> In other words, both Johnson and M'Intosh claimed the same parcel, but from different sovereigns. Johnson sought redress in United States federal court to have his conveyance from the Tribe upheld.<sup>115</sup> Ultimately, the Supreme Court sided with M'Intosh.<sup>116</sup> The case has been misconstrued as standing for the proposition that the Tribe's title was meaningless, that the Tribe could not issue good title.<sup>117</sup> Yet this ignores the portion of Chief Justice Marshall's opinion, in which he wrote: "The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws."<sup>118</sup>

In other words, Marshall recognized that tribes possess territorial sovereignty, including the power to issue title to whomever they please. He then reasoned that if a person held property under a tribe's authority and the tribe subsequently sold the encompassing territory, that person's legal recourse lay with the tribe and not with the purchasing sovereign.<sup>119</sup> This analysis begins to sound remarkably similar to the "consensual

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109. *Id.*

110. *Id.*

111. *Johnson*, 21 U.S. (8 Wheat.) 543.

112. *Id.* at 560-61.

113. *Id.* at 560.

114. *Id.*

115. *Id.* at 571-72.

116. *Id.* at 604-05.

117. ROBERT A. WILLIAMS, JR., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 254 (1986).

118. *Johnson*, 21 U.S. (8 Wheat.) at 593. This may be of particular significance in the Salish-Kootenai/Montana context.

119. *Id.*

relations" test in the *Montana* case.<sup>120</sup> It also resurrects the issue of whether all private property in Indian Country stems from the tribe, especially property acquired by non-Indians from the tribe or any of its members. How many non-Indians holding property within the Salish-Kootenai's "Indian Country" fall into that category?

The latter two cases in the Marshall trilogy, *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, paint an entirely different picture.<sup>121</sup> Both cases involved the Cherokee Nation, which had a treaty relationship with the United States.<sup>122</sup> While treaties are generally tools of international relations, Chief Justice Marshall held that the treaty at issue in *Cherokee Nation* transformed the Tribe into a "domestic dependent" nation whose sovereignty the United States was obligated to protect.<sup>123</sup> Therefore, a treaty can also be viewed as establishing a federative-type relationship between two overlapping sovereign spheres, similar to the relationship between the American Union and its member states. Moreover, the words "treaty" and "federal" share the same etymology, signifying a relationship based on good faith.<sup>124</sup>

Mirroring the Union/State relationship as embodied in the Tenth Amendment, the Court once construed the role of treaties in the Union/Tribe relationship by declaring that a "treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."<sup>125</sup> In other words, the cornerstone of the Union/State relationship would also become the cornerstone for analyzing the Union/Tribe relationship. The Tenth Amendment's reserved-rights logic would preordain the Treaty's reserved-rights logic. This, in turn, would predetermine some of the most critical cases arising out of the Union/Tribe relationship.<sup>126</sup> Therefore, treating Tribes as States is not without some firm theoretical, constitutional underpinnings.

120. *Montana v. United States*, 450 U.S. 544, 565 (1981).

121. *Cherokee Nation*, 30 U.S. (5 Pet.) 1; *Worcester*, 31 U.S. (6 Pet.) 515.

122. *Cherokee Nation*, 30 U.S. (5 Pet.) 2; *Worcester*, 31 U.S. (6 Pet.) 540.

123. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

124. SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 315 (1993).

125. *United States v. Winans*, 198 U.S. 371, 381 (1905).

126. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) (holding that Union Bill of Rights does not apply to State governments); *Talton v. Mayes*, 163 U.S. 376, 384-85 (1896) (holding that Union Bill of Rights does not apply to tribal governments). See also *United States v. Lanza*, 260 U.S. 377, 382 (1922) (subsequent Union and State prosecutions do not constitute double jeopardy; "[w]e have here two sovereignties deriving power from different sources."); *United States v. Wheeler*, 435 U.S. 313, 320-22 (1978) (subsequent Union and Tribe prosecutions do not constitute double jeopardy; "the controlling question in this case is the source of this power.").

Determining the underlying source of sovereignty is central to interpreting federal statutes which deal with both states and tribes. What is the source of a tribe's power to govern the natural environment in its territory? Is it the tribe itself, its members, all individuals within their territory, or federal statutes? Thus, the fundamentals of American constitutionalism hone the issue to its core: if a tribe has inherent sovereignty, then no federal statute need delegate it. But, can a tribe have inherent sovereignty over persons who have neither authorized nor consented to the tribe's government, *i.e.*, nonmembers? What would be the tribe's source of sovereignty over them? The liberal tradition would require the nonmembers to be the sole source of sovereignty over themselves. But does the more conservative tradition, which recognizes strong police powers in a territorial fashion, offer room to maneuver?

