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TRIBAL REVESTITURE

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ESSAY

Tribal Revestiture

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I. Implicit Divestiture Presumes Cultural Incompatibility

Tribes have a precarious political posture in relation to the United States. Tribes are distinctly sovereign and extra-constitutional,¹ but are also without meaningful external infrastructure to define and protect their legal status in relation to the United States.² That is, the U.S. recognizes Tribes as “domestic dependent nations,”³ but can, at any moment pursuant to their plenary power over Indian affairs, unilaterally alter or even destroy that status.⁴ Tribes

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1. See *Talton v. Mayes*, 163 U.S. 376, 380 (1896) (holding the Fifth Amendment grand jury requirement does not apply to Tribal governments and thus reaffirming that Tribes are extra-constitutional—that is, outside the U.S. Constitutional framework).
2. See Elizabeth Hildago Reese, *Tribal Representation and Assimilative Colonialism*, 76 STAN. L. REV. 771, 822 (2024) (“Without stronger representation for tribal citizens, when Congress exercises plenary power over them, its actions do not appear to be an exercise of democratic self-governance but of colonial rule.”).
3. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). See also *id.* at 21 (“I cannot but think that there are strong reasons for doubting the applicability of the epithet *state*, to a people so low in the grade of organized society as our Indian tribes most generally are.”).
4. The federal government’s “plenary power” to regulate the federal-Tribal relationship refers to the authority of the federal government—exclusive of the states—to regulate the federal-Tribal relationship. That power traces to the Indian Commerce Clause. See U.S. CONST. art. I, § 8, cl. 3 (“Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”); see also *Brackeen v. Haaland*, 599 U.S. 255, 273 (2023) (describing Congressional power to legislate with respect to the Indian tribes as “plenary and exclusive” and “muscular, superseding both tribal and state authority”). The plenary power doctrine also seems to

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consequently have an unsteady future as they are dependent upon the U.S.'s good favor. Historically, such unsteadiness has resulted in both threats of diminished Tribal sovereign authority as well as sovereign encroachments of state authority.⁵ So what shall the future entail? Are Tribes intended to decay and eventually be absorbed into the states in which they reside? Are Tribes intended to "graduate" into the sovereign equivalent of a state, with representation in Congress?⁶ Both these options presume amalgamation with the American polity. Alternatively, perhaps Tribes are intended to retain their status quo—that is, exist as politically distinct sovereign entities, but under the plenary thumb of the United States. For Tribes, it is probable that all three options reflect only the western gaze's vision for Tribes and their sovereign potential in relation to the United States. A forth option, centered in the Tribe, lingers in the wings. Tribal inherent sovereignty is both ancient and, importantly, necessarily demands the capacity to securely self-determine the future. Notably, a Tribally self-determined future is also what is required of the federal government.

The U.S. has federal plenary power over Indian affairs because they have a trust responsibility to Tribes and vice versa.⁷ The trust responsibility to Tribes

have an independent basis in federal Indian common law. For one example, see *United States v. Kagama*, 118 U.S. 375, 380–84 (1886) ("These Indian tribes are the wards of the nation From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power."). See generally Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666 (2016) (arguing that the nonjusticiability approach to congressional plenary power over Indian affairs should be extended to questions of Tribal sovereignty).

5. See, e.g., California Rancheria Termination Act, Pub. L. No. 85-671, 72 Stat. 619 (calling for the distribution of all 41 rancheria communal lands and assets to individual tribe members and terminating the Tribal status); see also Michalyn Steele, *Congressional Power and Sovereignty in Indian Affairs*, 2 UTAH L. REV. 307, 325 (2018) ("In some ways states may view tribal jurisdiction as a challenge or diminishment of state prerogatives or authority.").
6. See Reese, *supra* note 2, at 774 ("[T]here is a mystery hiding in the current configuration of fifty states. Why aren't there any Indian states?"); see also Stacy L. Leeds, *Defeat or Mixed Blessing? Tribal Sovereignty and the State of Sequoyah*, 43 TULSA L. REV. 5, 12 (2007) (arguing Tribal sovereignty was enhanced, rather than diminished, by the federal government's rejection of the State of Sequoyah, a 1905 effort to create a new state that would have served as the successor to the former governments of the Five Tribes of what is now Oklahoma).
7. See, e.g., *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980) ("[A] reviewing court must recognize that tribal lands are subject to Congress' power to control and manage the tribe's affairs. But the court must also be cognizant that 'this power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inherent in . . . a guardianship, and to pertinent constitutional restrictions.'" (quoting *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935))).

requires that the U.S. protect Tribes.⁸ And such protection cannot be successfully accomplished without protecting Tribes' underlying sovereignty.⁹ The Supreme Court first articulated this duty of protection in 1832, in *Worcester v. Georgia*.¹⁰ In recognizing that sovereignty implicates not only the existence of Tribal jurisdiction, but also the *lack* of state jurisdiction, the Court held that "Indian nations ha[ve] always been considered as distinct, independent political communities," and as such the State of Georgia lacks jurisdiction on Tribal lands.¹¹ Affirming *Worcester*, the Court held in 1959, in *Williams v. Lee*,¹² that the State of Arizona similarly lacked jurisdiction on Tribal lands. In *Lee*, the Court found the State lacked adjudicatory jurisdiction over a civil claim against a Navajo defendant for a contract executed on the reservation, because such adjudicatory jurisdiction would "infringe on the right of the Indians to govern themselves."¹³ Recognizing the encroachment of state authority as threatening Tribal sovereignty comports with the understanding of sovereignty broadly, in which the sovereign retains territorial integrity, political unity, and mutuality with fellow sovereigns.¹⁴ It additionally comports with the duty to protect Tribal sovereignty from inadvertent divestment and state infringement. Today, however, the federal judiciary seemingly does not support such a secure anticipation of Tribal sovereignty. Worse still, courts are relying on a logic of implicit divestment of sovereignty which is wholly counter to the protection of Tribal sovereignty.

8. See Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENVTL. & ADMIN. L. 397, 412 (2017) ("[T]he relationship of Indian tribes with the United States is founded on the 'settled doctrine of the law of nations,' that when a stronger sovereign assumes authority over a weaker sovereign, the stronger assumes a duty of protection for the weaker, which does not surrender its right to self-government." (quoting *Worcester v. Georgia*, 31 U.S. 515, 555 (1832))).

9. See Colette Routel & Jeffrey K. Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 432 (2013).

10. 31 U.S. 515, 556, 559 (1832) (describing that the 1791 Treaty of Holston "explicitly recogniz[es] the national character of the Cherokee, and their right of self government; thus guarantying their lands; *assuming the duty of protection*, and of course pledging the faith of the United States for that protection; has been frequently renewed, and is now in full force.").

11. *Id.* at 559 (holding that the State of Georgia lacks regulatory jurisdiction within the Cherokee Nation).

12. 358 U.S. 217, 223 (1959).

