Tough Love for Tribes: Rethinking Sovereignty After *Atkinson* and *Hicks*

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It is an article of faith among American Indian tribes, and most scholars who write about them, that tribes possess the powers of inherent sovereigns. The reasoning, based on an 1832 opinion by Chief Justice Marshall, is that tribes are free to govern their territories as they choose, except as limited by acts of Congress.[1] What many tribes and scholars are only now discovering is that the Supreme Court all but ended this territorial conception of tribal power more than twenty years ago. In 1981, in *Montana v. United States*,[2] the Court announced a general proposition that the inherent powers of a tribe do not extend beyond the membership.[3] Sovereignty, in other words, is not a matter of inherent power over territory, but of authority over those who consent to be governed. Subject to only two limited exceptions, *Montana* decided that tribes do not have inherent power over nonmembers unless Congress delegates the power to them.[4]

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1. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 595 (1832). Chief Justice John Marshall wrote that the Cherokee Nation, then located in the State of Georgia, was a distinct community with its own boundaries in which state laws had no force, and into which state residents could not enter without Cherokee consent. *See id*. at 561. While *Worcester* decided only the limitations on state power over tribal territory, it forms the basis for contemporary conceptions of inherent sovereignty. Felix S. Cohen, the foremost advocate of tribal rights, expressed the modern formulation in 1934: "Perhaps the most basic principle of all Indian law … is the principle that those 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*." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945).

2. 450 U.S. 544 (1981).

3. *See id*. at 565.

4. *See id*. at 565–66. The two exceptions listed in *Montana* relate to activities of nonmembers who enter into consensual relationships with tribes, and to those whose conduct on non-Indian fee lands within a reservation has a direct effect on the political

For those who had not gathered *Montana*'s portent, a rude awakening to consent-based sovereignty occurred in 2001.[5] In that year the Court announced two decisions that effectively discard what little may have remained of territorial sovereignty. In *Atkinson Trading v. Shirley*, [6] the Court decided that the Navajo Tribe lacked authority to impose an occupancy tax on guests of a hotel located on fee land within the reservation, because the sovereign power to tax does not reach beyond tribal land.[7] Justice Rehnquist wrote that "[o]nly full territorial sovereigns enjoy the 'power to enforce laws against all who come within [their] territory,' and Indian tribes 'can no longer be described as sovereigns in this sense.'"[8] Neither of *Montana*'s exceptions was sufficient to assert inherent sovereignty, despite evidence that the tax was an important source of revenue for the tribe, and that it benefited nonmembers by supporting tribal services.[9] The fiscal repercussions of *Atkinson* may well be catastrophic for some tribes.[10]

integrity, economic security, or health or welfare of a tribe. *See id*. Although the limitation on sovereignty announced in *Montana* was expressed as one of a general limitation on tribal power, the case itself dealt with the narrower question whether tribes could assert regulatory powers over non-tribal members on fee lands within a reservation. At the time it was decided, many commentators greeted *Montana* with relief, because it did not foreclose all civil tribal power over nonmembers on tribal territory. Subsequent decisions, however, extended *Montana*'s reach. *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 438, 459 n.14 (1997) (holding that tribes' adjudicatory powers do not exceed their regulatory powers).

5. A few commentators discussed the shifting paradigm in the 1990s. *See, e.g.*, Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 4 (1993); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996) [hereinafter Gould, *Consent Paradigm*]. As used in this essay, consent refers to voluntary membership in an Indian tribe recognized by the federal government.

6. 532 U.S. 645 (2001).

7. *See id*. at 659.

8. *Id*. at 653 (quoting Duro v. Reina, 495 U.S. 676, 685 (1990)).

9. *See id*. at 655. Applying the first of *Montana*'s two exceptions, the Court decided that "a nonmember's actual or potential receipt of tribal police, fire, and medical services" was insufficient to constitute consent. *Id*. "If it did," observed the Court, "the exception would swallow the rule" that there be a nexus between the tribal tax or regulation and the consensual relationship of the nonmember. *Id*. To construe generalized benefits to nonmembers as constituting consent would "ignore[ ] the dependent status of Indian tribes and subvert[ ] the territorial restriction upon tribal power." *Id*. The Court also rejected application of the second *Montana* exception, stating that it was triggered only where nonmembers' conduct was so severe that it "actually 'imperil[s]' the political integrity of the Indian tribe." *Id*. at 657–58 n.12.

10. Amicus briefs were filed by sixteen separate and confederated tribes in support of the respondent Navajo Tribe. Many of these tribes had levied taxes on nonmembers that the tribes contended were essential for supporting public services for both members and

The second opinion, *Nevada v. Hicks*[11] ignored a principle laid down almost half a century ago—that states cannot regulate the affairs of Indians on reservations without authority from Congress.[12] Instead, in deciding that a tribal court did not have jurisdiction over a civil proceeding brought against state game wardens for conduct occurring on tribal land, the Court embraced a converse principle. Justice Scalia wrote that states possess "inherent jurisdiction" over reservations, except where their authority is limited by Congress.[13] "[I]t was 'long ago' that 'the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. 'Ordinarily,' it is now clear, 'an Indian reservation is considered part of the territory of the State.'"[14]

To Justice Souter, joined by Justices Kennedy and Thomas, the principal determinate of jurisdiction over civil matters on a reservation should be the membership status of the nonconsenting party, not the status of the underlying real estate.[15] That is, the paradigm for judging tribal sovereignty

nonmembers. These services ranged from fire and police protection to building code enforcement, public health inspections, and public transportation. The revenue sources affected by *Atkinson* included, among others, real and personal property taxes, ad valorem taxes on utility rights-of-way, gasoline taxes, and sales and use taxes.

11. 533 U.S. 353 (2001).

12. *See* Williams v. Lee, 358 U.S. 217 (1959). The Court decided that an Arizona state court did not have jurisdiction to entertain a civil suit by a non-Indian against an Indian over conduct occurring on a reservation. Justice Black wrote that "Congress has … acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Id*. at 220. "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id*. Justice Black added that "[i]t is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id*. at 223. In *Hicks*, an Indian brought suit in tribal court against state officers for trespass, abuse of process, and violation of civil rights in connection with execution of a warrant. *See Hicks*, 533 U.S. at 353. Although the warrant related to an off-reservation crime, the tribal court proceeding involved conduct on the reservation. *See id*. at 356. Nonetheless, and despite *Williams*, Justice Scalia pointedly observed that the Court had thus far avoided the question whether a tribal court may ever assert jurisdiction over a non-Indian. *See id*. at 374.

13. *See Hicks*, 533 U.S. at 365.

14. *Id*. at 361–62 (citations omitted) (quoting U.S. Dep't of Interior, Federal Indian Law 510, and n.1 (1958)) (citing Utah & Northern R. Co. v. Fisher, 116 U.S. 28 (1885)). The 1958 publication has been repudiated by some scholars. *See, e.g.*, 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). *See also* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980) (observing "it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States").

15. *See Hicks*, 533 U.S. at 375–76 (Souter, J., concurring).

should be membership, not territory. "The path marked best is the rule that, at least as a presumptive matter, tribal courts lack civil jurisdiction over nonmembers."[16]

Atkinson and *Hicks* have provoked concern and outrage among both tribal organizations and academics. The National Congress of American Indians (NCAI) has called for legislation to "reconfirm Tribes' inherent authority and place Tribes in their original position of full sovereignty."[17] Numerous scholars have offered remedies to strengthen tribal sovereignty. For example, Robert Clinton called upon Congress to amend 28 U.S.C. § 1738 to require that full faith and credit be extended to tribal court adjudications.[18] Gloria Valencia-Weber advocates, among other solutions, a revision of the Indian country statute to give tribal courts express jurisdiction over all reservation lands.[19] Carol Tebben calls upon the Court

16. *Id*. at 376–77.

17. National Congress of American Indians, *Sovereignty Protection Comm. Descriptions, Legislative Options* (Sept. 11, 2001), *available at* http://www.ncai.org/main/pages/issues/governance/documents/committees.pdf. *See also infra* note 103 (describing NCAI legislative agenda for the 108th Congress).