First, let us clarify the nature of inherent sovereignty vis-a-vis that delegated by federal statutes.<sup>127</sup> Outside the environmental arena, several federal statutes treat Tribes as States to varying degrees.<sup>128</sup> In almost every instance where a statute has more or less explicitly treated "Tribes as States," either the statute or an attendant Supreme Court opinion clarified that the tribe itself, and not the statute, provided the source of the tribe's sovereignty.<sup>129</sup> The most illustrative examples of these statutes are the Indian Reorganization Act of 1934 (IRA), the Indian Child Welfare Act of 1978 (ICWA), and the Indian Gaming Regulatory Act of 1988 (IGRA).<sup>130</sup>

In *Merrion v. Jicarilla Apache Tribe*, the Supreme Court upheld the imposition of the Tribe's severance tax on a non-Indian owned company because the Tribe's constitution, which was passed pursuant to the IRA and approved by the Secretary of the Interior, authorized it.<sup>131</sup> The Court's reasoning seemed to imply that the Secretary's approval, and thus the IRA, was the source of the Tribe's sovereignty over the non-Indian

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127. The ensuing discussion is not to foreclose the inquiry whether, if tribes do not have inherent sovereignty over nonmembers, the federal government can delegate such powers to them. It can, and several commentators have convincingly argued that the federal environmental statutes at issue do just that. But that discussion represents a tacit concession that the tribes' inherent sovereignty alone is insufficient, instead of addressing the more fundamental, if more theoretical, questions regarding tribes' inherent sovereignty over nonmembers.

128. *See, e.g.*, Tribal Tax Status Act, 26 U.S.C. § 7871(a) (1994) ("An Indian tribal government shall be treated as a State . . .").

129. *See, e.g.*, Indian Reorganization Act, 25 U.S.C. § 461 (1994); Indian Child Welfare Act, 25 U.S.C. §§ 1901-1922 (1994); Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1994).

130. *Id.*

131. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 155, 159 (1982).

company.<sup>132</sup> However, three years later, in *Kerr-McGee Corp. v. Navajo Tribe*, the Court ruled for Navajo on virtually identical facts even though the Navajo Tribe had not reorganized under the IRA with Secretarial approval.<sup>133</sup> In other words, *Kerr-McGee* makes clear that the IRA is not the source of the tribal sovereignty.<sup>134</sup> Rather, the tribes and its people are the source of those powers.<sup>135</sup>

The ICWA provides another helpful example. In 1978, Congress enacted the ICWA, which provided that a “tribe shall have jurisdiction exclusive as to any state over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe.”<sup>136</sup> Again, the implication arose that the ICWA “grants” tribes this power.<sup>137</sup> However, two years earlier, the Supreme Court held in *Fisher v. District County Court* that the Tribe had exclusive jurisdiction over adoption proceedings involving tribal members on the reservation, reversing the position taken by the Montana Supreme Court.<sup>138</sup> In other words, the ICWA is not the source of tribes’ sovereignty; it did not “give” tribes anything, but rather recognized their inherent sovereign power and forced errant states to comply.

In 1988, Congress enacted the IGRA setting up a federal plan to regulate gambling operations in Indian Country.<sup>139</sup> Once again, the implication seems to have taken hold that IGRA is the source of tribes’

132. *Id.* at 155. Unfortunately, commentators have been less than critical in recognizing the distinction. See, e.g., Walter E. Stern, *Environmental Compliance Considerations for Developers of Indian Lands*, 28 LAND & WATER L. REV. 77, 84 (1993) (“Federal courts and tribal advocates have derived support for broad *delegation* of authority primarily from the Indian Reorganization Act of 1934 . . . .”) (emphasis added).

133. *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 200 (1985).

134. Judith V. Royster and Rory S. Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 597 (1989). The Department of Interior’s Solicitor’s Office attempted to nurture some distinction between levels of sovereignty from tribe to tribe, depending on their historical circumstances. However, Congress recently disagreed, passing an equal-footing doctrine of sorts for tribes. Act of Sept. 30, 1992, Pub. L. No. 102-374, § 5(b), 106 Stat. 1186 (1992).

135. Furthermore, it is important to note that the severance tax at issue in these cases was being imposed upon nonmembers of the Tribes. Thus, we can safely assume that *Kerr-McGee* recognized the Tribes’ inherent *territorial* sovereignty over all people within it, at least under those circumstances. *Kerr-McGee Corp.*, 471 U.S. at 197.

136. 25 U.S.C. § 1911(a) (1994).

