

IS *LARA* THE ANSWER TO IMPLICIT DIVESTITURE?:  
A CRITICAL ANALYSIS OF THE CONGRESSIONAL DELEGATION EXCEPTION

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## I. INTRODUCTION

When the colonies attained their political independence from Europe, they also acquired a problematic relationship with the indigenous peoples who already inhabited the “new” continent. Due to Britain’s practice of seeking tribal consent to settle lands, underlying questions about the tribes’ and tribal members’ rights vis-à-vis settlers lay dormant during the period of Britain’s rule.<sup>1</sup> Since the United States’ formation, however, tribal and Anglo-American interests often have conflicted. As a result, the Supreme Court repeatedly has adjudicated the tribes’ and the United States’ respective rights as sovereigns.

The Court’s jurisprudence in deciding these disputes is best understood as two separate periods: 1823-1977, and 1978 to present. In both, the Court developed doctrines to vindicate the United States’ interests at the expense of tribal sovereignty, but there are important distinctions between them. During the first period, the doctrines the Court developed constrained sovereignty when its exercise *expressly* conflicted with the interests of the United States. In the second period, the Court extended its inquiry and began to divest tribes of sovereignty when it considered that sovereignty *implicitly* incongruent with the United States’ interests – even when allowing tribal sovereignty would not create an express conflict between the two sovereigns.

This Article explores the limits that the Court historically has imposed upon tribal sovereignty and the questions raised by the Court’s most recent doctrine: the doctrine of implicit divestiture. Section II reviews the two doctrines the Court developed during the first period of its Indian law jurisprudence: the doctrine of discovery and the doctrine of plenary power. Section III introduces the second period’s doctrine of implicit divestiture,

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<sup>1</sup> See DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 55 (5th ed. 2005).

and discusses a potential limit on that doctrine: the “congressional delegation exception,” the use of which the Court recently held removed a constraint on tribal jurisdiction that the Court had imposed under the implicit divestiture doctrine. Part IV reviews commentators’ thoughts about how the exception might be used to fortify tribal sovereignty, and considers potential problems in applying the exception. It argues that, at present, the implicit divestiture doctrine lacks a coherent rationale; that this makes the doctrine unmoored and malleable; and that its malleability potentially poses enormous threats to exercises of tribal sovereignty – even those expressly sanctioned by Congress.

## II. 1823-1977: THE DOCTRINES OF DISCOVERY AND PLENARY POWER

The Supreme Court considered the nature of tribal authority beginning in the nineteenth century, as interactions between non-Indians and tribes generated litigation. To resolve these disputes, the Court developed two doctrines: the doctrine of discovery and the doctrine of plenary power. The effect of these doctrines was to vindicate the United States’ interests at the expense of tribal sovereignty.

### A. *Johnson v. M’Intosh*: The Doctrine of Discovery and the United States as Successor in Interest

In *Johnson v. M’Intosh*,<sup>2</sup> the Court considered the effect of Europe’s discovery of the New World upon tribal sovereignty. The case involved competing claims to land originally inhabited by the Illinois and Piankeshaw Indians which had been under Britain’s control. Prior to the American Revolution, the Tribes’ chiefs sold the lands to various individuals.<sup>3</sup> Virginia assumed control of the territory during the Revolution and later ceded its rights to the United States; the United States, in turn, eventually sold the

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<sup>2</sup> 21 U.S. (8 Wheat.) 543 (1823).

<sup>3</sup> *Id.* at 550-54 (Illinois Indians), 555-58 (Piankeshaw Indians).

tracts to McIntosh.<sup>4</sup> After McIntosh took possession of the land, the parties that had purchased it from the Tribes sued McIntosh, arguing they had superior title.<sup>5</sup>

After reviewing the history of North America's colonization, the Court concluded that European nations' "discovery" of the continent necessarily divested Indian nations of complete sovereignty. The Court based its holding on the "doctrine of discovery" developed by colonizing European governments.<sup>6</sup> This doctrine, the Court explained, grew out of a mutual need:

[I]t was necessary [for the European nations who colonized North America], in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves.<sup>7</sup>

Thus, as the various European nations rushed to stake claims on the "new" continent, it became to each's advantage to establish rules by which its claims would be respected by the others. These interests converged to establish the doctrine of discovery by which each European nation vindicated its claims in exchange for recognizing the claims of its competitors.

According to the Court, the doctrine's "original fundamental principle" was that discovery gave the discoverer the sole right to title over the discovered land.<sup>8</sup> This title, the Court found, was "consummated" by possessing the land.<sup>9</sup> Until possession,

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<sup>4</sup> *Id.* at 558-60.

<sup>5</sup> Plaintiffs also included successors in interest to the parties that had purchased the lands.

<sup>6</sup> For a comprehensive discussion of the doctrine of discovery, see generally ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY* (2006).

<sup>7</sup> *Johnson*, 21 U.S. at 573.

<sup>8</sup> *Id.* at 574 ("original fundamental principle"), 573.

<sup>9</sup> *Id.* at 573.

discovery prevented other European governments from establishing any claim to the land, including claims based on negotiations with the tribes that occupied it.<sup>10</sup>

The Court next considered the effect of the doctrine upon the rights of North America's indigenous inhabitants:

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were . . . necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it . . . but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.<sup>11</sup>

Here, the Court held the event of discovery divested tribes of the sovereign power to convey their lands freely. Although tribes might (and often did) remain in possession of the land, the doctrine of discovery granted the discoverer the right to obtain land from a tribe.<sup>12</sup> In addition, it granted the discoverer power, with the tribes, to "regulate" the relations which were to exist between them. These rights and powers were exclusive: no one but that land's discoverer held them.

Finally, the Court concluded that Britain's treaty with the United States at the close of the American Revolution, in which Britain ceded its territorial rights, conveyed

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<sup>10</sup> *See id.*

<sup>11</sup> *Id.* at 573-74.

<sup>12</sup> Indeed, the Court went on to say that the doctrine gave the discoverer not only the exclusive right to acquire land occupied by Indians, but also the power to grant title to others while the tribes were in possession of the land. *Id.* at 574.

the rights and powers of discovery upon the American States.<sup>13</sup> The States subsequently ceded their rights to the United States.<sup>14</sup> Thus, the rights and powers of discovery eventually vested in the federal government.

As applied to McIntosh, the finding that discovery divested tribes of the power to convey their land to anyone except their discoverer meant that the Tribes lacked the ability to sell legal title to the plaintiffs, and that McIntosh's title was superior. More broadly speaking, *Johnson* stands for the principle that discovery divested tribes of their authority as sovereigns to have government-to-government relations with anyone but their discoverer (or its successor in interest). External government-to-government relations with another European country, the Court said, "would have been considered and treated as an invasion of the [discoverer's] territories."<sup>15</sup>

The constraints upon tribal sovereignty imposed by discovery did not mean that tribes no longer functioned as governments. Interestingly, the Court in *Johnson* recognized that tribes had authority to govern the sale of the rights they retained:

If an individual might . . . purchase [Indian title], still he could acquire . . . that title. Admitting [the tribes'] power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from [that tribe's] will; and, if [that tribe] choose[s] to resume it, and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title. . . . The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws.<sup>16</sup>

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<sup>13</sup> *See id.* at 584.