18. Robert Clinton, Remarks at the University of Pennsylvania School of Law Symposium on Native Americans and the Constitution (Feb. 1–2, 2000). This legislation was enacted pursuant to the full faith and credit clause of the United States Constitution. *See* U.S. CONST. art. IV § 1. The Act states in relevant part that the "judicial proceedings of any court of any such State, Territory or Possession … shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." Congress has not required federal and state courts to accord full faith and credit to all tribal court decisions, although it has required that full faith and credit be extended in specific matters. *See, e.g.*, 18 U.S.C. § 2265 (domestic violence orders); 25 U.S.C. § 1911(d) (child custody orders). Some states have accorded full faith and credit to tribal court decisions. *See, e.g.*, Gesinger v. Gesinger, 531 N.W.2d 17 (S.D. 1995); Barrett v. Barrett, 878 P.2d 1051 (Okla. 1994); *In re* Custody of Sengstock, 477 N.W.2d 310 (Wis. Ct. App. 1991); Fredericks v. Eide-Kirschmann Ford, Inc., 462 N.W.2d 164 (N.D. 1990); Sheppard v. Sheppard, 655 P.2d 895 (Id. 1982); *In re* Marriage of Red Fox, 542 P.2d 918 (Or. Ct. App. 1975); *cf.* Jones v. Meehan, 175 U.S. 1, 31–32 (1899). Other commentators have also appealed for the extension of full faith and credit to tribal court decisions. *See, e.g.*, Stacy L. Leeds, *Full Faith and Credit After* Nevada v. Hicks, Fall Judicial Conference, Montana Judges for Courts of Special Jurisdiction, Billings, Montana, October 2, 2001; Stacy L. Leeds, *Working Collaboratively on Full Faith and Credit across Tribal and State Lines*, Five-State Judicial Conference, Montana Supreme Court, Bozeman, Montana, June 25, 2001.

19. *See* Valencia-Weber, *supra* note 14 at 473–74 (referring to 18 U.S.C. § 1151 (1994)). Amending this statute to provide tribal court civil jurisdiction over rights-of-way within a reservation would affect a legislative override of *Strate v. A-1 Contractors*, in which the Court decided that a tribal court lacked jurisdiction over a tort occurring on a right-of-way within the reservation. *See* Strate v. A-1 Contractors, 520 U.S. 438, 459 (1994). The term Indian country is defined in 18 U.S.C. § 1151 as including:

to acknowledge the constitutional status of tribal governments as members of a "trifederal" republic.[20] Frank Pommersheim envisions protecting tribal sovereignty by a constitutional amendment.[21]

Among these and other scholars, at least three themes recur. First, the Court's continuing diminishment of territorial sovereignty owes to the majority's fixation on expanding the powers of the states. Second, salvaging sovereignty depends on implementing solutions that will insulate tribes and tribal courts from federal judicial inquiry. Third, implicitly, finding these solutions depends on conceptualizing sovereignty from a tribal point of view.

This essay suggests that themes such as these misperceive the underlying reason for the Court's new consent paradigm, and that because they do, prophylactic measures aimed at insulating tribes from judicial attack may only further isolate them. It may well be that the majority's preoccupation with states' rights sheds light on why it denied the Navajos the right to tax nonmembers on fee lands in *Atkinson*, despite substantial benefits to those taxed, while elsewhere it permitted New Mexico to tax nonmembers within the Jicarilla Apache reservation, despite evidence the state provided only modest benefits.[22] But federalism does not explain the Court's diminishment of tribal sovereignty in cases where states' rights have no bearing. In *Oliphant v. Suquamish Indian Tribe*[23] and *Duro v. Reina*[24] the Court stripped tribes of jurisdiction over crimes committed by non-Indians and nonmembers without any reference to state interests. Indeed there were none.[25] Neither does a conservative majority explain the reluctance of the

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government … (b) all dependent Indian communities within the borders of the United States … whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same[.]

Id.

20. Carol Tebben, *An American Trifederalism Based Upon the Constitutional Status of Tribal Sovereignty*, 5 U. PA. J. CONST. L. 318 (2003).

21. *See* Frank Pommersheim, *Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA J. CONST. L. 271 (2003).

22. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1988) (upholding state taxation of oil and gas production of non-Indian leases within a reservation, despite evidence that state provided services amounting to less than four percent of revenues collected).

23. 435 U.S. 191 (1978).

24. 495 U.S. 676 (1990).

25. Historically, state courts did not have jurisdiction over crimes occurring in Indian country that involved Indians and non-Indians. *See* 18 U.S.C. § 1152 (1988). Jurisdiction was limited to the tribes or federal government. In 1953, Congress enacted Public Law 280,

Court's liberal members to support broad-based tribal jurisdiction. Justices Ginsburg[26] and Breyer[27] have each authored opinions that limit tribal powers.

The root cause of the Court's unwillingness to vest tribes with regulatory or adjudicatory jurisdiction over non-Indians and nonmembers is its inability to reconcile the constitutional protection of individual rights with the tribal conception of group rights. There is virtually no textual basis in the Constitution to support tribal authority over nonmembers, while the rights of individuals to due process and equal protection are hallmarks of the Constitution and the Court's modern jurisprudence.[28] Hence, when contests have pitted a tribe against an individual, unless the individual was a member of the tribe, the tribe has almost always failed.[29] In those few cases where the Court has found that tribes may exercise authority over nonmembers, it has done so because Congress delegated the authority,[30] or

which supplanted tribal court jurisdiction in several states. Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified and amended at 18 U.S.C. § 1162 (2000)); 25 U.S.C. §§ 1321–26 (2000); 28 U.S.C. § 1360 (2000). Shortly before *Oliphant* was decided, Washington relinquished Public Law 280 jurisdiction over reservations in that state, including the Port Madison reservation of the Suquamish Indian Tribe. *See* Chief Seattle Properties, Inc. v. Kitsap County, 541 P.2d 699 (1975).

26. Justice Ginsburg wrote for a unanimous Court in *Strate v. A-1 Contractors*, which decided that tribes' adjudicatory powers do exceed their regulatory powers. *See* Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997).

27. Justice Breyer wrote for the Court in *Chickasaw Nation v. United States*, which discounted a canon of construction that ambiguous statutory provisions are to be interpreted for the benefit of Indians, deciding instead that the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(d), fails to exempt tribes from federal gambling-related excise and occupational taxes. *See* Chickasaw Nation v. United States, 534 U.S. 84, 86 (2001).

28. *See* U.S. CONST. art. I, § 8, cl. 3 (conferring power on Congress to "regulate Commerce … with the Indian Tribes"). Tribes are referred to expressly only once in the Constitution. *See id*. Indians are mentioned twice, in Article I and the Fourteenth Amendment, but only in reference to persons counted in congressional apportionments. *See* U.S. CONST. art I, § 2, cl. 3; U.S. CONST. amend. XIV (excluding "Indians not taxed" from population counts). Elsewhere, the Constitution confers power on the President to make treaties with the advice and consent of the Senate. *See* U.S. CONST. art. II, § 2, cl. 2.

29. The paradigms are *Oliphant*, finding tribes lack inherent power to prosecute non-Indians for crimes, and *Talton v. Mayes*, deciding tribal prosecution of tribal members is not subject to Fifth Amendment grand jury requirements because of tribal exercise of the power of inherent sovereignty. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978); Talton v. Mayes, 163 U.S. 376, 384 (1896).

30. *See, e.g.*, United States v. Mazurie, 419 U.S. 544, 557 (1975) (upholding congressional delegation of authority to tribes to regulate introduction of liquor into Indian country on grounds that tribes possess attributes of sovereignty over both their members and their territory).

because it found an instance of consent.[31]

If there is any chance to shift the paradigm of tribal sovereignty back toward *Worcester* from *Montana*, it depends on finding solutions that will persuade a reluctant, often hostile, Court that tribes can appropriately assert regulatory and adjudicative authority over all individuals in their territory, regardless of consent, because their authority is subject to the safeguards of the Constitution. Meaningful sovereignty after *Atkinson* and *Hicks*—sovereignty over territory, not just tribal members—requires that tribal powers be centered in, not insulated or conjured from the Constitution.

