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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.[1] Since the United States' formation, however, tribal and Anglo-American interests often have conflicted.[2] As a result, the Supreme Court repeatedly has adjudicated the tribes' and the United States' respective rights as sovereigns.[3]

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.[4] 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.[5]

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. Part II reviews the two doctrines the Court developed during the first period of its Indian law jurisprudence: the doctrine of

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[1] *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 55 (5th ed. 2005).

[2] *See generally* GETCHES ET AL., *supra* note 1. Getches' casebook gives concise synopses of the United States' Indian Law jurisprudence and current conflicts within federal Indian Law.

[3] *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (concerning effects of discovery upon tribal sovereign rights); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (holding that Congress has plenary power over Indian tribes); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (stating that Indian tribes are impliedly divested of sovereign authority where exercise of power is inconsistent with the tribes' status).

[4] *See Lone Wolf*, 187 U.S. at 565-66 (holding that Congress has plenary power over "tribal relations," and explaining that this legislative power allows Congress to pass laws in conflict with treaty provisions); *Johnson*, 21 U.S. at 573 (holding that discovery necessarily diminished tribes' rights to alienate land).

[5] *Oliphant*, 435 U.S. at 208-09 ("[T]he tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. . . . Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty.").

discovery and the doctrine of plenary power. Part III introduces the second period's doctrine of implicit divestiture, 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.[6] 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*,[7] 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 non-Indian individuals.[8] 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 tracts to McIntosh.[9] After McIntosh took possession of the land, the parties that had purchased it from the Tribes sued McIntosh, arguing they had superior title. [10]

The Court reviewed the history of North America's colonization[11] and concluded that the European "discovery" of the continent necessarily divested Indian nations of complete sovereignty.[12] The Court based its holding on the "doctrine of

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[6] *See, e.g.*, *Johnson*, 21 U.S. 543.

[7] *Id.*

[8] *Id.* at 550-54 (Illinois Indians); *see also id.* at 555-58 (Piankeshaw Indians).

[9] *Id.* at 558-60.

[10] *See id.* at 560-62. Plaintiffs also included successors in interest to the parties that had purchased the lands. *Id.* at 560-61.

[11] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574-87 (1823).

[12] *Id.* at 574.

discovery" developed by colonizing European governments.[13] This doctrine, the Court explained, grew out of a mutual need:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. . . . [A]s they were all in pursuit of nearly the same object, it was necessary, 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.[14]

Thus, as the various European nations rushed to stake claims on the "new" continent, it became to the advantage of each 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 colonial 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.[15] This title, the Court found, was "consummated" by possessing the land.[16] Until possession, discovery prevented other European governments from establishing any claim to the land, including claims based on negotiations with the tribes that occupied it.[17]

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.

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[13] *See id.* 572-74 (discussing discoverers' rights as recognized by European colonizing governments); *see also id.* at 587 (stating that the United States has "unequivocally acceded" to doctrine that discovery granted discoverer rights). 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).

[14] *Johnson*, 21 U.S. at 572-73.

[15] *Id.* at 574 ("original fundamental principle"); *see also id.* at 573 ("[D]iscovery gave title to the government by whose subjects, or by whose authority, it was made, as against all other European governments, which title might be consummated by possession.").

[16] *Id.* at 573.

[17] *See id.*

> 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.
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> 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.[18]

Here, the Court held the event of discovery divested tribes of the sovereign power to convey their lands freely.[19] 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.[20] In addition, it divested the tribes of their "rights to complete sovereignty, as independent nations," and granted the discoverer power, with the tribes, to "regulate" the relations which were to exist between them. The rights and powers granted by discovery 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 Britain's rights and powers of discovery upon the American States.[21] The States subsequently ceded their rights to the United States.[22] Thus, the rights and powers of discovery eventually vested in the federal government.[23]

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

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[18] *Id.* at 573-74.

[19] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573-74 (1823).

[20] 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.

[21] *See id.* at 584-85.

[22] *Id.* at 586.

[23] *See also id.* at 587 (stating United States "unequivocally acceded" to doctrine of discovery).

superior.[24] 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).[25] External government-to-government relations between occupying tribes and another European country, the Court said, "would have been considered and treated as an invasion of the [discoverer's or its successor's] territories."[26]

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

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[24] *See id.* at 595 ("If . . . discovery be made . . . under the authority of an existing government . . . the country becomes a part of the [discovering] nation, and . . . the vacant soil is . . . disposed of [according to the discoverer's laws].").

[25] *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573-74 (1823) (holding that discovery gave the discovering nation "exclusive" right, along with the land's tribal occupants, to regulate the relations between them, and finding that, upon discovery, the tribes' rights to "complete sovereignty, as independent nations, were necessarily diminished"). Traditionally, the Court cites Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), for this proposition. *E.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978) (citing *Cherokee*, 30 U.S. at 17-18). However, the statements in *Cherokee* that are cited for this principle merely echo those that appeared previously in *Johnson*. *Compare Cherokee*, 30 U.S. at 17-18 ("[Indian tribes] and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility."), *with Johnson*, 21 U.S. at 573-74, 583-84 (stating that after Britain ceded territory west of the Mississippi to France "any [later] attempt to purchase it from the Indians, would have been considered and treated as an invasion of the territories of France"); *Id.* at 587 (stating that after the United States purchased Louisiana from France, "any attempt of others to intrude into that country . . . would be considered as an aggression which would justify war").

[26] *Johnson*, 21 U.S. at 583-84.

> property purchased; holds their title under their protection, and subject to their laws.[27]

Here, the Court's comments indicate that those powers retained by tribes after discovery remain subject to tribal authority.[28] 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 upon the United States) for recognition and enforcement.[29] 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 *Lone Wolf v. Hitchcock*,[30] one of the most sweeping decisions in its history, 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 incursions upon tribal authority.[31]

Lone Wolf contested Congress' authority to unilaterally change agreements made by tribes and officers of the federal government.[32] 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.[33] 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 purchase "surplus" lands for later sale to non-Indians.[34] Subsequently, Congress acted to effectuate the agreement

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[27] *Id.* at 593.