13. *Id.*

14. See, e.g., United Nations Charter, art. 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

In 1978 in *Oliphant v. Suquamish Indian Tribe*,¹⁵ the Court held that Tribal sovereignty was implicitly diminished despite the lack of express Congressional statements or Tribal consent. While Congress's plenary authority has been recognized to include the authority to unilaterally modify and even diminish Tribal inherent powers,¹⁶ such authority is generally tempered by the requirement that Congress must clearly express its intentions to execute such actions.¹⁷ Even then, those clear expressions are presumed to be in the best interest of the impacted Tribes pursuant to the federal trust responsibility. Treaties are another legal device which might similarly limit Tribal authority, but at least ostensibly contain Tribal consent.¹⁸ Implicit divestiture, in contrast, is a judicial doctrine. Implicit divestiture suggests that in addition to Congressional actions or treaties, Tribes additionally lack those powers that are "*inconsistent with their status*."¹⁹ Since 1978, the judiciary has determined what is, or should be, the status of Tribes.

In *Oliphant*, the Court held that Tribal status is inconsistent with the power to criminally prosecute non-Indian citizens of the United States. The Court reasoned that Tribes were divested of this power at the moment Tribes submitted to the sovereignty of the United States, whenever that might have been.²⁰ With limited guidance as to which powers have been divested, subsequent jurisprudence has effectively treated Tribal sovereignty as decaying, in which courts increasingly expand the scope of lost Tribal powers.²¹ In *Oliphant*, the Court reasoned that Tribes lack authority to

15. 435 U.S. 191 (1978).

16. See *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 be controlled by the judicial department of the government.").

17. See Alex Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, U. MICH. J.L. REFORM, 267, 307 (2022) (noting "[t]he tribal sovereignty canon is based on Congress's relatively unchecked plenary power over Indian nations . . . [It] is to ensure that in using its plenary power, Congress has willfully and intentionally decided to abrogate tribal sovereign rights.").

18. In addition to anecdotal critiques that various treaties were the result of coercion and/or deceit, other treaties have been found by the Supreme Court to have been fraudulently obtained, resulting in constitutional damages. See, e.g., *United States v. Sioux Nation*, 448 U.S. 371 (1980) (holding the Fort Laramie Treaty of 1868 was ineffectively abrogated because the federal government failed to obtain the Tribe's consent, resulting in a Fifth Amendment takings of the Black Hills requiring compensation).

19. *Oliphant*, 435 U.S. at 208 (citing *Oliphant v. Schile*, 544 F.2d 1007, 1009 (9th Cir. 1976)).

20. *Id.* at 210.

21. See, e.g., *Montana v. United States*, 450 U.S. 544, 566 (1981) (limiting a tribe's civil authority over non-Indians within reservations); see also *Duro v. Reina*, 495 U.S. 676, 694 (1990) (holding that Tribes were implicitly divested of criminal jurisdiction over

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prosecute non-Indians because the United States had manifested a great solicitude for criminal procedure.²² In contrast, Tribes were held to have lacked “fixed laws [and] competent tribunals of justice.”²³ The Court seemed to suggest that principles of federal preemption by way of criminal procedure²⁴ coupled with cultural mismatch inform the implicit divestiture analysis. Yet, these perceived deformities on the part of the Tribe were incurable. The Court restricted their analysis to the historical posture of the United States and Tribes regarding criminal procedure at the time of subjugation. While it is unclear when the Court defined the moment of subjugation, it presumably is 1787, or an equivalent moment of U.S. formation, given that the implicit divestiture analysis applies to all Tribes regardless of when or how any specific Tribe encountered and negotiated authority with the U.S. It was therefore inconsequential whether the Suquamish Indian Tribe, or any Tribe, had adopted federal criminal procedure by 1978. The *Oliphant* majority conceded that “some [contemporary] Indian tribal court systems have become increasingly sophisticated . . . [and] with the passage of the Indian Civil Rights Act . . . many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared.”²⁵ But Tribes are still divested. That is, even if Tribes and Congress cure the perceived criminal procedure cultural mismatch, Tribes remain implicitly divested. Lost inherent powers remain lost and can only be revived through explicit congressional reinstallation of those sovereign powers. Or so it seems.

A. *McBratney* Enables State Jurisdiction

Oliphant was not the first judicial intrusion into Tribal territorial sovereignty. Throughout the nineteenth century, Congress regulated Tribal and federal criminal authority on Tribal lands. In one of the first acts of the country, Congress empowered the federal government with concurrent

nonmember Indians), *superseded by statute*, Act of Nov. 5, 1990, Pub. L. No. 101-511, 104 Stat 1856 § 8077.

22. *Oliphant*, 435 U.S. at 211.

23. *Id.* at 210 (citing H.R. REP. NO. 23-474, at 18 (1834)).

24. Notably, federal preemption within Indian law is typically analyzed in relation to the preemption of *state* jurisdiction, rather than Tribal jurisdiction. See generally Bethany Berger, *Preemption Colonialism: The Constitutional & Structural Dimensions of Federal Indian Law Preemption*, U.C. DAVIS L. REV. (forthcoming 2025) (establishing how federal preemption functions differently in Indian law compared to other fields). Yet in *Oliphant*, the Court seems to suggest that the federal government’s articulation of criminal procedure broadly preempts contradictory frameworks, and in this case, nullifies Tribal jurisdictional authority.

25. *Oliphant*, 435 U.S. at 211-12.

criminal jurisdiction (with Tribes) within Indian country through the 1790 Trade and Intercourse Act²⁶ and the 1817 General Crimes Act.²⁷ In 1883, the Court found in *Ex Parte Crow Dog*²⁸ that despite the General Crimes Act, the federal government lacked sufficient authority to prosecute Kan-gi-shun-ca (Crow Dog) for the murder of Sinte Gleska (Spotted Tail), on what is now the Rosebud Sioux Indian Reservation in South Dakota.²⁹ Consequently, Congress passed the Major Crimes Act, vesting federal and territorial courts with concurrent criminal jurisdiction over Indian defendants for certain specified “major crimes,” regardless of the Indian-status of their victim.³⁰ Both the General Crimes Act and the Major Crimes Act represent definitive congressional statements regarding criminal jurisdictional authority on Tribal lands, including that such authority shall be “shared” between the federal government and Tribes. Beyond locale-specific treaties and acts, Congress would not say anything regarding state concurrent authority on Tribal lands under the 1953 enactment of Public Law 280.³¹

However, in 1881, despite no operative congressional act, the U.S. Supreme Court expanded state criminal authority on Tribal lands and remarkably found that Tribes lacked significant territorial jurisdiction. In *United States v. McBratney*,³² the Court held the state possessed criminal jurisdiction over non-Indians who commit crimes against other non-Indians within Indian country, and that this state jurisdiction is to the exclusion of either the federal government or the Tribe.³³ Defendant McBratney, a non-Indian, was convicted in federal court for murdering Thomas Casey, also non-Indian, within the boundaries of the Ute Reservation located within the exterior boundaries of the State of Colorado.³⁴ While the General Crimes Act would otherwise apply, the Court turned to the Colorado’s Enabling Act. The Colorado Territory Act of 1861 specifically provided that Indian lands were not to be included within the Colorado territory, including for purposes of

26. Act of July 22, 1790, ch. 33, 1 Stat. 137.

27. Act of Mar. 3, 1817, ch. 92, 3 Stat. 383.

28. 109 U.S. 556, 572 (1883).