WEAKNESSES IN THE DOCTRINAL BEDROCK OF INHERENT SOVEREIGNTY AND CONGRESSIONAL TRUST RESPONSIBILITY

The failure of two opposing doctrines accounts for much of the Court's new emphasis on consent-based sovereignty. The failure also illuminates the Court's unwillingness to identify tribal rights superior to those of nonmember individuals, and helps explain why *Atkinson* and *Hicks* will not be overcome by focusing on measures aimed only at protecting tribal power. These failed doctrines, one the virtual reciprocal of the other, are the doctrines of inherent sovereignty and Congressional trust responsibility. Each doctrine has roots in *Worcester*. The one asserts that tribes are sovereigns whose powers are both pre- and extra-constitutional,[32] the other that tribal powers, indeed tribes themselves, are subject to complete defeasance by the Congress.[33]

As I argue elsewhere, the doctrine of inherent sovereignty has been unequal to the task of protecting tribal power because it has no textual support within the Constitution.[34] Bold as it was, Justice Marshall's view

31. *See, e.g.*, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980). In 1980, the Court determined that tribes possess inherent power to tax nonmembers for transactions occurring on trust lands, such power being deemed a fundamental attribute of sovereignty. *See id*. Subsequent decisions suggest that *Colville* does little more than confirm tribal power over nonmembers who consent to deal with them, as by buying cigarettes at tribal smokeshops. *See id*. *See also* Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 427 (1989) (opinion of White, J.) (reconciling *Colville* with *Montana* on basis of consensual relationship). In *Atkinson*, Chief Justice Rehnquist suggests that consent must be based on express commercial dealings or similar arrangements, not simply on the receipt of benefits. *See* Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 655 (2001).

32. *See, e.g.*, CHARLES WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 111–13 (1986) (describing tribal powers as existing outside the constitution).

33. *See, e.g.*, FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 206–36 (1988) (contending tribes possess those inherent powers that have not been expressly limited by Congress).

34. *See* Gould, *Consent Paradigm*, *supra* note 5, at 895–902.

that Georgia had no authority to impose its laws within the territory of the Cherokees was what now would be regarded as federal common law, interstitial rather than constitutional.[35] This is why Justice Scalia could discard *Worcester* so easily in *Hicks*.[36] More to the point, because the doctrine of inherent sovereignty lacks constitutional underpinnings, it has consistently failed the tribes whenever it has been advanced as a basis for asserting power over nonmembers. Thus, the Court has found inherent power insufficient for tribes to prosecute non-Indians[37] or nonmember Indians for crimes.[38] It has found inherent power insufficient for tribes to regulate hunting and fishing by non-Indians on fee lands within their reservations,[39] even when Congress has acquired the lands without intent to limit tribal jurisdiction.[40] While the Court has held that tribes can regulate land use on fee lands in areas of their reservations that are essentially closed to non-Indians,[41] it has effectively limited the reach of this holding to its facts.[42] The Court has also found that a tribe's inherent sovereignty is insufficient to extend its adjudicative jurisdiction beyond its capacity to

35. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Federal common law ordinarily refers to that body of law decided by federal courts which is neither governed by the Constitution, Acts of Congress, nor by state law pursuant to the Erie Doctrine. *See* Erie R. Co. v. Thompkins, 304 U.S. 64 (1938). As applied to federal Indian law, it refers to decisions in which the Court construes congressional intent in the absence of explicit legislation. *See id*.

36. *See supra* text accompanying note 12. Of course, the *Hicks* Court was also declaring federal common law, and is presumably subject to contrary legislation by the Congress, lest the Court exceed its Article III authority. *See* Nevada v. Hicks, 533 U.S. 353 (2001). This is the basis of legislation designed to overturn *Duro v. Reina*, 495 U.S. 676 (1990), discussed in *infra* text accompanying notes 111–14. *See also* Nell Jessup Newton, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109, 115 (1992) (discussing legislative correction of Court's misunderstanding of congressional intent).

37. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) (finding inherent sovereignty proscribed when tribes assert powers inconsistent with their status).

38. *See Duro*, 495 U.S. at 685 (declaring retained sovereignty limited to authority necessary to control internal tribal matters). *But see infra* text accompanying note 110 (discussing congressional override of *Duro*).

39. *See* Montana v. United States, 450 U.S. 544, 564 (1981) (citing United States v. Wheeler, 435 U.S. 315, 326 (1977) (declaring that exercise of tribal power beyond internal relations requires congressional delegation of authority)).

40. *See* South Dakota v. Bourland, 508 U.S. 679, 691 (1993) (declaring that inherent tribal rights to regulatory control are destroyed when treaty rights are abrogated, regardless of congressional purpose).

41. *See* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 442 (1989) (Stevens, J., concurring).

42. *See* Atkinson Trading v. Shirley, 532 U.S. 645, 658 (2001) (finding *Brendale* judgment turned on closed nature of tribal lands and jeopardy to tribe that would occur from non-Indian development).

regulate,[43] and recently, in *Hicks*, left open the possibility that it may find tribes' adjudicative powers fall short of even their diminished regulatory powers over nonmembers.[44]

One commentator writing in these pages observes that inherent sovereignty has become so doubtful a basis for asserting tribal power that it constitutes malpractice to urge it as grounds for bringing suit.[45] Responses to *Atkinson* and *Hicks* that try to resurrect this power are likely to be equally unavailing. Yet proposals that would reconstruct inherent sovereignty are what many tribal advocates champion, aided, ironically, by the doctrine of congressional trust responsibility.

According to the latter doctrine, Congress has plenary authority over tribes, hence power to correct the Court's impoverished view of tribal sovereignty. But this congressional authority has little more textual support within the Constitution than the doctrine of inherent sovereignty. At best, it is a fiduciary responsibility that can be extrapolated from the treaty power[46] and the Indian Commerce Clause.[47] At worst, it is a judicial grant of unbridled power to the Congress to act without constitutional basis or constraint.

In the nineteenth century, the doctrine enabled Congress to impose criminal laws on tribal Indians on reservations,[48] to divide tribal lands into allotments,[49] and to abrogate its treaties.[50] In the twentieth century, the

43. *See* Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997).

44. *See* Nevada v. Hicks, 533 U.S. 353, 358 (2001).

45. *See* Steven Paul McSloy, *The "Miner's Canary": A Bird's Eye View of American Indian Law and Its Future*, 37 NEW ENG. L. REV. 733, 738 (2003).

46. *See* U.S. CONST. art. II, § 2, cl. 2.

47. *See* U.S. CONST. art. I, § 8, cl. 3; *infra* notes 49–53 and accompanying text (discussing Morton v. Mancari, 417 U.S. 535 (1974)).

48. The Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2000)) subjects Indians to federal court prosecution for certain crimes committed in Indian country, originally including murder, manslaughter, rape, arson, burglary, larceny, and assault with intent to kill. Following enactment of the legislation in 1885, it was challenged in *United States v. Kagama*, 118 U.S. 375 (1886) as exceeding Congress' Article I authority. Hitherto, only tribes had jurisdiction over crimes committed in Indian county by Indians. The Court observed that no provisions of the Constitution empowered Congress to regulate the internal affairs of tribes. *See Kagama*, 118 U.S. at 378–79 (referring to the phrases "Indians not taxed" in U.S. CONST. art. I, § 2, cl. 3, and U.S. CONST. amend. XIV, §2, and to the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3). It nonetheless upheld the legislation, concluding that Congress' plenary power over tribes must exist "because it has never been denied, and because [Congress] alone can enforce its laws on all the tribes." *Id*. at 384–85.

49. The Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887), provided for division of tribal lands into farming and grazing tracts, the ostensible purpose being to "civilize" tribal Indians by turning them into farmers. The allotment policy was a

doctrine lay behind legislative acts that terminated several tribes.[51] Even in its most benign formulation, the doctrine has often disadvantaged Indians and their tribes. It is this capacity to cause unexpected harm that cautions great care be taken before invoking congressional power to undo *Atkinson* and *Hicks*.