[28] *Id.*

[29] 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.

[30] 187 U.S. 553 (1903).

[31] *See* CONFERENCE OF W. ATTORNEYS GEN., AMERICAN INDIAN LAW DESKBOOK 107-08 (Joseph P. Mazurek et al. eds., 2d ed. 1998) (listing various statutes enacted under Congress' plenary power to govern Indian country).

[32] Lone Wolf v. Hitchcock, 187 U.S. 555, 564 (1903).

[33] *Id.* at 554.

[34] *Id.* at 554-55.

by congressional acts.[35] These acts, however, modified the agreement in various particulars.[36]

The Tribes sued, arguing that the acts violated their property rights without due process and were unconstitutional.[37] The Tribes had three arguments against the law, two of which touched upon the federal government's authority to take unilateral action affecting the Tribes. First, the Tribes argued that the agreement they had signed (and the acts implementing it) was invalid because it had not been consented to by three-fourths of the Tribes' adult male population, as required by treaty.[38] Second, the Tribes argued the acts were invalid because they unilaterally changed the terms of the signed agreement "without submitting such changes to the Indians for their consideration."[39]

In a short opinion, the Court affirmed lower court decisions that sustained the United States' motion to dismiss.[40] 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 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.

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[35] *Id.* at 559-60 (Senate bill, amended and passed by House of Representatives and subsequently enacted as amended); *see also id.* at 560 (subsequent acts passed to implement non-Indian settlement).

[36] 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.

[37] *Id.* at 561.

[38] Lone Wolf v. Hitchcock, 187 U.S. 553, 556 (1903). 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.

[39] *Id.* at 561. The Tribes also argued that the agreement was invalid because the interpreters had misrepresented its terms to the Tribes. *Id.*

[40] *Id.* at 568.

> . . . [A]s with treaties made with foreign nations, the legislative power might pass laws in conflict with treaties made with the Indians.[41]

In *Johnson*, the Court found that discovery granted the discoverer the exclusive right to "regulate" its relationship to the tribes within its territory.[42] *Lone Wolf* further elucidated the United States/tribal relationship, characterizing it as one in which Congress had absolute, unilateral power over tribes.[43]

By characterizing Congress' power as plenary, the Court implied that, while the United States' relationship with tribes developed through mutual negotiation, these negotiations were merely an exercise of Congress' absolute power over tribes.[44] Essentially, the Court's rationale was that the greater power (plenary power) included the lesser (the power to negotiate).[45] 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.[46]

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 sidestepped the inherent inequities caused by the United States' actions and avoided discussion of the self-interest that motivated them. Though the Court's opinion in *Johnson* contains expressions of regret,[47] these comments are unpersuasive in the face of the Court's vindication of the doctrine of discovery.[48] The *Lone Wolf* Court's assertion that it "must presume

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[41] *Id.* at 567, 565-66 (citation omitted).

[42] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823).

[43] *See Lone Wolf*, 187 U.S. at 567.

[44] *See id.* at 564 ("The contention [that the agreement was void because it violated the terms of the Tribes' treaty with the United States] in effect ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent . . . of all power to act, if the assent of the Indians could not be obtained.").

[45] *See id.*

[46] *See id.*

[47] *Johnson*, 21 U.S. 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.").

[48] *Id.* at 588, 591 ("However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the

that Congress acted in perfect good faith" in exercising its plenary power, and its suggestion that the Tribes instead petition Congress for relief, are of little comfort given its conclusion that any congressional act regarding Indians is nonjusticiable.[49] Moreover, *Lone Wolf*'s premise that the United States held more power than it exercised[50] 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.[51] Ultimately, many tribes weathered discovery and various congressional acts (some intended to destroy them) and survived as political entities.[52]

III. 1978-PRESENT: THE RISE OF JUDICIAL CONSTRAINTS ON TRIBAL SOVREIGNTY

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.[53] Unlike the doctrine of plenary power, implicit divestiture does not require express congressional action inimical to tribal sovereignty.[54]

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property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.").

[49] Lone Wolf v. Hitchcock, 187 U.S. 553, 567-68 (1903).

[50] *See supra* text accompanying notes 41-42.

[51] *See Lone Wolf*, 187 U.S. at 567 (characterizing Congress' plenary power as "legislative") (quoting *Choctaw Nation v. United States*, 119 U.S. 1 (1886), for the proposition that "Indians who [are] not . . . fully emancipated from the control and protection of the United States are subject . . . to be controlled by direct legislation of Congress.").

[52] For an excellent overview of the history of congressional Indian policy, see generally GETCHES ET AL., *supra* note 1, at 140-256. 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.

[53] *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

[54] *Id.* ("[T]he tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. . . . 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.*" (citation omitted)).

Under implicit divestiture, the Court scrutinizes the contested tribal act, and then *itself* decides whether the act was "inconsistent" with the tribe's status.[55] If the Court finds the tribe's act to be "inconsistent," it holds the act invalid.[56]

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 determinations of the act's "consistency" with the tribes' status.[57] 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.[58]

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

Beginning in 1978 with *Oliphant v. Suquamish Indian Tribe*,[59] the Supreme Court decided a series of cases which dramatically curtailed the sovereignty tribes retained under previous jurisprudence.[60] 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.[61]

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.[62] Petitioners Mark David Oliphant and Daniel B. Belgarde were non-Indian residents of the Suquamish Indian Tribe's Port Madison Reservation.[63] The Tribe

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[55] *See, e.g., Oliphant*, 435 U.S. 191 (1978).