<sup>14</sup> *Id.* at 586.

<sup>15</sup> *Id.* at 584.

<sup>16</sup> *Id.* at 592-93.

Here, the Court’s comments indicate that those powers retained by tribes after discovery remain subject to tribal authority. Post-discovery, tribes retained the right of occupancy and were able to convey it to another party, even a non-Indian; these conveyed rights, however, depended upon that tribe (rather than the United States) for recognition and enforcement.<sup>17</sup> Thus, the *Johnson* plaintiffs’ remedies, if available, were only available under tribal law.

B. *Lone Wolf v. Hitchcock*: the Advent of Congressional Plenary Power

In one of the most sweeping decisions in its history, *Lone Wolf v. Hitchcock*,<sup>18</sup> the Court addressed the question of the bounds of tribal authority vis-à-vis the United States. *Lone Wolf* and its premise – that Congress had “plenary” power over Indian tribes – became the basis and justification for subsequent limitations upon tribal authority over reservation lands.

*Lone Wolf* contested Congress’ authority to unilaterally change agreements made by tribes and officers of the federal government. The Kiowa and Comanche Tribes’ 1867 treaty with the United States provided specifically that cessions of reservation lands required the consent of three-fourths of the adult male Indians on the reservation.<sup>19</sup> In 1892, the Tribes signed an agreement to cede lands held in common by them to the United States; the United States was to allot lands to individual tribal members and

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<sup>17</sup> In the instant case, the Court determined that, since the plaintiffs’ beneficial title depended on the Tribes’ recognition, *Johnson et. al* lost the right of occupancy they had purchased from the Tribes when the Tribes ceded their lands to the United States without recognizing plaintiffs’ titles within the terms of the cession: “[The Tribes’] cession of the country, without a reservation of this land, affords a fair presumption, that they considered [the conveyance to plaintiffs] as of no validity. They ceded to the United States this very property, after having used it in common with other lands, as their own, from the date of their deeds to the time of cession[.]” *Id.* at 594.

<sup>18</sup> 187 U.S. 553 (1903).

<sup>19</sup> *Id.* at 554.

purchase “surplus” lands for later sale to non-Indians.<sup>20</sup> Subsequently, Congress acted to effectuate the agreement by congressional acts. These acts, however, modified the agreement in various particulars.<sup>21</sup>

The Tribes sued, arguing that the act violated their property rights without due process and was unconstitutional.<sup>22</sup> The Tribes had three arguments against the law, two of which touched upon the federal government’s authority to unilaterally take action affecting the Tribes. First, the Tribes argued that the agreement they had signed (and the act implementing it) was invalid because it had not been consented to by three-fourths of the Tribes’ adult male population, as required by treaty.<sup>23</sup> Second, the Tribes argued the act was invalid because it unilaterally changed the terms of the signed agreement “without submitting such changes to the Indians for their consideration.”<sup>24</sup>

In a short opinion, the Court affirmed lower court decisions that sustained the United States’ motion to dismiss.<sup>25</sup> The Court explained that Congress had complete power over tribes:

Indians who . . . [are not] fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands . . . [are] concerned, to be controlled by direct legislation of Congress . . . Plenary authority over the tribal relations of the Indians has

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<sup>20</sup> *Id.* at 554-55.

<sup>21</sup> As finally passed, the adopted bill: changed the time frame for making allotments; amended requirements regarding the composition of Indian allotments (between agricultural and grazing land); set aside an amount of grazing land to be used in common by the Tribes; eliminated provisions which treated the Indian agent and army officer who negotiated the agreement for the U.S. as members of the Tribes (thus entitling them to benefits under the agreement); exempted monies from the surplus land sale from Indian depredation claims; and provided that surplus land proceeds would be subject to further congressional action in the event that a claim then pending against the Tribes (by other tribes) was successful. *See id.* at 556-60.

<sup>22</sup> *Id.* at 561.

<sup>23</sup> *Id.* at 554-55. This contention was confirmed by the Secretary of the Interior. The Secretary lacked census records for the year the agreement was made, and so based his calculation upon member rolls used to make payments to tribal members. *Id.* at 557.

<sup>24</sup> *Id.* at 561. The Tribes also argued that the agreement was invalid because the interpreters had misrepresented its terms to the Tribes. *Id.*

<sup>25</sup> *Id.* at 568.

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. . . . [A]s with treaties made with foreign nations[,] . . . the legislative power might pass laws in conflict with treaties made with the Indians.<sup>26</sup>

In *Johnson*, the Court found that discovery granted the discoverer the exclusive right to “regulate” its relationship to the tribes within its territory.<sup>27</sup> *Lone Wolf* further elucidates the United States/tribal relationship, characterizing it as one in which Congress has absolute, unilateral power over tribes.

By characterizing Congress’ power as plenary, the Court found that, while the United States’ relationship with tribes developed through mutual negotiation, these negotiations merely were an exercise of Congress’ absolute power over tribes.

Essentially, the Court’s rationale is that the greater power (plenary power) includes the lesser (the power to negotiate). Thus, under *Lone Wolf*, the United States would have been within its rights had it chosen never to negotiate with the tribes but unilaterally to impose its will upon them from the start.

### C. Analysis of Early Doctrines Regarding Tribal Sovereignty

The doctrines of discovery and plenary power can be criticized easily on the grounds that they legitimize colonialism at the expense of indigenous rights. In both *Johnson* and *Lone Wolf*, the Court sidesteps the inherent inequities caused by the United States’ actions and avoids discussion of the self-interest that motivates them. Though the Court’s opinion in *Johnson* contains expressions of regret,<sup>28</sup> these comments are unpersuasive in the face of the Court’s unerring affirmation of the United States’ absolute

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<sup>26</sup> *Id.* at 567.

<sup>27</sup> *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823).

<sup>28</sup> *Id.* at 588 (“Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”).

power over the tribes. The *Lone Wolf* Court’s assertion that it “must presume that Congress acted in perfect good faith” in exercising its plenary power,<sup>29</sup> and its suggestion that the Tribes instead petition Congress for relief,<sup>30</sup> are of little comfort given its conclusion that any congressional act regarding Indians is nonjudicial. Moreover, *Lone Wolf*’s conclusion that the United States held more power than it exercised also figures as an unwelcome harbinger of – and invitation for – later impositions upon the tribes.

Nonetheless, unjust though they may be, these early doctrines at least have the virtue of restraint. The consequences of discovery appear to be limited to the loss of legal title and the right to have a government-to-government relationship with any nation other than the United States; limitations on tribal sovereignty under the plenary power doctrine require express congressional action adverse to tribal sovereignty. Ultimately, many tribes weathered discovery and various congressional acts (some intended to destroy them) and survived as political entities.<sup>31</sup>

By contrast, the future of tribal sovereignty during the second, current period of jurisprudence is far from certain. In this period, the Court created and continues to develop the doctrine of implicit divestiture. Under this doctrine, the Court invalidates exercises of tribal sovereignty that it finds to be “inconsistent” with the tribes’ “dependent status.” Unlike the doctrine of plenary power, implicit divestiture does not require express congressional action inimical to tribal sovereignty. Under implicit

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<sup>29</sup> *Lone Wolf*, 187 U.S. at 568.