The present Court's conception of the doctrine of congressional trust responsibility was announced in *Morton v. Mancari*, a decision that upheld an employment preference for Indians in the Bureau of Indian Affairs (BIA).[52] In deciding that the preference did not violate the equal protection component of the Due Process Clause, the Court made two determinations that have since become mixed blessings for tribes and Indians. It decided, first, that the preference was not racial because it applied only to members of federally-recognized tribes, not to Indians in general.[53] As such, the preference was political.[54] Hence legislation that applied to Indians as members of quasi-sovereign entities was not susceptible to challenge on grounds that it improperly benefited a particular racial group.[55] Second, the Court decided that when Congress legislated respecting tribes, its actions did not require heightened scrutiny so long as the legislation was tied rationally to the fulfillment of Congress' trust obligation.[56]

These two determinations have fueled much debate and many articles, mine among them, because they have been turned against tribes and individuals at least as often as they have benefited them.[57] Only two years

disastrous failure, resulting in an estimated 90-million-acre loss of tribal lands. *See* MONROE E. PRICE & ROBERT N. CLINTON, LAW AND THE AMERICAN INDIAN: READINGS, NOTES AND CASES 629 (2d ed. 1983).

50. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (deciding Congress had power to abrogate treaty provisions requiring tribal consent to allot a reservation, and that treaty abrogations presented nonjusticiable political questions).

51. Congress passed fourteen tribal termination acts between 1954 and 1962. *See* Michael C. Walch, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1187 (1983). Virtually all of these tribes were later successful in regaining tribal status, although many recovered only a small portion of their former lands. *See* L. Scott Gould, *The Congressional Response to* Duro v. Reina: *Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, nn.8–9 (1995) [hereinafter Gould, *Congressional Response*].

52. 417 U.S. 535, 555 (1974).

53. *See id*. at 553 n.24.

54. *See id*.

55. *See id*. at 554.

56. *See* Morton v. Mancari, 417 U.S. 535, 555 (1974).

57. *See, e.g.*, L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 711–18, 726–36 (2001) [hereinafter Gould, *Mixing Bodies*]; Gould, *Consent Paradigm*, *supra* note 5, at 854–64; Ralph W. Johnson & E. Susan Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587, 605 (1979); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 759

after *Mancari* was decided, for example, its concept of political classifications was invoked to deny Indians access to a state court in an adoption proceeding.[58] The Court reasoned that although the Indian plaintiff was denied a right available to any other citizen of the state, the disparate treatment was justified because the authorizing legislation was beneficial to the class of which the Indian plaintiff was a member.[59] One year later, again applying *Mancari*, the Court decided that an Indian, charged with murdering another Indian on a reservation, could be prosecuted under the Major Crimes Act[60] even though a non-Indian could not.[61] Federal regulation of Indian affairs, the Court concluded, was not based on impermissible racial classifications because it dealt with Indians and tribes as "political communities."[62]

The effect of these decisions was to permit Congress and the Court to deal with Indians in ways that would be constitutionally offensive if applied to other groups. Moreover, even when the Court was willing to consider an equal protection challenge brought by Indians, *Mancari* required only minimal judicial scrutiny. In one case, the Court upheld legislation that treated equally situated Indians differently, even though Congress was completely unaware of the disparate treatment when it acted.[63] All that was required was that there be some rational connection between the legislation and fulfillment of the trust responsibility.[64]

Mancari has influenced not only the Court's disposition of equal protection claims by individual Indians; it has also influenced the Court's conception of tribes and tribal powers. Shortly after *Mancari* was decided, the Court applied its rationale to uphold the immunity of Flathead reservation Indians from various Montana taxes.[65] The Court rejected the state's equal protection claim on grounds that the immunity was created as an exercise of Congress' trust responsibility toward tribes as polities, not as

(1991).

58. *See* Fisher v. Dist. Ct. of the 16th Jud. Dist. of Mont., 424 U.S. 382, 390 (1976) (per curiam) (denying tribal member access to state court on grounds Congress had authorized tribe to exercise exclusive jurisdiction).

59. *See id*. at 390–91 (citing Morton v. Mancari, 417 U.S. 535, 551–55 (1974)).

60. *See supra* note 48 (discussing Major Crimes Act).

61. *See* United States v. Antelope, 430 U.S. 641 (1977).

62. *Id*. at 646.

63. *See* Del. Tribal Bus. Comm'n v. Weeks, 430 U.S. 73, 85 (1977) (citing *Mancari*, 417 U.S. at 555 (1974) (holding unequal distribution of Indian Claims Commission award not violative of equal protection when tied rationally to Congress' responsibility to tribes)).

64. *See id*.

65. *See* Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) (rejecting equal protection claim brought by state attempting to impose taxes on cigarette sales to Indians on reservation and on personal property used on reservation).

racial groups.[66] Unfortunately, this rationale also meant that tribal members could be isolated from others present on their reservations.

In 1980, the Court permitted the State of Washington to impose sales taxes on Indians on the Colville reservation who were not members of the reservation tribes.[67] The Court reasoned that because nonmembers were not part of the governing tribes, they were no different from non-Indians, and therefore had no tax immunity.[68] The immediate result of the decision was to destroy a competitive advantage the Colville tribes had enjoyed in selling cigarettes.[69] A graver consequence was that the Court could use political status distinctions, and its concept of the congressional trust responsibility, to trivialize tribal claims for equal protection. Still graver was the prospect that the Court would use the concept of political status to confine the powers of tribal governments to their membership, thereby eliminating their sovereignty over their territory.

The first of these possibilities was realized when the Yakima tribes challenged the authority of the State of Washington to impose its laws within their reservation.[70] They contended that state enabling legislation singled out Indians in violation of the equal protection and due process guarantees of the Fourteenth Amendment.[71] Nevertheless, the Court decided that the state's powers were derivative from Congress, and that "the unique legal status of Indian tribes under federal law" permitted the federal government to single out tribal Indians with legislation that might otherwise offend the Constitution.[72] The congressional trust responsibility, which the Court had invoked as a rationale to uphold greater rights for Indians in *Mancari*, now supplied the reasoning to diminish constitutional protections.

The second of these possibilities, that of using political distinctions to limit the territorial authority of tribes, was realized in a succession of

66. *See id*. at 480.

67. *See* Wash. v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980).

68. *See id*. at 156.

69. The Makah, Lummi, and Colville tribes had generated substantial revenues selling cigarettes to purchasers who visited the Colville reservation, since they collected tribal taxes but not state taxes. As a result of the *Colville* holding, the tribes were forced to either forego their own cigarette taxes or to lose sales by imposing both state and tribal taxes. *See id*. at 170–71 (Brennan, J., dissenting).

70. *See* Wash. v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979).

71. *See id*. at 467. The state had enacted legislation under provisions of Public Law 280, a congressional grant of authority for states to exercise criminal and limited civil jurisdiction over reservations. *See supra* note 25.

72. *See Yakima Indian Nation*, 439 U.S. at 500–01 (quoting Morton v. Mancari, 417 U.S. 535, 551–52 (1974)).

decisions following *Mancari*.[73] The current ramification is the Court's constricting view of tribal sovereignty in *Atkinson* and *Hicks*.

Taken together, the doctrines of inherent sovereignty and trust responsibility have helped produce a state of affairs in which tribal powers are denigrated when tribes are pitted against nonmembers, and in which the rights of Indians as individuals are minimized in contests with their tribes. The fulcrum is consent. For those outside the fold—nonmembers and non-Indians—the Court expresses great solicitude for protected liberties.[74] For those inside, it frequently exhibits scorn.[75] The result is that the two doctrines have injured both tribes and their members.

What will surely fail in attempts to overcome *Atkinson* and *Hicks* are solutions that enlist Congress and its trust responsibility to revest tribes with inherent powers—implicitly nonreviewable powers—because doing so will only renew the losing contest between non-constitutional group rights and individual (nonmember) rights. Better to protect tribal sovereignty by making tribal actions subject to the Constitution.