137. David M. Ujke, *Not Just a Matter of Comity: Tribal Court Jurisdiction in Domestic Relations Matters Involving Indian Children*, 66 WIS. LAW. 12 (1993) (“[T]he ICWA grants the tribe jurisdiction . . . .”) (emphasis added).

138. *Fisher v. District County Court*, 424 U.S. 382, 383, 389 (1976).

139. 25 U.S.C. §§ 2701-2721 (1994).

power, "giving" them the right to govern gaming in Indian Country.<sup>140</sup> However, IGRA was not the source of tribes' sovereignty; it did not give the tribes anything. While recognizing tribal sovereignty to a great extent, the IGRA in fact ended up restricting tribes' inherent powers in this area.<sup>141</sup>

Predictably then, federal environmental statutes authorizing the EPA to treat Tribes as "States" have been construed as an act of largesse by the federal government toward the tribes. The EPA's own newsletter once declared, "[a] little-noticed provision in the House-passed Clean Water Act reauthorization bill is a direct attack on EPA's policy of *giving* Native American tribes the authority to develop and enforce their own environmental regulations."<sup>142</sup> Ironically, this perception that the federal government is the "giver" of sovereign powers may in fact be construed as treating "Tribes as States" if we also misunderstand the Union/State relationship. For example, in an otherwise relatively informative article, one author wrote that, "[t]he federal pollution control laws *grant* jurisdiction to states to operate the applicable programs within state borders."<sup>143</sup> Both are wrong; the federal government does not grant sovereignty to either the states or the tribes. The point is that states' rights conservatives seethe at such misrepresentations about the source of their sovereignty. The question is whether they will impute the positivism of their principles and logic into the Union/Tribe relationship, thus recognizing tribes' inherent territorial sovereignty over Indian Country, including certain police powers over nonmembers.<sup>144</sup>

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140. See, e.g., Pauline Yoshihashi, *As Casinos Spread, Politicians and Rivals Maneuver to Fight the Trend*, WALL ST. J., May 4, 1993, at B1. However, the IGRA was enacted expressly in response to a case decided one year prior. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987), the Supreme Court held that the Tribe had the inherent right to regulate gaming activities.

141. Although *Cabazon* arose in a P.L. 280 State, the IGRA applied the P.L. 280 prohibitory-versus-regulatory test to all the states and tribes. Richard A. Monette, Comment, *Indian Country Jurisdiction and the Assimilative Crimes Act*, 69 OR. L. REV. 269, 287-90 (1990).

142. INSIDE E.P.A., May 19, 1995, at 7 (emphasis added).

143. Teresa A. Williams, *Pollution and Hazardous Waste on Indian Lands: Do Federal Laws Apply and Who May Enforce Them?*, 17 AM. INDIAN L. REV. 269, 276 (1992) (emphasis added). This quote raises another critical point in a roundabout way. While the federal government is decidedly not granting jurisdiction to states, it is providing them with program dollars and technical assistance to ease the burden of a federally imposed statutory and regulatory scheme. Without this assistance, states might not be so willing to expand their programs into Indian Country. On the other hand, with such assistance, tribes may be just as capable as states in protecting their environment.

144. It is not surprising that the same author also writes: "The Clean Air Act (CAA) gives exclusive authority to tribes to redesignate air quality." *Id.* at 271. But our political and legal theorists know better.

*B. The Non-Indian in Indian Country*

Today, many non-Indians live in Indian Country. Indeed, on some reservations, non-Indians represent the vast majority of residents. The critical query is: how did non-Indians and their property interests come to be in Indian Country? The short answer is that the Dawes Severalty Act, otherwise known as the General Allotment Act (GAA) of 1887, opened Indian Country to non-Indians in a variety of ways.<sup>145</sup> However, some background and case law preceding the GAA is necessary to appreciate the full impact the Act would bring to bear on modern Indian Law.

In an early case, *United States v. Rogers*, the Supreme Court decided that a non-Indian could not dodge federal jurisdiction by donning the cloak of his membership in the Cherokee Tribe.<sup>146</sup> In other words, where the Cherokee Tribe had extended its full membership rights to a non-Indian without regard to his race, the United States Supreme Court would begin the process of analyzing Indian Law in race-based terms, rather than in political terms. To a great extent, this pre-determined that racial non-Indians would be political nonmembers of tribes even when they lived in Indian Country. The primary significance of this case is that the negative sentiment often directed at tribes today for excluding even resident non-Indians from their membership rolls ironically finds its genesis in an opinion by the United States Supreme Court.