<sup>30</sup> *Id.*

<sup>31</sup> For an excellent overview of the history of congressional Indian policy, see generally DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 140-256 (5th ed. 2005). The United States has pursued various measures to destroy tribalism. *Id.* Generally, early approaches attempted to achieve this goal by making traditional tribal lifestyles impossible; the Anglo-American lifestyle, meanwhile, was promoted aggressively. *Id.* at 141-47, 165-84. From 1945-1961, the United States even attempted to assimilate tribal members by “terminating” tribes – ending their legal existences. *Id.* at 199-207.

divestiture, the Court scrutinizes the contested tribal act, and then *itself* decides whether the act was “inconsistent” with the tribe’s status. If the Court finds the tribe’s act to be “inconsistent,” it holds the act invalid.

Thus, through its implicit divestiture doctrine, the Court has interjected itself alongside Congress as a power able to curtail tribal sovereignty. Invalidations under implicit divestiture do not merely enforce limits expressly imposed upon the tribes by Congress; rather, the Court creates limits independently based upon its determination of the act’s “consistency” with the tribes’ status. The standard for the doctrine’s application is vague, with the result that it is difficult to determine the doctrine’s reach. Moreover, judicially-imposed constraints may prove intractable: at present, it is unclear whether Congress can use its plenary power to check all constraints on tribal sovereignty imposed under the doctrine.

### III. 1978 – PRESENT: THE RISE OF JUDICIAL CONSTRAINTS ON TRIBAL SOVEREIGNTY

#### A. *Oliphant* and Its Progeny: Implied Divestiture of Tribal Sovereignty

Beginning in 1978 with *Oliphant v. Suquamish Indian Tribe*,<sup>32</sup> the Supreme Court decided a series of cases which dramatically curtailed the sovereignty tribes retained under previous jurisprudence. Specifically, the Court in *Oliphant* created a new doctrine by which to evaluate the validity of assertions of tribal authority: the doctrine of implicit divestiture.

At issue in *Oliphant* was whether a tribe retained inherent, sovereign power to assert criminal jurisdiction over non-Indians for their acts on the tribe’s reservation.

Petitioners Mark David Oliphant and Daniel B. Belgarde were non-Indian residents of the

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<sup>32</sup> 435 U.S. 191 (1978).

Suquamish Indian Tribe’s Port Madison Reservation.<sup>33</sup> The Tribe had adopted a Law and Order Code addressing a variety of offenses that purported to extend the Tribe’s jurisdiction over both Indians and non-Indians.<sup>34</sup> Oliphant and Belgarde each were charged by the Tribe under the Code, and, in habeas corpus petitions to the United States District Court, each argued that the Tribe’s purported criminal jurisdiction was invalid as applied to non-Indians.<sup>35</sup> The Tribe argued that it had criminal jurisdiction over non-Indians as a result of its “retained inherent powers of government over the Port Madison Indian Reservation.”<sup>36</sup>

In assessing the Tribe’s claim of retained authority, the Court boldly pronounced that tribes’ sovereign powers could be reduced even when the federal government had not acted expressly to delimit them: “[T]he tribes’ retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments.”<sup>37</sup> Instead, the Court announced a new rule for determining when a tribe had been divested of sovereign power which applied even absent express federal action limiting tribal authority: “Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers ‘inconsistent with their status.’”<sup>38</sup> This holding is the central pillar of the doctrine of implicit divestiture. The doctrine is one of divestiture because, through its application, Indian tribes are held to have been divested of specific sovereign powers; it is implicit because the divestiture is

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<sup>33</sup> *Id.* at 194.

<sup>34</sup> *Id.* at 193. The Tribe also had gone to great lengths to publicize its jurisdiction over all entrants to the Reservation: “[n]otices were placed in prominent places at the entrance to the Port Madison Reservation informing the public that entry onto the Reservation would be deemed implied consent to the criminal jurisdiction of the Suquamish tribal court.” *Id.* at 193 n.2.

<sup>35</sup> *Id.* at 194-95.

<sup>36</sup> *Id.* at 195-96.

<sup>37</sup> *Id.* at 208.

<sup>38</sup> *Id.* (citing *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976)) (emphasis in original).

not the result of an express executive or legislative action. Under the doctrine, tribal exercises of authority found to be inconsistent with the tribes' status are null and void; the doctrine of implicit divestiture thus has become a powerful vehicle for challenging tribal actions.

In applying this new doctrine, the *Oliphant* Court ultimately determined that a tribe's asserting criminal jurisdiction over non-Indians was inconsistent with its status and thus void.<sup>39</sup> To reach this decision, the Court considered both the history of tribal criminal jurisdiction over non-Indians and the federal government's interest in protecting United States citizens from tribal prosecution. After reviewing the history of tribal jurisdiction over non-Indians, the Court concluded that Congress, the Executive Branch, and lower federal courts each held a "commonly shared presumption" that tribes lacked criminal jurisdiction over non-Indians.<sup>40</sup> In addition, the Court was concerned that allowing tribal jurisdiction would infringe upon important rights incident to United States citizenship. The Court noted that "from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested [a] . . . solicitude that its citizens be

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<sup>39</sup> *Id.* at 210.

<sup>40</sup> *Id.* at 206. The Court's historical review acknowledged that the United States Reports did not specifically discuss the question of tribal jurisdiction over non-Indians, but concluded that this omission was because historically the issue was moot: most tribes did not have a formal court system, and so did not assert jurisdiction over non-Indians. *Id.* at 197. The Court then reviewed treaties between the United States and various tribes, and decided that the treaties showed that both the federal government and the tribes presumed that tribes would lack jurisdiction over non-Indians absent a "congressional statute or treaty provision to that effect." *Id.*; treaty provisions reviewed *id.* The Court also considered opinions by the Attorneys General, written in the 1800's, that argued tribal jurisdiction over non-Indians was inconsistent with treaty provisions that recognized the United States' sovereignty over Indian Country and the Indians' dependence upon the United States. *Id.* at 199. The Court noted that one federal court decision considering the issue had concluded that tribal courts lacked jurisdiction to try non-Indians. The Court also reviewed legislative history regarding the issues of tribal criminal jurisdiction over non-Indians in a proposed Indian Territory, federal criminal jurisdiction over Indians, and federal legislation preventing trespass on Indian lands, and concluded that Congress' discussions and acts evinced its understanding that tribes did not retain jurisdiction over non-Indians. *Id.* at 201-03, 204-05. Finally, the Court noted that one of its 1891 opinions recognized that congressional acts "demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts." *Id.* at 204.

protected by the United States from unwarranted intrusions on their personal liberty.”<sup>41</sup> It reviewed a prior case in which it had held the United States lacked federal criminal jurisdiction over tribal members on the basis that allowing federal jurisdiction would subject tribal members to trial under an “external and unknown code . . . by a standard made for others and not for them . . . according to the law of a social state of which they have an imperfect conception.”<sup>42</sup> Allowing tribal jurisdiction over non-Indians, the Court continued, would cause the same problem in reverse: United States citizens would be subjected to a similarly “external code.” The federal interests in protecting United States citizens from unwarranted intrusions upon their personal liberty and from exposure to alien tribal court systems, said the Court, also led it to conclude that tribes lacked inherent jurisdiction to try non-Indians.<sup>43</sup>

Subsequent decisions have built upon *Oliphant* and developed further guidelines for assessing whether the Court will find that a tribe’s authority was “inconsistent with [its] status” and therefore implicitly divested. Generally, the Court has found the tribes to be divested of jurisdiction over anyone except their respective members.<sup>44</sup> This principle applies to both criminal and civil jurisdiction.<sup>45</sup>

The Court has carved out narrow exceptions to this “members-only” limitation in the context of civil jurisdiction; these were set out in *Montana v. United States*,<sup>46</sup> the current lodestar regarding tribal civil jurisdiction. First, a tribe may regulate “the

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<sup>41</sup> *Id.* at 210.