RECONSIDERING *MARTINEZ*

In 1968, Congress responded to criticism that tribal governments abused the rights of members by enacting the Indian Civil Rights Act (ICRA), which extended most of the protections of the Bill of Rights into tribal territory.[76] The legislation, however, did not contain an express provision for federal enforcement in civil actions.[77]

Santa Clara Pueblo v. Martinez posed the question whether a federal

73. *See, e.g.*, Duro v. Reina, 495 U.S. 676, 693 (1990) (observing that inherent sovereignty of tribes amounts to authority over only those consenting to be tribal members); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208–10 (1978) (deciding tribal criminal jurisdiction over non-Indians implicitly divested by tribes' dependent status); United States v. Wheeler, 435 U.S. 313, 326 (1978) (indicating inherent tribal powers over nonmembers implicitly divested).

74. *See, e.g.*, Gould, *Consent Paradigm*, *supra* note 5, at 861 (contending that differing treatment of non-Indians by Court may turn on tribal membership).

75. *See, e.g.*, Gould, *Mixing Bodies*, *supra* note 57, at 738–41 (discussing the Court's hostility to groups whose memberships are based on ancestry, in reference to *Rice v. Cayetano*, 528 U.S. 495 (2000)).

76. *See* Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301–1303 (2000)). There are significant differences between ICRA and the Bill of Rights. For example, ICRA does not guarantee indigents the right to appointed counsel. It also does not prohibit the establishment of religion (as a means to protect Pueblo theocratic governments).

77. ICRA does provide for federal habeas corpus review in criminal matters. *See* 25 U.S.C. § 1303 (2000).

remedy for ICRA violations could be implied.[78] A Santa Clara ordinance permitted the children of male members who married outside the tribe to become tribal members but not the children of female members who married outside the tribe.[79] Julia Martinez, a full-blooded tribal member married to a Navajo, brought suit in federal district court on grounds that her daughter was denied equal protection under ICRA.[80]

In an opinion written by Justice Thurgood Marshall, the Court decided that sovereign immunity prevented ICRA violations from being tried in federal courts, absent an express congressional directive to the contrary.[81] The Court reasoned that ICRA had the dual objectives of protecting the rights of Indians vis-á-vis their tribes and strengthening tribal governments.[82] It declined to infer a remedy from Congress' silence that might unbalance these objectives.[83]

Martinez is a difficult decision. At least one commentator has viewed it as an affirmation of group rights,[84] and, without question, in upholding the sovereign immunity of tribes, the decision protected tribal resources from depletion in federal civil suits for damages. Yet Julia Martinez, who had sought only declaratory and injunctive relief, was left without a remedy.[85] Indeed, Justice Marshall wrote a year after *Martinez* was decided that the case marked the only instance in which the Court had reviewed an explicit federal right and failed to find a remedy.[86]

In recent years, much academic ink has been spilled over the Court's decision in *Alden v. Maine*[87] in which the Court held that sovereign

78. 436 U.S. 49, 52 (1978).

79. *Id*. at 51.

80. *Id*.

81. *Id*. at 63–64.

82. *Id*. at 62.

83. *Id*. at 60.

84. *See* Ronald R. Garet, *Community and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1035 (1983) (reasoning *Martinez* is coherent only as a recognition of group rights).

85. She had already sought unsuccessfully to persuade the Santa Clara Pueblo to change its membership requirements and later sought unsuccessfully for action by the Congress. *See* Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 675 n.15 (1989).

86. *See* Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979) (distinguishing *Martinez* on grounds federal remedies would interfere with matters relegated to semisovereign tribes). In recent years, the Court has become decidedly less willing to find implied private rights of action to enforce federal laws. *See, e.g*., Gonzaga University v. Doe, 536 U.S. 273 (2002) (deciding creation of new rights enforceable by private parties under 42 U.S.C. § 1983 requires clear and unambiguous evidence of congressional intent).

87. 527 U.S. 706 (1999). The Supreme Court held that state probation officers could not seek damages against the State of Maine for violations of the Fair Labor Standards Act

immunity protects states from most damage suits by citizens in state courts to enforce federal rights.[88] No such widespread hue and cry was raised for Julia Martinez.[89] Nor did Congress respond to *Martinez* as it might have, but could not have done to *Alden*, by providing express civil remedies in federal courts.

At its core, *Martinez* dealt with an exercise of Congress' trust responsibility. ICRA was a congressional divestiture of tribal sovereignty intended to benefit Indians as individuals.[90] This occurred because tribes exercising their inherent powers were not subject to the Constitution.[91] *Martinez* turned ICRA's purpose on its head. But whether even tribes benefited from the Court's solicitude for sovereignty is doubtful.

(FLSA), 29 U.S.C. §§ 201–219 (1994) in state court, deciding that Congress lacks power to waive states' Eleventh Amendment sovereign immunity under the Necessary and Proper Clause. *Id*. at 732. Three years earlier, the Court had decided that the states' sovereign immunity protected them from damage suits by private citizens to enforce federal laws in federal court, unless such laws were enacted pursuant to Section 5 of the Fourteenth Amendment. *See* Seminole Tribe v. Florida, 517 U.S. 44, 59, 76 (1996). The effect of these decisions is to immunize states from damage suits by individuals seeking to redress violations of federal law.

88. *See, e.g*., Erwin Chemerinsky, *The Hypocrisy of* Alden v. Maine*: Judicial Review, Sovereignty Immunity and the Rehnquist Court*, 33 LOY. L.A. L. REV. 1283 (2000) (decrying Eleventh Amendment decisions as preferring state government power over individual rights); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001) (contending *inter alia* that sovereign immunity frustrates deterrence because states can violate federal laws with impunity); Louise Weinberg, *Of Sovereignty and Union: The Legends of* Alden, 76 NOTRE DAME L. REV. 1113, 1181 (2001) (lamenting that until *Alden* the Constitution would have protected individuals from state deprivations of property without due process: "The [Court's] message is that Congress does not have the capacity to govern this country with which, we supposed, the Founders endowed it, the power that Chief Justice Marshall made plain, that the Civil War paid for in blood, and that the post New Deal Court, we imagined, finally acknowledged."). *But see* William P. Marshall, *Understanding* Alden, 31 RUTGERS L. J. 803 (2000) (concluding *Alden* does not compromise constitutional integrity by only prohibiting individuals from seeking damage awards).

89. *But see, e.g.*, Resnick, *supra* note 85, at 719–21 (describing federal influence concerning tribal membership and significance of loss of federal benefits when membership is denied); Christina D. Ferguson, Martinez v. Santa Clara Pueblo*: A Modern Day Lesson on Tribal Sovereignty*, 46 ARK. L. REV. 275, 301 (1993) (faulting Court for denying civil rights to Indians while upholding tribal sovereignty that elsewhere it had crippled).

90. One commentator faults *Martinez* on precisely this basis. *See* Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2295 (1989) (contending that in upholding ICRA the Court affirmed an unconstitutional exercise of congressional power).

91. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (observing tribes historically unconstrained by constitutional limitations imposed on federal and state governments); Talton v. Mayes, 163 U.S. 376, 384 (1896) (holding that the Fifth Amendment did not apply in tribal prosecution of tribal member).

