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The Supreme Court and Federal Indian Policy

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Federal Indian law is dynamic, and though few outside the field acknowledge it, cutting edge.¹ In the last few decades, coinciding with the rise of Indian gaming,² Indian tribes, individual Indians, and In-


Indian-owned businesses have acted far beyond the direction of statutes and agency promulgations. Indians and Indian tribes are too energetic and resourceful to wait for Congress or the agencies to make policy decisions. Federal Indian law and policy is no longer driven by Congress, the bureaucracy, or even the states. Indian tribes lead the way and the rest have to catch up. It appears that Congress and the Executive Branch may never catch up, having already adopted a reactionary approach to deal with Indian issues by relying more on case-specific legislation and claims adjudication in the administrative courts. Now that Indian actors lead the way, there may never be another time when Congress or the President makes broad, sweeping changes to federal Indian policy.

5. Robert N. Clinton, Carole E. Goldberg & Rebecca Tsosie, American Indian Law: Native Nations and the Federal System: Cases and Materials, at xv (4th ed. 2003) ("During the past decade, tribal governments and their legal systems have expanded in size and sophistication and their business enterprises, particularly in the gaming industry, have exploded. Tribes have become increasingly self-sufficient and far less reliant on the federal government both for funding and technical assistance."); cf. Edwin Kneedler, Indian Law in the Last Thirty Years: How Cases Get to the Supreme Court and How They are Briefed, 28 Am. Indian L. Rev. 274, 279-80 (2003) ("So much of the law concerning Indian tribal sovereignty has been judge made. The Court has had many decisions over the last twenty or thirty years articulating the scope of tribal sovereignty where there has not been any act of Congress or treaty on the subject, and all the Court could rely upon were its own prior decisions.").
6. See Mark Tushnet, The New Constitutional Order 22 (2003) ("Partisan polarization and divided government have obvious implications for the lawmaking process: Only initiatives that have bipartisan support are likely to be enacted, and polarization makes it difficult to assemble a bipartisan majority for major policy initiatives.").
7. See, e.g., S. 113, 109th Cong. (2005) (modifying the date as of which certain tribal land of the Lytton Rancheria of California is deemed to be held in trust); H.R. 680, 109th Cong. (2005) (directing the Secretary of Interior to convey certain land held in trust for the Paiute Indian Tribe of Utah to the City of Richfield, Utah, and for other purposes).
As an institution, federal courts are reactionary.\textsuperscript{10} They cannot
decide an issue without a party bringing suit in the first instance.
And, though it is the Court's job to interpret the Constitution, in the
Indian cases the Court has little or no constitutional text to interpret.
Indian tribes in recent decades have outpaced the law in many ways.
Through their commitment to tribal self-determination, Congress and
the Executive have opened the door—and tribes have finally sprinted
through.\textsuperscript{11} Each tribe is a laboratory for self-determination,\textsuperscript{12} business
ideas,\textsuperscript{13} and intergovernmental relations.\textsuperscript{14} As a result, the fed-

\textsuperscript{10} See also Saikrishna Prakash, Against Tribal Fungibility, 89 CORNELL L.
REV. 1069, 1117 (2004) ("[F]ederal Indian policy has been highly cyclical, moving
from extreme measures to assimilate Indians and end Indian tribal autonomy to
the eventual resurrection of Indian tribes and implementation of policies meant
to foster Indian self-government. These wild swings in federal Indian policy do
not speak well of federal control." (footnotes omitted)). Numerous scholars have
harshly criticized—and with good reason—federal Indian policy choices made by
Congress and the Executive Branch. See Sandra L. Cadwalader, Preface to The
AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880s, at ix
(Sandra L. Cadwalader & Vine Deloria, Jr., eds., 1984); Bethany R. Berger, In-
dian Policy and the Imagined Indian Woman, 14 KAN. J.L. & PUB. POL'Y 103
(2004); Raymond Cross, The Federal Trust Duty in an Age of Indian Self-Determi-
nation: An Epitaph for a Dying Doctrine?, 39 TULSA L. REV. 369, 372–73 (2003);
Robert B. Porter, A Proposal to the Hanodaganyas to Decolonize Federal Indian

\textsuperscript{11} See TUSHNET, supra note 6, at 93 ("The Supreme Court can aggressively exercise
the power of judicial review only when its members think that government's
power is narrow (relative to the views of legislators) and members of legislatures
think that broader exercises of power are both good public policy and constitu-
tionally permissible.").

\textsuperscript{12} See generally WILKINSON, supra note 4.

\textsuperscript{13} See, e.g., Wenona T. Singel, Labor Relations and Tribal Self-Governance, 80 N.D.
L. REV. 691, 725–29 (2004) (discussing ways for tribes to solve labor disputes
through the exercise of self-determination).

\textsuperscript{14} Some intergovernmental agreements between Indian tribes and states include,
for example, the Intergovernmental Accord between the Tribal Leaders of the
Federally Recognized Indian Tribes in the State of Michigan and the Governor of
the State of Michigan Concerning Economic Development Interests, May 13,
2005 (on file with author); Intergovernmental Accord between the Federally Rec-
ognized Indian Tribes in Michigan and the Governor of the State of Michigan
michigan.gov/documents/Accord_91058_7.pdf; Tax Agreement between the Little
Traverse Bay Bands of Odawa Indians and the State of Michigan, Dec. 20, 2002,
https://www.michigan.gov/documents/LTBB_Agreement_58762_7.pdf. One ex-
ample of an intergovernmental agreement between Indian tribes from both the
United States and Canada is the Tribal and First Nations Great Lakes Water
eral courts have had fewer and fewer authorities to rely on to decide disputes, opening the door for the Supreme Court to exercise additional latitude in deciding Indian cases according to its own preferences.\textsuperscript{15} The anchor preventing the Court from taking the law into its own hands—the decades of federal law and policy dictating to tribes how to civilize themselves—has begun to rust away.

And yet it is a dangerous time for Indian tribes.

Observers of the current state of Indian affairs are aware that Indian gaming underlies nearly all of the major issues facing Indian

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\begin{footnotesize}
\begin{enumerate}
\item The anchor preventing the Court from taking the law into its own hands—the decades of federal law and policy dictating to tribes how to civilize themselves—has begun to rust away.
\item Edwin Kneedler stated:
\begin{quote}
As we know, in the area of Indian law, a statute or treaty seldom supplies a specific answer to a case. The relevant statute or treaty was typically adopted against the background of certain premises and understandings that, you can be fairly sure, were on the mind of the legislators or the treaty drafters at the time, but they didn't put it in writing. Because this is a Court that wants to find the answers in text rather than suppositions about what the drafters might have thought, there often is less to go on for a tribe or for the United States on behalf of tribes. As a result, there may actually have been more latitude for the Court in deciding Indian cases.
\end{quote}
\end{enumerate}
\end{footnotesize}
tribes in their relations with federal, state, and local governments.\textsuperscript{16} Huge ethics scandals involving high-ranking Republican leaders relate directly back to the use and abuse of Indian gaming revenues.\textsuperscript{17} Already huge land claims in New York and elsewhere are being affected by the potential to use recovered lands for gaming operations.\textsuperscript{18} Gaming politics also interfere with the quest for federal recognition of historically oppressed Indian tribes.\textsuperscript{19} State governments are looking to wealthy Indian tribes as cash cows to balance state budgets.\textsuperscript{20} The taking of land into trust for the benefit of Indian tribes—one the most important provisions of the Indian Reorganization Act (IRA)—has been virtually shut down by the politics of (and derivative litigation involving) Indian gaming.\textsuperscript{21} Purely internal tribal matters, such as

\begin{itemize}
\item \textbf{20.} See In Minnesota as Elsewhere, Standing Up to Governors is a Good Idea, INDIAN COUNTRY TODAY (Oneida, N.Y.), May 25, 2005, at A2, available at 2005 WLNR 8288737 (“The solution in the minds of politicians and other special interest groups in the various states that contain Native nations is to go after whatever assets and revenues Indian tribal governments and member associations presently hold, and work to impose fees, taxes and any and all manner of tentacles upon such sovereign properties.”); Glenn Coin, Casino Mania: A Casino in Every Neighborhood, Hope for Money in Every Coffer, POST-STANDARD (Syracuse, N.Y.), Jan. 12, 2003, at A1 (“State legislators and the governor are betting that the largest expansion of gambling in state history will help resolve the state’s fiscal crunch.”); Amy Lane, State Looks to Indian Casinos to Add Revenue, CRAIN’S DETROIT BUS., Apr. 14, 2003, at 6 (discussing how Michigan Governor Jennifer Granholm and the Michigan Legislature “are looking to Michigan’s American Indian tribes as potential revenue sources”).
\item \textbf{21.} See, e.g., Taxpayers of Mich. Against Casinos v. Norton, 433 F.3d 852 (D.C. Cir. 2006) (affirming taking of trust land for benefit of Pokagon Band of Potawatomi Indians); Carceri v. Norton, 398 F.3d 22 (1st Cir. 2005) (affirming taking of trust land for benefit of Narragansett Indian Tribe); cf. Off-Reservation Indian Gaming: Hearing Before the S. Comm. on Indian Affairs, 109th Cong. (2005) (statement of George T. Skibine, Acting Deputy Secretary for Indian Affairs, Dep’t of the Interior) (“Finally, please keep in mind the fact that although the Department has approved a trust acquisition for an Indian tribe it does not necessarily mean that the land has actually been taken into trust. For instance, the existence of liens or other encumbrances, or litigation challenging the Secretary’s decision may delay the proposed trust acquisition, often for years.”).
membership questions, are affected by gaming. Some wealthy tribes use gaming revenues in efforts to influence state elections. Finally, and most importantly, the backlash against Indian gaming feared since its early days is now here and flourishing.

Concurrent with these recent events is the hyper-politicization of federal Indian law. Until the 1977 case of Delaware Tribal Business Committee v. Weeks, the Supreme Court treated Indian cases with a soft touch, preferring to leave the policy choices to Congress and the Executive, often invoking the political-question doctrine in refusing to review the constitutionality of Indian legislation. But the explicit rejection of the political-question doctrine in Weeks was a signal of a


23. See John M. Broder, Tribes Now Ready to Deal With Their New Governor, N.Y. TIMES, Nov. 9, 2003, at N18, available at 2003 WLNR 5666987 (“A small number of California’s Indian tribes, by spending $12 million to defeat Mr. Schwarzenegger in the recall election, may have done more to ensure his victory than any other group, political analysts said. A total of $84 million was spent on the election, with Indian gambling interests the single largest contributor.”).


25. 430 U.S. 73, 83–85 (1977) (citing Morton v. Mancari, 417 U.S. 535 (1974), and United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946), as examples of cases where the Court had reviewed congressional legislation in Indian affairs); see also United States v. Sioux Nation of Indians, 448 U.S. 371, 413 (1980) (“Thus, it seems that the Court’s conclusive presumption of congressional good faith was based in large measure on the idea that relations between this Nation and the Indian tribes are a political matter, not amenable to judicial review. That view, of course, has long since been discredited in takings cases, and was expressly laid to rest in [Weeks].”); Robert Laurence, The Unseemly Nature of Reservation Diminishment by Judicial, as Opposed to Legislative, Fiat and the Ironic Role of the Indian Civil Rights Act in Limiting Both, 71 N.D. L. REV. 393, 400 n.41 (1995) (discussing judicial review of disputes between Congress and Indian tribes); Frank Pommersheim, Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy, 58 MONT. L. REV. 313, 320 n.30 (1997) (same); Alex Tallchief Skibine, Integrating the Indian Trust Doctrine into the Constitution, 39 TULSA L. REV. 247, 255 (2003) (same); Comment, Federal Plenary Power in Indian Affairs after Weeks and Sioux Nation, 131 U. PA. L. REV. 235, 241 (1982) (same).

26. See, e.g., Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to
parallel phenomenon—the increasing tendency of the Court to make policy in the field of federal Indian law. The Court's entrance into the field of federal Indian policy is unwelcome, largely because the Court's policy choices are frequently uneducated in terms of their on-the-ground impacts, but also because they are in direct contravention of explicit congressional and Executive Branch policy choices.

Professor Philip P. Frickey argued in 1990 that congressional intent rarely provided much guidance to the Court in some of the cases this Article discusses. His analysis of the Court's cases did not touch upon the explicit statements of congressional and Executive Branch federal Indian policy. He proposed to "construct an antiformalist alternative for federal Indian law scholarship by relying upon recent writings about practical legal reasoning." But more recently, Professor Frickey declared that "it is exceedingly doubtful that . . . judicial solutions are among [the answers]" to the problem of American Indian law.

In contrast to Professor Frickey's earlier proposal, this Article proposes that the Court should follow congressional and Executive

be controlled by the judicial department of the government."; United States v. Holliday, 70 U.S. 407 (1865).


28. See Kronk, supra note 1, at 17 ("Indian Country and individual American Indians are suffering as a result of a federal bench that is 'ill-equipped' to handle cases involving federal Indian law.").

29. Cf. Tushnet, supra note 6, at 95 ("The Court's strong theory of judicial supremacy meshes reasonably well with its generalized suspicion of legislators, interest groups, and politics because it explains to the Court why it is the proper forum for deciding again questions already addressed by politicians.").


31. Id. at 1142–74. Professor Frickey also discussed the Indian Civil Rights Act, id. at 1157–60, 1163, and the Act of Aug. 15, 1953, id. at 1165–68.

32. Id. at 1142.

Branch federal Indian policy when confronted with cases where no treaty, statute, or regulation controls, proposing a test based on language contained in Justice Thomas’s concurrence in United States v. Lara.\textsuperscript{34} Particularly in the area of federal Indian law known as inherent tribal authority, as limited by the doctrine of implicit divestiture,\textsuperscript{35} this new analytical structure would allow the Court to make decisions that more closely parallel the national interest as identified in explicit statements of federal Indian policy.