In 1883, the Supreme Court ruled, in *United States v. McBratney*, that states have exclusive jurisdiction when one non-Indian murders another within the tribe's territory.<sup>147</sup> Shortly thereafter, in a peculiarly analogous case, *Ex parte Crow Dog*, the Court ruled that a tribe had exclusive jurisdiction when one member of a tribe murdered another in the tribe's territory.<sup>148</sup> In response to what was apparently deemed an insufficiently light sentence imposed by the Tribe in the case, Congress took its first action to legislatively permeate tribes' sovereign spheres, passing the Indian Major Crimes Act and assuming federal jurisdiction over such cases.<sup>149</sup> A year later, in *United States v. Kagama*, the Act withstood a

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145. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381 (1994)).

146. *United States v. Rogers*, 45 U.S. (4 How.) 567, 573 (1846).

147. *United States v. McBratney*, 104 U.S. 621, 622 (1882).

148. *Ex parte Crow Dog*, 109 U.S. 556, 571-72 (1883).

149. Indian Major Crimes Act, ch. 645, 62 Stat. 758 (1948) (codified as amended at 18 U.S.C. § 1153 (1994)).

constitutional challenge, which set in motion the vehicle that would traverse the slippery slope—the General Allotment Act.<sup>150</sup>

In 1887, buoyed by its new, judicially-sanctioned power over internal tribal matters, Congress enacted the GAA, dismantling what it deemed to be the most serious obstacle to eliminating the “Indian problem”—the communal nature of property in Indian Country.<sup>151</sup> Among other things, the GAA authorized the government to divide the reservation into designated parcels and to allot a designated amount to each individual tribal member.<sup>152</sup> Section five of the Act allowed any “surplus” lands remaining after each member got a share to be available for purchase by the government and placed in the public domain for homesteading by non-Indians.<sup>153</sup> Section five also imposed restrictions on acquisition or alienation of the allotments by requiring the government to hold the title in trust for twenty-five years.<sup>154</sup> However, several subsequent statutes served to shorten these restrictions in various ways.<sup>155</sup>

Thus, the tribes and its members lost, or rather non-Indians acquired, property within their territories generally in four ways: (1) non-Indians acquired nearly sixty million acres of “surplus” land through general homestead practices after each Indian’s allotment was identified; (2) non-Indians purchased property from tribe members either during or after the twenty-five year trust period; (3) non-Indians would purchase property after the trust expired where local county governments had forced a sale or foreclosure for tax purposes; or (4) non-Indians acquired property by inheritance, and thus would be descendants of tribe members but would no longer be members themselves.<sup>156</sup>

After the GAA’s passage, Congress and the Supreme Court fell largely silent regarding Indian matters for nearly half a century while the Act worked its indulgences on the tribes. Land within the tribes’ territories decreased from approximately 140 million acres in 1887, to 78

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150. *United States v. Kagama*, 118 U.S. 375, 379-80 (1886).

151. Act of Feb. 8, 1887, ch. 119.

152. *Id.*

153. Act of Feb. 8, 1887, § 5.

154. *Id.*

155. In 1906, the Burke Act authorized removing an allotment from trust status if the allottee was deemed competent. The Burke Act, ch. 2348, 34 Stat. 182 (1906) (codified as amended at 25 U.S.C. § 349 (1994)). The Appropriations Act of 1907 permitted the government to sell as long as the proceeds went to the allottee. Act of March 1, 1907, ch. 2285, 34 Stat. 1018 (1908) (codified as amended at 25 U.S.C. § 405 (1994)). A 1908 statute authorized the government to remove the trust status where the allottee had died. Act of May 27, 1908, ch. 199, 35 Stat. 312, 315 (1908).

156. FRANK POMMERSHEIM, *BRAID OF FEATHERS* 19-20 (1995).

million acres in 1900, to 48 million acres in 1934.<sup>157</sup> Then in 1934, Congress passed the IRA.<sup>158</sup> The purpose of the IRA was to end the loss of land, if not territory, that had resulted from the Allotment Acts.<sup>159</sup> Thereafter, a line of criminal and civil cases would emerge evidencing the devastating after-effects of the Allotment Acts on tribes and Indian Country; they would also begin to shape the backdrop of the TAS disputes.<sup>160</sup>

In 1978, the Supreme Court held in *Oliphant v. Suquamish Indian Tribe*, that the Tribe did not have criminal jurisdiction over nonmembers, reasoning that such powers were “inconsistent with their status.”<sup>161</sup> Providing a premonition of its final order and illustrating the after-shock of the GAA on the Tribe, the Court explained in the opinion’s first footnote:

Port Madison Indian Reservation consists of approximately 7,276 acres of which approximately 63 % thereof is owned in fee simple absolute by non-Indians and the remaining 37% is Indian owned lands subject to the trust status of the United States. . . . Residing on the reservation is an estimated population of approximately 2,928 non-Indians living in 976 dwelling units. There lives on the reservation approximately 50 members of the Suquamish Indian Tribe.<sup>162</sup>

Then, in providing its rationale for its ruling, the Court signaled a line of reasoning that would ultimately affect today’s disputes over federal environmental statutes that treat “Tribes as States.” It wrote:

[T]he United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the over-riding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try

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157. *Id.*

158. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-466, 470-476, 478-479 (1994)).