<sup>42</sup> *Id.* at 210-11 (citing and quoting *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883)).

<sup>43</sup> *See id.* at 212.

<sup>44</sup> *See Wheeler v. United States*, 435 U.S. 313, 326 (1978) (“The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe”) (holding Indian tribe has criminal jurisdiction over tribal member for crime committed on tribes’ reservation on basis that it was an exercise of tribe’s retained right to internal self-government).

<sup>45</sup> *See Montana v. United States*, 450 U.S. 544, 565 (1981).

<sup>46</sup> *Id.*

activities of nonmembers who enter consensual relationships with the tribe or its members.”<sup>47</sup> Second, as to land owned by a particular tribe or held by the United States in trust for the tribe, that tribe has authority to prohibit or regulate nonmembers’ activities.<sup>48</sup> Finally, as to fee lands within a tribe’s reservation boundaries, the tribe may regulate the “conduct of non-Indians” only “when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.”<sup>49</sup>

As apparent by this attempt to set out the law regarding tribal authority over nonmembers, *Oliphant*’s doctrine of implicit divestiture has resulted in a judicially-devised system for assessing assertions of tribal authority that is tangled and unpredictable. As jurisprudence now stands, various factors influence whether a tribe can assert jurisdiction: what jurisdiction the tribe is asserting (i.e., criminal or civil); over whom the tribe asserts jurisdiction (a tribal member or a non-Indian); how reservation lands are held (by the tribe, by the United States in trust for the tribe; or in fee); the character of a nonmember’s relationship to the tribe (consensual or not); and finally, the effect of a nonmember’s activities upon the tribe (whether or not they threaten or directly affect the tribe’s political integrity, economic security, health, or welfare). Each factor is merely a means to assess whether a tribe’s assertion of jurisdiction is “inconsistent with its status.” Nor are the principles articulated in current case law exhaustive: the Court could consider other factors and reach a decision contrary to these principles, which then would serve as a springboard for further iterations of limits on tribal jurisdiction.

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 557 (tribe had authority to prohibit or regulate hunting and fishing).

<sup>49</sup> *Id.* at 566.

Speculating about applying implicit divestiture to possible assertions of tribal authority illustrates the problems caused by the doctrine's vagaries. Significantly, under *Oliphant*, the Court alone determines whether a tribe's authority to act was implicitly divested. Thus, *Oliphant* casts doubt upon all exercises of tribal sovereignty, because any exercise which seems legitimate at its outset later may be invalidated under implicit divestiture. Professor Philip Frickey rightly describes this development as "a model of ad-hoc common law-making" that "supplement[s] the plenary power of Congress with [the Court's] own plenary common law authority."<sup>50</sup> After *Oliphant* and its progeny, tribes can not be certain any assertion of tribal jurisdiction will be upheld.

#### B. Reigning in Implicit Divestiture: *Duro*, *Lara*, and the Congressional Delegation Exception

As the Court developed the doctrine of implicit divestiture, it recognized one exception to its general rule that divested tribes of authority the Court held to be "inconsistent with their status."<sup>51</sup> This exception was most clearly expressed in *Montana v. United States*: "Exercise of tribal power . . . inconsistent with the dependent status of the tribes . . . cannot survive *without express congressional delegation*."<sup>52</sup> Express congressional delegation, then, potentially could allow a tribe to exercise authority the Court otherwise would have found was divested.

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<sup>50</sup> Philip P. Frickey, *(Native) American Exceptionalism in Federal Indian Law*, 119 HARV. L. REV. 431, 459 (2005). Frickey postulates that this approach grew out of the Court's attempts to normalize law in Indian Country with Anglo-American jurisprudence. He argues that, rather than using implicit divestiture to standardize law in Indian country, we should "hav[e] the courage to admit our larger confusions about the place of federal Indian law in public law." *Id.* at 437.

<sup>51</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

<sup>52</sup> *Montana*, 450 U.S. at 564 (emphasis added). *See also Oliphant*, 435 U.S. at 208 (tribes implicitly divested of criminal jurisdiction over non-Indians "absent affirmative delegation of such power by Congress").

For many years, this exception was purely theoretical: no congressional act intervened to curtail implicit divestiture's continuing erosion of tribal authority. In 1990, however, Congress amended a statute so as to conflict with the Court's holding in a case decided earlier that same year. Following a challenge involving the effect of the amended statute, the Court was forced to consider the effects of the congressional delegation exception upon its implicit divestiture doctrine.

In 1990, the Court decided *Duro v. Reina*,<sup>53</sup> in which a member of the Torres-Martinez Band of Cahuilla Mission Indians was arrested for a crime committed on the Pima-Maricopa Tribe's reservation and was prosecuted by the Tribe. The defendant contested the Tribe's asserting criminal jurisdiction over him.<sup>54</sup> The Court ruled for the defendant on the basis that Indian tribes had been implicitly divested of criminal jurisdiction over "nonmember Indians" – Indians not members of the specific tribe asserting jurisdiction over them – for crimes committed on their reservations.<sup>55</sup> The Court found that Congress had not considered tribal authority over nonmembers, and concluded that tribes' retaining this authority would be inconsistent with their dependent status.<sup>56</sup>

The *Duro* decision created an enormous problem respecting nonmember Indians who committed crimes within Indian Country: after *Duro*, no government had complete jurisdiction over these nonmembers.<sup>57</sup> To address the problems created by *Duro*,

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<sup>53</sup> 495 U.S. 676, 679 (1990).

<sup>54</sup> *Id.* at 681-82.

<sup>55</sup> *Id.* at 688.

<sup>56</sup> *See id.* at 690 ("[Congressional] statutes reflect at most the tendency of past Indian policy to treat Indians as an undifferentiated class"), 684-85 ("We think the [implicit divestiture] rationale . . . compels the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members.").

<sup>57</sup> Discussing the reason for this "prosecutorial void" is not necessary for the purposes of this Article. Prior to *Duro*, it was clear that federal courts' jurisdiction over Indians was sharply curtailed to jurisdiction for a small list of enumerated crimes. States usually did not have jurisdiction over Indians for crimes committed

Congress enacted the “*Duro* fix.” This legislation amended relevant statutes to statutorily recognize Indian tribes’ “powers of self-government” to include “exercis[ing] criminal jurisdiction over *all* Indians.”<sup>58</sup> Congress also amended existing statutes specifically to recognize the tribes’ power as an “*inherent power* of Indian tribes, hereby recognized and affirmed.”<sup>59</sup> The amendments’ express allocation arguably put tribal jurisdiction over nonmember Indians within the implicit divestiture doctrine’s “express congressional delegation” exception. Moreover, by casting the tribes’ criminal jurisdiction over nonmembers to be an exercise of *inherent tribal* power, Congress clarified that it considered tribal criminal jurisdiction over nonmembers to stem from retained tribal sovereignty rather than from Congress delegating federal power to the tribes.