Part II of this Article describes current federal Indian policy as articulated in the collection of federal statutes, regulations, and other official pronouncements issued by Congress and the Executive since 1970. These statements of federal Indian policy are supportive of tribal self-determination, tribal economic development, and tribal court development. Part III argues that the Supreme Court has increasingly acted as the leading federal Indian policymaker, leading to unwelcome results for the federal government, Indians, Indian tribes, states, and non-Indians. The Court’s federal common law cases often contravene express federal Indian policy. Part IV demonstrates that the unusual extraconstitutional status of Indian tribes and the limited constitutional authority for federal government both open the door for the Court to act as a sort of plenary federal Indian policymaker. Part IV also describes and critiques the tenuous middle ground that a bare majority of the Supreme Court is willing to follow in relation to the plenary and exclusive authority of Congress to make federal Indian law and policy—a sort of preconstitutional federal power. Part V proposes that the Supreme Court adopt, in part, Justice Thomas’s proposal for a “consistent-with-federal-policy” test, whereby the Court would not restrict tribal inherent authority absent express federal Indian policy to the contrary. This test relieves the Court of its uncomfortable and unwelcome policymaking activities in Indian cases and would produce results more indicative of federal Indian policy.\textsuperscript{36}

\textsuperscript{34} 541 U.S. 193 (2004).
\textsuperscript{35} See United States v. Wheeler, 435 U.S. 313, 326 (1978) (defining “implicit divestiture” as “that part of sovereignty which the Indians implicitly lost by virtue of their dependent status”).
\textsuperscript{36} Other commentators have proposed numerous alternatives for the Court to consider in its Indian law canon, but none in the vein of explicitly endorsing congressional and Executive Branch federal Indian policy. See, e.g., ALEINIKOFF, supra note 14, at 145–49 (arguing for the expansion of nonmember political participation rights in tribal governments); Hope M. Babcock, A Civic-Republican Vision of “Domestic Dependent Nations” in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered, 2005 Utah L. Rev. 443, 559–69 (urging Congress or the Court to authorize Indian tribes to “nullify” laws or actions that infringe on tribal sovereignty); Robert Laurence, Symmetry and Asymmetry in Federal Indian Law, 42 Ariz. L. Rev. 861 (2000) [hereinafter Laurence, Symmetry and Asymmetry] (blending notions of symmetry and asymmetry into federal Indian law); Robert Laurence, Federal Court Review of Tribal Activity
For the purposes of this Article, "federal Indian policy" refers to the express statements of policy or congressional findings contained in acts of Congress related to Indians, Indian tribes, and Indian tribal organizations. On occasion, Senate or House reports accompanying legislation will be discussed, but as a general matter, legislative history will not be considered "federal Indian policy."

II. FEDERAL POLICY ON INDIAN AFFAIRS

The political branches of the United States—the Executive and the Legislative—tend to make the policy decisions for the entire country on matters of broad national concern. In *Marbury v. Madison*, Chief Justice Marshall stated that some cases are of a class that federal courts cannot review because "the[ir] subjects are political." The Justices of the Supreme Court and the judges of the lower federal courts are not popularly elected, unlike the officials from the other two branches. In a perfect federal system, the federal courts would not be placed in the position of deciding what is best for the nation, and thus making federal policy. The Court is aware that it does not have

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37. See David S. Tatel, Judicial Methodology, Southern School Desegregation, and the Rule of Law, 79 N.Y.U. L. Rev. 1071, 1074-75 (2004) ("[L]ife-tenured judges from across the political spectrum maximize the extent to which their decisions are driven not by personal policy agendas, but by the application of law to established fact. Critical to the principle of judicial restraint, these standards help federal courts avoid intruding on the policymaking function and retain the credibility they need to serve in our democracy as the arbiter of constitutional issues and the ultimate protector of constitutional rights." (citations omitted)).

38. 5 U.S. (1 Cranch) 137 (1803).

39. Id. at 166.

40. See U.S. Const. art. II, § 2, cl. 2; id. art. III, § 1.
the institutional capacity that Congress and the Executive have to make intelligent and wise decisions about federal policy.41

There are exceptions to the Court's reluctance to engage in explicit policymaking. For example, the Court adopted a substantive due process analysis in *Lochner v. New York*,42 now hailed as a low point in Supreme Court jurisprudence.43 In *Lochner*-era cases, the Court second-guessed the political branches of the federal government in declaring hundreds of state economic regulations unconstitutional.44

Another exception is more contemporary—federal Indian policy. In the last three decades, beginning in force around the mid-1970s with then-Justice Rehnquist's opinion in *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*,45 the Court has made broad statements of policy, often in contravention of explicit congressional policy. These statements include determining how much inherent tribal authority an Indian tribe retains;46 determining the territorial scope of Indian Country;47 and, perhaps most importantly, determining to what degree state law and authority extends into Indian Country.48 Most recently, the Court rejected an attempt by the Oneida Indian Nation to seek tax immunities from local governments on reservation lands on the policy basis that the Nation waited too long to assert its own governmental authority.49 The Court has shown an increasing disregard in certain instances for explicit con-

42. 198 U.S. 45, 56 (1905).
44. See Friedman, supra note 43, at 623 n.228.
gressional statements of federal Indian policy. This is a strange development considering that until the mid-1970s, the Supreme Court often stated that congressional legislation and Executive Branch discretionary decisionmaking relating to Indian affairs were nonjusticiable political questions. Congress and the Executive continue to make policy decisions in Indian affairs that apply to these cases, although not the broad policy shifts made during the Roosevelt, Eisenhower, and Nixon Administrations. Despite this, the Court has plenty of relevant federal Indian policy guidance to follow.

The reason why federal courts have stepped into the interventionist role as policymaker is likely the overlooked debate over a missing constitutional source of authority for Congress and the President to make federal Indian legislation and policy in the first instance.

50. See infra Part III.
52. See infra Part II.
54. See Wilkinson, supra note 4, at 65–75 (noting the Eisenhower Administration’s actions leading to the passages of House Concurrent Resolution 108, the official statement of the Termination Era).
55. See Clinton, Goldberg & Tsosie, supra note 5, at 43 (discussing President Nixon’s message to Congress announcing his support for tribal self-determination).
debate has its roots in the Rehnquist Court’s deep suspicion of congressional and Executive authority,\textsuperscript{57} and its increasing focus on textual bases for exercises of federal power.\textsuperscript{58} The Rehnquist Court’s...
"states' rights" jurisprudence has also impacted the outcome of its Indian cases.59 Without a clear textual source of authority in the Constitution for Congress or the Executive to make federal Indian policy, the Court is not constrained from entering into the realm of federal Indian policymaking,60 despite the fact that the Judiciary has "an even more inferior constitutional pedigree than Congress has."61 For example, in other areas the Court is usually mindful, respectful, and pragmatic in separation-of-powers questions.62 But Indian tribes are "extraconstitutional"63— they did not engage in the debates over the Constitution; they did not execute the Constitution; they were not included in the federal system at all.64 Chief Justice Marshall's strained solution to case where the Court could not "rely on any provision in the Constitution, so this time they used their own new conception of the constitutional 'framework' and 'structure'".


60. See William N. Eskridge, Jr. & Philip P. Frickey, Law as Equilibrium, 108 HARV. L. REV. 26, 29 (1994) ("The most interesting public law issues, however, tend to be those in which technological, social, or economic changes have rendered an equilibrium unstable, or at least susceptible to movement. At that point, one of the institutions of government, often the Court, will in fact successfully shift public policy to render it more reflective of its own preferences.").


63. Lara, 541 U.S. at 213 (Kennedy, J., concurring); David E. Wilkins, American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice 21 (1997); Charles F. Wilkinson, American Indians, Time, and the Law 112 (1987) ("Our jurisprudence, then, has recognized tribal authority as being both preconstitutional and extraconstitutional."); Frickey, supra note 30, at 1156 ("[T]ribal sovereignty is inherent and 'pre-constitutional' . . . ."); cf. Frickey, (Native) American Exceptionalism, supra note 27, at 464–65 ("In the last three decades, the Court has also been exercising an extraconstitutional power over Indian affairs . . . .").

64. See United States v. Gregg, No. CR 04-30068, 2005 WL 1806345, at *1 (D.S.D. July 27, 2005) ("Indian tribes, unlike the original states, had no connection with and no involvement in the drafting and the adoption of the United States Constitution. They had no connection with the give and take which resulted in the adoption of the United States Constitution and the Bill of Rights."); Clinton,
this problem was to label Indian tribes “domestic dependent nations” as a matter of federal common law. It appears that to the Court, the constitutional rights, powers, duties, and responsibilities of Indian tribes in “Our Federalism” are questions that the Court began to wrestle with in 1810. If nothing in the Constitution says otherwise, then perhaps for the Court, federal Indian law is a problem for the Judiciary. This leads to what Professor Frickey calls a “ruthless pragmatism inconsistent with even the modest respect for tribal prerogatives that traditional federal Indian law sometimes reflected in appreciation of our colonial past.”

A. Sources of Federal Indian Policy

The utterly inconsistent and fluctuating history of federal tribal legal affairs is well documented. Federal policy toward Indian tribes has moved in various decades from physical extirpation to measured...
separatism to removal to assimilation—sometimes at the same time.  


75. See generally Duro v. Reina, 495 U.S. 676, 709 (1990) (Brennan, J., dissenting) ("This country has pursued contradictory policies with respect to the Indians.").
As a matter of federal constitutional law, the Indian Commerce Clause grants Congress the only explicit constitutional authority to deal with Indian tribes. Congress has legislated on the subject of Indian affairs from the very beginning, starting with the Trade and Intercourse Acts. It is Congress that decides the overall federal policy of the United States—and as the popularly elected legislative body, that is the way it should be.

The President and the Executive Branch also retain some policymaking duties regarding Indian affairs. Until 1871, the President retained authority to enter into treaties with Indian tribes. With that authority, the President helped to drive federal Indian policy for decades. Congress's termination of the President's authority to make treaties with Indian tribes eviscerated much of the President's constitutional power to make affirmative federal Indian policy. Congress, however, has delegated much of its authority to make federal Indian policy to the Executive, namely through the Bureau of Indian Affairs (BIA) and other federal agencies, including the Indian Health Service and the National Indian Gaming Commission.

76. U.S. Const. art. I, § 8, cl. 3; Lara, 541 U.S. at 200; Prakash, supra note 9, at 1087-90.
83. See 25 U.S.C. § 2704 (2000); Light & Rand, Indian Gaming and Tribal Sovereignty, supra note 2; Washburn, Recurring Problems in Indian Gaming, supra note 2, at 431-33; Brian P. McClatchey, Note, A Whole New Game: Recognizing the Changing Complexion of Indian Gaming by Removing the "Governor's Veto"
Through the promulgation of federal regulations and the making of informal policy, these federal agencies have extensive federal Indian policymaking capabilities.

The third branch—the Federal Judiciary—has wavered throughout the history of the Federal Constitution, uncertain of its place in federal Indian policy. From the time of the Marshall Court to the mid-1880s, the Supreme Court maintained a federal common law that emphasized a wide divide between federal law and policy, and the internal sovereign affairs of Indian tribes. In *Worcester v. Georgia*, the Court drew a bright line separating state law from Indian Country, allowing tribes to govern themselves without interference. In two critical state taxation cases, *In re Kansas Indians* and *In re New York Indians*, the Court held that states have no power to tax Indian trust lands. In *Elk v. Wilkins*, the Court held that the Fourteenth Amendment did not apply to Indians, relying on the fact that, while tribes were not foreign nations, they were not entirely included in the American constitutional scheme. The Court held in *Ex parte Crow* for Gaming on “After-Acquired” Lands, 37 U. Mich. J.L. Reform 1227, 1247 (2004).


86. 31 U.S. 515 (1832).

87. *See id.* at 520 (“The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of [C]ongress.”); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 393–406 (1993) (discussing *Worcester*).

88. 72 U.S. 737 (1866).

89. 72 U.S. 761 (1866).

90. *Id.* at 771–72; *In re Kansas Indians*, 72 U.S. at 759–60 (declining taxation of the Shawnee, Wea, and Miami lands).

91. 112 U.S. 94 (1884).

92. *See id.* at 99.
Dog\textsuperscript{93} that the federal government had no authority to prosecute Indians who murder other Indians on reservation lands when the accused had already been prosecuted in accordance with tribal law. While the Court of the nineteenth century acknowledged, as a matter of federal common law, that Indian tribes lost their external sovereignty by the mere presence of the United States,\textsuperscript{94} the Court did not see a constitutional basis for the intervention of American policy or American law into the separate and internal affairs of Indian tribes.\textsuperscript{95}

From the mid-1880s, however, until the latter half of the Burger Court years, as Congress and the Executive intervened more into the internal affairs of Indian tribes—breaking down the wall that separated the federal government from the inner workings of tribal government and society—the Court completely stepped out of the picture. In \textit{Lone Wolf v. Hitchcock},\textsuperscript{96} the Court recognized as a matter of federal common law that Congress possessed unprecedented plenary and exclusive power over Indian affairs,\textsuperscript{97} while at the same time adopting the position that congressional decisions on Indian affairs were non-justiciable political questions.\textsuperscript{98} The Court adopted a stance for al-

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  \item \textsuperscript{94} See Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Johnson v. M’Intosh, 21 U.S. 543 (1823); see also Brendale v. Confed. Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 463 (1989) (Blackmun, J., concurring and dissenting) (expressing the view that splitting tribal zoning authority is inconsistent with the Court's past decisions of inherent sovereignty).
  \item \textsuperscript{95} See United States v. Kagama, 118 U.S. 375, 378-79 (1886) (noting that the Indian Commerce Clause does not explicitly confer upon Congress the authority to enact criminal laws in Indian Country). \textit{But see id. at 383-84} (finding congressional authority in the “state of pupilage” in which the Court found Indians resided); \textit{id. at 384-85} (“It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.”).
  \item \textsuperscript{96} 187 U.S. 553 (1903).
  \item \textsuperscript{97} See \textit{id. at} 565 (noting that Congress has “[p]lenary authority over the tribal relations of the Indians”).
  \item \textsuperscript{98} See \textit{id. at} 568 (citing Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902)). \textit{Lone Wolf} tested the authority of Congress to abrogate an Indian treaty. See \textit{id. at} 566. In twisted irony, the Court asserted two restrictions on congressional plenary power, but refused to enforce either. First, Congress should only act in a “contingency” or an emergency related to Indian lands. See \textit{id.}. Second, Congress’s power depends on its ability to act “in perfect good faith.” \textit{Id.} The plaintiffs in \textit{Lone Wolf} had asserted that federal agents had committed fraud and that no
most a century that federal Indian policy choices were political questions with which it would not interfere.99

Until recently, the states have had a very limited role in the making of federal Indian policy. The Court retained its stance in Worcester through Justice Black’s opinion in Williams v. Lee,100 which denied state court jurisdiction over a civil claim brought against an Indian over events occurring in Indian Country.101 Yet, as we shall see, from the appointment of then-Justice Rehnquist to the present day, the Court more frequently and powerfully invoked the interests of state governments and non-Indian citizens in its Indian cases.102

B. Modern Congressional Statements of Federal Indian Policy

Most watchers of Indian affairs agree that federal Indian policy is now within the era of self-determination for Indian tribes, an era that began in the 1960s and early 1970s.103 Congress has legislated in numerous areas relating to Indian affairs since the mid-1970s, often stating a federal policy promoting the self-determination of Indian tribes. Congressional and Executive Branch commitment to the federal policy of tribal self-determination has, for some commentators, strengthened or wavered, prompting commentators to suggest that we have entered new eras of federal Indian policy—government-to-gov-

particular emergency existed, see id. at 556, 558, 561, strong evidence that Congress, and the federal government overall, had not acted in good faith in the matter. Despite this, the Court concluded that a lack of good faith was irrelevant because it would treat allegations of fraud as nonjusticiable political questions. See id. at 559 (“In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts.”). One federal judge called Lone Wolf “the Indians’ Dred Scott decision.” Sioux Nation v. United States, 601 F.2d 1157, 1173 (Ct. Cl. 1979) (Nichols, J., concurring), aff’d, 448 U.S. 371 (1980).