29. *Id.*

30. Act of Mar. 3, 1885, § 8, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153 (1948)). See also *United States v. Kagame*, 118 U.S. 375, 377, 379-83 (1886) (upholding the constitutionality of the Major Crimes Act pursuant to Congress’s plenary authority over Indian affairs).

31. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (providing for state criminal and civil adjudicatory jurisdiction on select Tribal lands, and removing federal concurrent criminal jurisdiction on those same lands).

32. 104 U.S. 621 (1881).

33. *Id.* at 624.

34. *Id.* at 621-22.

jurisdiction.³⁵ The 1868 Treaty with the Ute Indians specifically provided for federal jurisdiction over crimes involving Indians.³⁶ But the Court emphasized that the Colorado Enabling Act of 1875 did *not* include such disclaimer language specific to Indian lands.³⁷ Instead, the Act provided that Colorado would be admitted into the Union “upon an equal footing with the original States in all respects whatsoever.”³⁸

The Court interpreted the equal footing language to necessitate “repeal[ing] the provisions of any prior statute or of any existing treaty which are clearly inconsistent therewith.”³⁹ In this case, the General Crimes Act, the Colorado Territory Act of 1861, and the 1868 Treaty, all of which contained language specific to the jurisdictional status of Tribal lands to exclude state authority, were to be tossed aside to effectuate Colorado’s “equal footing.”⁴⁰ Such reasoning contradicts the Indian canons of construction, which generally require express statements and clear indications that Tribal interests were considered.⁴¹ But the *McBratney* Court, foreshadowing the narrowing sphere of Tribal interests that the implicit divestiture doctrine would later draw upon, noted that the case did not concern “the punishment of crimes committed by or against Indians, the protection of the Indians in their improvements, or the regulation by Congress of the alienation and descent of property and the government and internal police of the Indians.”⁴² That is—regardless of the

35. *Id.* at 623; Act of Feb. 28, 1861, ch. 59, 12 Stat. 172, 176 (noting its purpose to “provide a temporary government for the Territory of Colorado . . . any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Colorado” and highlighting that “the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said Territory of Colorado as elsewhere within the United States.”).

36. *McBratney*, 104 U.S. at 622.

37. *Id.* at 623.

38. *Id.*; Act of March 3, 1875, ch. 139, 18 Stat. 474 (providing for the admission of Colorado into the Union, and authorizing the inhabitants of the Territory “to form for themselves out of said Territory a State government, with the name of the State of Colorado; which State, when formed, shall be admitted into the Union upon an equal footing with the original States in all respects whatsoever”).

39. *McBratney*, 104 U.S. at 623.

40. *Id.*

41. *United States v. Dion*, 476 U.S. 734, 739-40 (1986) (holding the Eagle Protection Act abrogated the treaty rights of members of the Yankton Sioux Tribe, but noting that “[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treat rights on the other, and chose to resolve that conflict by abrogating the treaty”).

42. *McBratney*, 104 U.S. at 624.

Colorado Enabling Act, the Tribe arguably *shouldn't* have jurisdiction, because the case does not sufficiently impinge upon Tribal interests.

In 1983, the Supreme Court conceded that if the Colorado Enabling Act had different language, *McBratney* likely would have come out the other way.⁴³ Most state enabling acts in the west actually contained jurisdictional disclaimers, while Colorado's enabling act was an outlier in its silence.⁴⁴ After *McBratney*, Congress seemingly resumed the practice of inserting jurisdictional reservations into every enabling act after 1882.⁴⁵ But with the holding in *McBratney*, the die had apparently been cast. Jurisdictional disclaimers would no longer be dispositive to restrict the encroachment of state jurisdiction and *McBratney* would apply to all of Indian country. In *Draper v. United States*,⁴⁶ for example, the Court held that, despite the jurisdictional reservation in the Montana Enabling Act, a federal court still did not have jurisdiction over a crime committed on an Indian reservation by one non-Indian against another, because the state's jurisdiction was exclusive.⁴⁷

McBratney and *Draper* judicially pierced the Tribal-federal enclave and categorically injected state authority onto Tribal lands. States retain exclusive jurisdiction over non-Indians who victimize non-Indians while on Tribal lands. The combination of the Colorado Enabling Act's lack of a jurisdictional disclaimer, coupled with the seeming lack of Tribal "interests," meant that the typical understanding of territorial sovereignty was modified for Tribes, and

43. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 561-62 (1983) (noting the potential limitations of Enabling Acts on state adjudicatory jurisdiction over Indian water rights, while holding those jurisdictional potentials are nullified by the McCarren Amendment); *see also McBratney*, 104 U.S. at 623-24 (noting the Kansas Enabling Act, in contrast to Colorado's, exempted Tribal lands from state jurisdiction with express words).

44. *San Carlos Apache Tribe*, 463 U.S. at 561.

45. *Id.* at 561 n.12 (noting the following enabling acts contain jurisdictional disclaimers: "Enabling Act of Feb. 22, 1889, § 4, 25 Stat. 676-677 (North Dakota, South Dakota, Montana, and Washington); Enabling Act of July 16, 1894, § 3, 28 Stat. 108 (Utah); Enabling Act of June 16, 1906, § 3, 34 Stat. 270 (Oklahoma); Enabling Act of June 20, 1910, §§ 2, 20, 36 Stat. 558-559, 569 (New Mexico and Arizona); Enabling Act of July 7, 1958, § 4, 72 Stat. 339, as amended by Pub.L. 86-70, § 2(a), 73 Stat. 141 (Alaska). Idaho and Wyoming, which were both admitted to statehood in 1890 without prior Enabling Acts, nevertheless inserted disclaimers in their State Constitutions. *See* Idaho Const., Art. 21, § 19; Wyo. Const., Art. 21, § 26.").

46. 164 U.S. 240 (1896).

47. *Id.* at 244-45 ("As equality of statehood is the rule, the words relied on here to create an exception cannot be construed as doing so, if, by any reasonable meaning, they can be otherwise treated. The mere reservation of jurisdiction and control by the United States of 'Indian lands' does not of necessity signify a retention of jurisdiction in the United States to punish all offenses committed on such lands by others than Indians or against Indians.").

paved the way for future intrusions, including the implicit divestiture doctrine.