[56] *See, e.g., id.*

[57] *See, e.g., id.*

[58] *See* United States v. Lara, 541 U.S. 193 (2004) (holding that Congress could use its plenary power to permit tribes, as an exercise of their inherent sovereign authority, to criminally prosecute nonmember Indians, but intimating that Congress' implementing statute may be subject to constitutional challenge).

[59] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[60] *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981) (ruling that tribes generally divested of legislative jurisdiction over "nonmembers of the tribe," with exceptions); Strate v. A-1 Contractors, 520 U.S. 438 (1997) (ruling that tribal courts' adjudicative jurisdictions are coextensive with tribes' legislative jurisdictions; assertions of tribal adjudicative jurisdiction are judged under *Montana*); *see, e.g.*, Montana v. United States, 450 U.S. 544 (1981) (holding that tribes generally divested of legislative jurisdiction over "nonmembers of the tribe," with exceptions).

[61] *Oliphant*, 435 U.S. 191.

[62] *Id.*

[63] *Id.* at 194.

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.[64] Oliphant and Belgarde were charged by the Tribe under the Code. 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.[65] 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."[66]

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."[67] 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.*'"[68] 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 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.[69]

In applying this new doctrine, the *Oliphant* Court ultimately determined that tribal assertions of criminal jurisdiction over non-Indians were inconsistent with their status and thus void.[70] To reach this decision, the Court considered

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[64] *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.

[65] *Id.* at 194-95.

[66] *Id.* at 195-96.

[67] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

[68] *Id.* (citing and quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)).

[69] *See* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (holding that the tribe is divested of power to impose zoning regulations on reservation lands within open area of reservation and owned by nonmembers); *see, e.g.*, Montana v. United States, 450 U.S. 544 (1981) (holding that the tribe is divested of power to regulate hunting and fishing by non-Indians on reservation lands held in fee by nonmembers of the tribe); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (tribe divested of power to impose zoning regulations on reservation lands within open area of reservation and owned by nonmembers).

[70] *Oliphant*, 435 U.S. at 210.

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.[71] In addition, the Court was concerned that allowing tribal jurisdiction would infringe upon important rights incident to United States citizenship.[72] 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 protected by the United States from unwarranted intrusions on their personal liberty."[73] It reviewed a prior case[74] 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."[75] 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."[76] The federal interests in protecting United States citizens

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[71] *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. *Id.* 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.

[72] *See id.* at 210.

[73] *Id.*

[74] *Ex parte* Crow Dog, 109 U.S. 556 (1883).

[75] *Oliphant*, 435 U.S. at 210-11 (quoting *Ex parte* Crow Dog, 109 U.S. at 571).

[76] *Id.* at 211.

from unwarranted intrusions upon their personal liberties 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.[77]

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.[78] Generally, the Court has found the tribes to be divested of jurisdiction over anyone except their respective members.[79] This principle applies to both criminal and civil jurisdiction.[80]

The Court has carved out certain exceptions to this "members-only" limitation in the context of civil jurisdiction; these were set out in *Montana v. United States*,[81] the current lodestar regarding tribal civil jurisdiction. First, a tribe may regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[82] Second, 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."[83]

A later case, *Strate v. A-1 Contractors*,[84] demonstrated that the Court construes *Montana*'s exceptions very narrowly. The *Strate* Court rejected tribal jurisdiction in a civil suit between two non-Indians arising from an auto accident that occurred on land held in trust for the tribes and maintained as a highway by North Dakota.[85] *Strate*'s discussion of the first *Montana* exception clarified that

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[77] *See id.* at 212.

[78] *See, e.g.*, Montana v. United States, 450 U.S. 544, 546 (1981) (tribes generally divested of legislative jurisdiction over "nonmembers of the tribe," with exceptions); Strate v. A-1 Contractors, 520 U.S. 438 (1997) (stating that the tribal courts' adjudicative jurisdictions are coextensive with tribes' legislative jurisdictions; assertions of tribal adjudicative jurisdiction are judged under *Montana*).

[79] *See* United States v. Wheeler, 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 that an Indian tribe has criminal jurisdiction over tribal member for crime committed on tribe's reservation on basis that it was an exercise of tribe's retained right to internal self-government).

[80] *See Montana*, 450 U.S. at 565. *Montana* rejected the Crow Tribe's authority to regulate non-Indian fishing and hunting on reservation lands held in fee by nonmembers. *Id.* at 544.

[81] *Id.*

[82] *Id.* at 565.

[83] *Id.* at 566.

[84] Strate v. A-1 Contractors, 520 U.S. 438 (1997).

[85] *Id.*

the *mere existence* of a "consensual relationship" between a party and the tribe was insufficient to sustain that tribe's claim of jurisdiction.[86] The *Strate* Court construed *Montana*'s second exception equally narrowly: while it conceded that careless driving "endanger[s] all in the vicinity, and surely jeopardize[s] the safety of tribal members[,]"the Court declined to find that this activity rose to the level required for the tribe to have jurisdiction under *Montana*'s second exception.[87] In rejecting the argument in favor of tribal jurisdiction, the Court commented, "if *Montana*'s second exception requires no more, the exception would severely shrink the rule."[88] Instead, the Court framed its discussion of the exception as focusing on whether allowing state jurisdiction would "trench unduly on tribal self-government,"[89] and characterized the tribes' rights to self-government as limited to "'the right of reservation Indians to make their own laws and be ruled by them.'"[90] Thus, after *Strate*, *Montana*'s exceptions seem out of reach for all but the most dramatic scenarios under which a tribe would attempt to assert jurisdiction.