In *United States v. Lara*,<sup>60</sup> the Court considered the effect of the “*Duro* fix” legislation upon tribal criminal jurisdiction. *Lara* involved a nonmember Indian criminal defendant prosecuted for a crime committed on a tribe’s reservation under both tribal authority (under the *Duro* fix legislation) and federal authority. Billy Jo Lara, an Indian, married a member of the Spirit Lake Tribe and lived on its reservation, but was not a member of the Tribe.<sup>61</sup> After “several instances of serious misconduct,” the Spirit Lake Tribe excluded him from its reservation.<sup>62</sup> Lara disobeyed the order, and, when federal

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on the reservation. *Duro* held that tribes’ criminal jurisdiction was limited to tribal members. Thus, after *Duro*, no authority had jurisdiction over many crimes committed by non-tribal-member Indians. This is because both States and tribes lacked criminal jurisdiction altogether, and federal jurisdiction was limited to the enumerated crimes. For a good discussion of criminal jurisdiction in Indian Country (written prior to the Court’s *Duro* decision), see Chriss Wetherington, *Criminal Jurisdiction of Tribal Courts Over Nonmember Indians: The Circuit Split*, 1989 DUKE L.J.1053 (1989) (arguing that tribal courts have jurisdiction over nonmembers).

<sup>58</sup> Act of Nov. 5, 1990, 101 P.L. 511, § 8077(b), 104 Stat. 1856 (1990) (temporary legislation)(emphasis added); Act of Oct. 28, 1991, 102 P.L. 137, 105 Stat. 646 (1991) (making change permanent).

<sup>59</sup> Act of Nov. 5, 1990, 101 P.L. 511, § 8077(b), 104 Stat. 1856 (1990) (temporary legislation)(emphasis added); Act of Oct. 28, 1991, 102 P.L. 137, 105 Stat. 646 (1991) (making change permanent).

<sup>60</sup> 541 U.S. 193 (2004).

<sup>61</sup> *Id.* at 196.

<sup>62</sup> *Id.*

officials stopped him, struck one of them.<sup>63</sup> Based on Congress' statutory amendments granting tribes criminal jurisdiction over all Indians (including nonmember Indians) for crimes committed on the reservation, the Tribe asserted jurisdiction over Lara and charged him with "violence to a policeman."<sup>64</sup> Lara pleaded guilty in Tribal Court and served 90 days in jail.<sup>65</sup> Subsequently, the United States government prosecuted Lara for the federal crime of assaulting a federal officer.<sup>66</sup>

Each side in *Lara* assumed the validity of the Tribe's prosecution under the "*Duro fix*" legislation; the dispute was over its effect upon the United States' efforts to prosecute under federal jurisdiction. Lara claimed that tribal prosecutions under the "*Duro fix*" were made under federal authority that Congress had delegated to the tribes.<sup>67</sup> He moved to dismiss the federal prosecution, arguing that because it also was made under federal authority, it violated the Fifth Amendment's Double Jeopardy clause.<sup>68</sup> The United States argued that the *Duro fix* did not delegate *federal* power to tribes but instead enlarged *tribes'* powers of self-government.<sup>69</sup> Since the Tribe's prosecution was made under its own sovereign authority, the two prosecutions were made by separate sovereigns, and subsequent federal prosecution did not violate the Double Jeopardy Clause.<sup>70</sup>

The Court first decided that Congress had intended tribal sovereign power (and not federal power) to underlie tribal prosecutions.<sup>71</sup> It reviewed the amendments' plain

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<sup>63</sup> *Id.*

<sup>64</sup> *See id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 197.

<sup>67</sup> *United States v. Lara*, 294 F.3d 1004, 1006 (2002).

<sup>68</sup> *Lara*, 541 U.S. at 197.

<sup>69</sup> *Id.* at 198.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 199.

language and legislative history, and found these showed that Congress had not intended merely to delegate federal authority to the tribes: rather, Congress had intended that tribal prosecutions under the statute be made under tribal sovereign authority.<sup>72</sup>

Next, the Court determined that Congress' plenary power over Indian tribes under the Constitution allowed it to expand the tribes' sovereignty:

[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as “plenary and exclusive.” . . . Congress, with this court’s approval, has interpreted the Constitution’s “plenary” grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority. From the Nation’s beginning Congress’ need for such legislative power would have seemed obvious. After all, the Government’s Indian policies, applicable to numerous tribes with diverse cultures, affecting billions of acres of land, of necessity would fluctuate dramatically as the needs of the Nation and those of the tribes changed over time. . . . Such major policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty.<sup>73</sup>

The Court’s reasoning ratifies Congress’ authority to restore sovereignty to the tribes under the plenary power doctrine. Just as Congress can use plenary power to restrict tribal sovereignty, it may use plenary power to expand it – as it meant to do by enacting the *Duro* fix. Seen in this light, the “congressional delegation” exception is really a way of saying that Congress, by exercising its plenary power, can legislatively overrule the Court’s finding implicit divestiture.

#### IV. POST-*LARA*: IS THE CONGRESSIONAL DELEGATION EXCEPTION “THE” ANSWER TO IMPLICIT DIVESTITURE?

##### A. An Overview of Literature Treating the Congressional Delegation Exception: Of Promise and Problems

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<sup>72</sup> *Id.* (citing the statute’s language, committee reports, and statements made by various members of Congress while Congress considered the amendments).

<sup>73</sup> *Id.* at 200.

Though no new cases have reached the Court since *Lara*, commentators generally have accepted that *Lara* vindicates the congressional delegation exception as an avenue to enlarge tribal authority, and cite express congressional delegation as a means of resolving various problems that confront Indian Country. For example, authors have suggested express congressional delegation could expand tribal authority to tax,<sup>74</sup> could allow tribes criminal jurisdiction over non-Indians who committed crimes on the reservation,<sup>75</sup> and could provide for inter-tribal enforcement of each tribe's court orders;<sup>76</sup> one commentator reads *Lara* in conjunction with Maine's Indian Claims Settlement Act and Congress' Indian Claims Settlement Act to propose that Maine tribes could force state courts to recognize same-sex marriages acknowledged under tribal law.<sup>77</sup> While articles usually treat the subject of tribal jurisdiction in the context of a specific issue, some authors posit that Congress could use *Lara* to annul the Court's broadest incursions into tribal authority: its holdings in *Oliphant* and *Montana*.<sup>78</sup>

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<sup>74</sup> See Anna-Marie Tabor, *Sovereignty In the Balance: Taxation by Tribal Governments*, 15 U. FLA. J.L. & PUB. POLICY 349, 399 (2004) (citing *Lara* for proposition that "congressional action could . . . expand the reach of tribal [tax] jurisdiction"); see also Matthew L. M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 800-03 (2004) (Congress could extend tribal authority to tax non-Indians).

<sup>75</sup> See Amy Radon, Note, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J.L. REFORM 1275, 1295, 1301-02 (2004) (Congress should affirm tribal jurisdiction over non-Indian men accused of committing domestic violence against Indian women).

<sup>76</sup> Steven J. Gunn, *Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M. L. REV. 297, 322 (2004).