B. Anticipating Castro-Huerta

Since *Oliphant*, the implicit divestiture doctrine has been relied upon by courts,⁴⁸ and has in turn been excoriated by legal scholars.⁴⁹ In theory, implicit

48. See, e.g., *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 429 (1989) (holding the Indian Tribe may exercise zoning authority over some, but not all of the lands owned by nonmembers within the Tribe's reservation); *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993) (describing inherent Tribal sovereignty over nonmembers as nonexistent, and consequently "cannot survive without express congressional delegation"); *State v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (extending implicit divestiture theory to both Tribal civil regulatory and adjudicatory authority); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) (holding the Tribe may not impose an occupancy tax on a hotel operated on nonmember land within the Tribe's reservation); *Nevada v. Hicks*, 533 U.S. 353, 364 (2001) (holding a Tribal court may not exercise adjudicatory jurisdiction over a civil suit brought by a Tribal member against a state law enforcement officer for conduct that occurred on Tribal land); *Dollar General Corp. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 173 (5th Cir. 2014), *aff'd by an equally divided court sub nom. Dollar General Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (per curiam) (holding the Tribe does possess Tribal court jurisdiction over a nonmember for conduct on Tribal lands).

49. See generally, e.g., WALTER R. ECHO-HAWK, *IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED* (2012) (analyzing ten cases that embody the roots of Indian law injustice, including *Cherokee Nation v. Georgia*); CHARLES WILKINSON, *BLOOD STRUGGLE* (2005) (tracing the rise of modern Tribal Nations, including the disruption of the implicit divestiture doctrine); ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005) (exploring the racist language infused in Indian law cases, including the cases invoking the implicit divestiture doctrine); Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005) (examining the Court's use of the implicit divestiture doctrine to reveal and criticize two unfounded assumptions: first, that Tribal courts are seemingly unfair to outsiders, and second, that jurisdiction over outsiders has little to do with Tribal self-government); Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623 (2011) (comparing the evolution of implicit divestiture with the Indian canons of construction to reveal a constriction of the Indian canons to "traditional" Indian activities); Matthew L.M. Fletcher, *Indian Lives Matter: Pandemics and Inherent Tribal Powers*, 73 STAN. L. REV. ONLINE 38 (2020) (using the powers employed by Tribes during the COVID pandemic to examine the contours of Tribal powers over nonmembers); Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779 (2014) (comparing the consent theory and the territory theory of Tribal civil jurisdiction); Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499 (2013) (arguing that implicit divestiture limitations on Tribal court jurisdiction over nonmembers should be recharacterized as limits on personal jurisdiction); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999) (calling the implicit divestiture doctrine what it is—anglocentric analogical reasoning); Philip P. Frickey, *Adjudication*
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divestiture solely concerns the limitations of Tribal power that are inconsistent with the status of Tribes. The lack of Tribal authority may even result in jurisdictional voids.⁵⁰ Such chaotic potentials are irrelevant to the implicit divestiture analysis—is a Tribe’s status consistent with sovereign authority? And while Congress may consider jurisdictional voids created by a court’s implicit divestiture finding when weighing whether to intervene,⁵¹ as *McBratney* foreshadows, state interests lurk just beneath the surface to reveal the true deviousness of implicit divestiture.

In *Organized Village of Kake v. Egan*,⁵² the Alaska Enabling Act was held to have not deprived the State of the right to regulate Indian fishing licensed by

and Its Discontents: Coherence and Conciliation in Federal Indian Law, 110 HARV. L. REV. 1754 (1997) (arguing for the reconception of federal Indian law as the product of negotiation among sovereigns rather than of adjudications in federal court); Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187 (2010) (providing a summary of the implicit divestiture doctrine); John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes From the Cohen’s Handbook Cutting Room Floor*, 38 CONN. L. REV. 731 (2006) (reflecting on the process of developing the “implicit divestiture” portion of the 2005 edition of Cohen’s Handbook of Federal Indian Law); Addie C. Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. REV. 1638 (2016) (examining the implicit divestiture doctrine through criminal jurisdiction and calling for an “inside out” approach); Joseph William Singer, *Canons of Conquest: The Supreme Court’s Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003) (excortiating the reasoning of *Nevada v. Hicks* as comparable to the deplorable reasoning of *Bush v. Gore*); Alex Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77 (2014-2015) (arguing the reasoning of implicit divestiture is faulty because it lacks a constitutional foundation); Alex Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV’T L. REV. 49 (2017) (examining the definition of “Indian” for purposes of Tribal criminal jurisdiction); Alex Tallchief Skibine, *The Court’s Use of the Implicit Divestiture Doctrine to Implement its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267 (2000) (arguing the Court’s use of the implicit divestiture doctrine assumes the federal government has implicitly surrendered certain powers over Indian affairs); Lance F. Sorenson, *Tribal Sovereignty and the Recognition Power*, 42 AM. INDIAN L. REV. 69 (2017) (exploring the historical shift from the sovereign-to-sovereign model to the pupliage model, exemplified by the implicit divestiture doctrine); Gloria Valencia-Weber, *The Supreme Court’s Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405 (2003) (naming the finding of state inherent jurisdiction on reservation as an undisclosed and destructive judicial microbe).

50. See, e.g., *Duro v. Reina*, 495 U.S. 676 (1990) (holding that Tribes lack inherent criminal jurisdiction over nonmember Indians, resulting in a jurisdictional void in which in certain states, neither the Tribe, the federal government, nor the State possess criminal jurisdiction over nonmember Indians who committed victimless crimes, such as drunk driving).

51. See, for example, the “Duro-fix,” Defense Appropriations Act for FY 91, Pub. L. No. 101-511 § 8077(b)-(d), 104 Stat. 1856, 1892 (1990), amending 25 U.S.C. § 1301(2), which was an amendment to the Indian Civil Rights Act of 1968 that restored Tribal criminal jurisdiction over nonmember Indians.

52. 369 U.S. 60, 75-76 (1962).

the Department of the Interior, finding that the state regulation neither interfered with Indian self-government nor impaired any right granted or reserved by federal law.⁵³ The case was facially a treaty fishing case. However, it has since come to serve as the primary basis for blessing encroaching state power on Tribal lands. In *Nevada v. Hicks*,⁵⁴ the Court limited Tribal adjudicatory jurisdiction over a civil claim against state officers in executing a search warrant on Tribal trust lands. In finding the Tribe lacked adjudicatory jurisdiction over the case, the Court held that considerable state interests have the effect of decimating Tribal authority, because such Tribal authority is “not essential to tribal self-government or internal relations.”⁵⁵ Referencing *Kake*, the Court auspiciously stated, “it is now clear, ‘an Indian reservation is considered part of the territory of the State.’”⁵⁶ Implicit divestiture is really not just about the status of the Tribes, but the status of Tribes as dissolving entities, balanced against state regulatory interests that are hungry to grow.⁵⁷

It is perhaps fitting, then, that the Court has pulled upon this implicit divestiture logic not to further diminish the remaining slivers of Tribal authority, but rather, to help grow state authority on Tribal lands. In 2022 in *Oklahoma v. Castro-Huerta*, the Court held that the federal government and the State have concurrent jurisdiction to prosecute non-Indians for crimes committed against Indians in Indian country.⁵⁸ The holding is effectively a quasi-extension of *McBratney*. The federal government’s criminal jurisdiction derives from the General Crimes Act of 1817 and the Major Crimes Act of 1885.⁵⁹ But there was no congressional act providing for state jurisdiction. The *Castro-Huerta* Court asserted that, rather than having to await a congressional delegation of authority in Indian country, states already possess criminal jurisdiction over non-Indians in Indian country, unless preempted by federal law.⁶⁰ Citing to *Kake*, the *Castro-Huerta* Court noted that federal policy sought the “eventual assimilation of the Indian population” which would eventually result in “the dissolution of tribal affairs and jurisdiction.”⁶¹ Then, despite a robust body of federal Indian country criminal jurisdictional statutes

53. *Id.*

54. 533 U.S. 353 (2001).