As apparent by this attempt to sketch the contours of law regarding implicit divestiture of tribal authority over nonmembers,[91] *Oliphant*'s implicit divestiture doctrine has resulted in a judicially-devised system for assessing assertions of tribal authority that is tangled and unpredictable. As jurisprudence now stands, various factors may influence whether a tribe can assert jurisdiction: what jurisdiction the tribe is asserting (i.e., criminal or civil);[92] over whom the tribe asserts jurisdiction

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[86] *Id.* at 456-57. *Strate*'s defendants were working on the reservation under subcontract with a tribal corporation (i.e., one wholly owned by the Tribe). *Id.* at 443. One source summarizes *Montana*'s first exception after *Strate* as "typically . . . aris[ing] in connection with business dealings on reservations with tribes or their members where the right to engage in the particular activity may be conditioned on compliance with tribal law." CONFERENCE OF W. ATTORNEYS GEN., *supra* note 31, at 120.

[87] *See Strate*, 520 U.S. at 457-58.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 458 (quoting Williams v. Lee, 358 US 217, 220 (1959)).

[91] This brief summary of the most salient decisions regarding implicit divestiture of tribal authority over nonmembers presents a far-from-complete picture of the Court's jurisprudence in the general area of tribal authority. For a comprehensive overview of tribal authority generally, see CONFERENCE OF W. ATTORNEYS GEN., *supra* note 31, at 109-21 (tribal civil jurisdiction); CONFERENCE OF W. ATTORNEYS GEN., AMERICAN INDIAN LAW DESKBOOK 45-53 (Joseph P. Mazurek et al. eds., 2d ed. Supp. 2002) (tribal civil jurisdiction); GETCHES ET AL., *supra* note 1, at 488-92 (criminal jurisdiction in Indian Country).

[92] Tribes have criminal jurisdiction over members for crimes committed on the tribe's reservation. *See* United States v. Wheeler, 435 U.S. 313 (1978). Tribes also have criminal jurisdiction over nonmember Indians. *See* United States v. Lara, 541 U.S. 193 (2004). Tribes have civil jurisdiction over members. *See* Montana v. United States, 450 U.S. 544, 565 (1981). Tribes also have civil jurisdiction over nonmembers under limited circumstances. *See Montana*, 450 U.S. at 565-67.

(a tribal member, a nonmember Indian, or a nonmember non-Indian);[93] how reservation lands are held (by the tribe, by the United States in trust for the tribe, or in fee);[94] the character of a nonmember's relationship to the tribe (consensual or not);[95] 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).[96] The delineated factors help the Court to determine whether a tribe's particular assertion of jurisdiction is "inconsistent with its status" and thus implicitly divested. But the principles articulated in current case law are not exhaustive: the Court could consider other factors, which then would serve as springboards for further iterations of limits under implicit divestiture.

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.[97] 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."[98] After *Oliphant* and its progeny, tribes cannot be certain any assertion of tribal jurisdiction will be upheld.

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[93] *E.g.*, *Wheeler*, 435 U.S. 313 (criminal jurisdiction over tribal members); *Montana*, 450 U.S. 544 (civil jurisdiction over nonmember non-Indians); *Lara*, 541 U.S. 193 (criminal jurisdiction over nonmember Indians).

[94] A tribe's civil jurisdiction over non-Indians on reservation lands held in fee is extremely limited. *See Montana*, 450 U.S. at 565. But tribal jurisdiction over lands held in trust for the tribe is not assured. *See* Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997) (tribe lacks jurisdiction over suit between nonmembers arising from accident on trust land within reservation).

[95] A tribe may regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members." *Montana*, 450 U.S. at 565. But the mere existence of *some* consensual relationship to the tribe does not confer jurisdiction. *See Strate*, 520 U.S. at 456-57.

[96] A tribe may regulate the activities of non-Indians on fee land within the reservation when the non-Indian's conduct "threatens or has some . . . effect on the [tribe's] political integrity, the economic security, or [its] health and welfare." *Montana*, 450 U.S. at 566. But the Court construes this exception narrowly. *See Strate*, 520 U.S. at 457-59.

[97] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09 (1978) and discussion *infra* Part IV.B.

[98] 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. *Id.* 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.

B. *Reining 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."[99] 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.*"[100] Express congressional delegation, then, potentially could allow a tribe to exercise authority the Court otherwise would have found was divested.[101]

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 the Indian Civil Rights Act of 1968[102] so as to conflict with the Court's holding in *Duro v. Reina*,[103] 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.[104]

In *Duro*, 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.[105] The defendant contested the Tribe's assertion of criminal jurisdiction over him.[106] 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.[107] The Court

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[99] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (quoting Oliphant v. Schlie, 544 F.2d. 1007, 1009 (9th Cir. 1976)), *superseded by statute*, Indian Civil Rights Act, 25 U.S.C. § 1301 (1979), *as recognized in* Dairyland Greyhound Park, Inc. v. Doyle, 719 N.W.2d 408 (Wis. 2006).

[100] Montana v. United States, 450 U.S. 544, 545-46 (1981) (emphasis added); *see also Oliphant*, 435 U.S. at 208 (stating that tribes are implicitly divested of criminal jurisdiction over non-Indians "absent affirmative delegation of such power by Congress").

[101] *See, e.g.*, *Montana*, 450 U.S. at 564.

[102] Act of Nov. 5, 1990, Pub. L. No. 101-511, 104 Stat 1856 § 8077 (codified as amended at 25 U.S.C. § 1301(2) (2006)).

[103] Duro v. Reina, 495 U.S. 676 (1990) (holding that tribes were implicitly divested of criminal jurisdiction over nonmember Indians), *superseded by statute,* Act of Nov. 5, 1990, Pub. L. No. 101-511, 104 Stat 1856 § 8077, *as recognized in* Mousseaux v. U.S. Comm'r of Indian Affairs, 806 F. Supp. 1433, 1439-1440 (D.S.D. 1992).

[104] United States v. Lara, 541 U.S. 193 (2004).

[105] *Duro*, 495 U.S. at 679-80.

[106] *Id.* at 681-82.