<sup>77</sup> L. Scott Gould, *December Song: The Waiting Game for Tribal Sovereignty in Maine*, 20 ME. B.J. 18, 21-23 (2005). Maine's Indian Claims Settlement Act expressly stated that Maine could not regulate "internal tribal matters," which the Act defined to include "membership" and marriage between tribal members who reside on the reservation; the federal Maine Indian Claims Settlement Act provided that the tribes and Maine would give full faith and credit to each's respective judicial proceedings. *Id.* at 22-23. Gould suggests the tribes could use their powers to define marriage to allow same-sex marriages prohibited under Maine's laws; Maine would have to honor these marriages under the federal Act's full faith and credit provisions. *Id.* at 23. He also posits that the tribes might have jurisdiction over non-Indian same-sex couples who wished to marry under tribal law. *Id.*

<sup>78</sup> Gould, *supra* note 77, at 21; Gunn, *supra* note 76, at 322.

Notwithstanding the congressional delegation exception's availability in theory, commentators have identified practical obstacles that may prevent using *Lara* to further expand tribal jurisdiction. Of these, the most commonly cited is the political process itself. Many commentators suggest that Congress lacks the "political will" to statutorily enlarge jurisdiction, except under limited circumstances like those that led to the "*Duro* fix."<sup>79</sup> One author opines that Congress actually would be hostile to the idea: "there remains a core of ill will toward Indian nations and sovereignty in both congressional houses."<sup>80</sup> Another practical problem is that tribes, who have suffered under the plenary power doctrine, may not be willing to use it to their advantage.<sup>81</sup>

#### B. The Lurking Issue: Implicit Divestiture as an Unmoored Doctrine

As summarized above, most of the commentary regarding *Lara* focuses on discussing the *Duro* fix as an application of the congressional delegation exception, and postulating further applications this exception may have in Indian Country.

Commentators see congressional delegation as a means by which Congress can reverse the Court's implicit divestiture holdings, and as a way it can enlarge the tribes' authority while proactively preventing legal challenges. Under this reading, the major obstacle to using the congressional delegation exception to vindicate tribal sovereignty is the practical problem of convincing Congress and the tribes to do so.

However promising *Lara*'s acceptance of the congressional delegation exception is, the most important aspect of the *Lara* decision is what it reveals about implicit

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<sup>79</sup> See Gould, *supra* note 77, at 21; Gunn, *supra* note 76, at 322-323; Tabor, *supra* note 74, at 401; Fletcher, *supra* note 74, at 802.

<sup>80</sup> See Christopher J. Schneider, *Hornell Brewing Co. v. Rosebud Sioux Tribal Court: Denigrating the Spirit of Crazyhorse to Restrain the Scope of Tribal Court Jurisdiction*, 43 S.D. L. REV. 486, 525 (1998) (written prior to *Lara*).

<sup>81</sup> Gunn, *supra* note 76, at 324.

divestiture: currently, the doctrine lacks a consistent rationale. In fact, the rationale the *Lara* Court offers for implicit divestiture differs significantly from that it set out in *Oliphant*. The *Lara* Court does not acknowledge this discrepancy, but it could prove problematic. Theoretical inconsistency may indicate that implicit divestiture doctrine is a moving target. *Lara* may not, after all, provide the definitive statement of implicit divestiture's scope and consequences. If it does not, *Lara*'s usefulness for Indian Country may be more limited than current literature suggests.

The *Lara* opinion appears to set out a rationale for implicit divestiture:

[The *Duro* fix] relaxes the restrictions, recognized in *Duro*, that the political branches had imposed on the tribes' exercise of inherent prosecutorial power. . . . [Holdings finding implicit divestiture] reflect the Court's view of the tribes' retained sovereign status *as of the time* the Court made them.<sup>82</sup>

Here, the Court implies that divestiture was accomplished by legislative and executive acts. The Court's divestiture rulings seem to result from the Court's reasoning that Congress had impliedly exercised its plenary power to divest tribal sovereignty. In cases where it thought Congress had enacted a law without explicitly addressing all issues relating to Indian Country, the Court was inferring congressional intent, and using implicit divestiture to effectuate that intent. Under this rationale, implicit divestiture would divest any attributes of tribal sovereignty which interfered with Congress' intent in passing any particular legislation.<sup>83</sup>

In *Oliphant*, however, the Court offered a different rationale. After announcing implicit divestiture's rule that "Indian tribes are prohibited from exercising both those

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<sup>82</sup> United States v. Lara, 541 U.S. 193, 200, 205 (2004) (emphasis in original).

<sup>83</sup> Under *Lara*'s rationale, implicit divestiture essentially would serve as a gap-filler by effectuating Congress' intent when the congressional act failed to speak to the matter at issue.

[sovereign] powers . . . that are expressly terminated by Congress *and* those powers ‘inconsistent with their status[,]’<sup>84</sup> the Court went on to explain:

We have already described some of the inherent limitations on tribal powers that stem from [tribes’] incorporation into the United States. In *Johnson v. M’Intosh*, . . . we noted that the Indian tribes’ “power to dispose of the soil at their own will, to whomsoever they pleased,” was inherently lost to the overriding sovereignty of the United States. And in *Cherokee Nation v. Georgia*, . . . the Chief Justice observed that since Indian tribes are “completely under the sovereignty and dominion of the United States, . . . any attempt [by foreign nations] to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.” . . . Nor are the intrinsic limitations on Indian tribal authority restricted to limitations on the tribes’ power to transfer lands or exercise external political sovereignty.<sup>85</sup>

Here, the Court says that the tribes’ “incorporation into the United States” limited their powers. The Court also holds that limitations on tribal sovereignty “stem” from this incorporation. Finally, the Court adds that the limitations on tribal sovereignty that it has mentioned – presumably, those that “stem” from “incorporation” – are not exclusive.

Since *Oliphant* situates “incorporation” at the heart of implicit divestiture doctrine, it becomes vital to understand it. The Court’s examples indicate that it is using “incorporation” to describe rights conferred upon a discoverer under the doctrine of discovery. As discussed in Section II, *Johnson* originally stood for the propositions that discovery divested tribes of the ability to convey their land freely, and also of the authority to have government-to-government relations with anyone but their discoverer.<sup>86</sup> In *Oliphant*, the Court lists the results of discovery *Johnson* recognized, and cites them as examples of limitations that result from the tribes’ incorporation. What, in prior cases,

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<sup>84</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) (emphasis in original).

<sup>85</sup> *Id.* at 209 (deciding that Indian tribes’ “dependent status” implicitly divested them of criminal jurisdiction over non-Indians).

<sup>86</sup> *Supra* pp. 4-5.

the Court held to result from discovery, it now describes as resulting from “incorporation.” Moreover, the Court identifies “incorporation” as the event that limits tribal authority. Given that the consequences of incorporation are those of discovery, it seems the Court is saying that *discovery* is the event which divested the tribes of authority “inconsistent with their status.”