99. See supra Part II.
101. See id. at 220–21, 223.
102. See generally Getches, Beyond Indian Law, supra note 27; Skibine, supra note 36.
ernment relations\textsuperscript{104} or self-reliance.\textsuperscript{105} Regardless, the explicit legislative policy remains self-determination.

1. Self-Governance

The various self-determination acts include the Indian Self-Determination and Education Assistance Act\textsuperscript{106} and the Native American Housing Assistance and Self-Determination Act.\textsuperscript{107} These Acts implement a federal tribal relationship first proposed by Interior Secretary Collier during the debates leading up to the Indian Reorganization Act of 1934.\textsuperscript{108} Up to this time, the federal government relied exclusively on the BIA to superintend Indian reservations.\textsuperscript{109} The federal government funded the agency, and the agency ran the reservations. In some instances, local BIA superintendents were tyrannical in the ways they governed Indian reservations.\textsuperscript{110}

By the Depression, the long-standing federal Indian policy was that Indians and Indian tribes were in a state of pupilage.\textsuperscript{111} The federal government treated tribes as if they needed training in American

\textsuperscript{104} CLINTON, GODBERG \& TSOSIE, supra note 5, at 45–48.
\textsuperscript{105} See Colman McCarthy, Congress Kicking Indians While They're Down, GRAND RAPIDS PRESS (Mich.), Sept. 22, 1995 ("Another argument heard in the House and Senate to justify the budgetary hacking is that Indians, along with others on welfare, need to acquire self-reliance. It's forgotten that social programs for Indians are matters of justice, not charity, largesse or the dole."). quoted in Fletcher, supra note 85, at 43 n.40.
\textsuperscript{109} See generally COHEN'S HANDBOOK 1ST ED., supra note 77, at 9–32; James E. Officer, The Indian Service and Its Evolution, in THE AGGRESSIONS OF CIVILIZATION, supra note 9, at 59–71.
ways to become civilized. The reservation, as one federal district court judge stated in United States v. Clapox,112 was a sort of school, and BIA superintendents were school masters.113 Secretary Collier, working with his brilliant legal counsel, Interior Solicitor Nathan Margold and Assistant Interior Solicitor Felix Cohen, proposed abandoning the BIA and allowing the tribes to govern their own reservations with federal assistance.114 BIA employees, desperate to save their floundering bureaucracy, did what they could to undermine the proposal, arguing at times that tribal governments had no capacity to take over federal governmental functions.115 The proposal was dropped in the final version of the IRA, replaced with the compromise provision offering preference to Indians in BIA employment.116

In the mid-1970s, however, with local control of government a hot topic in federal circles, it was the perfect time to begin the process of allowing Indian tribes to take over for the BIA. Congress ordered the BIA and the Indian Health Service to enter into contracts, known as “638-contracts” (named after the Public Law creating the mechanism), whereby the tribes would take over certain federal programs at the tribe’s request.117 For example, a tribe could make a request to the BIA to enter into 638-contracts relating to the tribal courts, enrollment, and child welfare functions.118 The BIA would have no choice but to negotiate a form contract119 with the tribe and turn over a certain sum of federal dollars that would have been allocated to the BIA to operate those functions, minus administrative costs, of course. A few years later, Congress began to authorize Indian tribes to take over the entire bevy of federal programs administered by the BIA.120 These tribes are known as self-governance tribes.121

112. 35 F. 575 (D. Or. 1888).
113. See id. at 579 (“[T]he act with which these defendants are charged [helping a prisoner convicted of adultery escape] is in flagrant opposition to the authority of the United States on this reservation, and directly subversive of this laudable effort to accustom and educate these Indians in the habit and knowledge of self-government. It is therefore appropriate and needful that the power and name of the government of the United States should be invoked to restrain and punish them.”).
114. See supra note 108; Hauptman, supra note 69, at 135–36 (noting the role of Collier, Margold, and Cohen).
115. See generally Officer, supra note 109, at 72–73.
116. See Hauptman, supra note 69, at 137.
118. See id.
119. See id. § 450l (2000).
121. See generally McCarthy, supra note 81, at 135–37.
The import of these programs is that Congress has placed its support behind Indian tribal governments. Although the process of taking over federal functions by tribes has often been painful and annoying, congressional support of tribal self-governance is unwaivering. The clear federal policy in this area is to advance tribal self-government. Congress's explicit declaration of policy incorporated into the Self-Determination Act is as follows:

(b) Declaration of commitment

The Congress declares its commitment to... the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians... In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

Similarly, Congress's statement of policy in the Native American Housing Assistance and Self-Determination Act provided:

The Congress finds that—

(6) the need for affordable homes in safe and healthy environments on Indian reservations, in Indian communities, and in Native Alaskan villages is acute and the Federal Government should work not only to provide housing assistance, but also, to the extent practicable, to assist in the development of private housing finance mechanisms on Indian lands to achieve the goals of economic self-sufficiency and self-determination for tribes and their members; and

(7) Federal assistance to meet these responsibilities should be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance by making such assistance available directly to the Indian tribes or tribally designated entities under authorities similar to those accorded Indian tribes in Public Law 93-638 (25 U.S.C. 450 et seq.).

The self-determination acts fulfill much of the promise of the original version of the Indian Reorganization Act that Commissioner Collier proposed in the early 1930s and affirms the federal Indian policy of self-determination and self-governance, an original purpose of the IRA itself.

122. See Hauptman, supra note 69, at 143; Porter, supra note 9, at 965.
124. Id. § 4101 (emphasis added).
Congressional policy is also strongly in favor of tribal economic development. Congress is fully aware that few Indian tribes have a sufficient tax revenue base to fund a necessary array of governmental functions. An Indian tribe with business operations sufficient to pay for its own administration, social services, education, health care, housing, etc., reduces tribal member dependence on the federal, state, and local safety net. Section 17 of the IRA allowed Indian tribes to form economic development corporations under federal law.

Congress took a sharp turn away from tribal self-government and economic self-sufficiency during the "Termination Era" of the 1950s and 1960s. Congress enacted laws terminating the federal supervision of hundreds of tribes and issued policy statements encouraging

Joranko & Mark C. Van Norman, Indian Self-Determination at Bay: Secretarial Authority to Disapprove Trial Constitutional Amendments, 29 Gonz. L. Rev. 81 (1993); Porter, supra note 73.

126. See S. Rep. No. 105-95, at 18 (1997) ("This program will help local jurisdictions maintain public roads that serve Indian reservations and are used by school buses to transport children to or from school or a Headstart program. Such jurisdictions, which comprise mostly Federal or tribal land, and may not do not [sic] have sufficient tax bases to support the maintenance of roads on these Federal lands."); S. Rep. No. 102-158, at 5 (1991) ("Despite the progress made in recent years among Indian tribes and individuals, most American Indians and other Native Americans continue to experience rates of joblessness far higher than other Americans, owing, among other things, to an absence of employment opportunities. In locations often remote from population centers and usually lacking a tax base, most tribal governments are handicapped in their efforts to stimulate local economic development and, in some locations, to effectively carry out the basic functions of government."); Matthew L.M. Fletcher, In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue, 80 N.D. L. Rev. 759, 771-72 (2004).


the BIA to wind down tribal operations on all reservations.\textsuperscript{130} Congress then turned away from that mode and returned to the self-sufficiency and economic development mode of the IRA.

Congress enacted numerous pieces of legislation since the 1970s to encourage tribal economic development and ease tax burdens on Indian tribes.\textsuperscript{131} In each piece of legislation, Congress made findings of fact and strong statements of support for tribal economic development. For Congress, the long-term solution to tribal dependence on federal programs lies in reservations with economic strength.\textsuperscript{132} Congress's recent commitment to encouraging tribal economic development has been unwavering.

Congress's first piece of legislation designed to bolster tribal economic development in the self-determination era was the Indian Financing Act of 1974.\textsuperscript{133} Section 1 of the Act provides:

It is hereby declared to be the policy of Congress to provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.\textsuperscript{134}

The House Report accompanying the Act made clear that Congress's intent was to promote tribal economies through the development of individual and tribal capital structures.\textsuperscript{135} The House Report elaborated by noting, "On every reservation today, there is almost a total lack of an economic community. If the long-sought goal of Indian self-sufficiency is to be reached, such financial assistance must be pro-

\begin{enumerate}
\item See Wilkinson, supra note 4, at 71–81, 178–82 (identifying laws terminating federal provisions of the Menominee, Klamath, California, Oregon, and Colville tribes); Cross, supra note 74, at 963–64 (discussing proposed termination of Fort Berthold Reservation).

The termination policy was misguided and utterly disastrous for Indians and Indian tribes. See Winona LaDuke, Recovering the Sacred: The Power of Naming and Claiming 52–55 (2005) (describing impacts at Klamath); Wilkinson, supra note 4, at 81–84 (documenting impacts at Klamath and Menominee); Wilkinson & Biggs, supra note 129, at 144.

\item See infra text accompanying notes 132–41.


\item See H.R. Rep. No. 93-907, at 1 (1974), as reprinted in 1974 U.S.C.C.A.N. 2873, 2874 ("The purpose of the bill . . . is to provide Indian tribes and individuals [with] capital in the form of loans and grants to promote economic and other development.").
\end{enumerate}
vided or facilitated." In short, tribal economic development, according to Congress, is critical to tribal self-sufficiency.

In 1982, Congress enacted the Indian Tribal Government Tax Status Act, further cementing its support for tribal economic development efforts. In this Act, Congress extended many (but not all) of the tax advantages enjoyed by state and local governments to Indian tribal governments. Congress intended the Act to "create the development environment necessary for true economic and social self-sufficiency." In perhaps the strongest and most explicit statement in favor of tribal economic development, Congress codified and validated Indian gaming operations in the Indian Gaming Regulatory Act (IGRA). Congress made an explicit statement of federal Indian policy strongly

136. Id. at 6-7, 1974 U.S.C.C.A.N. at 2874.
140. See Williams, supra note 138, at 357 (citing 127 Cong. Rec. 11132 (1982) (statement of Sen. Wallop)).


Some courts and commentators have asserted that a critical element of congressional intent in passing IGRA was to slow or halt the spread (or proliferation) of Indian gaming. See Ponca Tribe of Okla. v. Oklahoma, 37 F.3d 1422, 1425 (10th Cir. 1994), vacated, 517 U.S. 1129 (1996); Texas v. Ysleta del Sur Pueblo, 220 F. Supp. 2d 668, 681 n.6 (W.D. Tex. 2001); Nicholas S. Goldin, Note, Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gaming, 84 Cornell L. Rev. 798, 824 n.200 (1999). However, this view is the minority view and has not been upheld by a court of last resort. See, e.g., Grand Traverse Band of Ottawa & Chipewa Indians v. U.S. Att'y for the W. Dist. of Mich., 198 F. Supp. 2d 920, 933 (W.D. Mich. 2002) (rejecting State of Michigan's argument that the purpose of IGRA was to "limit the proliferation of casinos"), aff'd, 369 F.3d 960 (6th Cir. 2004).
favoring tribal economic development by stating that IGRA is intended "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."\textsuperscript{142}

In short, explicit congressional statements of federal Indian policy, as well as legislative history related to Indian affairs legislation, strongly support the tribal economic development activities of Indian tribes. This is critical given that the only textual support within the Constitution for congressional authority is the Indian Commerce Clause.\textsuperscript{143}

3. Tribal Court Development

Part and parcel of tribal governance is tribal court development, but the history of tribal court development is spotty. The first tribal courts for many reservations were the old Courts of Indian Offenses,\textsuperscript{144} later known as CFR Courts.\textsuperscript{145} These courts are Article II courts created by the Secretary of the Interior and run by the BIA to regulate the reservation activities of Indians.\textsuperscript{146} The BIA enacted reservation law-and-order codes as federal regulations for every activity of reservation life from crimes to curfews to religious ceremonies.\textsuperscript{147}


\textsuperscript{143} U.S. CONST. art. I, § 8, cl. 3; see also Angela R. Riley, Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities, 18 CARDOZO ARTS & ENT. L.J. 175, 205 (2000) (describing the Indian Commerce Clause as "grant of singular authority to Congress to regulate intercourse and trade with Indian tribes, the only minority group explicitly mentioned in the Constitution").