[107] *Id.* at 688.

found that Congress had not considered tribal authority over nonmembers, and concluded that tribes' retaining this authority would be inconsistent with their dependent status.[108]

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.[109] To address the problems created by *Duro*, Congress enacted the "*Duro* fix."[110] This legislation amended the relevant statute to statutorily recognize Indian tribes' "powers of self-government" to include "exercis[ing] criminal jurisdiction over *all* Indians."[111] Congress also amended the statute specifically to recognize the tribes' power as an "*inherent power* of Indian tribes, hereby recognized and affirmed."[112] The amendments' express allocation arguably put tribal jurisdiction over nonmember Indians within the implicit divestiture doctrine's "express congressional delegation" exception.[113] 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.[114]

In *United States v. Lara*,[115] 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 author-

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

[109] 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 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).

[110] Civl Rights Act Amendments of 1990, Pub. L. No. 101-511, § 8077, 104 Stat. 1856 (1990) (codified as amended at 25 U.S.C. § 1301(2)); *see also* Pub. L. No. 102-137, 105 Stat. 646 (1991) (making change permanent).

[111] Pub. L. No. 101-511, § 8077, 104 Stat. 1856.

[112] *Id.*

[113] *See id.*

[114] *See id.*

[115] United States v. Lara, 541 U.S. 193 (2004).

ity.[116] 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.[117] After "several instances of serious misconduct," the Spirit Lake Tribe excluded him from its reservation.[118] Lara disobeyed the order, and, when federal officials stopped him, Lara struck one of them.[119] 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."[120] Lara pleaded guilty in Tribal Court and served 90 days in jail.[121] Subsequently, the United States government prosecuted Lara for the federal crime of assaulting a federal officer.[122]

The validity of the Tribe's prosecution under the "*Duro* fix" legislation was not at issue in *Lara*; rather, the dispute was over its effect upon the United States' efforts to prosecute under federal jurisdiction.[123] Lara claimed that tribal prosecutions under the "*Duro* fix" were made under federal authority that Congress had delegated to the tribes.[124] 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.[125] The Government argued that the "*Duro* fix" did not delegate *federal* power to tribes but instead enlarged *tribes'* powers of self-government.[126] The Government concluded by arguing that because 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."[127]

The Court first decided that Congress had intended tribal sovereign power (and not federal power) to underlie tribal prosecutions.[128] It reviewed the amendments' plain language and legislative history, and found these showed that

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[116] *Id.*
[117] *Id.* at 196.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] United States v. Lara, 541 U.S. 193, 196 (2004).
[122] *Id.* at 197.
[123] *See id.* However, Lara also made arguments based on the Due Process and Equal Protection clauses, which tended to attack the legality of the Tribe's prosecution. *See id.* at 208-09. The Court did not describe these arguments in detail but mentioned that, if valid, they would show that Lara's tribal prosecution was constitutionally defective. *Id.* The Court dismissed these arguments as "beside the point," noting that they would not affect the Double Jeopardy claim at issue, and refused to address them. *Id.*
[124] United States v. Lara, 294 F.3d 1004, 1006 (8th Cir. 2002).
[125] *See Lara*, 541 U.S. at 197.
[126] *Id.* at 198.
[127] *Id.*
[128] *Id.* at 199.

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.[129]

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.[130]

The Court's reasoning ratified Congress' authority to restore sovereignty to the tribes under the plenary power doctrine.[131] 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."[132] 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 of 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

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 they have cited express congressional delegation as a means of resolving various problems that confront Indian Country.

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[129] *Id.* (citing the statute's language, committee reports, and statements made by various members of Congress while Congress considered the amendments).
[130] *Id.* at 200-02 (citations omitted).
[131] United States v. Lara, 541 U.S. 193, 200-02 (2004).
[132] *Id.*

For example, authors have suggested express congressional delegation could expand tribal authority to tax,[133] could allow tribes criminal jurisdiction over non-Indians who committed crimes on the reservation,[134] and could provide for inter-tribal enforcement of each tribe's court orders.[135] 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.[136] 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*.[137]

Notwithstanding the congressional delegation exception's availability in theory, commentators have identified practical obstacles that may prevent using *Lara* to further expand tribal jurisdiction.[138] Of these, the most commonly cited

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[133] *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) (noting that Congress could extend tribal authority to tax non-Indians).

[134] *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) (noting that Congress should affirm tribal jurisdiction over non-Indian men accused of committing domestic violence against Indian women).

[135] Steven J. Gunn, *Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M. L. REV. 297, 322 (2004).

[136] 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.*

[137] *Id.* at 21; Gunn, *supra* note 135, at 322.

[138] Literature treating *Lara* discusses two potential limits on the congressional delegation exception. First, many commentators speculate that political processes will prevent tribes from making use of the exception. This paragraph discusses this first, most common argument. Second, some writers note that comments made by the Court indicate that the Court may think the exception has external limits. For discussion of this argument, see discussion *infra* Part IV.C. (Court's dicta implies that Constitution may limit use of congressional delegation exception).

is the political process itself.[139] Many commentators suggest that Congress lacks the "political will" to enlarge jurisdiction, except under limited circumstances like those that led to the "*Duro* fix."[140] 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."[141] Another practical problem is that tribes, who have suffered under the plenary power doctrine, may not be willing to use it to their advantage.[142]

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.[143] Commentators see congressional delegation as a means by which Congress can reverse the Court's implicit divestiture holdings[144] and as a way it can enlarge the tribes' authority while proactively preventing legal challenges.[145] 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.[146]

However promising *Lara*'s acceptance of the congressional delegation exception may be, the most important aspect of the *Lara* decision is what it revealed about implicit divestiture: currently, the doctrine lacks a consistent rationale. In fact, the rationale the *Lara* Court offers for implicit divesture differs significantly from that which 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,

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[139] *See, e.g.*, Gould, *supra* note 136, at 21; Gunn, *supra* note 135, at 322-324; Tabor, *supra* note 133, at 401; Fletcher, *supra* note 133, at 802; 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*).