Had Julia Martinez been sued in a civil action by her tribe, she would have been subject to its jurisdiction by virtue of her membership. Arguably, she would also have been subject to its jurisdiction in any criminal proceeding.[92] But nonmembers did not necessarily need to be involved with ICRA or with tribal courts. Weeks before *Martinez* was decided, the Court ruled that tribes lacked jurisdiction to try non-Indians in criminal proceedings.[93]

Following *Martinez*, various avenues were sought by civil litigants to circumvent actions in the tribal courts.[94] Among the most notable challenges were *National Farmers Union Insurance Cos. v. Crow Tribe*[95] and *Iowa Mutual Insurance Co. v. LaPlante*,[96] which upheld, respectively, the power of federal district courts to review tribal court decisions on the basis of federal question[97] and diversity jurisdiction.[98] These decisions, which manifested deference to tribal court adjudications, have since been held to state only prudential exhaustion rules.[99]

What if *Martinez* had come out the other way? Deference to the ICRA rights of individual Indians would have meant that Julia Martinez had a remedy in federal court. It seems equally possible that if federal review of tribal court decisions were generally possible, nonmember litigants might also have been willing over the years to submit to tribal court jurisdiction. By insulating tribes from federal ICRA remedies, *Martinez* may well have injured tribes themselves by inviting the challenges that have undercut their

92. She would also have been subject to the tribe's jurisdiction in a misdemeanor criminal proceeding, but possibly not for commission of a crime subject to the Major Crimes Act. *See* Gould, *Congressional Response*, *supra* note 51, at 85–86 & n.141.

93. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). Kevin Gover and Robert Laurence observe that Mark Oliphant, a non-Indian accused of misdemeanors by the Suquamish Tribe, had a clear ICRA claim for which a federal habeas corpus remedy was available. He chose instead to challenge the sovereign power of the tribe. In *Oliphant*, the authors point out, discussion of ICRA is relegated to a footnote. *See* Kevin Gover & Robert Laurence, *Avoiding* Santa Clara Pueblo v. Martinez*: The Litigation in Federal Court of Civil Actions Under the Indian Civil Rights Act*, 8 HAMLINE L. REV. 497, 511 (1985).

94. *See generally*, Gover & Laurence, *supra* note 93 (discussing litigation of ICRA cases in federal court).

95. 471 U.S. 845 (1973).

96. 480 U.S. 9 (1987).

97. *See* 28 U.S.C. § 1333. In *National Farmers* the Court decided that non-Indian defendants properly invoked federal jurisdiction on allegations that tribal court jurisdiction had been divested by federal law. *See* 471 U.S. at 852.

98. *See* 28 U.S.C. § 1332. In *Iowa Mutual* the Court declined to find that federal diversity jurisdiction divested tribal courts of jurisdiction over nonmembers, but did hold that if a tribal appeals court held that the tribe had jurisdiction, the defendant could challenge the determination in federal court. *See* 480 U.S. at 17–19.

99. *See* Strate v. A1 Contractors, 520 U.S. 438, 448–50 (1997).

jurisdiction. Three members of the current Court openly express doubts about the fairness of the tribal courts and the adequacy of their laws and procedures by pointedly observing that losing parties are unable to remove or appeal to state or federal courts.[100] The majority, citing *National Farmers*, now hints darkly that it may find there is no civil jurisdiction whatsoever over nonmember defendants in tribal court proceedings.[101]

Reconsidering *Martinez* from an individual point of view, that in some respect involves the federal judiciary, will entail a loss of tribal sovereignty. Yet the loss will only be superficial if, in exchange, tribal courts receive broader jurisdiction. The NCAI hopes to initiate legislation emphasizing such an exchange in the 108th Congress.[102] A draft version would provide for federal appellate court review of tribal court decisions, while empowering tribes to assume both civil and criminal jurisdiction over all persons in their territory.[103] Surely, proposals such as these, that protect the rights of individuals, are the surest way to regain sovereignty lost in the decades from *Montana* through *Atkinson* and *Hicks*.[104]

THE *DURO* LEGISLATION POINTING WHERE A *HICKS* FIX SHOULD NOT GO

In its 2002 term, the Supreme Court denied certiorari in *United States v. Enas*.[105] In failing to review the case, the Court let stand an exercise by Congress of its trust responsibility that is inflicting a continuing injury on tribes and Indians. *Enas* is one of a handful of appellate decisions to consider the constitutionality of legislation that overturns the Court's decision in *Duro v. Reina*.[106] *Duro* held that tribes do not have jurisdiction to bring criminal prosecutions in tribal court against Indians who are not

100. *See* Nevada v. Hicks, 533 U.S. 353, 384–85 (Souter, J., joined by Kennedy, J. and Thomas, J., concurring).

101. *See id*. at 358 n.2 (citing 471 U.S. at 855–56).

102. Telephone Interview with John Dossett, NCAI General Counsel (Apr. 4, 2003).

103. *See id*. (discussing draft §§ 5 and 7). The final version of the legislation is expected to exempt from federal review tribal actions based on "traditional and customary governance practices." Resolution #SD-02-005, NCAI (Nov. 15, 2002).

104. *See also infra* text accompanying notes 141–47 (discussing a dual-court system as a possible compromise to restore broad-based tribal jurisdiction).

105. *See* 225 F.3d (9th Cir. 2001), *cert. denied*, 534 U.S. 1115 (2002).

106. 495 U.S. 676 (1990). *See also, e.g.*, Means v. N. Cheyenne Tribal Ct., 154 F.3d 941 (9th Cir. 1998); United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1998). On Mar. 24, 2003, shortly before this article was published, the Eighth Circuit Court of Appeals decided a double jeopardy challenge to the *Duro* legislation differently from the Ninth Circuit's resolution of a similar challenge in *Enas*. *See* United States v. Lara, No. 01-3695, 2003 WL 1452033 (8th Cir. 2003). The conflict between the circuits may at last lead to Supreme Court review.

members of the forum tribe.[107] The decision paralleled *Oliphant*, which had earlier reached the same result concerning tribal jurisdiction over non-Indians.[108]

Duro caused an uproar among tribes because it created a jurisdictional void in which neither tribes, nor states, nor the federal government had authority to try nonmember Indians for misdemeanors committed on tribal lands.[109] Shortly after *Duro* was announced, Congress passed corrective legislation. It amended ICRA to acknowledge the "inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[110] Congress did not, however, restore tribes' ability to prosecute non-Indians; it left *Oliphant* intact.

The wording of the legislation is significant. It does not purport to delegate congressional authority to tribes; instead it recognizes tribes' inherent power.[111] The distinction is critical because the Court has made plain that when Congress delegates authority, the powers delegated must be constitutional.[112] If the *Duro* legislation operated as a delegation, it would be susceptible to challenge as a violation of the equal protection component of the Fifth Amendment.[113] But if the legislation simply corrected the Court's errant view of tribes' inherent power, equal protection would not become an issue.[114] Tribes would be required by ICRA to treat defendants equally, but their jurisdiction could be exercised only over those they had the inherent right to prosecute.

The legislation passed unanimously, hailed by tribes and scholars.[115]

107. *See Duro*, 495 U.S. at 688.

108. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978).

109. *See* Gould, *Congressional Response*, *supra* note 51, at 84–87 (discussing limits of tribal, state, and federal jurisdiction over crimes occurring in Indian country).

110. Department of Defense Appropriations Act, Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892–93 (1990) (made permanent by Criminal Jurisdiction Over Indians Act of 1991, Pub. L. No. 102-137, 105 Stat. 646 (1991)).

111. *See id*.

112. The *Duro* Court itself expressed doubt as to whether Congress could delegate authority to tribunals that do not provide constitutional protections as a matter of right. *See* Duro v. Reina, 495 U.S. 676, 693–94 (1990) (citing Reid v. Covert, 354 U.S. 1 (1957)).

113. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (incorporating the equal protection clause of the Fourteenth Amendment into the Fifth Amendment).

114. At least it would not become an issue unless the Court determined that even congressional recognition of inherent power is subject to strict scrutiny under the Fifth Amendment. *See* Gould, *Mixing Bodies*, *supra* note 57, at 744–47 (contending that *Rice*, 528 U.S. 495 (2000) contemplates that Congress' powers under the Indian Commerce Clause are limited by other provisions of the Constitution).