\textsuperscript{147} See Clapox, 35 F. at 578–79; Deloria & Lytle, supra note 144, at 78; Valencia-Weber, supra note 146, at 235; cf. generally Cohen, supra note 110 (alleging that the Bureau of Indian Affairs exercised complete, authoritarian control over many reservations).
BIA agents used the courts and the codes to stamp out traditional ceremonies.148

Through the IRA, Congress made a strong statement in support of tribal governments but ignored tribal courts.149 It is possible that Congress was implicitly recognizing that Indian tribes, as a general rule, did not resolve disputes using an adversarial court system in the Anglo-American model.150 BIA officials and superintendents working with tribes to develop written constitutions encouraged, and in some cases coerced, tribes to adopt a model IRA constitution.151 The model IRA constitutions read similar to a municipal code, not like a governing document useful for sovereign governments that pre-existed the United States Constitution. The constitutions often did not provide for the establishment of tribal courts.152 Where they did, they did not provide for a separation of powers; typically, the constitution would authorize the tribal council to create the tribal court.153

Congress unwittingly gave a large boost to tribal courts by enacting the Indian Civil Rights Act (ICRA).154 On one hand, the Act itself is certainly a denigration of tribal sovereign authority, limiting the powers of tribal governments,155 but the Act does not provide a federal

148. See Deloria & Lytle, supra note 144, at 78.
149. See Christine Zuni, Legal History of Tribal Courts, in INTRODUCTION TO TRIBAL LEGAL STUDIES, supra note 144, at 78, 80–81.
court forum in which to vindicate civil rights. Moreover, the Supreme Court in *Santa Clara Pueblo v. Martinez* explicitly stated that persons alleging ICRA violations must use a tribal forum, usually tribal courts. This ruling required tribal courts to develop quickly and in a manner sophisticated enough to handle complex civil rights litigation.

And since the 1990s, Congress has unfailingly made statements of federal policy in favor of tribal court development. In 1993, Congress enacted the Indian Tribal Justice Act. There, Congress stated:

> The Congress finds and declares that—

> 1. tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments;
> 2. Congress and the Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights;
> 3. traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes and to the goals of this chapter;
> 4. tribal government involvement in and commitment to improving tribal justice systems is essential to the accomplishment of the goals of this chapter.

Unfortunately, Congress did not appropriate funds to implement the legislation. Nevertheless, the statute is an important statement about federal Indian policy relating to tribal courts.

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160. See *id.* at 66–67.

161. See *Introduction to Tribal Legal Studies*, supra note 144, at 258.


164. Clinton, Goldberg & TsoSie, supra note 5, at 48.
In 2000, Congress enacted the Indian Tribal Justice Technical and Legal Assistance Act.\textsuperscript{165} Congress made more explicit findings and statements of federal Indian policy, reaffirming its 1993 statements:

The Congress finds and declares that—

\begin{itemize}
  \item[(2)] Indian tribes are sovereign entities and are responsible for exercising governmental authority over Indian lands;
  \item[(5)] tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring the health and safety and the political integrity of tribal governments;
  \item[(6)] Congress and the Federal courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands;
  \item[(7)] enhancing tribal court systems and improving access to those systems serves the dual Federal goals of tribal political self-determination and economic self-sufficiency.\textsuperscript{166}
\end{itemize}

These are strong statements of federal Indian policy in favor of the development of tribal court systems, tribal self-government, and, most importantly, tribal court jurisdiction over Indian lands.\textsuperscript{167}

4. Sovereign Immunity

The judge-made doctrine of sovereign immunity does not necessarily fit well under the category of congressional statements of federal policy, but this is one area where the Supreme Court gives grudging deference to Congress. In cases such as \textit{Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.},\textsuperscript{168} and more implicitly, \textit{Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma},\textsuperscript{169} the Court has upheld the doctrine of tribal sovereign immunity from strenuous challenge, but has invited Congress to revisit the question.\textsuperscript{170} The Court asserted, "In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians."\textsuperscript{171} The Court cited instances where Congress acted to waive the immu-

\textsuperscript{168} 523 U.S. 751 (1998).
\textsuperscript{170} See \textit{Kiowa Tribe}, 523 U.S. at 760.
nity of certain tribes in certain circumstances and where Congress could have eliminated the doctrine altogether, concluding that Congress has not yet made a clear statement of intent to eviscerate tribal sovereign immunity.\textsuperscript{172}

And the Court is correct. Congress has often debated the usefulness of tribal sovereign immunity, concluding that Indian tribes should retain the immunity from suit of a sovereign.\textsuperscript{173} So, as a matter of federal Indian policy, there is plenty of explicit and implicit congressional support for the doctrine.\textsuperscript{174}

C. Modern Presidential Statements of Federal Indian Policy

During the “treaty era” of federal Indian policy, the Executive possessed much more explicit authority to make policy in this area.\textsuperscript{175} The President and his delegates negotiated treaties between Indian tribes and the federal government, resulting in the cession of hundreds of millions of acres of land from the tribes to the federal government.\textsuperscript{176} Moreover, when negotiations failed, it was the President as Commander-in-Chief who made war on the tribes.\textsuperscript{177} Jealous of the President and the Senate, the House, in an act of dubious constitutionality, revoked the power of the President to negotiate treaties.\textsuperscript{178} Congress, at that time, became the leading branch of government in the area of federal Indian policy.

Nevertheless, the bureaucracy wielded an almost unparalleled and absolute power on the ground in Indian Country throughout the latter half of the nineteenth century and even into the present day.\textsuperscript{179} The BIA controlled the day-to-day activities of many reservation Indi-

\textsuperscript{172} See id. at 758–59 (citing 25 U.S.C. §§ 450ff(c)(3), 450n, 1451, 2710(d)(7)(A)(ii) (2000)).


\textsuperscript{178} See Cohen, supra note 110, at 352–90; Vine Deloria, Jr. & Clifford Lytle, The Evolution of Tribal Governments, in INTRODUCTION TO TRIBAL LEGAL STUDIES, supra note 144, at 63, 64; Hauptman, supra note 69, at 140–41.
The BIA also carefully and quietly wrote off dozens, if not hundreds, of Indian tribes by refusing to provide services or superintendence. The American Indian Policy Review Commission identified hundreds of tribes that the BIA had disregarded over the decades—all without express congressional approval.

However, the IRA's Indian preference provisions, after decades of obstinate but unsurprising BIA resistance, began to alter the nature of the agency. Few BIA employees were Indians at the time Congress enacted the IRA. Now, more than ninety percent of BIA employees are Indians, including most employees holding high-level policymaking positions. As a result, Executive Branch policymaking mirrors congressional federal Indian policy in every important way since the 1970s.

1. Nixon's Self-Determination Address (and Kennedy and Johnson)

Executive Branch policymaking, and possibly even federal policymaking, begins with the President as chief legislator. The first President in the modern era to advocate for tribal reservation development was President Kennedy. His successor, President Johnson, echoed support for tribal government and reservation development. But it was President Nixon who most pointedly issued a statement about federal Indian policy in his 1970 address to Congress. President Nixon's message was a dramatic reversal and renunciation of the Termination Era of federal Indian policy, and as some commentators noted, "set the legislative agenda for Congress in the field of Indian affairs for the entire decade."

180. See generally Cohen, supra note 110.
182. See Task Force Ten, supra note 181.
183. See generally Cohen, supra note 110, at 383–84 (discussing firing of the most competent Bureau employees during the 1950s); Note, The Indian: The Forgotten American, 81 Harv. L. Rev. 1818, 1820 (1968).
185. See Getches, Wilkinson & Williams, supra note 1, at 232.
186. See Clinton, Goldberg & Tsosie, supra note 5, at 41; McNickle, supra note 103, at 115–16.
187. See McNickle, supra note 103, at 124.
189. Clinton, Goldberg, & Tsosie, supra note 5, at 43.
President Reagan's tenure in office was a mixed bag. Importantly, the Reagan Administration supported tribal economic development in numerous ways. That administration's impetus for tribal economic development was explicitly to "reduce [tribal] dependence on Federal funds by providing a greater percentage of the cost of their self-government." Though the underlying motivation of the President's federal Indian policy was not charitable, some results were powerful. As had already begun in the 1970s, federal agencies, particularly the Department of Housing and Urban Development, began to provide federal funds and financial assistance for tribes to begin operating bingo halls and card rooms. The Court noted the importance of this federal assistance to tribal gaming establishments in its path-marking case, California v. Cabazon Band of Mission Indians, which precluded states from regulating Indian bingo halls.

2. Government-to-Government Relationship

The federal agencies, particularly the BIA—but also other federal agencies administering federal lands, property, and natural resources—had long treated Indians and Indian tribes poorly. As noted above, the BIA has a long history of attempting to forcibly assimilate and even Christianize Indians, but other federal agencies are guilty of this cultural imperialism as well.

President Clinton made no new huge federal Indian policy statements but did issue numerous executive orders to the federal agencies requiring them to deal with Indian tribes on a government-to-government basis and to consult with Indian tribes on any new policy changes or rules promulgations. Around this time, several federal agencies began to engage in a negotiated rulemaking process with Indian tribes over the creation of new or amended federal regulations dealing with critical federal programs.

190. Statement of Indian Policy, 1 PUB. PAPERS 97 (Jan. 24, 1983).
191. The first Interior Secretary under President Reagan, James Watt, infamously criticized Indian tribes as examples of the failures of socialism. See Fletcher, supra note 126, at 784–85.
194. See id. at 221–22.
195. See United States v. Clapox, 35 F. 575, 577 (D. Or. 1888); Cohen, supra note 110, at 369.
196. See H.R. REP. No. 95-1308, at 1–4 (1978); PEVAR, supra note 146, at 63–64.
As demonstrated in this Part, Congress and the Executive have inextricably intertwined many of the interests of the federal government with the interests of Indians and Indian tribes. But, as Part III establishes, despite the unwavering federal Indian policy expressed by the political branches of the federal government in favor of tribal self-governance, tribal court development, economic development, and other important tribal interests, the Supreme Court has frequently ignored those policy statements.

III. UNGROUNDED FEDERAL JUDGE-MADE INDIAN LAW, OR THE SUPREME COURT AS FEDERAL INDIAN POLICYMAKER

Federal common law is judge-made law.\textsuperscript{199} It is law that the federal courts propound in areas of federal subject matters where no act of Congress controls and no regulation of the Executive Branch applies. Where Congress hears of a federal court decision relying upon federal common law, it has the authority to legislate to codify the decision, modify or expand the decision, or even reverse the decision.\textsuperscript{200}

But what happens when the Supreme Court makes federal common law in a particular area of federal subject matter and Congress has little or no constitutional authority in that area? Can Congress still overrule, modify, or codify the Court's pronouncement? Or does the Court retain exclusive power to decide those matters? What is the role of the Executive?

This Part provides an overview of how these questions are answered by the federal government in the area of federal Indian law. In short, as some commentators have already alleged, it appears that the Supreme Court, at least potentially, could assert virtually unlimited authority over these matters—a sort of judicial plenary power to make federal policy and to make law.\textsuperscript{201} Other commentators suggest that where federal positive law is silent, state constitutional and statutory


\textsuperscript{200} See Field, supra note 199, at 896.

\textsuperscript{201} See Clinton, There Is No Federal Supremacy Clause, supra note 56, at 214; Pommersheim, supra note 25, at 328; Prakash, supra note 9, at 1070–71.
law fills the gap. These commentators suggest further that federal common law itself is possibly an impermissible infringement on state law.

Perhaps the best example of how the Supreme Court has asserted this plenary power is the case of County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation. That decision held that lands alienated under an allotment statute, but reacquired by the tribe or individual Indians, were taxable by the state. The Court began by noting that the federal Indian policy at the time the lands had been alienated was "to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." The Court then stated that the federal Indian policy changed in 1934 with the enactment of the IRA, with Congress "[r]eturning to the principles of tribal self-determination and self-governance which had characterized the pre-Dawes Act era." However, the Court pointed out that Congress did not enact legislation that would have reversed the damage done during the Allotment Era. The Yakima Nation argued that, while the allotment act opened the door to state taxation authority on alienated lands, the IRA—and later, the codified Indian Country definitional statute—closed that door. The Court rejected this argument, relying on judge-made law in other contexts; namely that implied repeals

203. See, e.g., id.
205. See id. at 270.
206. Id. at 254 (citing In re Heff, 197 U.S. 488, 499 (1905)).
207. Id. at 255.
208. See id. at 255-56 (citing Wilcomb E. Washburn, Red Man's Land/White Man's Law 145 (1971)).
210. As the Court noted, in enacting the IRA:
Congress halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands. In addition, the Act provided for restoring unallotted surplus Indian lands to tribal ownership, and for acquiring, on behalf of the tribes, lands "within or without existing reservations."
211. As the Court characterized the Nation's argument, "In 1948, for instance, Congress defined 'Indian country' to include all fee land within the boundaries of an existing reservation, whether or not held by an Indian, and pre-empted state criminal laws within 'Indian country' insofar as offenses by and against Indians were concerned." Id. at 260 (citing 18 U.S.C. §§ 1151-1153 (2000); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351 (1962)).
212. See id. at 259-60.
of federal statutes are not favored, and when two or more statutes are in apparent conflict but are capable of co-existence, the Court must regard both as effective. There was no federal statute that controlled the outcome of the case, but there was a definitive statement of federal Indian policy from Congress that the ravages of the Allotment Era should be stopped, and where possible, reversed. The Court disregarded federal Indian policy to reach an opposing outcome—one directly in favor of state governments and non-Indian landowners, the direct beneficiaries of the Allotment Era.

The Court even rejected (or, as Justice Blackmun stated, “misapplie[d]”) its own precedents. The Court’s precedents supported the Nation, requiring that Congress must make its intention to open Indian lands to state taxation “unmistakably clear.” Despite a forceful statement of federal Indian policy by Congress and strong Supreme Court precedent in favor of the tax immunity of Indian tribes, the Court authorized state taxation. The Court, in an almost arrogant challenge to Indian tribes and Congress, instructed the Nation to seek legislation from Congress to reverse the result; although, in fact, Congress had already legislated nearly sixty years before to abandon the Allotment Era.