55. *Id.* at 364.

56. *Id.* at 361-62.

57. *See id.* at 364. (noting the state’s interest in execution of process is “considerable”).

58. 597 U.S. 629, 656 (2022).

59. Act of Mar. 3, 1817, ch. 92, 3 Stat. 383, (codified at 18 U.S.C. § 1152 (1948)); Act of Mar. 3, 1885, § 8, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153 (1948)).

60. *Castro-Huerta*, 597 U.S. at 636.

61. *Id.* at 654-55 n.9, (citing *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962); and *Draper v. United States*, 164 U.S. 240, 246 (1896)).

suggesting otherwise, the Court found there was no federal preemption of state jurisdiction.⁶²

Like in *McBratney*, *Kake*, and *Hicks*, the *Castro-Huerta* Court sought to balance the seemingly competing Tribal and state interests. The Court went so far as to import the balancing test from *Bracker*, a 1980 case in the Tribal civil taxation context, to weigh whether the exercise of state criminal jurisdiction would unlawfully infringe upon Tribal self-government.⁶³ Notably, *Castro-Huerta*'s extension of concurrent state jurisdiction into Indian country was made without seeking or obtaining Tribal consent.⁶⁴

Implicit divestiture, including its weaponization in *Castro-Huerta*, is pragmatically nightmarish. It has compromised Tribal nation-building and wreaked havoc on the day-to-day safety and well-being of Tribes.⁶⁵ Concurrent criminal jurisdiction is not simply the simultaneous presence of police officers and prosecutors. Concurrent state jurisdiction injects state criminal definitions, sentencing guidelines, and state criminal procedure. To the extent sovereigns diverge on how a criminal justice system should operate, which crimes, investigations, and prosecutions should be prioritized, and how perpetrators should be punished, concurrent jurisdiction has the effect of nullifying Tribal sovereignty.⁶⁶ The inability to hold criminal perpetrators

62. *Id.* at 639; *see also id.* at 660-667 (Gorsuch, J., dissenting) (detailing the relevance of the General Crimes Act, the Major Crimes Act, Public Law 280 and related statutes, assuming a preemption analysis was even valid).

63. *Id.* at 649-651. Notably, in *White Mountain Apache Tribe v. Bracker*, the Court held the state did *not* possess authority to apply its civil tax laws on tribal land, even though Congress had not expressly prohibited the state from doing so. 448 U.S. 136, 148-49 (1980).

64. In 1968, Congress amended Public Law 280 to require Tribal consent for any states seeking to opt in, for which no Tribes have consented. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 401-402, 82 Stat. 73, 78-79.

65. INDIAN L. & ORD. COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES ix-x (2013) ("When Congress and the Administration ask why is the crime rate so high in Indian country they need look no further than the archaic system in place, in which Federal and State authority displaces Tribal authority and often makes tribal law enforcement meaningless."); AMNESTY INT'L, THE NEVER-ENDING MAZE: CONTINUED FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 9 (2022) ("The USA has formed a complex interrelation between federal, state, and tribal jurisdictions that undermines tribal authority and allows perpetrators of violence against [American Indian/Alaska Native] women to evade justice. Tribal governments are hampered by a complex set of laws and regulations that undermine their authority and make it difficult, if not impossible, to respond to sexual violence in an effective manner.").

66. *See, e.g.*, Lauren van Schilfgaarde, Aila Hoss, Ann E. Tweedy, Sarah Deer, & Stacy Leeds, *Tribal Nations and Abortion Access: A Path Forward*, 46 HARV. J.L. & GENDER 1, 33 (2023) (examining the extent to which state abortion laws, including criminal prohibitions, operate on Tribal lands).

accountable or craft comprehensive regulatory schemes creates undesirable economic markets, limits responsivity to the community's needs, and ultimately is dangerous. The "mazes" of jurisdiction that have resulted threaten the surviving pillars of Tribal sovereignty by making the exercise of that sovereignty ineffective.

Implicit divestiture is also antiquated. It positions Tribes as weakened vestiges of a bygone era within the State, in which we are all merely biding our time until Tribes eventually perish.⁶⁷ In the meantime, Tribal sovereignty is subject to continual implicit damage because not only were Tribes conquered,⁶⁸ but they were so culturally incompatible with the U.S. that the only remnants of sovereignty to survive conquest are limited to Tribal members.⁶⁹ This is a notable departure from the territorial jurisdiction endorsed in *Worcester*, in which Tribal authority explicitly extended over non-Indians.⁷⁰ It is also a notable departure from the federal trust responsibility that protects Tribal sovereignty and limits Tribal authority only through express statements. The implicit divestiture doctrine is arguably more in line with the vanishing Tribe and forced assimilation logics of the federal Indian policies of

67. See, e.g., Lauren van Schilfgaarde, *Restorative Justice as Regenerative Tribal Jurisdiction*, 112 CALIF. L. REV. 103, 111 (2024) ("Federal intrusion into Tribal governmental structures, including Tribal courts, is part of a large arc of federal Indian policy that has oscillated between diplomacy and conquest.").

68. See, e.g., *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 289-90 (1955) (holding that unrecognized aboriginal title does not warrant a takings pursuant to the Fifth Amendment due to conquest and noting "[e]very American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food, and trinkets, it was not a sale, but the conquerors' will that deprived them of their land."). The notion that Tribes were "conquered" at a particular moment in time has been critiqued. Tribes have continuously negotiated their status with the United States, including through numerous treaties. The reserved rights doctrine reflects the concept that all those rights not explicitly ceded remain reserved to the Tribe, and necessitates a liberal reading by the United States in interpreting these rights. *United States v. Winans*, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of right to the Indians, but a grant of right from them—a reservation of those not granted.").

69. See *Duro v. Reina*, 495 U.S. 676, 693 (1990) ("While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often 'subordinate to the political branches of tribal governments,' and their methods may depend on 'unspoken practices and norms.'" (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 334-35 (1982 ed.))).