115. *See, e.g.*, Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians*, 38 FED. B. NEWS & J. 70 (1991); Newton, *supra* note 36; Alex Tallchief Skibine, Duro v. Reina *and the Legislation that Overturned It: A*

Consider, however, the import of this tribe-centered approach to sovereignty for individuals: Albert Duro is subject to the jurisdiction of a tribe, but not Mark Oliphant.[116] The basis for this distinction is that Duro is an Indian and Oliphant is not. Julia Martinez might at least be said to be a member of the class that benefited from the Court's decision in her case, as Josephine Runsabove was said to be in *Fisher*.[117] Each was a member of her tribe. But the *Duro* fix is aimed specifically at Indians who are not and likely never will be members of the prosecuting tribe.[118]

In writing for the Court in *Duro*, Justice Kennedy observed that "[t]ribes are not mere fungible groups of homogenous persons among whom any Indian would feel at home."[119] The Court could perceive no reason to distinguish nonmember Indians from non-Indians.[120] Yet the *Duro* legislation divides not only reservations, it also reaches into households.[121]

Had the Court decided *Duro* on the basis of the Fifth Amendment, Congress could not have substituted its own vision. But the *Duro* holding did not turn upon the Constitution. It expressed federal common law: a judicial second-guess of congressional policy in the absence of express intent.[122] Congress has no power to insist on its own interpretation of the Constitution,[123] but as we have seen, it does have plenary power over

Power Play of Constitutional Dimensions, 66 S. CAL. L. REV. 767 (1993).

116. The method of this legislative override, which I criticize here and extensively in Gould, *Congressional Response*, *supra* note 51, was conceived by Philip S. Deloria and Nell Jessup Newton, than whom Native Americans could not find more devoted advocates.

117. *See supra* notes 58 & 59 and accompanying text (discussing Fisher v. District Court, 424 U.S. 382 (1976)). Josephine Runsabove and her husband, who had attempted to adopt the child of a tribal member in a state proceeding, were both members of the Northern Cheyenne tribe.

118. Most nonmember Indians cannot become tribal members, because membership usually turns on the requirement that an individual possess a specified quantum of blood in the particular tribe. *See* Gould, *Mixing Bodies*, *supra* note 57 at 721–23 (discussing requirements used in determining tribal membership).

119. Duro v. Reina, 495 U.S. 676, 695 (1990).

120. *See id*. at 695–96 (comparing non-Indians and nonmember Indians on reservations and concluding that their similar jurisdictional characteristics logically require similar jurisdictional status).

121. *See* Gould, *Congressional Response*, *supra* note 51, at 83–93 (discussing the jurisdictional quandary among Indians, nonmember Indians, and non-Indians that can occur within a single household). Thelma Oberly, Clerk of the Tribal Court on the Nez Perce reservation in northern Idaho (where I once supervised University of Idaho law students in a tribal public defender program) explained in a conversation on February 6, 2003, that domestic crimes on the reservation often go unpunished because neither tribal nor state law enforcement officers can decide who has jurisdiction.

122. *See supra* note 35 and accompanying text (discussing federal common law).

123. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

Indian affairs. The *Duro* legislation is a congressional correction of the Court.[124]

But think about the implications of this exercise of Congress' trust responsibility. The *Duro* fix does not simply substitute Congress' view for the Court's; it makes that view essentially non-justiciable. Why? Because the legislation "recognizes" inherent power and does not purport to delegate authority.[125] Remember that inherent power is not subject to the Constitution unless Congress limits it.[126] If this legislation stands, Congress could recognize the inherent right of Chippewa Indians to prosecute their traditional enemies, the Sioux, but not the other way around.[127] Or it could recognize an inherent right for Cherokees to hold slaves, as they, the Founding Fathers, and other tribes once did.[128] Absurd you say? Congress would never legislate unequal rights? *It already has.* It passed the *Duro* legislation. The Court would never stand for it? *It already has.* Nine to zip, it refused to review the challenge to the legislation.[129]

In failing to grant certiorari in *Enas*, the Court let stand an exercise of the trust responsibility whose express purpose is to permit incarceration of Indians by tribes who are forbidden to incarcerate non-Indians. This distinction is anything but trivial.[130] Yet, incredibly, one scholar advocates future exercise of this new brutal instrument by Congress until the day (which will never arrive) when states ratify a constitutional amendment that he proposes to protect the sovereignty of tribes.[131]

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124. *See* Gould, *Congressional Response*, *supra* note 51, at 79 (discussing *Duro* legislation as correction of federal common law, citing Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians*, 38 FED. B. NEWS & J. 70 (1991)).

125. Department of Defense Appropriations Act, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892 (1990).

126. *See supra* notes 32 & 33 and accompanying text.

127. *See, e.g.*, Greywater v. Josuah, 846 F.2d 486, 493 (8th Cir. 1988) (noting record evidence of cultural, legal, and racial differences between Devils Lake Sioux Tribe and Turtle Mountain Band of Chippewa Indians, and citing treaties brokered by United States to enforce peace between certain tribes).

128. *See, e.g.*, Gould, *Mixing Bodies*, *supra* note 57, at 719 n.121 (citing references to slavery in DEWARD E. WALKER, JR., INDIANS OF IDAHO 145 (1982) and SCOTT L. MALCOMSON, ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE 119 (2000)).

129. *See* Enas v. United States, 534 U.S. 1115, 1115 (2002) (denying petition for writ of certiorari to the Ninth Circuit Court of Appeals in *United States v. Enas*, 225 F.3d 662 (2001)).

130. The deprivation of liberty can be significant. *See* 25 U.S.C. § 1302(7) (1988) (permitting Indian tribes to impose imprisonment for up to one year and fines of up to $5,000 for any one offense). Sentences for different crimes can run consecutively.

131. *See generally* Pommersheim, *supra* note 21 at 279–87 (discussing *Duro* legislation and proposed constitutional amendment to protect tribal sovereignty).

If the Court had granted certiorari in *Enas*, various outcomes would have been possible. The Court may have construed *Duro* as a constitutional holding and thrown out the legislation as exceeding Congress's powers. More likely, since *Duro* is silent on the application of the Fifth Amendment, the Court would have confronted the question whether the legislation is in fact a delegation of authority, despite its purported recognition of inherent rights.

Considering that the current Court has reined in Congress's powers vis-à-vis the states, it seems unlikely that the Court would uphold recognition as a valid means of exercising power. More likely, the Court would decide that the legislation is a delegation of authority. If it did, might the Court nonetheless uphold the legislation? Michael Enas' case would certainly be reversed, because it dealt with Double Jeopardy. A tribe prosecuting the same crime as the federal government could not be both a delegate and a separate sovereign.[132] But what about Mark Oliphant and Albert Duro? The Court demands that laws that classify by race withstand strict scrutiny.[133] Can the legislation carve the distinction that it makes between Indians and non-Indians and yet withstand an equal protection challenge?

Yes, conceivably it could. The Court could summon hoary *Mancari* and its toothless level of review. It could decide, in the manner it decided *Antelope* and *Fisher*, that Mark Oliphant is a person and Albert Duro is a polity. One commentator advocates essentially this result.[134] Should the Court take this approach? Surely not. Among a lamentable number of decisions in which the current Court has diminished tribal powers and denigrated rights of Indians as individuals, *Duro v. Reina* is one decision that got it right. Indians are neither fungible nor different from non-Indians in their legal relationships or potential contacts with a prosecuting tribe. *Duro* got it right because, whether one agrees with *Oliphant*, once *Oliphant* came down, no fair consideration of nonmember Indians could come out

132. The challenges to the *Duro* legislation in *Enas* and *United States v. Weaselhead*, 156 F.3d 818 (8th Cir. 1998) involved successive prosecutions in tribal courts and federal district courts for the same criminal activity. The defendants asserted that the legislation delegated congressional authority to the tribes, such that tribes were not exercising powers of a separate sovereign when prosecuting nonmember Indians. *See Enas*, 255 F.3d at 665–66; *Weaselhead*, 156 F.3d at 818. The Fifth Amendment forbids any person from being subjected twice to jeopardy for the same offense. *See* U.S. CONST. amend. V.

133. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 236 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1988).