159. *Id.*

160. *See infra* notes 161-63 and accompanying text.

161. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

162. *Id.* at 193 n.1.

non-Indian citizens of the United States except in a manner acceptable to Congress.<sup>163</sup>

In other words, basic “due process” concerns regarding deprivation of life or liberty would determine the extent of tribes’ inherent sovereignty, at least in terms of jurisdiction over non-Indians.

In 1981, in *United States v. Montana*, the Court addressed whether tribes possessed enough inherent sovereignty to regulate certain activities of non-Indians on their own fee property within tribal territory.<sup>164</sup> Here, the Court expressly extended *Oliphant*’s holding, saying, “[t]hrough *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”<sup>165</sup> Strangely, it would appear that Montana places property rights on the same substantive level as liberty rights, and that regulating property requires the same level of due process as the denial of personal liberty.<sup>166</sup> Equally as strange, it appears that property interests, of all things, fall not under a territorial analysis but, rather, under a political analysis of the person who owns the property interest.

Nonetheless, the *Montana* Court posited two “tests,” making that decision one of the two most critical in the TAS analysis. The Court conceded that, “Indian tribes retain . . . some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.”<sup>167</sup> The Court then explained, “[a] tribe may regulate . . . the activities of

163. *Id.* at 210. In *United States v. Wheeler*, 435 U.S. 313 (1978), a case decided the same term as *Oliphant*, the Court repeatedly couched *Oliphant*’s holding in terms of “nonmembers” instead of non-Indians. *Wheeler*, 435 U.S. at 326. Although *Wheeler* dealt with subsequent Tribe and Union prosecutions of a tribe member, it forewarned the outcome of the inevitable dispute if a tribe were to exercise criminal jurisdiction over a “nonmember” of the tribe, even if they were an Indian who was a member of another Tribe. Importantly, if not ironically, the 1978 term also offered tribes an opportunity to try non-Indians and nonmembers “in a manner acceptable to Congress.” *Oliphant*, 435 U.S. at 210. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Tribes argued and the Court held that Congress’ imposition of due process requirements upon tribes under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1994), was virtually non-enforceable except in habeas corpus proceedings. *Id.* at 66-7. If the Court could not guarantee due process for non-Indians and nonmembers in the tribes’ courts, then it simply would not recognize tribes’ jurisdiction over them. At the risk of over-generalizing, *Oliphant* was written by Justice Rehnquist and adopted by the Court’s more conservative wing; *Martinez* was written by Justice Marshall and adopted by the more liberal wing; *Wheeler* was written by Justice Stevens and adopted by the Court’s center. It seems tribes and their Indian Law advocates have never fully appreciated the Court’s *quid pro quo* that these three cases represent.

164. *Montana v. United States*, 450 U.S. 544, 547 (1981).

165. *Id.* at 565.

166. See *infra* note 181 and accompanying text.

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

nonmembers who enter consensual relationships with the tribe or its members . . . . A tribe may also retain inherent power . . . when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."<sup>168</sup> Note the reference to *retained inherent* power in the police powers test. Irrefutably, the Tribe's inherent power did not have as its source the popular sovereignty of these nonmembers. The Tribe's source of sovereignty over the nonmembers and their property must have been the territorial, police power that is the hallmark of the conservative tradition.

Shortly after *Montana*, in *Merrion v. Jicarilla Apache Tribe* and *Kerr-McGee v. Navajo Tribe*, the Court invoked the first *Montana* exception and upheld the Tribes' taxes on non-Indians doing business with tribes, suggesting that taxation justifies a more territorial, police power analysis than one based solely upon the political status of the persons being taxed.<sup>169</sup> In other words, taxation of economic interests does not require the same level of protection as denying personal liberty.<sup>170</sup> More importantly, these opinions signal the Court's recognition of the axiom that differing levels of substantive rights require differing levels of due process applies to tribes as well. More important still, it appears that, while some non-Indian rights are so substantive, or the requisite levels of process so high, as to undermine tribal jurisdiction, other non-Indian rights are not so substantive, or the requisite level of process not so high. Although the line is vague, the Court has evidenced a willingness to subject certain non-Indian rights to the territorial, police power governance of tribes.<sup>171</sup> A subsequent case amplifies this prospect.