70. *Worcester v. Georgia*, 31 U.S. 515, 520 (1832) ("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 congress.").

the late nineteenth century. In that view, Tribal sovereignty was only ever a temporary accolade until Tribes completed the assimilation process.⁷¹

Today, federal Indian policy has shifted. Implicit divestiture should shift too.

II. External Self-Determination

On January 3, 2025, the Department of Justice announced that it will hold Tribal consultations regarding a potential legislative fix to *Castro-Huerta*.⁷² The framing paper accurately described the extent to which Tribes and Tribal advocates viewed the *Castro-Huerta* decision as an attack on Tribal sovereignty.⁷³ The framing paper proposes to amend the Indian Civil Rights Act to clarify that states lack criminal jurisdiction over offenses committed by or against an Indian in Indian country unless that State obtains the Tribe's consent.⁷⁴ The DOJ press release noted the potential for Congressional action to "restor[e] the previous balance of jurisdiction in Indian country."⁷⁵ To describe criminal jurisdiction in Indian country as "balanced," either pre-*Castro-Huerta* or even pre-*Oliphant*, is generous. But the sentiment is hopeful.

So what is a balanced approach? In *United States v. Wheeler*,⁷⁶ the U.S. Supreme Court held the double jeopardy clause does not bar the dual prosecutions of the federal district court and the Tribal court because they are separate sovereigns.⁷⁷ Doctrinally, the case is significant in reaffirming the inherent nature of Tribal powers as notably distinct from federal powers. But *Wheeler* describes the prescription and enforcement of Tribal criminal laws as "involv[ing] only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status."⁷⁸ *Wheeler* implies a closed and separate Tribal land on which no non-

71. See, e.g., Lauren van Schilfgaarde, *(Un)Vanishing the Tribe*, 66 ARIZ. L. REV. 409, 413 (2024) ("Because Tribes are perceived to be vanishing, courts have imported an interpretive lens that they *must* vanish, and thus their sovereignty can only ever be understood as vanishing.").

72. U.S. Dep't of Just., Off. Tribal Just., *Updated U.S. Department of Justice Tribal Consultation on Possible Legislation to Address the Supreme Court's Decision in Oklahoma v. Castro-Huerta* (Jan. 3, 2025).

73. *Id.* at 3.

74. *Id.* at 6.

75. *Id.*

76. 435 U.S. 313 (1978).

77. *Id.* at 330-32. See also Angela R. Riley & Sarah Glenn Thompson, *Mapping Dual Sovereignty and Double Jeopardy in Indian Country Crimes*, 122 COLUM. L. REV. 1899, 1937 (2022) (noting the issues of unfairness for Indian defendants subject to the exposure of dual prosecutions).

78. *Wheeler*, 435 U.S. at 326.

Indians ever tread.⁷⁹ The very dawn of contact revealed this to be a false narrative. The subsequent centuries have proven this to be deadly false. Today, the Missing and Murdered Indigenous Persons (MMIP) crisis is but one stark rallying point that demonstrates the divestiture of Tribal criminal authority continuously endangers Native people, and continuously prevents Tribes from protecting their own.⁸⁰

Castro-Huerta arguably limits Tribes' ability to protect their own community by injecting competing state criminal authority. Congress can, and should, "fix" *Castro-Huerta*, much like they did with the *Duro*-fix. In 1990 in *Duro v. Reina*, the Court used the implicit divestiture doctrine to hold that Tribal criminal jurisdiction over nonmember Indians had also been implicitly divested.⁸¹ In fact, the *Duro* Court conflated the reasonings of *Oliphant* and *Wheeler* to find that Tribal dependent status extends only to the sovereignty "needed to control their own international relations, and to preserve their own unique customs and social order."⁸² Congress immediately responded with the *Duro*-fix, which amended the Indian Civil Rights Act to recognize Tribal criminal authority over nonmember Indians.⁸³ Congress has provided comparable, albeit partial and piecemeal, *Oliphant*-fixes in the Violence Against Women Reauthorization Acts of 2013 and 2022.⁸⁴

In 2004, the Court acknowledged that the trail of implicit divestiture destruction is, in fact, capable of disruption. In *United States v. Lara*, the Court

79. *Id.* at 322 ("Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain 'a separate people, with the power of regulating their internal and social relations.'" (quoting *United States v. Kagame*, 118 U.S. 375, 381-82 (1886))).

80. See, e.g., AMNESTY INTERNATIONAL, *supra* note 65, at 32-33, 77 ("The erosion of tribal authority and chronic under-resourcing of tribal justice systems, law enforcement agencies and healthcare systems has perpetuated [the] injustice [of high rates of sexual violence against Indigenous women in the USA].").

81. *Duro v. Reina*, 495 U.S. 676, 685-86 (1990).

82. *Id.*

83. Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, § 8077(b)-(d), 104 Stat. 1856, 1892-93 (1990) (amending 25 U.S.C. § 1301(2), restoring Tribal criminal jurisdiction over nonmember Indians).

84. Violence Against Women Reauthorization Act (VAWA) of 2013, Pub. L. 113-4, § 904, 27 Stat. 54, 120-22 (2013) (recognizing Tribal criminal prosecutorial authority over non-Indians with connections to the Tribe, but only for the crimes of domestic violence, dating violence, and the violation of a protection order, only if their victim is Indian, and only if the prosecuting Tribe provides enumerated due process protections); Violence Against Women Reauthorization Act (VAWA) of 2022, Pub. L. No. 117-103, § 804, 136 Stat. 49, 899-904 (2022) (expanding federal recognition of inherent Tribal authority over non-Indians to include six additional crimes, including assault of Tribal justice personnel, child violence, obstruction of justice, sexual violence, and stalking, and removing the requirement that the defendant have connections to the Tribe).

acknowledged the constitutionality of Congress's *Duro*-fix, and arguably sanctioned all future congressional "re-recognitions" of Tribal sovereignty, or explicit corrections to the application of the implicit divestiture doctrine.⁸⁵ But sovereignty, including authority to protect the people, is broader than this. Territorial jurisdiction is not too much to ask. The DOJ press release highlights a hugely impactful potential to address the shortcomings of *Castro-Huerta*.⁸⁶ But presently, neither the *Duro*-fix, nor a hopefully imminent *Castro-Huerta*-fix, will relieve the judiciary from their obligation to repudiate the implicit divestiture doctrine and finally see Tribes for what they are—sovereigns.

Does Tribal self-determination require territorial sovereignty? As the implicit divestiture jurisprudence continuously presses, the Court understands Tribal self-determination to exist only to the extent that unique, internal Tribal issues are implicated.⁸⁷ Consequently, the *Duro*-fix might congressionally reinstall Tribal authority to prosecute nonmember Indians, but implicit divestiture recognizes only the criminal authority over *member* Indians as consistent with the conquered status of Tribes. The implicit divestiture doctrine logic perceives certain Tribal powers as having been lost due to the dependent status. Those powers could be revived by federal statute. But those federal statutes, such as the *Duro*-fix or a possible *Castro-Huerta*-fix, do not change the fact that those powers were originally lost. Implicit divestiture views Tribes unnecessarily narrowly—locked in a nonexistent historical past in which Tribes are only ever looking inward. This arguably has never been true historically. But more importantly, Tribal self-determination concerns Tribes as they are today, and Tribes are looking outward as they plan for the future.