134. *See* Skibine, *supra* note 115, at 797–99 (contending that the *Duro* legislation is a proper exercise of Congress' trust authority, but advocating jurisdiction be confined to enrolled members of tribes to avoid using political status as mask for race-based distinctions). *But see* Gould, *Congressional Response*, *supra* note 51, 98–99 (questioning Skibine's reasoning).

otherwise.[135]

Suppose the *Duro* fix were overturned. For a time there would be pandemonium. Nonmember Indians comprise a significant percentage of the population on many reservations.[136] If tribes were stripped of criminal jurisdiction over them, many reservations might become ungovernable. Yet, non-Indians comprise almost half the total population on the average reservation.[137] Indeed, on nine of the most populated reservations, non-Indians vastly outnumber Indians.[138] Because the *Duro* fix did not reach non-Indians, they have been free to commit crimes on reservations with virtual impunity.[139] Evidence indicates they have.[140]

Pandemonium did occur in 1990 when *Duro v. Reina* was announced. Stopgap measures had to be employed until Congress acted.[141] If the *Duro* fix were overturned, such measures would again be needed; but this time Congress could not wink at the Constitution. Congress might pass the problem on to the states, as it did with Public Law 280 in the 1950s,[142] but this seems unlikely. States have little interest in asserting jurisdiction over tribal lands, where they collect few taxes. Since ICRA was enacted, states have also needed tribes' consent.[143] Few if any tribes are likely to cede jurisdiction to what many regard as their arch enemies.

What seems likely if the *Duro* fix were overturned is that Congress

135. *Adarand* should trump *Mancari,* because Congress could exercise its powers under the Indian Commerce Clause by race-neutral means; that is, by enacting legislation that would empower tribes to assert criminal jurisdiction over both Indians and non-Indians. *See* Gould, *Mixing Bodies*, *supra* note 57, at 745 (discussing this result in light of *Rice v. Cayetano*, 528 U.S. 495 (2000)).

136. *See* Gould, *Congressional Response*, *supra* note 51, at 138–39 (discussing census data indicating that in 1980, 36.5% of Indians on the nation's ten most populous reservations, excluding the Navajo reservation, were not members of the reservation tribe).

137. *See id*. at 256, tbl.2.

138. *See id*. at 133–35 (discussing census data indicating that in 1990 among the ten most populous reservations, excluding the Navajo reservation, non-Indians comprised more than 83% of total population).

139. *See* Gould, *Congressional Response*, *supra* note 51, at 88–89 (discussing jurisdictional quagmire on reservations depending on race or ethnicity of perpetrator and victim and likelihood that crimes by non-Indians often go unpunished).

140. Keith Harper, Senior Staff Attorney with the Native American Rights Fund, Remarks at the Pennsylvania School of Law Symposium on Native Americans and the Constitution (Feb. 1–2, 2000). "Non-Indian crime rates are running rampant on many reservations." *Id*.

141. *See* Gould, *Congressional Response*, *supra* note 51, at 76–78 (discussing jurisdictional fixes proposed by the *Duro* Court).

142. *See supra* note 71 (discussing congressional delegation of authority to states to assert civil and criminal jurisdiction over tribal territory).

143. *See* 25 U.S.C. § 1323 (2000).

would finally have to confront tribes' needs for sovereignty with teeth—sovereignty over territory, not just tribal members—because any new criminal jurisdiction delegated by it to them would necessarily extend to both Indians and non-Indians. Restoring sovereignty, that is, will require solutions centered squarely in the Constitution; solutions that uphold first and foremost the rights of individuals.

It is not inconceivable that this could happen. Dumping the *Duro* fix will certainly get Congress to move in this direction. Yet even if the *Martinez* Court was right in concluding that Congress enacted ICRA without a federal civil remedy for Indians, no Congress ever will cede jurisdiction to another sovereign to wield power over the polity that counts—the one that elects it—without some mechanism for review. Neither would any tribe. For Congress, that polity is overwhelmingly non-Indian.

So what to do? Concede that might makes right? Hardly. Realize instead that a sovereign power play is the essential failing of *Martinez* and the *Duro* fix. Each is a cram down—this time by the tribes, aided respectively by the Court and Congress—that trivializes the equal rights of individuals. Realize that tribes themselves have suffered from these power plays, as they have helped prepare the way for *Atkinson* and *Hicks.* What is needed is to approach the problem of tribal sovereignty from the standpoint of the individual rather than the group. The Bill of Rights was designed to work that way.

The NCAI proposal to give federal appellate courts power to review decisions of the tribal justice system is certainly a step in the right direction.[144] Nonetheless, it does not go far enough. Few litigants will have the wherewithal to launch federal appeals. For much the same reason, proposals, such as that of Charles Wilkinson, seem unlikely to succeed.[145] Solutions acceptable to individuals, the Congress, and the Court, must almost certainly focus on the tribal courts themselves. Tribes not wishing to participate in broader jurisdiction should have the right to opt out, while those that do participate might be required to employ federal rules of evidence and procedure, to adopt codes of judicial and attorney conduct, to ensure separation of governmental powers, to apply federal appellate precedents, to permit removal, and to extend the right to appointed counsel.[146] Tough love for tribal courts, for sure, but hardly a death knell.

144. *See supra* note 103 (discussing NCAI legislative proposal).

145. *See* WILKINSON, *supra* note 32, at 113–19. Professor Wilkinson would empower federal courts, after tribal remedies were exhausted, to review violations of rights protected by ICRA under an elevated standard of review.

146. ICRA was enacted without a right to appointed counsel because of concern that attorney fees would drain tribal treasuries. One unfortunate consequence of this circumstance, based on my experience in the Nez Perce and Coeur d'Alene tribal courts in the 1980s, is that few tribal defendants have any notion of their ICRA rights. This

When asserting jurisdiction over consenting members, tribes should still be free to assert traditional and customary law[147]—but the overarching goal of restoring tribal sovereignty must involve solutions that respect the rights of individuals.

CONCLUSION

Montana has replaced *Worcester* as the paradigm of tribal sovereignty. For those who failed to see the shift, *Atkinson* and *Hicks* bring a sobering reality. Sovereignty over territory is now supplanted by sovereignty based upon consent. This new paradigm is shaped not only by a Court whose conservative majority is fixated on states' rights, but also by its liberal minority. Tribes must grasp that the entire Court now perceives tribal sovereignty differently from *Worcester*. The reason lies in a confrontation never faced by Chief Justice Marshall's Court: that of the constitutional rights of tribal groups in contest with individuals. The cause of the current Court's diminishment of tribal sovereignty is this very confrontation, and the inability of tribes to muster adequate constitutional support.

Among proposals to overcome *Atkinson* and *Hicks*, many center on efforts to protect tribal courts from federal review, or to expand their jurisdiction, or protect them with a constitutional amendment. Yet proposals that focus only on tribes, not individuals, are bound to fail. This is because tribe-centered proposals rely on the doctrines of inherent sovereignty and congressional trust responsibility—doctrines that themselves have failed.

In the hands of Congress and the Court, these two doctrines, virtually lacking in constitutional support, have disappointed tribes and members, helping to isolate tribes within their reservations and to trivialize the constitutional rights of Indians as individuals. Tribes that would embrace a new awakening of sovereignty should avoid these doctrines. They should

undoubtedly explains why there are few cases challenging the *Duro* legislation, and why, of those there are, most have resulted from federal district court proceedings in which counsel has been appointed. Consider how few tribal court prosecutions of nonmember Indians could go forward if hearsay objections were made to tribes' evidence that the defendants are even Indians, let alone enrolled members of a tribe. *But see* United States v. Broncheau, 597 F.2d 1260, 1263–64 (9th Cir. 1979), *cert. denied*, Broncheau v. United States, 444 U.S. 859 (1983) (presumably finding it sufficient that the district judge who tried Broncheau identified him as an Indian.)

147. I discuss how such a dual-court system could operate in Gould, *Congressional Response*, *supra* note 51, at 155–60, through use of "CFR" courts, so-called because they were originally established by the BIA through rules promulgated in the Code of Federal Regulations. *Id*. at 156 n.402. I do not mean to suggest, however, that *Martinez* should continue to compromise the ICRA rights of tribal members.

instead seek solutions that recognize that tribal sovereignty is best protected by first protecting individuals.