[140] *See* Gould, *supra* note 136, at 21; Gunn, *supra* note 135, at 322-323; Tabor, *supra* note 133, at 401; Fletcher, *supra* note 133, at 802.

[141] *See* Schneider, *supra* note 139, at 525.

[142] Gunn, *supra* note 135, at 324.

[143] *Supra* Part IV.A.

[144] *See supra* note 136.

[145] *See* Gould, *supra* note 136, at 21 ("*Lara* makes clear that the Court must step aside when Congress legislates respecting [tribal jurisdiction]"). *See also* Tabor, *supra* note 133, at 399; Fletcher, *supra* note 133, at 800-03; Radon, *supra* note 134, at 1301-02. Discussion in these authorities implies that congressional legislation is a solution immune from subsequent legal challenge.

[146] *See, e.g.*, Gould, *supra* note 136, at 21; Tabor, *supra* note 133, at 401; Fletcher, *supra* note 133 at 802.

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.[147]

Although, practically speaking, the limits imposed on tribal jurisdiction under *Duro* stemmed from the Court's *Duro* decision, the *Lara* Court implied that these limits instead originated from legislative and executive acts.[148] According to the Court's explanation, *Duro* merely effectuated limits that the *other* federal branches had imposed on tribal authority.[149] This analysis informs the Court's broader comment about its implicit divestiture holdings: that each holding reflected its view of the tribes' authority as of the time the Court made it.[150] According to *Lara*, the Court's divestiture rulings result from its reasoning that *another* federal branch *previously* had curtailed tribal authority.[151]

Essentially, then, *Lara* situates implicit divestiture doctrine as a gap-filler. In cases where a law's application in Indian Country is at issue but the law's text leaves that issue unresolved, the Court presumes that Congress enacted the law without considering it.[152] To settle the dispute, the Court tries to infer how Congress would have wanted the law to work, and uses implicit divestiture to effectuate what it considers Congress would have intended.[153] Thus, the *Lara* Court's comments recast implicit divestiture doctrine as a means by which the Court effectuates Congress' un- or imperfectly-expressed intent to limit tribal jurisdiction.

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[147] United States v. Lara, 541 U.S. 193, 200, 205 (2004).

[148] *See id.* at 200.

[149] *See id.*

[150] *Id.* at 205.

[151] *See id.*

[152] *See id.*

[153] *See* United States v. Lara, 541 U.S. 193, 205 (2004). *Cf.* Frickey, *supra* note 98, at 458. Writing post-*Lara*, Frickey summarizes *Oliphant*'s result using *Lara*'s rationale: "the Court in *Oliphant* stepped into what it must have perceived as a legal void and 'fixed' the problem." *Id.* Frickey rightly criticizes implicit divestiture doctrine on the basis that, "under foundational Indian law, things Congress has not done to diminish tribal authority are not voids—they are areas of retained tribal authority." *Id.*

In *Oliphant*, however, the Court offered a different rationale.[154] After announcing implicit divestiture's rule that "Indian tribes are prohibited from exercising both those [sovereign] powers . . . that are expressly terminated by Congress *and* those powers '*inconsistent with their status*[,]'"[155] 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."
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> Nor are the intrinsic limitations on Indian tribal authority restricted to limitations on the tribes' power to transfer lands or exercise external political sovereignty.[156]

Here, the Court said that the tribes' "incorporation into the United States" limited their powers.[157] The Court also held that limitations on tribal sovereignty "stem" from this incorporation.[158] Finally, the Court added that the limitations on tribal sovereignty that it had mentioned—presumably, those that "stem" from "incorporation"—are not exclusive.[159]

Since *Oliphant* situates "incorporation" at the heart of implicit divestiture doctrine,[160] it becomes vital to understand it. The Court's examples of "inherent limitations" on tribal powers resulting from incorporation[161]—that tribes are unable to alienate land and to exercise external political sovereignty—indicate that the Court is using "incorporation" to describe the limitations imposed upon tribes under the doctrine of discovery. As discussed in Part II, *Johnson* stands for the propositions that discovery stripped tribes of the ability to convey their land freely, and also of the authority to have government-to-government relations with

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[154] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09 (1978).
[155] *Id.* at 208.
[156] *Id.* at 209 (citations omitted) (deciding that Indian tribes' "dependent status" implicitly divested them of criminal jurisdiction over non-Indians).
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978).
[161] *Id.*

anyone but their discoverer. In *Oliphant*, the Court cited these dispossessions as examples of limitations that resulted from the tribes' incorporation.[162] The limitations that, in *Johnson*, the Court held to result from discovery,[163] it described in *Oliphant* as resulting from "incorporation."[164]

By equating the consequences of discovery with those of incorporation, it seems the *Oliphant* Court is saying that *discovery* is the event which divested the tribes of authority "inconsistent with their status."[165] Under *Oliphant*'s reasoning, the Court's implicit divestiture holdings are consequences of discovery: just as discovery divested the tribes of the right to alienate land (*Johnson*), it also divested tribes of the rights to criminally prosecute non-Indians (*Oliphant*), to criminally prosecute nonmember Indians (*Duro*), and so on. The Court's conflation thus has the effect of broadening *Johnson*'s doctrine of discovery.[166] Discovery's effects are not limited to *Johnson*'s prior holdings; rather, discovery carries additional consequences enumerated in the Court's implicit divestiture jurisprudence.

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* identified Congress as the source of these limits: Congress' plenary power over tribes allows it unilaterally to restrict tribal authority.[167] 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.[168] By contrast, *Oliphant*'s reason-

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[162] *Oliphant*, 435 U.S. at 209.

[163] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823).

[164] *Oliphant*, 435 U.S. at 209.

[165] *Id.* at 208.