In 1989, in *Brendale v. Confederated Yakima Indian Nation*, the Court issued the decision which ranks perhaps second in importance in the TAS arena.<sup>172</sup> The Tribe sought to zone the fee property of two non-Indians, a Mr. Brendale and a Mr. Wilkinson.<sup>173</sup> Again revealing the lasting significance of the General Allotment Act, the Court wrote:

The Yakima Nation no longer retains the 'exclusive use and benefit,' of all the land within the Reservation

168. *Id.* at 565-66.

169. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982); *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 197 (1985).

170. Or perhaps governments have a greater interest in raising revenue than in regulating personal conduct and land use.

171. See *supra* note 169 and accompanying text.

172. *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408 (1989).

173. *Id.* at 419.

boundaries established by the Treaty with the Yakimas. Under the Indian General Allotment Act [of 1887], 24 Stat. 388, significant portions of the Yakima Reservation, including the tracts of land at issue here, were allotted to individual members of the Tribe. The land was held in trust for a period of years, generally 25 although the period was subject to extension, after which fee patents were issued. Over time, through sale and inheritance, nonmembers of the Tribe, such as petitioners Brendale and Wilkinson have come to own a substantial portion of the allotted land.<sup>174</sup>

The statement of the facts reveals that Mr. Brendale was a descendant of the Tribe, although not meeting the Tribe's present qualifications for participatory membership.<sup>175</sup> He had come into his property by inheritance.<sup>176</sup> Mr. Wilkinson, on the other hand, was not a descendant, and the facts rather cryptically omit just how Wilkinson acquired his property.<sup>177</sup> Would such an inquiry not be relevant under the first *Montana* tests, especially when the lower court found no evidence of any consensual relationship between the Tribe and Wilkinson or Brendale?<sup>178</sup> For that reason, apparently, the issue before the Supreme Court involved only *Montana*'s second—police power—test. The Court summarily dismissed the matter, stating: "The parties agree that the first *Montana* exception does not apply in these cases."<sup>179</sup>

How could the Tribe have made such a concession? The Court opined, "Brendale and Wilkinson do not have a 'consensual relationship' with the Yakima Nation simply by virtue of their status as landowners within reservation boundaries, as *Montana* itself necessarily decided."<sup>180</sup> Granted, if the conclusion is confined to this narrow inquiry, then perhaps the Court's analysis has merit. But, in determining whether the relationship is consensual, is it not necessary to query how Wilkinson acquired the property? Indeed, is it not necessary to inquire how the property was first acquired by a nonmember, whether Wilkinson or his predecessor in interest?

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174. *Id.* at 422 (citation omitted).

175. *Id.* at 417.

176. *Id.*

177. *Id.* at 422.

178. *Yakima Indian Nation v. Whiteside*, 617 F. Supp. 750, 757 (E.D. Wash. 1985).

179. *Brendale*, 492 U.S. at 428.

180. *Id.*

In other words, if the argument is that the property escapes a tribe's jurisdiction because it is owned by a nonmember who may not participate in the tribe's government, does that argument not relate back to the first non-Indian who acquired it? Is that not when the tribe's governance over that property ceased or diminished? Should the consensual relations test not be applied to that first transaction? For example, if a nonmember purchased the property from a member right after the twenty-five year trust period lapsed in 1913 and it passed by devise or conveyance down to Wilkinson, is that first transaction not the point of inquiry? If not, any nonmember could circumvent a tribe's jurisdiction by sending in a straw-man to acquire property in a consensual relationship and then purchasing the property from the straw-man so as to terminate the consensual relationship. Under the Court's almost pure popular sovereignty approach to tribes' power, the property left a tribe's jurisdiction when that first nonmember acquired it. If that original transaction was consensual, the property should still be subject to the tribe's jurisdiction regardless who holds the deed. Certainly the chain of title would reveal the consensual nature of the original transaction.

Interestingly enough, the Court in *Brendale* split the blanket and held that the Tribe could regulate the activity of one nonmember, Brendale, but not the other, Wilkinson. Since the Court decided that no consensual relations existed, the Court's holding must have relied on *Montana's* second, police power test.<sup>181</sup> Thus, as is generally the case, the substantive levels of rights varies from one property interest to the next, requiring differing levels of protection depending on the circumstances. But more importantly, the opinion evidences the proposition that some non-Indian property in Indian Country may indeed be governed by territorial sovereignty. The Court evidently decided that some process due to Wilkinson was not due to Brendale. Since Brendale and Wilkinson basically had the same standing within the Tribe under a popular sovereignty approach (*i.e.*, both unable to participate as nonmembers), what factors determined the different treatment?