If discovery is the event which compels implicit divestiture, *Oliphant* appears to broaden *Johnson*’s doctrine of discovery. Under *Oliphant*, the effects of incorporation/discovery may not be limited to *Johnson*’s prior holdings. By saying that intrinsic limitations on tribal authority are not “restricted to limitations on the tribes’ power to transfer lands or exercise political sovereignty[,]” the *Oliphant* Court seems to imply that discovery carries additional, unenumerated consequences. Thus, in *Oliphant*, if discovery is the source of divestiture, its consequence is that tribes are divested of *any* sovereign power the Court determines to be inconsistent with their status.<sup>87</sup>

Comparing the *Lara* and *Oliphant* implicit divestiture rationales side by side highlights the points at which the two paradigms diverge. These theoretical differences reflect models of implicit divestiture that are significantly different and potentially incompatible. Because the rationale the Court ultimately chooses will have dramatic repercussions upon the scope of authority it allows tribes to exercise, it is important to examine the differences between the two rationales and the consequences of each.

The first point of difference between the two rationales is what each identifies as the source of limits on tribal sovereignty. *Lara* identifies Congress as the source of these

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<sup>87</sup> For example, if discovery divested tribes of the right to alienate land (*Johnson*), discovery would also divest tribes of the rights to criminally prosecute non-Indians (*Oliphant*), to criminally prosecute nonmembers (*Duro*), and so on. Every power of which the tribes were held to be divested would relate back to the date of their discovery.

limits: Congress' plenary power over tribes allows it unilaterally to restrict tribal authority. Under this model, Congress divests tribes of specific sovereign powers piecemeal, by various congressional acts that either deal directly with or that indirectly affect Indian Country. By contrast, *Oliphant*'s reasoning implies that discovery is the sole source of limits upon tribal sovereignty. Under *Oliphant*, divestiture occurred in one fell swoop at the point of the tribes' discovery, and independently of any congressional exercise of plenary power.

In addition, the two decisions cast the Court's role differently. In *Lara*, implicit divestiture is the means by which the Court attempts to consummate congressional intent. Congress' acts impose limits on tribes' authority; the Court discerns and enforces these limits, using the doctrine of implicit divestiture to invalidate exercises of tribal authority that exceed them. Thus, under *Lara*, congressional intent circumscribes the Court's role. Since implicit divestiture is merely a means of effectuating congressional intent, any ruling refuted by Congress would override the decision by showing that the Court had failed to correctly discern and implement Congress' intent.

In *Oliphant*, however, divestiture automatically resulted from the tribes' discovery, and implicit divestiture doctrine is the Court's way of enforcing the limits it considers to result from discovery. Because the Court alone determines what limits discovery imposes upon tribal sovereignty, this model gives the Court unlimited latitude itself to determine the bounds of tribal authority.

The *Lara* Court's opinion does not acknowledge that its rationale for implicit divestiture differs from *Oliphant*'s. The fact that *Lara*'s majority disregarded this disparity should give pause to those who see *Lara* as a way of overruling implicit

divestiture.<sup>88</sup> The asymmetries are troubling because they cause different results regarding the Court's authority to invalidate tribal actions via implicit divestiture doctrine and also Congress' role in setting the bounds of tribal authority. A skeptic might say that having two concurrent implicit divestiture rationales gives the Court latitude to cite to whichever one allows it to reach its desired result. At the very least, it leaves open the possibility that the Court might find that discovery divested the tribes of the sovereignty necessary for some assertions of jurisdiction.<sup>89</sup>

C. Constitutional Limits on the Congressional Delegation Exception?: an Illustration of the Problems of an Unmoored Doctrine

A few commentators have discussed a conundrum contained in the *Lara* decision that may illustrate the problems caused by vagaries in implicit divestiture's rationale. The Court's comments in *Lara* and other cases indicate that it may consider tribal authority somehow to be circumscribed by the United States Constitution.<sup>90</sup> Steven J. Gunn draws upon various Court opinions to offer a succinct overview of the Court's concerns:

The *Lara* Court mentioned, but did not "consider," the question of "whether the Constitution's Due Process or Equal Protection Clauses prohibit tribes from prosecuting a nonmember citizen of the United States." Thus, while the Court held that Congress possesses the "constitutional power to enact a statute that modifies tribal power," it did not decide whether the *Duro* fix itself ran afoul of the Constitution by

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<sup>88</sup> *But cf.* Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667, 679 (2006). Skibine argues that *Lara* narrows the scope of implicit divestiture doctrine, and premises this argument upon his belief that *Lara*'s majority opinion repeals parts of *Oliphant*'s implicit divestiture rationale. *Id.* Skibine later posits, however, that the congressional delegation exception nonetheless may be limited. He suggests that the Court's recent decisions "could be construed" as defining Congress' plenary power over "Indian affairs" narrowly, to exclude any matter that implicates state interests. *Id.* at 683 ("While the Court repeatedly insists that Congress has plenary authority over Indian affairs, recent cases could be construed as indicating that the Court might consider regulation of non-Indians on Indian reservations as not always involving such 'Indian affairs' over which Congress has plenary power."). If so, the congressional delegation exception would be available *only* in matters that involved Indian interests exclusively.

<sup>90</sup> Gunn, *supra* note 76, at 318-19; *cf.* Radon, *supra* note 75, at 1306-09 ("dominant society" is concerned that tribal courts will not protect individual's rights and liberties).

permitting tribes to prosecute nonmember Indian citizens without affording them “certain constitutional safeguards.” . . .

[T]he Court has stated that it would be “inconsistent with the overriding interests of the National Government” to permit Indian tribes to prosecute non-tribal members in “tribal courts which do not accord the full protections of the Bill of Rights.” The Court has long held that the Bill of Rights does not apply to Indian tribal governments, and while the Indian Civil Rights Act . . . imposes on tribal governments “some guarantees of fair procedure,” it does not incorporate all of the protections under the Bill of Rights. For example, . . . ICRA contains no guarantee of court appointed counsel for indigent criminal defendants. In light of this and other limitations, the Court has suggested that there may be “constitutional limitations” on the ability of Congress, “through recognition of inherent tribal authority” or otherwise, to “subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right.”

. . . .

As for the Equal Protection Clause, the Court has suggested that congressional authorization of tribal power over nonmember Indians, but not over non-Indians, may raise equal protection concerns.<sup>91</sup>

As Gunn’s synopsis makes clear, the Court consistently has hinted that tribal criminal jurisdiction over nonmembers may be subject to constitutional limits. Specifically, the Court speculates that, depending on how Congress structured its delegation, tribal jurisdiction could run afoul of the Due Process and Equal Protection clauses.

Though Gunn’s analysis focuses on possible constitutional limits regarding tribal *criminal* jurisdiction over nonmembers, it seems likely the Court also might find the Constitution imposes limits on other kinds of jurisdiction – including civil adjudicative jurisdiction and legislative jurisdiction. Constitutional concerns would seem to apply equally to these areas: any exercise of tribal jurisdiction potentially could subject American citizens to action that would be unconstitutional if taken by the federal, state, or municipal governments.

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<sup>91</sup> Gunn, *supra* note 76, at 318-19 (citations omitted). In addition to *Lara*, Gunn quotes and cites *Wash. v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and *Duro v. Reina*, 495 U.S. 676 (1990).