The County of Yakima opinion is merely one case that typifies Rehnquist Court Indian cases where the Court asserts a plenary policymaking power. The elements of these cases usually run along these lines: (1) the subject matter is outside the scope of the limited terms of the Indian Commerce Clause; (2) the Court must choose between two or more competing interests—typically federal, tribal, state, and individual; and (3) no statute controls the outcome. The Court’s judge-made doctrines at issue in these sorts of cases often are the doctrines of implicit divestiture of tribal inherent authority, and the plenary and exclusive power of Congress to legislate in the area of Indian affairs, as discussed below.

213. See id. at 262 (quoting Posadas v. Nat’l City Bank, 296 U.S. 497, 503 (1936)).
215. Id. at 270 (Blackmun, J., concurring in part and dissenting in part).
217. See id. at 265.
218. See 25 U.S.C. § 461 (2000) (“On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.”).
A. The Court Doubts the Inherent Sovereign Powers of Indian Tribes and Expands the Doctrine of Implicit Divestiture

Felix S. Cohen famously described the formulation that federal courts had announced in decades of cases—acquiesced to by Congress and the Executive—that Indian tribes retained the inherent powers of sovereignty that they possessed since time immemorial except those the tribes had agreed to release through treaties and other agreements, or those Congress explicitly divested from the tribes via legislation. Cohen’s statement was accurate at that time except for one glaring omission: The very first Indian case the Court decided in 1823, Johnson v. McIntosh, was a case of implicit divestiture. There, the Court held that Indian tribes had been divested of the right to alienate their land to any person or entity except the conquering sovereign. Cohen’s statement was perhaps an accurate statement of normative federal Indian law, but Johnson illustrates that the very foundation of federal Indian law is based on the notion of implicit divestiture of inherent tribal sovereignty. Implicit divestiture, a notion that has been criticized by commentators, is the doctrine whereby an Indian tribe might lose an aspect of its inherent sovereign authority without either an act of Congress or a treaty expressing that divestiture.

219. Cohen’s exact statement was this: “[T]hose powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.” Cohen’s Handbook 1st Ed., supra note 77, at 122.

220. 21 U.S. 543 (1823).

221. See id. at 604–05.


224. See, e.g., Nevada v. Hicks, 533 U.S. 353 (2001) (deciding that Indian tribes do not possess civil adjudicatory jurisdiction over nonmembers except in very narrow circumstances); Strate v. A-I Contractors, 520 U.S. 438 (1997) (same); Duro v. Reina, 495 U.S 676 (1990) (deciding that Indian tribes do not possess the author-
Cohen’s statement, however, was influential on federal courts and was even quoted, in part, by the Court in *United States v. Wheeler*, and virtually adopted in toto by *Merrion v. Jicarilla Apache Tribe*. In *Wheeler*, the Court stated, “The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.” The Court in *Wheeler*, however, had to acknowledge that less than a month earlier it had just held, through use of the implicit-divestiture doctrine, that Indian tribes had no authority to prosecute non-Indians. The Court in *Merrion* seemed to overtly reject the implicit-divestiture doctrine once and for all. In *Merrion*, the Court first quoted a Senate report from 1879 presaging the Cohen formulation: “We have considered [Indian tribes] as invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress.” Citing *Wheeler*, the Court then stated, “Only the Federal Government may limit a tribe’s exercise of its sovereign authority.” This is consistent with the Cohen formulation that only Congress, through legislation, or the Executive Branch, in negotiating a treaty or other agreement, can divest an Indian tribe of inherent sovereignty, but it does not exclude the federal courts. When confronted with the argument that the tribe in *Merrion* had been implicitly divested of its inherent power, the Court, following the above-stated rule, looked only to the acts of Congress. Upon finding no act of Congress divesting the tribe of its relevant inherent authority, the Court concluded that there had been no divestiture. In fact, the Court declared in a footnote, “Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence... is that the sovereign power... remains intact.” At the conclusion of the majority opinion, the Court stated, “[T]he Tribe may enforce its severance tax unless and until Congress divests this power,
an action that Congress has not taken to date." Affirming the adoption of the Cohen formulation in *Merrion*, the Court stated in *Iowa Mutual Insurance Co. v. LaPlante*, "Civil jurisdiction over [the activities of non-Indians on reservation land] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." It appears that, with *Merrion*, followed by *Iowa Mutual*, the Court had chosen to restrict—if not eliminate altogether—its implicit-divestiture doctrine. However, given that *Wheeler* was decided at the same time as *Oliphant v. Suquamish Indian Tribe*, the first shocking implicit-divestiture decision of the modern era, and given further that *Merrion* has been virtually ignored by the Court since its filing and the statement in *Iowa Mutual* was explicitly discredited by the Court, it is safe to say that Cohen's normative statement is only part of the law.

Even the Court is uncertain or unclear on when the implicit-divestiture doctrine applies. Borrowing from the notion in *Cherokee Nation v. Georgia* that Indian tribes are "domestic dependent nations," a formulation necessary for Chief Justice Marshall to reach his conclusions in the Marshall Trilogy, the Court now holds that Indian tribes do not retain authority "inconsistent with their [dependent status]." But in 1980, the Court decided the landmark Indian taxation case *Washington v. Confederated Tribes of Colville Indian Reservation*, noting:

234. *Id.* at 159 (emphasis added).
236. *Id.* at 18 (citing *Merrion*, 455 U.S. at 148 n.14; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978)).
237. *See* *Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (referring to *Merrion* as a "minor exception").
238. *See* *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) ("[T]he statement stands for nothing more than the unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, 'civil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'" (quoting *Iowa Mutual*, 480 U.S. at 18)). But see *Hicks*, 533 U.S. at 358 n.2 ("Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general.").
239. 30 U.S. 1 (1831).
240. *Id.* at 17.
Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights.\textsuperscript{244}

In \textit{Colville}, the Court concluded that Indian tribes could be implicitly divested of their inherent authority only when the exercise of that authority is inconsistent with the overriding interests of the national government. If we take \textit{Johnson} as an example of a case where the Court had no choice but to validate the actions of the young American government, as some have,\textsuperscript{245} then one can make the argument that \textit{Johnson} is an example of implicit divestiture under the consistent-with-overriding-national-interest test.

But the more recent cases, \textit{Hicks} among them, have restated that rule much more expansively from a consistent-with-overriding-national-interest test to consistency with a tribe's dependent status. Considering that Congress has frequently declared tribal-court jurisdiction and tribal-government development to be consistent with national interest,\textsuperscript{246} and that Indian tribes are now less dependent on the federal government than in the last century or more, it makes no sense for the Court to adopt this new consistency-with-dependent-status test.

What authority is "inconsistent" with the status of Indian tribes as "dependent"? The Court and the Court alone decides what authority is inconsistent with the dependent status of Indian tribes. The Court has disregarded the Congress and Executive Branch statements of federal Indian policy in favor of its own policy choices.

\subsection*{B. The Court Doubts that Tribal Economic Development and Taxation Authority are Tribal Government Necessities}

The Rehnquist Court's preference for the authority of states and the rights of nonmembers in Indian Country becomes clearest in the context of taxation and regulation. The Warren Court's jurisprudence in this area generated the per se rule in \textit{Williams v. Lee}\textsuperscript{247} that Indians are free to make their own laws and be governed by them within Indian Country.\textsuperscript{248} Further, under \textit{Williams}, state laws that conflict

\begin{table}
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\textbf{244.} & \textit{Id.} at 153–54 (emphasis added). \\
\textbf{246.} & \textit{See supra} subsection II.B.3. \\
\textbf{248.} & \textit{See id.} at 220, 223. \\
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with this right to self-government are preempted by federal law. Unfortunately for those in favor of a bright-line rule, then-Justice Rehnquist opened the door to state authority in Indian Country by announcing a watering-down of the Williams test in Moe v. Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation.

In Moe, then-Justice Rehnquist wrote that an Indian retailer selling cigarettes to non-Indians free from state taxes was not free to, as he characterized it, "flout" state law in order to reap "the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation." The Court required Indian traders to collect state cigarette taxes from non-Indians for the first time in its history. The Court acknowledged that Congress had intended for Indians and Indian tribes to trade without the burden of state interference, but held that the interest extended only to trading between Indians.

The Court has taken then-Justice Rehnquist's concern about the alleged "competitive advantage" that Indian retailers might have and adopted a whole line of cases castigating Indians and Indian tribes for "marketing" an "exemption" from state taxation or regulation. In short, because the Court in Moe questioned the public policy of whether Indians and Indian tribes should be allowed to maintain a competitive advantage by marketing an exemption from state taxation and regulation, that suspicion has now become the law. Given that Congress was aware of cases such as Williams and Worcester that drew a wall around Indian Country keeping out state laws and did nothing, the Court by negative implication could easily have left Indians retailers alone. If Congress wanted to make a change, then the Court would wait until that day. But it chose to impose its own policy choice upon Indian retailers.

249. See id. at 220.
251. Id. at 482.
252. See id. at 483.
253. See id. at 482 (citing Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685, 686, 691 (1965)).
254. See id.
256. See Frickey, supra note 30, at 1157–58 (arguing that "negative inferences" are "weak" arguments).
The policy choices made by the Court have gone only one way since then: against tribal retailers. The question of competitive advantage does not work both ways. In *Cotton Petroleum Corp. v. New Mexico*, the Court held that states may tax the on-reservation business activities of non-Indian-owned businesses, even where the tribe was already imposing its own tax. This result was presaged by cases such as *Moe*, but the impact on Indian tribes has been nothing short of devastating. *Cotton Petroleum* authorized a system of double taxation that works to the extreme detriment of Indian tribes. Professor Philip Frickey noted that Congress had once authorized state taxation in this circumstance in 1927, but then repealed that law in favor of another in 1938, this time without language authorizing state taxation. Professor Frickey noted, "[A] good argument arises on the face of the statutes that Congress knew how to authorize state taxation and failed to do so." The Court could have noted these statutes and relied upon implicit congressional intent through negative implication, but it chose not to.

With the Court deciding that states were authorized to tax and regulate the activities of non-Indians in Indian Country—a clear reversal of congressional policy to the contrary—the Court opened the door to double-taxation and the evisceration of nascent tribal economies. This result conflicts with express federal Indian policy in favor of tribal self-sufficiency.

As noted earlier, the mass of the Rehnquist Court’s Indian cases are decided in accordance with federal common law. The Court’s doubts as to the constitutional authority for congressional plenary power, tribal inherent authority, and the contours of Indian Country supply a motivation to revisit each case reaching the Court anew. In short, the lack of constitutional grounding for federal Indian law opens the door to new Supreme Court precedent. Since nothing in the Constitution prevents or even discourages the Court from making pol-

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258. *See id.* at 173.
261. *Id.*
262. *See supra* subsection II.B.2.
policy choices, there is no respect for stare decisis in the Court's Indian cases.

A quick review of the cases discussed in this Article establishes a few of the Court's policy choices. First, the Court is suspicious of the authority asserted by Indian tribes over nonmembers. In line with its "states' rights" decisions, the Court tends to vacate tribal exercises of authority, either opening the door to state authority in Indian Country or purposefully leaving a vacuum for Congress to fill. Second, the Court has acted to protect the economic interests of non-Indians, non-Indian-owned companies, and the tax base of state and local governments—all at the direct expense of tribal economic and taxation interests. In Indian Country, the Court tends to draw the lines in terms of economic competition and fairness against Indians and Indian tribes.

It seems clear that Congress has strongly supported the exercise of tribal sovereign authority in regulatory, taxation, adjudicatory jurisdiction, and in tribal economic development through its legislative authority, but also in its authority to declare the federal Indian policy for the nation. But the Court does not weigh seriously the congressional statements of federal Indian policy in its decisions, choosing to apply its own policies and preferences. As Professor Joe Singer wrote:

"The Court is increasingly reluctant to recognize the special rights that go along with the special status of Indian nations. At the same time, the Court also often fails to accord Indian nations the same rights as others in cases where the tribes are indeed similarly situated to non-Indians."

IV. THE MIDDLE GROUND—PRECONSTITUTIONAL CONGRESSIONAL AUTHORITY OVER INDIAN AFFAIRS

Without a path to follow, the Supreme Court moves on as before. In the area of Indian law, the Court does not have policy guidance to follow that it trusts—that is, guidance from Congress—nor textual guidance from the Constitution. As Part IV demonstrates, the Court has taken the mantle of lead federal Indian policymaker, or as Profes-

263. See Aleinikoff, supra note 14, at 114–21; Frickey, supra note 199, at 45–46; Singer, supra note 36, at 666–67.
266. See, e.g., Atkinson Trading, 532 U.S. 645; Cotton Petrol., 490 U.S. 163; Confed. Tribes of the Colville Indian Reserv'n, 447 U.S. 134; Moe, 425 U.S. 463.
267. Singer, supra note 27, at 3.
sors Frank Pommersheim and Robert Clinton artfully noted, adopted the doctrine of "judicial plenary power."268

A. The Court Doubts the Existence of Congressional Plenary and Exclusive Power over Indian Affairs

The Justices on the Rehnquist Court were as focused on locating a source of textual support for the authority exercised by Congress as any Court in the history of Supreme Court jurisprudence.269 And where there is textual support for congressional action, the Rehnquist Court tended to read the language narrowly.270 Its most controversial cases relevant to this discussion are the cases relating to the Commerce Clause. For the first time since the Lochner-era Court, the Rehnquist Court invalidated acts of Congress as exceeding its authority under the Commerce Clause.271 The Court's decision in Seminole Tribe of Florida v. Florida,272 a watershed Eleventh Amendment decision in favor of states' rights, also foreshadowed the limits of the Indian Commerce Clause as a grant of authority to Congress.273

This development is critical to federal Indian policy because the sole source of explicit textual authority from which Congress may draw upon to legislate in the area of Indian affairs is the Indian Commerce Clause.274 In few (if any) other areas of federal policy is Congress so limited. For example, in the area of civil rights, by contrast, Congress may also draw upon its enforcement authority under Section 5 of the Fourteenth Amendment.275 The Constitution does not include a similarly broad grant of authority to Congress to legislate on Indian affairs.276

268. Clinton, There Is No Federal Supremacy Clause, supra note 56, at 214; Pommersheim, supra note 25, at 328; see also Frickey, (Native) American Exceptionalism, supra note 27, at 460 (noting that "some Justices . . . suggest that the Court, not Congress, should have the final say about some matters").
270. See generally Schwartz, supra note 57.
273. See Tushnet, supra note 6, at 52–53.
274. See U.S. Const. art I, § 8, cl. 3; Riley, supra note 143, at 205.
275. See U.S. Const. amend. XIV, § 5.
276. For more detailed discussion of the origins of the Indian Commerce Clause and its purpose, see Cleveland, supra note 56; Clinton, There Is No Federal Supremacy Clause, supra note 56; Clinton, The Dormant Indian Commerce Clause, supra note 64; Clinton, Redressing the Legacy of Conquest, supra note 56; N. Bruce Duthu, The Thurgood Marshall Papers and the Quest for a Principled Theory of Tribal Sovereignty: Fueling the Fires of Tribal/State Conflict, 21 VT. L. REV. 47 (1996); Martha A. Field, The Seminole Case, Federalism, and the Indian Commerce Clause, 29 ARIZ. ST. L.J. 29 (1997); Getches, Beyond Indian Law,
Ironically, despite the inherent limits of the text of the Indian Commerce Clause, the Court held for almost a century that Congress had unlimited and exclusive authority to determine federal Indian policy and law— and even the authority to regulate the internal affairs of Indian tribes. To this day, the federal courts continue to affirm that Congress has plenary and exclusive authority. The unlimited and absolute nature of this authority was moderated only by the imposition of a rational basis test in 1977. The plenary power of Congress in Indian affairs has generated an enormous amount of vociferous scholarly debate in the federal Indian law academic community, with the argument that Congress has no business regulating at least the internal affairs of Indian tribes being most popular.