The foregoing line of cases reveals how America's divergent traditions play a significant role in Indian Law. First, as *Montana's* governor so aptly argued, America's political principles hold that a government generally may govern only those who have authorized that government in the first instance, or who may consent through possible

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181. *Brendale* actually stiffened the *Montana* police power test by declaring that a protectable tribal interest must be defined in terms of a demonstrably serious impact and must imperil the political integrity, economic security, or the health and welfare of the tribe. *Brendale*, 492 U.S. at 410.

participation.<sup>182</sup> Therefore, fundamental fairness generally requires that a government may not govern a person who may not participate in that government. That is the essence of popular sovereignty. Nonetheless, the *Montana* exceptions reveal another truism in American law: that simple presence within the sovereign's territory justifies a certain level of governance and that the level of requisite participation or process varies depending upon what level of life, liberty, or property is at stake. Indeed, the second *Montana* exception—that a tribe may act for the health or safety of the tribe—is the accepted definition of police power in America, which allows government action without prior consent and perhaps without popular authority.<sup>183</sup> In the American legal system, these ideas of fundamental fairness in requiring certain levels of participation to ensure that government is acting with the authority or consent of the governed all fall under the rubric of “due process.” Thus, before the concluding arguments for treating “Tribes as States” are proffered, at least a cursory understanding of just what is meant by “due process” is in order.

#### IV. A QUESTION OF DUE PROCESS

In 1354, an English court wrote: “No man . . . shall be put out of his lands or tenement nor taken . . . , nor disinherited, nor put to death, without being brought in answer by due process of the law.”<sup>184</sup> Likewise, in America, “[i]t is now the settled doctrine . . . that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental. . . . Due Process is that which comports with the deepest notions of what is fair and right and just.”<sup>185</sup> America's hallmark is that when it comes to the power of government, what is fair, right, and just are the ideals of democracy, and that government is by, for, and of the people who would be governed. Those democratic ideals are most appropriately stringent when a government would attempt to deprive a person of her life, liberty, or property.<sup>186</sup>

This is the Governor of Montana's point: it is inconceivable in America that a government will tax property, or transactions related to

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182. Racicot Letter, *supra* note 24.

183. *Berman v. Parker*, 348 U.S. 26, 32 (1954) (“Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power . . .”).

184. 28 Edw. III, ch. 3 (1354).

185. *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting).

186. U.S. CONST. amend. V.

property, and otherwise regulate the property, perhaps to the point of a taking, or attempt to deny the personal liberty of the property's owner, who refuses the tax or who violates the regulation, when that government is not of, for, or by that property's owner.<sup>187</sup> So what must a tribe's government do to ensure that its actions provide due process, protect fundamental fairness, promote democratic ideals, with non-Indians and their property in mind? Must a tribe's provision of due process be the same for every action it takes and for every interest it affects? Must tribes provide the same level of due process for taxation as they do for denying personal liberty? For taxing as they do for regulating property? For regulating property as they do for denying personal liberty? Must tribes provide the same level of due process for certain kinds of taxation as they do for other kinds of taxation?

"In all cases," the Supreme Court wrote, "that kind of procedure is due process of law which is suitable and proper to the nature of the case."<sup>188</sup> In other words, in order to ensure fundamental fairness, all affectations of individual rights, whether personal liberty, property, or otherwise, do not require the same level of due process. "It is a mistaken idea," the Court said, "that due process of law requires a plenary suit and a trial by jury, in all cases where property or personal rights are involved."<sup>189</sup> Since the Court adapted its rationale in *Oliphant*, where personal liberty was at stake, to its decision in *Brendale*, where property was at stake, must we conclude that tribes are required to provide the same level of due process, or allow the same level of participation, no matter what the interest?<sup>190</sup> If not, what factors will the Court employ to determine the requisite level of due process from case to case? More importantly, will tribes be allowed to develop the factors or to know beforehand what those factors will be?

In Justice Blackmun's portion of the *Brendale* opinion he wrote: "[I]n light of the Federal Constitution's extraordinary protection against intrusions on personal liberty, we concluded that inherent criminal jurisdiction over non-Indians is inconsistent with the dependent status of the tribes."<sup>191</sup> First, this quote raises a critical issue for tribes, because tribes naturally balk at the idea of providing non-Indians due process in the nature of a legally enforceable right to participate in the tribal governing

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187. Racicot Letter, *supra* note 24.

188. *Ex parte Wall*, 107 U.S. 265, 289 (1882).

189. *Id.*

190. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408 (1989).

191. *Id.* at 453.

processes. Tribes hold fast to the notion, repeatedly upheld by the Supreme Court, that they are not bound by the Federal Constitution.<sup>192</sup> On one level they are not, at least where they have jurisdiction.<sup>193</sup> However, where the Federal Constitution would otherwise bind tribes, the Court has merely restricted the tribes' jurisdiction. In other words, the Federal Constitution indeed applies to tribes. The ball is in the tribes' court, so to speak, to determine whether they will attempt to meet the due process demands of the Constitution or whether they will place their underlying jurisdiction in the hands of the Court.