85. 541 U.S. 193, 196 (2004).

86. The DOJ framing paper calls for Tribal input on two proposals that seek to make clear that states lack jurisdiction over crimes within Indian country committed by or against Indians, unless expressed authorized by federal statute. U.S. Dep't of Just., *supra* note 72, at 4. The proposed fix would address the confusion and infringement caused by *Castro-Huerta*, but does not necessarily prevent future intrusions by subsequent reliance on the implicit divestiture doctrine.

87. *See, e.g., Nevada v. Hicks*, 533 U.S. 353, 361, 364 ("[T]ribes have authority '[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members . . . tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations—to 'the right to make laws and be ruled by them.'" (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981))); *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 650 (2022) ("[T]he exercise of State jurisdiction here would not infringe on tribal self-government . . . [because] a State prosecution of a non-Indian does not involve the exercise of State power over any Indian or over any tribe.").

The international legal definition of Indigenous self-determination may offer useful guidance here. Self-determination is an actively evolving term within international human rights jurisprudence.⁸⁸ “Self-determination” is characterized as the “heart,” “cornerstone,” and “pillar” upon which all other aspects of Indigenous rights rest.⁸⁹ In contrast to human rights broadly, Indigenous rights recognize the collective rights of Indigenous peoples, and conversely, their right to self-determination as a collective.⁹⁰ Undoubtedly, Indigenous self-determination includes internal aspects. For example, in the 2007 United Nations Declaration on the Rights of Indigenous Peoples (“Declaration”), self-determination is defined to include the “right to . . . self-government in matters relating to their internal and local affairs,”⁹¹ and the right to develop and maintain their own political, legal, economic, and social institutions.⁹²

In drafting the Declaration, nation-states expressed concern for the perceived illegal or unfair “special rights” that such a recognition of Indigenous self-determination might bring.⁹³ Consequently, Art. 46(1) was included in the Declaration as part of a last-minute compromise between Indigenous advocates and nation-states to allow for broader support.⁹⁴ Art. 46(1) qualifies Indigenous rights as provided in the Declaration, as having no impairment on “the territorial integrity or political unity of sovereign and independent States.”⁹⁵ Some have argued that Art. 46(1), coupled with the Arts. 3 and 4 which define self-determination to include the “right to autonomy or self-government,” means that Indigenous self-determination, at least within the Declaration, is limited to only internal self-determination.⁹⁶ But, I posit here, that such a

88. See United Nations Expert Mechanism on the Rights of Indigenous Peoples, “Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous Peoples and the Right of Self-Determination,” A/HRC/48/75, ¶¶ 3-18 (Aug. 4, 2021).

89. Alexandra Xanthaki, *Self-Determination Rights*, in RESEARCH HANDBOOK ON THE INTERNATIONAL LAW OF INDIGENOUS RIGHTS 75 (Dwight Newman ed., 2022).

90. *Id.*

91. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 4, (Sept. 13, 2007).

92. *Id.* arts. 5, 20.

93. Xanthaki, *supra* note 89, at 82.

94. S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 78 (2009); Lola Ayotunde, *Evaluation of Indigenous Peoples’ Influence During the Drafting Process of UNDRIP*, in RESEARCH HANDBOOK ON THE INTERNATIONAL LAW OF INDIGENOUS RIGHTS 56, 72 (Dwight Newman ed., 2022).

95. G.A. Res. 61/295, *supra* note 91, art. 46(1).

96. Xanthaki, *supra* note 89, at 86 (quoting Timo Koivurova, *Sovereign States and Self-Determining Peoples: Carving Out a Place for Transnational Indigenous peoples in a World of Sovereign States*, 12 INT’L CMTY. L. REV. 191, 202 (2010)).

reading is far too narrow of an understanding of Indigenous self-determination. In the context of Tribes within the United States, given the trust responsibility,⁹⁷ the historical and contemporary understanding of state jurisdiction as threats upon Tribal sovereignty,⁹⁸ and the requirements that infringements on Tribal sovereignty require, at best Tribal consent,⁹⁹ and at worst, at least clear and express congressional statements¹⁰⁰—Indigenous self-determination demands territorial sovereignty

Self-determination is the bold declaration that the Tribe exists. Moreover, the Tribe should continue to exist. In contrast to implicit divestiture and antiquated Indian policy, Indigenous self-determination is the understanding that the Tribe and its authority are not decaying. Self-determination is an active-term. Self-determination is to exist on one's own terms. Implicit divestiture rests on the principle that Tribal status is stale and confined to exclusively internal affairs. Such confinement is arguably discriminatory.¹⁰¹

97. Rey-Bear & Fletcher, *supra* note 8, at 459-60 (“[T]he federal trust responsibility is a fundamental component of federal-tribal relationships, both historically and legally [and] the trust responsibility is fundamentally what distinguishes federal-tribal government-to-government relationships from relationships between the federal government and states and among states.”).

98. *See, e.g.,* United States v. Kagama, 118 U.S. at 384 (“[Indian tribes] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.”); Oklahoma v. Castro-Huerta, 597 U.S. 629, 669 (2022) (Gorsuch, J., dissenting) (“In typical preemption cases, courts ‘start with the assumption’ that Congress has not displaced state authority. But when a State tries to regulate tribal affairs, the same ‘backdrop’ does not apply because Tribes have a ‘claim of sovereignty [that] long predates that of our own Government.’” (first quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); and then quoting *McClanahan v. Arizona Tax Comm’n*, 411 U.S. 164, 170-72 (1973))).

99. The UN Declaration on the Rights of Indigenous Peoples calls for “free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” G.A. Res. 61/295, *supra* note 91, art. 19. At least in regards to PL-280 federally-delegated authority to states, Congress has required Tribal consent for any proactive assumptions of state jurisdiction. 25 U.S.C. § 1322(a) (1968).

100. *See* United States v. Dion, 476 U.S. 734, 739-40 (1986) (“[W]here the evidence of congressional intent to abrogate is sufficiently compelling, ‘the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute.’ What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other and chose to resolve that conflict by abrogating the treaty.” (quoting COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 223 (1982 ed.))).

101. Xanthaki, *supra* note 89, at 76 (“There cannot be a double standard on the right of self-determination in international law. In particular, there cannot be a double standard based on race or our present status as dispossessed people residing in nation-states founded upon principles such as *terra nullus*, conquest and extinguishment.” (quoting Statement by Dr. Ted Moses on behalf of the Grand Council of the Crees, in the 1996 Commission Drafting Group (Oct. 30, 1996))); *see also* G.A. Res. 61/295, *supra* note 91,

footnote continued on next page

Rather, Indigenous self-determination demands the recognition of the Tribe's juridical personality in relation to other legal entities.¹⁰² Such recognition requires that the Tribe be able to engage with such external entities, with mutuality.¹⁰³ This includes jurisdictional integrity.