It is now clear that many statutes contained in Title 25 rest on the plenary and exclusive authority of Congress to legislate in this area that the Court has always recognized. The Justices are not unaware of the precarious nature of congressional authority. Justice Thomas, for example, argued recently in United States v. Lara that congressional plenary power is a doctrine without firm textual footing.


280. See supra note 56.

281. See generally Morton, 417 U.S. at 552 (“Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.”); Williams v. Babbitt, 115 F.3d 657, 665 n.8 (9th Cir. 1997) (suggesting that Congress has a “compelling interest” in legislating for the benefit of Indian tribes).
and should be revisited. This debate is moving from the ivory tower to the Supreme Court—and in short order.

The Supreme Court has long recognized that the Indian Commerce Clause alone does not confer plenary power upon Congress. In the very first case in which the Court could be said to acknowledge congressional plenary power, United States v. Kagama, the Court explicitly stated that the grant of authority to Congress under the Indian Commerce Clause was insufficient to authorize the Major Crimes Act, which extended federal criminal jurisdiction into Indian Country. Nevertheless, the Court did find sufficient congressional authority in another source—Indian treaties. More specifically, because Indian tribes had sometimes given themselves up to the protection of the United States in treaties, the Court construed the word “protection” to mean “dependence.” It was the “dependence” of Indian tribes upon the federal government that authorized Congress to take this action. It is as if one tribe’s “dependence” amounted to all tribes’ dependence.

After Lone Wolf, the Court did not question congressional plenary power until the 1970s, asserting that the political-question doctrine

283. See 541 U.S. 193, 224, 226 (2004) (Thomas, J., concurring); see also id. at 219 (“The tribes, by contrast, are not part of this constitutional order, and their sovereignty is not guaranteed by it.”).
284. 118 U.S. 375 (1886).
285. Id. at 378–79 (“But we think it would be a very strained construction of [the Indian Commerce] Clause that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.”).
287. See Kagama, 118 U.S. at 383–84.
288. See id. at 384 (citing Worcester v. Georgia, 31 U.S. 515 (1832))). It is clear, however, that in Worcester, the Court construed the word “protection” as used in the Treaty of Hopewell. See Treaty of Hopewell with the Cherokee Nation art. III, 7 Stat. 18 (1785), reprinted in Clinton, Goldberg & Tsosie, supra note 5, at 5 (“The said Indians for themselves and their respective tribes and towns do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whatsoever.” (emphasis added))). In short, in that treaty, “protection” amounts to little more than a declaration of loyalty. The treaty went on, in Article 5, to also note that non-Indians who move onto Cherokee territory without their permission “forfeit the protection of the United States, and the Indians may punish him or not as they please.” This is prototype treaty language implementing “measured separatism,” as defined by Wilkinson. See supra note 71. This is not “dependence,” as the Kagama Court alleged, especially given that the Cherokee Nation had developed an extremely sophisticated government and was “dependent” on no one. See Getches, Wilkinson & Williams, supra note 1, at 96.
289. See Prakash, supra note 9, at 1071 (“To the ‘Courts of the conqueror,’ Indian tribes are all the same.” (quoting Johnson v. McIntosh, 21 U.S. 543, 588 (1823))).
precluded the Court from second-guessing the choices made by Congress and the Executive in federal Indian policy.290

B. A Preconstitutional Congressional Power to Legislate in Indian Affairs?

Since Kagama, the Court has not delved deeply into the sources of congressional authority over and with Indian tribes. The Court in United States v. Lara articulated for the first time a notion that congressional plenary and exclusive power over Indian affairs is authorized by "preconstitutional powers necessarily inherent in a Federal Government, namely, powers that this Court has described as 'necessary concomitants of nationality.'"291

For this proposition, the Court cited United States v. Curtiss-Wright Export Corp.292 The Court in Curtiss-Wright stated:

(T)he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.293

In Lara, the Court did not indulge in the formulism with which the Rehnquist Court has often resorted. But the problem is that the "preconstitutional" authority the Court recognized in Lara is therefore unlimited and unconstrained except by the Court itself. Nothing in the Constitution constrains Congress or the Court because there is nothing in the Constitution. The Court has extended to Congress, finally, a modern theory as to why the federal government has authority over Indian tribes, but in doing so it has also extended that power to itself. Professor Pommersheim's prediction or observation of a "judicial plenary power" appears to have found further hold in this notion of a "preconstitutional" power to deal with Indian tribes.

The result in Lara no doubt was a powerful victory for Indian tribes and the United States.294 The Court concluded that Congress does indeed have the power to ratchet up tribal inherent authority, recognizing congressional authority to reverse the Court's implicit-di-

290. See supra Part II.
292. 299 U.S. 304.
293. Id. at 318.
vestiture cases. But Congress essentially codified the implicit-divestiture doctrine in its *Duro* fix—and the Court approved that formulation. In short, there is no going back from implicit divestiture and perhaps Cohen's normative statement is a dead letter. And, as Professor Kevin Washburn stated, "Even though *Lara* was a victory in an immediate sense, it moves tribes further down a doctrinal dead end if the ultimate goal is a return to the constitutionally-envisioned role for Indian tribes."\(^{295}\)

The adoption and recognition of this "preconstitutional" federal government power is satisfactory for the time being. But with two new Justices heading to the Court and textualist Justices Scalia and Thomas doubting the existence of such a "preconstitutional" power, this doctrine might wither on the vine. Another theory is required.

V. CONSISTENT-WITH-FEDERAL-POLICY TEST

With several Justices questioning the foundations of federal Indian law and with new appointees heading to the Court, the time is ripe for a reconsideration of the Court's role as federal Indian policymaker. Other commentators have suggested massive changes in federal Indian law, including the following: a constitutional amendment protecting tribal sovereignty or explicitly providing for broad congressional authority;\(^{296}\) congressional legislation authorizing federal courts to provide a limited review of tribal court decisions;\(^{297}\) tribal or congressional legislation expanding nonmember political rights within Indian Country;\(^{298}\) a new paradigm of reviewing Indian cases;\(^{299}\) or either an act of Congress or a Supreme Court opinion finding that Indian tribes are simply no longer sovereign.\(^{300}\) The solution, however, must be one

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\(^{295}\) Washburn, *supra* note 56, at 43. *But see* United States v. Gregg, No. CR 04-30068, 2005 WL 1806345, at *1* (D.S.D. July 27, 2005) ("I reject the argument of defendant that *Morrison* and *Lopez* have by way of implication overruled the 'wards of the nation' holdings in a line of cases beginning with *United States v. Kagama.*" (citation omitted)).


\(^{298}\) See Skibine, *supra* note 36, at 34 (reporting a tribal attempt to lobby for a "Hicks fix").

\(^{299}\) See Frickey, *supra* note 30, at 1142; Washburn, *supra* note 56, at 43.

\(^{300}\) *Cf.* United States v. Lara, 541 U.S. 193, 226 (2004) (Thomas, J., concurring) ("We might find that the Federal Government cannot regulate the tribes through ordinary domestic legislation and simultaneously maintain that the tribes are sovereigns in any meaningful sense.").
This Article proposes something much simpler and more fair—the partial adoption of the test proposed by Justice Thomas in his concurrence in *United States v. Lara*—the consistent-with-federal-policy test. It would allow the Court to review exercises of inherent tribal authority with a semblance of consistency under a rubric of its own making.

A. Justice Thomas’s *Lara* Concurrence

*United States v. Lara* involved an appeal of a federal conviction of Billy Jo Lara for assaulting a federal law enforcement officer. Mr. Lara, a member of the Turtle Mountain Band of Chippewa Indians, had been excluded from the Spirit Lake Tribe’s reservation due to a series of domestic violence convictions. He returned to the Spirit Lake reservation and then assaulted an arresting officer who was cross-deputized as both a tribal and federal officer. After the tribe convicted Mr. Lara of assaulting the officer, the federal government prosecuted him for the same offense. Mr. Lara argued that the federal prosecution violated the Double Jeopardy Clause. Normally, concurrent tribal and federal prosecutions are not barred by the Double Jeopardy Clause under the dual-sovereignty exception. The Court had previously affirmed that Indian tribes had inherent authority to prosecute tribal members, but not non-Indians or people classified as “nonmember Indians.” Since Mr. Lara is a “nonmember Indian,” the Court would have held that the Spirit Lake Tribe had no inherent authority to prosecute him under *Duro v. Reina*.

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302. 541 U.S. 193.

303. See id. at 197.


305. See *Lara,* 541 U.S. at 196–97.

306. See id. at 197.

307. See id.


312. See id. However, as Justice Kennedy noted in his concurrence, Mr. Lara never appealed his tribal court conviction. See *Lara,* 541 U.S. at 214 (Kennedy, J., concurring).
However, Congress attempted to reverse (or at least rectify) *Duro* in 1991 by enacting amendments to the Indian Civil Rights Act that would "'recognize and affirm' in each tribe the 'inherent' tribal power (not delegated federal power) to prosecute nonmember Indians for misdemeanors."313 Lara’s argument was that once the Court made a determination that a tribe’s inherent authority had been implicitly divested, no act of Congress could reverse that determination.314 As such, the authority exercised by the Spirit Lake Tribe was *delegated* federal authority, not *inherent* tribal authority.315 A finding that Congress had merely delegated its authority to Indian tribes would make the federal prosecution unconstitutional under the Double Jeopardy Clause.

The real question in *Lara* was whether Congress could reverse a determination by the Court that a portion of tribal inherent authority had been implicitly divested by the Court through the re-affirmation of tribal inherent authority. The Court concluded that Congress could re-affirm that authority.316

*Lara* was a 7–2 decision, suggesting that it stands on firm precedential footing for the time being, even with two new Justices on the Court. But upon closer review, at least one of the Justices in the majority, Justice Kennedy, ruled on the narrow grounds that Mr. Lara had not appealed his tribal court conviction—a position to which Justice Thomas was sympathetic.317 Justice Kennedy, in particular, would have voted the other way if the matter had reached the Court upon direct appeal by Mr. Lara of his tribal court conviction.318

Justice Thomas questions whether Congress has plenary and exclusive authority over Indian affairs as opposed to the Executive

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313. *Lara*, 541 U.S. at 199 (citations and alterations omitted). This was known as the "Duro fix." See LaRock v. Wis. Dept. of Revenue, 621 N.W.2d 907, 914 (Wis. 2001); see generally Alex Tallchief Skibine, *Duro v. Reina and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. Cal. L. Rev. 767 (1993).

314. This is the holding of the Eighth Circuit sitting en banc. See United States v. Lara, 324 F.3d 635, 640–41 (8th Cir. 2003) (en banc).

315. See *id.* However, as noted by the Assistant United States Attorney who prosecuted the matter, Janice Morley, see Fletcher, *supra* note 294, at 26, the United States circumvented Mr. Lara’s strategy to rely on the Double Jeopardy Clause by arguing that the tribal conviction was either done through inherent tribal authority or was not valid at all. See Brief for the United States at 43–44, United States v. Lara, 541 U.S. 193 (2004) (No. 03-107), 2003 WL 22811829. In any event, Mr. Lara’s strategy would have resulted in the affirmation of his conviction regardless of whether the *Duro* fix was constitutional.

316. See *Lara*, 541 U.S. at 196.

317. See *id.* at 214 (Kennedy, J., concurring); *id.* at 217 n.1 (Thomas, J., concurring).

318. See *id.* at 211 (Kennedy, J. concurring) (calling "most doubtful" the court’s holding that "the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians").
FEDERAL INDIAN POLICY

Branch and, implicitly, the states. He questions whether Indian tribes retain any inherent sovereignty at all and questions Indian law decisions that tribes have held in reverence for decades, such as United States v. Wheeler. Given these breathtaking comments, it should be no surprise that Justice Thomas's concurrence has been addressed in numerous commentaries since its publication.