Secondly, of course, the quote implicitly questions the requisite level of due process when something less, or at least different, than individual liberty is at stake. In the environmental arena, personal liberty is generally not the issue. Rather, almost always, regulating property, and to a lesser extent, paying for regulating property, is at stake. Perhaps the easiest route is for tribes to evaluate the levels of due process required for the various ways in which the Union and states affect individual liberty or property rights, including taxation. Tribes can then make an informed decision whether or not to attempt to conform.

Generally, the notion of political participation looms large in the due process equation: whether one can vote, sit on a jury, hold public office, sit on an administrative board, be compensated, have a right to notice, have an opportunity to comment, have a right to a hearing on the record, to be treated equally under the law, to not be impacted inordinately, etc. However, as we all know, the tribes' relationship to the Union and the States carries peculiar historical and social dynamics which may or may not inform what constitutes fairness in any given circumstance.

## CONCLUSION

Because Indian Law is a tossed salad of congressional acts, executive policies, general constitutionalism, and specific Indian Law cases, lengthy background analysis always seems necessary to reach the substance of Indian Law issues. First, Indian Law and policy, from the earliest period, recognizes tribes' territorial sovereignty more than recent case law suggests. Second, when it comes to nonmembers, the Supreme Court seems to impose upon tribes the same standard, or at least a very high standard, of due process regardless of the underlying substantive right, whether the matter be criminal or civil, adjudicatory or regulatory,

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192. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978); *Talton v. Mayes*, 163 U.S. 376, 379-80 (1896).

193. *Id.*

resident or non-resident. Third, the logic of our federalism, guided by principles of republican democracy, provides ample support for tribes in these disputes. This is especially true if these principles are applied the way conservatives on the Court apply them to states.

The two TAS disputes, *City of Albuquerque v. Browner*, or *Isleta*, and *Montana v. EPA*, or *Salish-Kootenai*, ought to be analyzed together.<sup>194</sup> On a general level, if the tribes' extraterritorial power will be upheld in the former instance, certainly their intra-territorial power ought to raise far less serious concerns. Moreover, if the EPA will recognize that the tribe may bind the adjacent sovereign, as in *Albuquerque*, surely that adjacent sovereign's subjects are also bound, if only indirectly when they live inside reservation boundaries.<sup>195</sup> After all, it is not as if those non-Indians living within *Salish-Kootenai* are at complete liberty from all governments, as much as some might like to be. For example, *Isleta's* extra-territorial power forces *Albuquerque's* adherence to the Tribe's environmental standards. Surely *Isleta's* resident nonmembers will be indirectly bound by virtue of the inter-sovereign relationship. And those resident nonmembers' "due-process" concerns will have been addressed through their own local sovereigns' processes.

Moreover, tribes should not be forced to provide the same high level of due process for every substantive right over which they would exercise their governance. While restricting individual liberties may require the highest level of process, as it does with states, governing property should generally require a lower level of process, as it does with states. Indeed, generally the level of requisite due process varies from property interest to property interest. While governing some property interests would require a relatively high level of process, such as notice and hearing on the record, others require only an informal hearing, and still others require only an opportunity to comment. Indeed, certain governing actions require little process at all from the states. Nevertheless, recent Court decisions would have us believe that such varying process is inconsistent with the tribes' status, unless the nonmember consented.

In order to determine if a relationship is consensual, tribes should investigate the very first transaction that conveyed the property at issue to

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194. *City of Albuquerque v. Browner*, 865 F. Supp. 733, 736 (D.N.M. 1993); *Montana v. EPA*, No. 95-56-M-CCL, 1996 WL 498123 (D. Mont. Mar. 27, 1996).

195. *Albuquerque*, 856 F. Supp. 733. In a letter opposing TAS developments to the Chairman of the U.S. Committee on the Environment and Public Works, the entire federal congressional delegation from Wyoming seemed to recognize this analysis. After devoting the entire letter to the *Salish-Kootenai/Montana* intra-territorial scenario, the authors write: "In addition, we're very concerned about the effects of water quality standards set by tribal governments on municipalities that lie upstream, off the reservation." [letter on file with author].

a nonmember, for that is where the jurisdiction scale seems to shift. Tribes should not concede that no consensual relation exists simply because the present owner did not conduct business with the tribe. Finally, tribes must learn the political rhetoric of the conservative tradition of American politics and use it to their advantage, as the current Court is weighted heavily with those who share that view.