[166] *See id.* (stating that intrinsic limitations on tribal authority imposed by incorporation are not "restricted to limitations on the tribes' power to transfer lands or exercise external political sovereignty").

[167] United States v. Lara, 541 U.S. 193, 202 (2004) ("Congress, with this Court's approval, has interpreted this Constitution's 'plenary' grants of power as authorizing it to enact legislation that . . . restricts . . . tribal sovereign authority.").

[168] *See id.* The Court gave examples of legislative acts representing Congress' changing policy towards the tribes, and concludes that such policy changes "inevitably involve major changes in the metes and bounds of tribal sovereignty." *Id.* The Court then described its *Oliphant* and *Duro* implicit divestiture holdings as resting upon historical sources,

ing implies that discovery is the sole source of limits upon tribal sovereignty.[169] Under *Oliphant*, divestiture occurred in one fell swoop at the point of the tribes' discovery, and independently of any congressional exercise of plenary power.[170]

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.[171] 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.[172] Thus, under *Lara*, congressional intent circumscribes the Court's role.[173] 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 correctly to discern and implement Congress' intent.[174]

In *Oliphant*, however, divestiture automatically resulted from the tribes' discovery, and the implicit divestiture doctrine is the Court's way of enforcing the limits it considers to result from discovery.[175] Because the Court alone determines what limits discovery imposes upon tribal sovereignty,[176] 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.[177] The fact that *Lara*'s majority disregarded this disparity should give pause to those who see *Lara* as a way of overruling implicit

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including congressional legislation, and concludes that "*Wheeler*, *Oliphant*, and *Duro* . . . are not determinative because Congress has enacted a new statute, relaxing restrictions on the bounds of . . . inherent tribal authority . . . . And that fact makes all the difference." *Id.* at 205-07.

[169] *See Oliphant*, 435 U.S. at 208-09.

[170] *See id.* at 209. The Court says that "incorporation into the territory of the United States" constrains the tribes' exercise of separate powers "so as not to conflict with" the interests of the United States' "overriding sovereignty." *Id.* The examples the Court gives of "inherent limitations" that "stem from" incorporation include the tribes' inability unilaterally to alienate the lands they occupy and the inability to have external relationships with other nations. *Id.*

[171] *See Lara*, 541 U.S. at 205-07 (describing *Wheeler*, *Oliphant*, and *Duro* as "reflect[ing] the Court's view of the tribes' retained sovereign status *as of the time* the Court made [the decisions]" and describing limitations on tribal authority as "restrictions imposed by the political branches") (emphasis added).

[172] *See id.*

[173] *See id.*

[174] *See id.*

[175] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09 (1978).

[176] *See id.* at 209.

[177] *See* United States v. Lara, 541 U.S. 193 (2004).

divestiture.[178] 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.[179] 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.

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

A few commentators[180] 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. 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 modi-

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[178] *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.

[179] Under *Oliphant*'s rationale, the Court retains ultimate authority to hold that discovery/incorporation divested the tribes of authority by finding that the asserted authority is inconsistent with the interests of the United States. *See Oliphant*, 435 U.S. at 209. Under *Lara*, implicit divestiture is merely a means of effectuating Congress' changing policy towards the tribes. *See Lara*, 541 U.S. at 205. Thus, *Lara* allows Congress to set the bounds of tribal authority, while *Oliphant* does not.

[180] Gunn, *supra* note 135, at 318-19; *cf.* Radon, *supra* note 134, at 1306-09 (stating that a "dominant society" is concerned that tribal courts will not protect individual's

> fies tribal power," it did not decide whether the *Duro* fix itself ran afoul of the Constitution by permitting tribes to prosecute nonmember Indian citizens without affording them "certain constitutional safeguards." . . .
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> [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."
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> . . . .
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> 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.[181]

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[182] 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

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rights and liberties); Gould, *supra* note 136, at 21 (saying that the Court "sidestepp[ed]" constitutional concerns and characterizing this circumvention as "a major downside" of the decision).

[181] Gunn, *supra* note 135, at 318-19 (citations omitted). In addition to *Lara*, 541 U.S. 193, 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).

[182] *Id.*

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.

The Court's comments nonetheless are difficult to explain doctrinally, because the Court's jurisprudence expressly holds that tribal authority does not arise from the Constitution and thus is not limited by the constraints the Constitution imposes upon the federal powers it created.[183] Philip P. Frickey addresses the problems inherent in the Court's constitutional arguments through a critique of Justice Kennedy's *Lara* concurrence, 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. . . .
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> "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.[184]

As seen in Gunn's synopsis,[185] 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

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[183] Talton v. Mayes, 163 U.S. 376, 383 (1896).

[184] Frickey, *supra* note 98, at 465, 468. Frickey uses Kennedy's concurrence to address the Court's constitutional concerns because *Lara*'s majority found that Lara's Double Jeopardy claim did not raise the constitutional issues squarely, and thus eschewed discussing them. *See Lara*, 541 U.S. at 209.

[185] *See supra* text accompanying note 181.

concerns, Frickey[186] correctly notes the problem with a constitutional argument: doctrinally, tribes are not subject to the Constitution.[187] In order to contend otherwise, the Court seemingly would have to identify a point at which tribal action became subject to the Constitution.[188]

Frickey suggests that the Court cannot identify this point because it does not exist.[189] Instead, says Frickey, Justice Kennedy resorts to a legal fiction: the "consent of the governed" argument.[190] 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.[191] 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. [192] The federal action granting the tribe jurisdiction would exceed the reign the citizenry allowed the federal government.[193]

Frickey argues that the "consent of the governed" argument is a "seduction" which "requires resisting."[194] Certainly it bodes ill for tribes. Assuming the argument is merely a "seduction,"[195] however, the rationale for applying constitutional

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[186] Frickey, *supra* note 98, at 467-68.

[187] *See Talton*, 163 U.S. at 376.