Nevertheless, contained within Justice Thomas's concurrence are the seeds for a very useful paradigm for the Court to use when analyzing its Indian law cases. For Justice Thomas, the cases underlying Lara—United States v. Wheeler and Duro v. Reina—"make clear that conflict with federal policy can operate to prohibit the exercise of [tribal inherent] sovereignty." In fact, Justice Thomas argues Oliphant v. Suquamish Indian Tribe is a case that exemplifies the Court's reliance on the "views of Congress and the Executive Branch." Oliphant and Duro are not cases about "inherent sovereignty"—they are "classic federal-common-law decisions" in which the Court must examine the underlying federal Indian policy. Justice Thomas, in a critical passage, points out that certain "authoritative pronouncements of the political branches make clear that the exercise of [inherent tribal] sovereignty is not inconsistent with federal policy." In other words, because Congress has no clear textual authority to limit or authorize the exercise of tribal inherent authority, the Court is left not to enforce or uphold the actual legislation, but the underlying federal Indian policy. As such, if the exercise of tribal inherent sovereignty conflicts with expressed federal Indian policy, only then would the Court invalidate exercises of tribal inherent sovereignty.

319. See id. at 218–19 (Thomas, J., concurring) ("But the States (unlike the tribes) are part of a constitutional framework that allocates sovereignty between the State and Federal Governments and specifically grants Congress authority to legislate with respect to them . . . ." (citing U.S. CONST., amend. XIV, § 5)).

320. See id. at 219 ("The tribes, by contrast, are not part of this constitutional order, and their sovereignty is not guaranteed by it.").

321. See id. at 215 ("I believe that the result in Wheeler is questionable.").


323. Lara, 541 U.S. at 220–21 (Thomas, J., concurring).

324. Id. at 221.

325. Id. at 220.

326. Id. at 222.
Justice Thomas explains that tribal inherent authority in Indian Country remains vested because, as "[p]urely 'internal' matters," they are "unlikely to implicate federal policy."\textsuperscript{327} In contrast, the exercise of tribal inherent sovereignty outside the borderlines of Indian Country and the exercise of tribal inherent sovereignty that affects non-members implicates federal Indian policy. In \textit{Lara}, Congress made a clear statement of federal Indian policy sufficient to satisfy Justice Thomas for the time being—"[s]pecifically, Congress ‘recognized and affirmed’ the existence of ‘inherent power . . . to exercise criminal jurisdiction over all Indians.’"\textsuperscript{328}

Justice Thomas, despite the thinly veiled warnings that he would vote to eradicate congressional acts in favor of tribal sovereignty if provided the opportunity (perhaps with a petitioner challenging the constitutionality of the Indian Civil Rights Act\textsuperscript{329}), acknowledges that federal Indian policy as articulated by Congress might be sufficient to permit tribes to exercise certain forms of inherent authority.

B. Explicit Federal Indian Policy Should Drive Federal Indian Common Law Relating to the Inherent Authority of Indian Tribes

Misgivings about the motivations of Justice Thomas aside, the consistent-with-federal-policy test provides an excellent avenue for restoring certainty and predictability in federal Indian law and re-establishes Congress as the primary federal Indian policymaker, relieving the Court of this burden and temptation. This test mostly avoids the problem of a lack of constitutional grounding for congressional authority in Indian affairs while respecting the intent of the Founders to provide exclusive authority to the federal government. Finally, the test provides the "fairly clean analytical structure"\textsuperscript{330} the Court has been seeking since the Marshall Trilogy itself.

Yet, Justice Thomas omits mention of examples of cases consistent with this test—\textit{Merrion v. Jicarilla Apache Tribe},\textsuperscript{331} \textit{New Mexico v. Mescalero Apache Tribe},\textsuperscript{332} and \textit{California v. Cabazon Band of Mission Indians}.\textsuperscript{333} \textit{Merrion} involved the inherent authority of Indian tribes to exercise the governmental power to tax—in that case, non-

\begin{itemize}
  \item \textsuperscript{327} \textit{Id.} at 221.
  \item \textsuperscript{328} \textit{Id.} at 222 (quoting 25 U.S.C. § 1301(2) (2000)).
  \item \textsuperscript{329} \textit{See} Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005) (rejecting challenge to the constitutionality of the prosecution of a nonmember Indian in accordance with the Indian Civil Rights Act); Morris v. Tanner, 288 F. Supp. 2d 1133 (D. Mont. 2003) (same).
  \item \textsuperscript{331} 455 U.S. 130 (1982).
  \item \textsuperscript{332} 462 U.S. 324 (1983).
  \item \textsuperscript{333} 480 U.S. 202 (1987).
\end{itemize}
Indian-owned businesses. The Court identified the relevant congressional federal Indian policy as "fostering tribal government" in concluding that "[i]t simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes." The 

Merrion Court also quoted from an 1879 Senate Judiciary Committee report that articulated the Committee's understanding that Indian tribes "undoubtedly" retain the inherent right to taxation.

The Mescalero Apache Court relied on the Executive Branch's actions as well as the explicit statements of federal Indian policy by Congress. That case decided that the State of New Mexico's attempt to enforce its hunting and fishing laws against individuals who engaged in those activities on tribal lands had been pre-empted by the operation of federal law. The Court noted that the economic development activities undertaken by the tribe had been financed and supported by federal agencies under federal law, such as the Indian Financing Act. The Court's analysis relied on congressional statements of federal Indian policy in favor of tribal self-governance and tribal economic development. Indeed, the Court concluded, as it had in earlier cases, that congressional federal Indian policy in favor of "tribal self-sufficiency and economic development" was "overriding."

In Cabazon Band the Court rejected the State of California's attempt to impose its laws and regulations relating to tribal high-stakes bingo. The Court relied on the statements of congressional federal Indian policy, noted in the Mescalero Apache decision, that Congress's
interest in encouraging “tribal self-sufficiency and economic develop-
ment” was “overriding.” Moreover, the Court relied on the fact that
the Executive Branch had encouraged and even assisted Indian tribes
in developing gaming operations for economic development purposes.

Merrion, Mescalero Apache, and Cabazon Band took seriously ex-
plicit congressional statements of federal Indian policy and Executive
Branch actions in concluding that the exercise of tribal inherent au-
thority was consistent with federal Indian policy. Under such a test,
congressional federal Indian policy permits Indian tribes to regulate
nonmembers. The Court reached its holding utilizing an analysis con-
ductive to Justice Thomas’s proposal to rely on statements of congress-
sional policy. The following subsections take up Justice Thomas’s
suggestion to revisit critical federal Indian law cases by applying
the consistent-with-federal-policy test.

1. Revisiting Hicks and Its “Open” Question

In Nevada v. Hicks, the Supreme Court held that tribal courts
do not have jurisdiction over a civil suit brought by a tribal member
against a state officer for actions taken on Indian lands. That deci-
sion has been subject to intense scholarly criticism, but not on the
question of whether the Court complied with explicit statements of
federal Indian policy. In fact, the majority opinion in Hicks did not
discuss federal Indian policy at all.

If one were to analyze the decision in Hicks under the consistent-
with-federal-policy test, one would ask if Congress stated a policy that
would permit an Indian tribe to exercise civil jurisdiction over a state
officer. The place to start is the Tribal Justice Act. Subsections 4
through 6 of Congress’s statement of federal Indian policy contained
in the Act support the view that Indian tribes have inherent civil adju-

343. Id. at 216 & n.19 (citing New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335 n.17 (1983)).
344. See id. at 217–18.
347. Id. at 374.
dicatory authority over all nonmembers. Subsection 5, in particular, states that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments." There is a strong argument that the State of Nevada's contention that tribal courts can never have jurisdiction over its officers—even for alleged civil rights violations against tribal members that occur on Indian lands—directly implicates the political integrity of the tribe. Applying the consistent-with-federal-policy test, there would be ample authority to support a conclusion that Congress would permit an Indian tribe to civilly adjudicate a state official in such circumstances.

In addition, Justice Scalia's concern about the state's interest in preventing Indian reservations from "becoming an asylum for fugitives from justice" is a question for Congress. As has been repeated numerous times in this Article, it is not for the Court to make federal Indian policy. Congress can hold the requisite hearings, take the necessary testimony, and admit the documentary and statistical evidence to prove whether or not Indian Country is truly becoming an asylum for fugitives from justice. That is the function of Congress.

Hicks left open the question of whether Indian tribes may assert civil adjudicatory jurisdiction over nonmembers who are not state officials. This would be an easier analysis because the state interest in law enforcement is not present. Again, applying the consistent-with-federal-policy analysis, a court would conclude that Congress's explicit policy statements favoring tribal court development and jurisdiction and tribal self-governance in general would mandate a conclusion that no federal Indian policy exists that would warrant the divestiture of tribal court jurisdiction.

350. See id. § 3601(4)-(6).
351. Id. § 3601(5) (emphasis added).
352. Cf. Nevada v. Hicks, 533 U.S. 353, 395–96 (2001) (O'Connor, J., concurring) ("The actions of state officials on tribal land in some instances may affect tribal sovereign interests to a greater, not lesser, degree than the actions of private parties. In this case, for example, it is alleged that state officers, who gained access to Hicks' property by virtue of their authority as state actors, exceeded the scope of the search warrants and damaged Hicks' personal property.").

This is not a hypothetical concern. In the years since Hicks, state officials have taken violent law enforcement actions against Indians and Indian tribes on trust lands. See Fletcher, supra note 14, at 1–4 (discussing Rhode Island law enforcement officials' raid on a Narragansett Indian Tribe's smokeshop); Fletcher, supra note 126, at 799–800 (discussing raids by the States of Washington and Kansas on tribal lands, and planned invasion of the Seneca Nation by the State of New York).

353. See Hicks, 533 U.S. at 364 (quoting Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 533 (1885)).
354. See id. at 358 n.2 ("Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general.").
2. Revisiting Atkinson Trading

In *Atkinson Trading Co. v. Shirley*, the Court held that Indian tribes may not tax non-Indian-owned businesses located on non-Indian lands within the Navajo Nation Reservation. The Court applied the famous Montana rule derived from its *Montana v. United States* decision. The Montana rule is that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." There are two exceptions, known as Montana 1 and Montana 2. Montana 1 provides that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Montana 2 provides that "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." To date, the Court has yet to find any circumstances that meet either of these two exceptions.

In 1982, the Court decided that Indian tribes retain the power to tax nonmembers as a portion of their retained inherent authority. In 1985, the Court further affirmed the inherent authority of Indian tribes to tax nonmembers. The only distinction relevant to the Court between those cases and *Atkinson Trading* was that the activities of the petitioners seeking immunity from Navajo taxation were located on non-Indian-owned land.

The *Atkinson Trading* Court did not engage in a discussion of explicit federal Indian policy relating to tribal taxation or economic development. As noted earlier in the discussion about *Merrion*, which discussed federal Indian policy at length, tribal taxation is necessary to "foster[] tribal self-government." Unlike *Hicks*, there was not

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356. Id. at 659.
357. Id. at 647.
359. Id. at 565.
360. Id. (citations omitted).
361. Id. at 566 (citations omitted).
363. See *Merrion*, 455 U.S. at 137.
366. See supra section V.B.
even an argument about a state or other competing interest in *Atkinson Trading*. Indeed, Arizona likely did not tax these properties at all.368

Federal Indian policy supported the exercise of the tribal tax in *Atkinson Trading*; indeed, it actively supported it. Since *Merrick*, Congress has spoken twice on the subject of tribal economic development and tribal government self-sufficiency. In the Tribal Tax Status Act, Congress stated that its intent was to "create the development environment necessary for true economic and social self-sufficiency."369 And in the Indian Gaming Regulatory Act, Congress stated that its intent was to contribute to its own policy of "promoting tribal economic development, self-sufficiency, and strong tribal governments."370 Without the authority to tax, tribes cannot become self-sufficient. As part of its federal Indian policy, Congress permits tribes to tax nonmembers located within Indian Country. The consistent-with-federal-policy test may require the Court to reconsider the Montana rule and the two exceptions, or not, but the Court's resolve to never find a circumstance where either exception applies must change.

3. The Trickier Case—Revisiting Oliphant

Like *Hicks*, *Oliphant* has been criticized by Indian law scholars.371 *Oliphant* involved a pair of petty criminals who were non-Indians arrested by the Suquamish tribal police during the Suquamish Tribe's annual Chief Seattle Days.372 The Court had no direct precedent on the matter, so it relied upon a collection of odds and ends of federal Indian legal authority373 to reach a conclusion that Indian tribes are


373. *See id.* at 197 (discussing pre-Civil War treaties with the Shawnee and Choctaw tribes); *id.* at 199 (citing 2 Op. Att'y Gen. 693 (1834); 7 Op. Att'y Gen. 174 (1855)); *id.* at 199–200 (citing *Ex parte* Kenyon, 14 F. 353 (W.D. Ark. 1878)). Most notorious was then-Justice Rehnquist's citation to a Solicitor's Opinion that had been
no longer possessed of the inherent authority to prosecute non-
Indians.\(^\text{374}\)

A few weeks later, the Court decided in *United States v. Wheeler*\(^\text{375}\) that Indian tribes possess the authority to prosecute their own mem-
bers. Regarding the tribal criminal jurisdiction cases, Justice Thomas
made clear that he believed “that the result in Wheeler is questiona-
ble.”\(^\text{376}\) However, Justice Thomas also goes on to agree that “[p]urely internal matters are by definition unlikely to implicate any federal
policy.”\(^\text{377}\) *Wheeler* is not the most difficult case to be revisited under
the consistent-with-federal-policy test. That case concerned the criminal
prosecution of tribal members by Indian tribes, an internal matter
to be sure.\(^\text{378}\) The more difficult case is, by far, *Oliphant v. Suquam-
ish Indian Tribe*, a case where an Indian tribe attempted to prosecute
a non-Indian. Indeed, Justice Thomas pointed to *Oliphant* as an ex-
ample of the Court’s previous successful application of the consistent-
with-federal-policy test.\(^\text{379}\)

However, one would be mistaken to hold out *Oliphant* as a success-
ful example of the application of a consistent-with-federal-policy test.
Justice Thomas noted in *Lara*, “[T]he Court in *Oliphant* carefully ex-
amined the views of Congress and the Executive Branch.”\(^\text{380}\) But, as
scholars have noted, all then-Justice Rehnquist concluded—in Justice
Thomas’s words, after “discussing treaties, statutes, and views of the
Executive Branch [and] discussing Attorney General opinions”\(^\text{381}\)—
was that there had been an “unspoken assumption” that the federal
government believed that Indian tribes did not possess criminal jurisdic-
tion over non-Indians.\(^\text{382}\) For all of the Court’s looking, it didn’t find
any explicit statement of federal Indian policy.