Indeed, the Declaration recognizes as much. Article 19 requires that States obtain the “free, prior, and informed consent” of Indigenous peoples before adopting legislative or administrative measures that might affect them.¹⁰⁴ Indigenous peoples have the right to “own, use, develop, and control” their lands.¹⁰⁵ Indigenous peoples have the right to their own legal institutions.¹⁰⁶ Critically, Indigenous peoples “have the collective right to live in freedom, peace, and security,” including the right to be free from violence.¹⁰⁷ Tribal courts, laws, and customs are nullified if they are not recognized as legally cognizable outside the members of the Tribe. The constriction of Tribal powers through implicit divestiture, which critically lacks Tribal consent, affects the scope and effectiveness of Tribal authority to regulate their land, hold offenders accountable, and express Tribal values, and is consequently a violation of Article 19. The failure of non-Indians to abide by Tribal laws, or be subjected to Tribal prosecutorial authority, is to divest Tribes of control of their own land and their own legal institutions. Perhaps most jarringly, implicit divestiture permits Indigenous peoples to be subject to violence without recourse.¹⁰⁸ The contraction of Tribal authority coupled with the encroachment of State jurisdictional authority on Tribal lands is plainly a violation of Tribal internal and external self-determination.

Federal judiciaries need not solely rely on international law to recognize the need to finally repudiate implicit divestiture. In 1970, President Richard

art. 2 (“Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.”).

102. G.A. Res. 61/295, *supra* note 91, art. 34.

103. Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT'L. & POL'Y 373, 374 (2003) (arguing for a view of sovereignty existing on a spectrum, that includes recognition of a range of intermediate sovereign statuses).

104. G.A. Res. 61/295, *supra* note 91, art. 19.

105. *Id.* art. 26.

106. *Id.* art. 5.

107. *Id.* art. 7.

108. *See, e.g.*, Comm. on the Elimination of All Forms of Racial Discrimination, Concluding Observations on the Combined Tenth to Twelfth Repts. of the United States, ¶ 47, U.N. Doc. CERD/C/USA/CO/10-12, (Sept. 12, 2022) (noting in their 2022 concluding observations to the United States, the Committee on the Elimination of All Forms of Racial Discrimination specifically identified the *Castro-Huerta* decisions as a likely violation of Indigenous women's right to access justice and reparation).

Nixon initiated what is now termed the “self-determination era.”¹⁰⁹ The federal government currently recognizes a sovereign-to-sovereign relation with 574 Tribes.¹¹⁰ The policy of self-determination toward Tribes recognizes the rights of Tribes to exist and self-govern.¹¹¹ The Indian Self-Determination and Education Assistance Act of 1975,¹¹² recognizes the “obligation of the United States to respond to the strong expression of the Indian people for self-determination”¹¹³ Numerous Executive Orders have expressed support for Tribes to exist, self-govern, and self-determine their existence and governance.¹¹⁴

We have been in the self-determination era for fifty years. Tribes and the United States are working to normalize consultation, co-management agreements, self-determination compacts, self-governing compacts, and even the return of land.¹¹⁵ There is no longer an “Indian problem,” but rather a

109. RICHARD NIXON, *Special Message to Congress on Indian Affairs, July 8, 1970*, in PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES: RICHARD NIXON 564, 575 (1970) (calling for a rejection of “the extremes of forced termination and constant paternalism”). See also COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 2.11[2] (Nell Jessup Newton ed., 2012).

110. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 88 Fed. Reg. 2112, 2112-16 (Jan. 12, 2023).

111. NIXON, *supra* note 109, at 566-70.

112. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203, 2206-07 (1975) (providing for, in part, self-determination contracts and self-governance compacts to Tribes to plan, conduct, and administer programs formerly administered by the federal government).

113. 25 U.S.C. § 5302(a).

114. See, e.g., Exec. Order No. 13,175, 65 Fed. Reg. 67249, § 2(c) (Nov. 6, 2000) (“The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.”); Exec. Order No. 13,647, 78 Fed. Reg. 39539, § 1 (June 26, 2013) (“The United States seeks to continue restoring and healing relations with Native Americans and to strengthen its partnership with tribal governments, for our more recent history demonstrates that tribal self-determination—the ability of tribal governments to determine how to build and sustain their own communities—is necessary for successful and prospering communities.”); Exec. Order 14,112, 88 Fed. Reg. 86027 (Dec. 6, 2023) (“Now is the time to build upon this foundation by ushering in the next era of self-determination policies and our unique Nation-to-Nation relationships, during which we will better acknowledge and engage with Tribal Nations as respected and vital self-governing sovereigns.”).

115. See, e.g., Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 4 (2015); Kevin K. Washburn, *Facilitating Tribal Co-Management of Federal Public Lands*, 2022 WIS. L. REV. 263, 266 (2022); Vanessa Racehorse & Anna Hohag, *Achieving Climate Justice Through Land Back: An Overview of Tribal Dispossession, Land Return Efforts, and Practical Mechanisms for #LandBack*, 34 COLO. ENV’T L.J. 175, 177 (2023).

growing reconfiguration of the American polity that is pluri-national.¹¹⁶ So when courts cite to *Kake*, or *Hicks*, or now *Castro-Huerta*, with the argument that Tribal interests are only ever internal, and that Tribes should make room for state interests on Tribal lands—the Court is out-of-step. Such arguments simply do not reflect the reality, much less align with the legal principles they purport to uphold.

The status of Tribes is robust, secure in internal and external forms of self-determination. A judicial revestiture doctrine would cleanly articulate this status. Tribal revestiture acknowledges that Tribes exist and will continue to exist; that the federal government has a federal trust obligation to protect Tribes and Tribal sovereignty; that the *status* of Tribes as domestic dependent nations means that Tribes exists within the United States while retaining self-determination, including territorial sovereignty; and that self-determination demands that any alteration to Tribal sovereignty requires Tribal consent. In many ways, Tribal revestiture is already incorporated in much of the Indian canons of construction. But the judicial notion that Tribal *status*, despite no congressional statements or explicit Tribal cessions, is inconsistent with sovereignty, must simply be abandoned. Perhaps the judiciary *feels* that Tribal status should be otherwise. Their nineteenth century counterparts certainly did.¹¹⁷ But Tribes survived that era. It is time the judiciary recognize the demands of federal plenary power over Indian affairs, of the federal trust responsibility to Tribes, and of Indigenous self-determination. The Tribal status is sovereign, and their sovereignty should be judicially revested.

116. See generally Roger Merino, *Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America*, 31(4) LEIDEN J. INT'L L. 773 (2018) (exploring plurinationality as a means of articulating Indigenous self-determination).

117. See, e.g., *United States v. Kagama*, 118 U.S. at 384 (“The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell.”).