[188] Frickey also comes to this conclusion. *See supra* note 98, at 466-67.

[189] Frickey, *supra* note 98, at 466-67. Frickey assumes that Kennedy's argument is that the Constitution's text renders tribes subject to it and criticizes Kennedy's opinion on the basis that it "applie[s] the doctrine of 'it-must-be-somewhere[.]'" *Id.* Frickey's analysis is problematic if Kennedy's rationale does not in fact rest on constitutional text, but instead upon the doctrine of discovery (as argued in this Article).

[190] Frickey, *supra* note 98, at 465-66.

[191] *See id.* at 465 ("The people condition [their consent to be governed, Kennedy] reasoned, upon a federal structure that limits the powers of both the national and state governments.").

[192] *See id.* at 466 ("Justice Kennedy suggested that [the *Duro* fix's] authorization of tribal prosecution violates the constitutional structure, for it allows the American citizen to be tried within the United States by a government to which that person has not granted the consent of the governed."). 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 therefore would be valid.

[193] *See id.*

[194] *Id.* at 468.

[195] *Id.* 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.

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.

Specifically, the Court could cite *Oliphant*'s implicit divestiture rationale[196] to find that discovery divested the tribes of the ability to exercise sovereignty in a way inconsistent with the Constitution.[197] This reasoning would establish the Constitution as a constraint on tribal assertions of jurisdiction and would explain the Court's cryptic warnings[198] that tribes may be subject to constitutional limitations.

If the Court follows this course, its decisions ultimately will clarify that *Oliphant*'s implicit divestiture rationale[199] remains viable post-*Lara*, and that discovery still functions as a source of power, independent of and concurrent with that described in *Lara*,[200] by which the Court can divest tribes of authority. If *Oliphant*'s rationale[201] remains valid, the Court retains authority to define what types of tribal authority are "inconsistent" with the tribes' status, as well as to strip tribes of power under the implicit divestiture doctrine.[202] Moreover, if the Court

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[196] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09 (1978) (noting that the tribes' "incorporation" into the United States "constrained" tribal sovereignty as not to conflict with the interests of the United States). The *Oliphant* Court characterizes assertions of sovereignty that are inconsistent with United States' interests as "inconsistent" with the tribes' statuses. *Id.* at 208. Under *Oliphant*'s implicit divestiture doctrine, the Court invalidates assertions of tribal authority it finds to conflict with the United States' interests. *See id. See also* discussion *supra* Part IV.B.

[197] The Court could find that congressional acts are not the *only* measure of the United States' interests, and could hold that the United States has an interest in constitutional principles which overrides congressional ratifications of tribal authority that would allow tribes to act in a manner inconsistent with the Constitution.

[198] *E.g.*, Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, at 153-154 (1980) (it would be "inconsistent with the overriding interests of the National Government" to permit tribal courts to prosecute nonmembers without the full protections of the Bill of Rights); Duro v. Reina, 495 U.S. 676, 693 (1990) (Court "hesitate[s]" to adopt a view of tribal sovereignty that allows nonmembers to be tried by tribal governments "that do not include them").

[199] *See supra* note 176 and accompanying text.

[200] *Lara* identifies congressional acts as a source by which tribes can be divested of power and describes implicit divestiture as a means by which the Court effectuates limitations on tribal power which Congress intended but did not expressly enact. *See* discussion *supra* Part IV.B.

[201] *See supra* note 174 and accompanying text.

[202] *See* discussion *supra* Part IV.B.

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.[203] The doctrines of discovery and plenary power provide dramatic examples of the way the Court has developed doctrines that vindicate the United States' interests at the tribes' expense.[204]

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.[205] Moreover, unlike either discovery or plenary power, implicit divestiture's reach as yet is undefined.[206] Under the doctrine, the Court potentially wields significant power to invalidate exercises of tribal authority.[207]

At first blush, *Lara* appears to provide a welcome means for Congress to 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.[208] On closer inspection, however, the

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[203] *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (holding that discovery necessarily diminished tribes' rights to complete sovereignty and their rights to alienate land), discussed *supra* Part II.A.

[204] *See* discussion *supra* Part II.

[205] *See* discussion *supra* Part III.A.

[206] *Id.*

[207] *Id.*

[208] *See* discussion *supra* Parts III.B, IV.A.

congressional delegation exception may be less promising than it appears. The Court continues to speculate that congressional delegation might be subject to external limits,[209] and, in *Lara*, practically invites parties to challenge the *Duro* fix on constitutional grounds.[210] Meanwhile, its *Oliphant* rationale—the doctrine of discovery in disguise—continues to lurk in the background.[211]

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 beyond the constitutional concerns already raised to find that discovery implicitly divested the tribes of the ability to exercise sovereignty in any way inconsistent with the Constitution.[212] Ironically, *Lara*—a decision hailed by many as a triumph for tribal sovereignty[213]—may serve as the starting point for limits upon sovereignty that are more stringent, not less.

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[209] Duro v. Reina, 495 U.S. 676, 693 (1990); *see* United States v. Lara, 541 U.S. 193, 207-10 (2004).

[210] 541 U.S. at 209 ("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).").

[211] *See* discussion *supra* Part IV.B.

[212] Until now, the Court's comments regarding non-congressional limits on tribal sovereignty have focused around its concerns about the constitutionality of allowing tribes to criminally prosecute nonmembers and non-Indians. *See* cases cited *supra* note 189. However, if *Oliphant*'s criteria for implicit divestiture is viable post-*Lara*, then tribes may not be able to exercise inherent tribal authority—whether or not congressionally ratified—that the Court considers "to conflict with the interests of [the United States'] overriding sovereignty." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978). Under *Oliphant*, the test is not constitutionality, but the United States' interests. *Id.* Congressional delegations of tribal authority that would not be unconstitutional might still run afoul of *Oliphant*'s broad national interests standard.

[213] *E.g.*, Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5 (2004).