Applying the test, what federal Indian policy does apply? By nega-
tive implication,\(^\text{383}\) at least, the *Duro* fix\(^\text{384}\)—the congressional over-
ruling of *Duro v. Reina* that held tribes have no inherent power to
prosecute nonmember Indians\(^\text{385}\)—suggests that Congress has in-
tended for tribes to possess inherent authority to punish nonmembers
Indians and members only, and not non-Indians. But *Duro* presup-
withdrawn by the Department of Interior. *See id.* at 201 & n.11 (citing Criminal
Jurisdiction of Indian Tribes over Non-Indians, 77 Interior Dec. 113 (1970)).

\(^{374}\) *See id.* at 209–12.

\(^{375}\) 435 U.S. 313 (1978).


\(^{377}\) *Id.* at 221.

\(^{378}\) *See, e.g.*, *Ex parte Crow Dog*, 109 U.S. 556 (1883).

\(^{379}\) *See Lara*, 541 U.S. at 221 (Thomas, J., concurring).

\(^{380}\) *See id.*

\(^{381}\) *Id.*


\(^{383}\) *But see* Frickey, *supra* note 30, at 1157–58.


poses that tribes do not already possess the inherent power to prosecute non-Indians. What about Oliphant in the first instance?

The analysis under the consistent-with-federal-policy test contains a bright-line rule in case of pure congressional silence. It is, in essence, a return to the Cohen formulation. We know that Congress had never spoken in statutory form about the inherent authority of tribes to prosecute non-Indians or else the Court would not have adopted the "unspoken assumption" formulation.\textsuperscript{386} And the test posits that where Congress has not spoken, then nothing prohibits the exercise of tribal inherent authority. Under this test, the Court decided Oliphant wrongly.

C. The Act of 1871 and "Residual Sovereignty"

Justice Thomas would part ways with the consistent-with-federal-policy test proposed by this Article because of the default rule in cases where Congress is silent. He certainly approves of the way Oliphant was decided,\textsuperscript{387} but he also seriously doubts that there can be residual inherent tribal authority at all.\textsuperscript{388} Justice Thomas and others suspicious of tribal sovereignty should not be suspicious of the shifting of the default rule contained in the consistent-with-federal-policy test. In fact, as noted earlier, the Court's implicit-divestiture doctrine contained a similar limitation before the Rehnquist Court shifted the rule.\textsuperscript{389} At one time, the doctrine of implicit divestiture read like this: If an \textit{overriding national concern} compels it, an aspect of an Indian tribe's inherent sovereignty can be implicitly divested.\textsuperscript{390} The Rehnquist Court wrote the rule like this: If a power is \textit{inconsistent with a tribe's dependent status}, then that aspect of inherent sovereignty can be implicitly divested.\textsuperscript{391} The Court has changed its threshold from one of "overriding national interest" to "inconsistent with dependent status." These are not synonymous. The Court has much more leeway to decide that a power is inconsistent with its dependent status than if it were deciding whether a power is inconsistent with the national interest. Changing the test smacks of writing the law to reach a particular result. The consistent-with-federal-policy test would relieve the Court of its policymaking and policy-deciding burden.

Justice Thomas also admits that he reads more into the Act of 1871 than one that merely "purported to prohibit entering into treaties with

\textsuperscript{386} See Oliphant, 435 U.S. at 203.
\textsuperscript{387} See Lara, 541 U.S. at 221 (Thomas, J., concurring).
\textsuperscript{388} See id. at 219.
\textsuperscript{389} See section III.A.
the 'Indian nation[s] or tribe[s].'" Ignoring that federal Indian policy now supports tribal sovereignty, Justice Thomas argues that perhaps "federal policy [as articulated by the 1871 Act] itself could be thought to be inconsistent with this residual-sovereignty theory." For Justice Thomas, the 1871 Act "reflects the view of the political branches that the tribes had become a purely domestic matter." Since Indian tribes most definitely maintain inherent sovereignty supported by federal Indian policy, the only way Justice Thomas's argument makes sense is if one agrees to a more fundamental argument he makes: "The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic regulation and also maintain that the tribes possess anything resembling 'sovereignty.'"

But here, Justice Thomas overstates his case and ignores a basic tenet of current federal Indian policy. Not only does the federal government not choose to regulate "virtually every aspect of the tribes," it has expressly disclaimed its intention to do so by adopting clear and unambiguous statements of federal Indian policy supporting tribal self-determination.

Justice Thomas's arguments evidence a deeper symptom of judicial arrogance—Justice Thomas simply does not believe that Indian tribes should retain any sovereignty at all. It does not matter to him that Congress has chosen for the United States to support tribal sovereignty. It also does not matter to him that the Executive Branch executes the wishes of Congress. The open question for tribes in this dangerous time is: How many other Justices think the same way as Justice Thomas? All he needs are four votes. He may already have some of them.

Until the Court steps back from the role of plenary federal Indian policymaker, a role that violates the basic precepts of the Constitution's system of separation of powers, it will continue to remain a dangerous time for Indian tribes.

393. *Id*.
394. *Id*.
395. *Id* at 225.
396. Professor Frickey suggested that some Justices have a "sense that Congress has failed to step in and fix a myriad of festering local problems by eliminating tribal authority." Frickey, *Native* American Exceptionalism, *supra* note 27, at 460.
397. See *Laurence*, *supra* note 322, at 151–53 (discussing Justice Scalia's view of tribal sovereignty).
D. The Limitations of the Consistent-with-Federal-Policy Test

As noted at the beginning of this Article, Congress is slow in reacting to the rapid changes in federal Indian law and the advances made by progressive Indian tribes. There may be circumstances where an Indian tribe takes action in accordance with its inherent authority that Congress or other branches of the federal government have not considered. For example, Indian tribes are beginning to exercise criminal jurisdiction over non-Indian aliens\(^{398}\) and exercising civil contempt authority in order to jail non-Indians.\(^{399}\) Indian tribes might also begin exercising civil forfeiture against non-Indians or prosecute non-Indians using a civil infractions system.\(^{400}\) No branch of the federal government is ready to opine on these issues.

And the federal government doesn’t need to say anything. Under the consistent-with-federal-policy test as envisioned here, congressional silence means a reversion back to the Cohen formulation whereby Indian tribes retain inherent authority absent congressional expression. Unless Congress speaks to these issues, Indian tribes retain those authorities.

Another more critical issue is whether Congress will continue to support tribal self-determination. It was not so long ago that the will of Congress was to terminate Indian nations rather than develop them.\(^{401}\) In that case, tribes would begin to rely more on the federal courts for relief from the changing political winds. One may question how the Court is to view the actions of Indian tribes where current legal trends, based on old federal Indian policy or common law, would likely foreclose tribal authority or immunity. For example, in 1960—near the end of the Termination Era—the Court decided \textit{Federal Power Commission v. Tuscarora Indian Nation}.\(^{402}\) Based on dicta in that decision,\(^{403}\) most federal circuits have decided that federal employment laws of general applicability will apply to Indian tribes un-

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399. See Order of Contempt, Bear Soldier Dist. v. Bear Soldier Indus. (Standing Rock Sioux Tribal Ct. Aug. 18, 2004) (on file with author); \textit{Introduction to Tribal Legal Studies}, \textit{supra} note 144, at 156 (quoting Jerry Gardner, \textit{Tribal Law and Policy Institute, Tribal Efforts to Address Problems Presented by the Lack of Tribal Criminal Jurisdiction} (1997)).
400. See \textit{Introduction to Tribal Legal Studies}, \textit{supra} note 144, at 155–56 (quoting Gardner, \textit{supra} note 399).
401. See \textit{supra} section II.A.
403. See \textit{id.} at 116 ("[A] general statute in terms applying to all persons includes Indians and their property interests.").
less certain narrow exceptions are met. Should federal courts applying the new test construe the dicta from Tuscarora consistent with federal Indian policy of the 1960s or from the twenty-first century? As a result, is a federal statute's meaning changed because of a new direction in the political winds?

The answer to this concern is not simple. It is similar to the revisitation of the Oliphant case discussed above. Many times, but not all, the consistent-with-federal-policy test's default rule—the silence of Congress operates to allow the Indian tribe’s exercise of inherent authority—will answer this concern. But Congress is a fickle creature, and Indian tribes should remain absolutely vigilant to prevent another termination or assimilationist era.

E. Concerning the Sovereignty of Indian Nations

Finally, Indian advocates may object to a proposal that results in the acknowledgment that Indian tribes could be divested of inherent authority without tribal consent. As Justice Thomas himself noted, “The tribes either are or are not separate sovereigns . . . .” Some scholars have long argued that Felix Cohen’s 1941 formulation and its affirmation—that Indian tribes could be divested of inherent tribal sovereignty by Congress—was yet another colonialist formulation. These scholars also suggest that Cohen’s formulation, later adopted by the Court in cases such as United States v. Wheeler and approved of in later editions of his Handbook, should be rejected in favor of a rule that Indian tribes can be divested of authority only if they explicitly agree. But, we must also acknowledge that tribal advocates have for decades argued in support of Cohen’s formulation—and more importantly, it is a much better formulation than allowing the Court to give in to its temptation to implicitly divest Indian tribes of their inherent authority. Moreover, Indian tribes have been successful of late in Congress, helping to defeat the worst of anti-tribal legislation proposed in the last few decades.

404. See Singel, supra note 12, at 695.
407. See id. at 801-02.
408. See id. at 803-04.
Adopting the consistent-with-federal-policy test could create a useful convergence of Indian law scholarship and Justice Thomas's conservatism. While Justice Thomas relied on the 1871 Act as evidence that perhaps no residual tribal sovereignty remains, he also asserts that the Act is "constitutionally suspect." Perhaps Justice Thomas suspects that Congress does not have the authority to take that action, a position Indian law scholars have long taken. In fact, numerous Indian law scholars have long argued that Congress does not have authority to legislate on the internal affairs of sovereign tribal governments. These Indian law scholars and Justice Thomas would agree that the Act, which, as Professor Sarah Cleveland stated, "essentially stripped the Indians of any future treatying capacity [without tribal consent]," is unconstitutional. Indeed, Justice Thomas also doubts that Congress has authority to regulate the internal affairs of Indian tribes. Given the adoption of the consistent-with-federal-policy test, the work of these Indian law scholars provides a detailed and well-researched foundation for Supreme Court analysis.

It is without question a major gamble to place so much faith in Congress given the way the political winds can change direction so

410. Lara, 541 U.S. at 218 (Thomas, J., concurring).
411. As Professor Clinton wrote:

While the constitutionality of the 1871 federal statute ending Indian treaty-making has never been questioned, there are significant reasons to question the constitutionality of the statute ending Indian treaty-making. First, the statute purported to prohibit the exercise of the treaty-making power which, under Article I of the Constitution, is allocated to the President of the United States. A federal statute prohibiting the President from exercising one of his constitutionally assigned duties seems to pose significant separation of powers problems, even if the Senate ultimately must ratify negotiated treaties. Second, while not expressed on the face of the statute, by effectively converting the presidentially initiated treaty-making process into a legislative process, the 1871 statute might be thought to aggrandize congressional power at the expense of the executive branch, thereby posing a different separation of powers concern. Third, by effectively substituting a process of statutory approval of Indian agreements for the Senate treaty ratification process prescribed in Article II, Congress has, by statute, attempted to amend the constitutionally prescribed Congressional process for treaty approval.

Clinton, There Is No Federal Supremacy Clause, supra note 56, at 168–69 (footnotes omitted). See also Prakash, supra note 9, at 1102 n.206.
412. E.g., Clinton, There Is No Federal Supremacy Clause, supra note 56, at 118 ("[T]here is no federal supremacy clause for Indian tribes and that any federal legislative activity that might affect Indian tribes or their lands requires their formal consent, through treaty or analogous procedure."); Robert Odawi Porter, The Inapplicability of American Law to the Indian Nations, 89 Iowa L. Rev. 1595 (2004); Porter, supra note 9, at 950–53; Singer, supra note 56, at 43; Skibine, supra note 36, at 45.
413. Cleveland, supra note 56, at 50.
414. See Lara, 541 U.S. at 226 (Thomas, J., concurring) (encouraging the Court "to ask . . . whether Congress . . . has th[e] power [to adjust tribal sovereignty]").
quickly. It is also dangerous to advocate for the federal courts to read these political winds. In discussing Professor Frickey’s recent suggestion that the Court should learn to live with ambiguity,415 Professor Singer worried that such an “approach to Indian law may be helpful to Indian nations, but, applied in the wrong way and with the wrong values, it could erode tribal rights and powers even further.”416 The consistent-with-federal-policy test may suffer from the same weakness. But the road Indian tribes are walking right now leads to legal and political extinction. Justice Thomas is the origin of this proposal, but he has also opened a door that might not be shut any time soon, a door that leads to the end of this business we call federal Indian law.

Gerald Vizenor has written and spoken of the compromises made by Indians and Indian tribes as a question of “survivance.”417 Tribes that agreed to Christianize in exchange for not being forcibly removed, according to Vizenor, have committed an act of survivance.418 Indians that gave up their language in exchange for not being beaten or killed committed an act of survivance.419 Tribes that agreed to cede most of their territory in exchange for protection from non-Indian predators and state governments committed acts of survivance.420 Tribes that opened their reservation borders to non-Indian gaming management companies and non-Indian gamers in exchange for revenue that pays for government services have committed acts of survivance.421 Indian poets and novelists who write about the horrors of growing up on devastated reservations commit acts of survivance.422

415. See Frickey, (Native) American Exceptionalism, supra note 27, at 487–89.
416. Singer, supra note 27, at 3.
421. See, e.g., N. SCOTT MOMADAY, HOUSE MADE OF DAWN (1968); SIMON J. ORTIZ, FROM SAND CREEK: RISING IN THIS HEART WHICH IS OUR AMERICA (1981); LESLIE
Advocating for adoption of the consistent-with-federal-policy test is also an act of survivance. If the choice is between heading toward legal and political extinction and adopting a legal doctrine that gives Indian tribes a fighting chance, then perhaps there is no choice.