The Court's comments nonetheless are difficult to explain doctrinally, because the Court's jurisprudence expressly holds that Indian tribes are *not* subject to the Constitution.<sup>92</sup> One commentator has criticized the Court's dicta on this basis. Philip P. Frickey addresses the problems inherent in the Court's constitutional arguments through his critique of Justice Kennedy's *Lara* dissent, which was based upon constitutional concerns:

For Justice Kennedy, the Constitution “is based on a theory of original, and continuing, consent of the governed.” The people condition this consent, he reasoned, upon a federal structure that limits the powers of both the national and state governments. Justice Kennedy suggested that Congress' authorization of tribal prosecutions violates the constitutional structure, for it allows an American citizen to be tried within the United States by a government to which that person has not granted the consent of the governed. . . .

. . . .

“The original, and continuing, consent of the governed” is a strange idea [to apply to tribal governments]. Just when and how did all the Indian tribes become part of the constitutional system? The answer from constitutional text is never . . . Justice Kennedy's argument reduces to this remarkable contention: tribes may be judicially subjugated based on the mystical implications of a document by which they have never consented to be bound and to which they have never even been coercively tied . . . because the document is manifestly good. The argument is driven by an almost irresistible impulse of coherence flowing from the canonical place of the Constitution in our legal culture and the related instinct that all exercises of governmental power must somehow be subject to it.<sup>93</sup>

As seen in Gunn's synopsis, the Court consistently has indicated that tribal governments might be subject to constitutional limits. Although the Court has not recently confronted a direct challenge to tribal action based on constitutional concerns, Frickey correctly notes the problem with a constitutional argument: doctrinally, tribes are not subject to the

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<sup>92</sup> *Talton v. Mayes*, 163 U.S. 376 (1896).

<sup>93</sup> Frickey, *supra* note 50, at 465, 468.

Constitution. In order to contend otherwise, the Court seemingly would have to identify a point at which tribal action became subject to the Constitution.

Frickey suggests that the Court cannot identify this point because it does not exist. Instead, says Frickey, Justice Kennedy resorts to a legal fiction: the “consent of the governed” argument. Under this argument, the citizenry’s consent to be governed by the United States is based upon its understanding that the government action to which it is subject is limited by the Constitution. Therefore, any federal action subjecting a citizen to a tribal government would be invalid, because it subjects the citizenry to a government *not* limited by the Constitution.<sup>94</sup> The federal action granting the tribe jurisdiction would exceed the reign the citizenry allowed the federal government.

Frickey argues that the “consent of the governed” argument is a “seduction” which “requires resisting.”<sup>95</sup> Certainly it bodes ill for tribes. Assuming the argument is merely a “seduction,”<sup>96</sup> however, the rationale for applying constitutional principles to the tribes would be a legal fiction, susceptible to attack as sleight of hand. However, Kennedy’s “consent of the governed” rationale may not be the only rationale supporting the argument that the Constitution limits exercises of tribal authority. The Court’s implicit divestiture jurisprudence may provide another, intractable rationale: the doctrine of discovery.

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<sup>94</sup> This statement assumes that the federal grant of jurisdiction was not conditioned upon the tribe’s being bound by constitutional mandates. Presumably, if a grant of jurisdiction to the tribe met constitutional muster, the grant would be within the scope of the citizenry’s consent to the federal government and would therefore be valid.

<sup>95</sup> *Id.* at 468.

<sup>96</sup> This assertion is arguable. The “consent of the governed” rationale may have a basis in the Tenth Amendment, which reserves powers not delegated to the United States “to the States respectively, or to the people.” U.S. Const. amend X. One could argue that the people had not delegated the United States the power to subject them to governments that did not comport with the Constitution; under the Tenth Amendment, then, the United States would lack the power to compel U.S. citizens to be subject to tribal jurisdiction.

Specifically, the Court could cite *Oliphant*'s implicit divestiture rationale to find that discovery divested the tribes of the ability to exercise sovereignty in a way inconsistent with the Constitution. This reasoning would establish the Constitution as a constraint on tribal assertions of jurisdiction and would explain the Court's cryptic warnings that tribes were subject to constitutional limitations.

If the Court follows this course, its decisions ultimately will clarify that *Oliphant*'s implicit divestiture rationale remains viable post-*Lara*, and that discovery still can function as a source of power, independent of and concurrent with that described in *Lara*, by which the Court can divest tribes of authority. If *Oliphant*'s rationale still is good, the Court retains authority to define what types of tribal authority are "inconsistent" with the tribes' status, and also unilaterally to strip tribes of power under the implicit divestiture doctrine. Moreover, if the Court holds that discovery can accomplish divestiture absent congressional action, the congressional delegation exception might not be an available means for Congress to override a Court decision that relies upon it. If *Oliphant* and *Lara* represent concurrent sources of authority for implicit divestiture, the Court has latitude to limit the congressional delegation exception's availability to *Lara*'s congressionally-driven, plenary power rationale.

The confusion surrounding implicit divestiture's rationale – or rationales – makes the doctrine unmoored and malleable. Ultimately, it may call *Lara*'s utility into question, because the implicit divestiture rationale the Court adopts may delineate the bounds of authority that Congress can restore to the tribes. Unless the Court clarifies that the doctrine of discovery does not underpin implicit divestiture, the Court nonetheless may invalidate exercises of tribal sovereignty expressly sanctioned by Congress. This result

would remove much of the power of the congressional delegation exception by situating the Court as the final arbiter of tribal sovereignty.

## V. CONCLUSION

From the beginning of its jurisprudence, the Supreme Court's holdings have ratified the federal government's encroachment upon Indian lands and sovereignty. The doctrines of discovery and plenary power provide dramatic examples of the way the Court has developed doctrines that vindicate United States interests at the tribes' expense.

Implicit divestiture undoubtedly is another such doctrine, but its characteristics distinguish it from its predecessors. Unlike the doctrine of plenary power, implicit divestiture is judicially-driven. Moreover, unlike either discovery or plenary power, implicit divestiture's reach as yet is undefined. Under the doctrine, the Court potentially wields significant power to invalidate exercises of tribal authority.

At first blush, *Lara* appears to provide a welcome means to legislatively overrule the Court's implicit divestiture holdings, and even act preemptively on the tribes' behalf, using the legislative process to ensure that tribes can effectively govern and manage Indian Country. On closer inspection, however, the congressional delegation exception may be less promising than it appears. The Court continues to speculate that congressional delegation might be subject to external limits, and, in *Lara*, practically invites parties to challenge the *Duro* fix on constitutional grounds.<sup>97</sup> Meanwhile, its *Oliphant* rationale – the doctrine of discovery in disguise – continues to lurk in the background.

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<sup>97</sup> See *United States v. Lara*, 541 U.S. 193, 209 (2004) (“Other defendants in tribal proceedings remain free to raise [a constitutional claim] should they wish to do so. See 25 U.S.C. §1303 (vesting district courts with jurisdiction over habeas writs from tribal courts).”).

Given these factors, the congressional delegation exception likely is not the panacea for implicit divestiture. Indeed, although constitutional concerns may provide a starting point for the Court to re-examine the validity of exercises of tribal sovereignty, they are not necessarily its terminus. The Court might go further, and find that discovery implicitly divested the tribes of the ability to exercise sovereignty consistently with the Constitution. Ironically, *Lara* – a decision hailed by many as a triumph for tribal sovereignty<sup>98</sup> – may serve as the starting point for limits upon sovereignty that are more stringent, not less.

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<sup>98</sup> E.g., Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5 (2004).