Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*

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> We desire you to consider, brothers, that our only demand is the peaceable possession of a small part of our once great country. Look back and review the lands from whence we have been driven to this spot. We can retreat no farther ....[1]

When the Supreme Court decided *Bush v. Gore*[2] on December 12, 2000, the entire country paid attention. The Court not only decided the presidential election, but did so in a 5-4 vote that split the Justices along ideological lines, creating the appearance, if not the reality, of raw political partisanship. The decision was especially shocking to most lawyers and law professors because the five Justices in the majority acted contrary to their own jurisprudential philosophies and in a manner that was arguably contrary to precedents they themselves had authored. The Court had recently proved a strong champion of state sovereignty, striking down a number of federal statutes that had purported to regulate state government. However, in *Bush v. Gore*, instead of deferring to the sovereign powers of the State of Florida, three of the Justices who joined the Court majority[3] would have held, possibly for the first time ever, that a state supreme court

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1. HELEN HUNT JACKSON, A CENTURY OF DISHONOR: A SKETCH OF THE UNITED STATES GOVERNMENT'S DEALINGS WITH SOME OF THE INDIAN TRIBES 42–43 (1881), *reprinted in* GREAT SPEECHES BY NATIVE AMERICANS 37 (Bob Blaisdell ed., 2000) (quoting unknown author from among Delaware or twelve other tribes).

2. 531 U.S. 98 (2000).

3. Chief Justice Rehnquist and Justices Scalia and Thomas.

had interpreted a state statute incorrectly, and in a manner so egregiously wrong that it had purportedly violated the Constitution's grant of power over state elections to state legislatures rather than to courts. This would have been a striking assertion of federal authority over state election procedures—procedures one might have thought to be at the core of state sovereignty.

Those same Justices and others in the majority[4] invalidated the state actions on the additional ground that they violated a newly created right grounded in the Equal Protection Clause of the Fourteenth Amendment. This was not exactly an expected development; the Rehnquist Court had not previously been known as a champion of civil rights. In fact, it had been known for its penchant to limit the creation of new constitutional rights—especially rights of equality. The final nail in the coffin was the Court's suggestion that the case was so unique that it should not be thought to create new rights that might be applied in future cases.[5] This last argument especially shocked lawyers because it appeared to suggest that the Court's ruling was intended to apply to this case alone—a result that would appear to contradict the principle that like cases should be treated alike—a principle at the heart of the rule of law.

Six months after the decision in *Bush v. Gore*, the Supreme Court decided *Nevada v. Hicks*.[6] Like *Bush v. Gore*, *Hicks* involved fundamental issues of sovereignty, separation of powers, and equality. This time, however, the issue concerned tribal sovereignty, or the relations among the federal, state, and tribal governments. Like *Bush v. Gore*, the decision shocked specialists in the field. *Hicks* changed fundamental norms in the field of federal Indian law in a manner that flew in the face of both established precedent and existing federal policy. If we take the Court at its word, the *Hicks* decision will radically alter the nature of tribal sovereignty by substantially limiting the power of tribal governments.

The ruling ignored, or overturned, prior law while purporting to explicate existing doctrine. It effectively rewrote the law in a manner that stripped tribal governments of powers they had previously possessed. In so doing, it breached existing treaties that remain in force, contravened longstanding congressional and executive policy, and infringed on retained property rights of American Indian nations. Moreover, the Court ignored its recent rulings protecting state sovereignty; if it had used the same principles to define the scope of tribal sovereignty that it has recently used

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4. Justices O'Connor and Kennedy.

5. *See Bush*, 531 U.S. at 109. "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." *Id.*

6. 533 U.S. 353 (2001).

to define the scope of state sovereignty, it would have ruled in a manner that protects tribal retained powers rather than stripping them to the bone.

As in *Bush v. Gore*, the opinion in *Hicks* suggested that the case was a mere application of established precedent and that nothing new or astonishing was occurring. However, one thing was different: unlike the decision in *Bush v. Gore*, the case of *Nevada v. Hicks* garnered almost no public attention. Neither the New York Times nor the Washington Post saw a reason to report the decision of the Court.

I believe the case was wrongly decided, and I want to explain why. More fundamentally, I want to explain why it matters—in other words, why the case was important. *Hicks* concerned not a technical legal issue of concern to a few, but principles that go to the core of our constitutional structure and the American way of life.

Over the last twenty years, the Supreme Court has led a massive assault on tribal sovereignty. Although it has acted to affirm expansive tribal powers over tribal members, it has substantially curtailed tribal power over nonmembers, including both non-Indians and Indians who are not tribal members. At the same time the Court has stripped tribes of governmental powers they had previously held in Indian country, it has increased the powers of state governments in Indian country. This transfer of power from tribes to states has occurred without congressional authorization or executive approval; indeed, it contradicts both congressional and executive policy which, in recent years, has strongly supported the revitalization of tribal governments.

These recent developments might be explained by the Supreme Court's recent forays into the field of state sovereignty. A stable feature of the Rehnquist Court over the last ten years is the effort to limit congressional power over state governments. This has been achieved both by narrowly construing the powers granted by the Constitution to Congress and by interpreting the Constitution in such a way as to immunize states from certain types of intrusions by federal power. This conflict presents a zero sum game. Increases in state power are achieved by decreases in federal power. Because state power is assumed to be plenary, and federal power limited to those powers expressly granted by the Constitution, any decrease in federal power is immediately filled by reserved state powers.

In recent years, the Supreme Court appears to have assumed that a similar situation exists with respect to the relation between state and tribal power. State power is inherent, and tribal power is limited. When tribal power is curtailed, the state steps in to fill the void. But this view about the relation between state and tribal power is inaccurate and misleading. When state powers are increased at the expense of tribal powers, there is not a mere shift in the relation between these two sovereigns as there is in the case of state-federal relations. Rather, there is an intervening actor: the

federal government. When tribal power is decreased, state power does not immediately fill the void. The sovereign that fills the void is the federal government. The Constitution grants the federal government exclusive power over Indian affairs. Thus, when tribal powers are decreased, the federal government steps in as sovereign, not the states. If state power fills the void left by a decrease in tribal power, it can only do so by an exercise of federal power delegating its authority to the states.

The recent cases that have led to an increase in state power vis-à-vis the federal government have been achieved by a concomitant decrease in federal power. The recent increases in state power vis-à-vis tribes have decreased tribal powers, but that decrease can only come from a concomitant *increase* in federal power. In the non-Indian case, states have plenary power and the federal government has limited and enumerated powers. In the Indian case, it is the federal government that traditionally has had plenary power while the states have had only those powers over tribes expressly delegated to them by Congress. This means that any limitation on tribal power has to be achieved by an act of the federal government that strips them of inherent, pre-existing sovereignty. Any increase of state power in Indian country has to come from a second act of federal power delegating the plenary power of Congress to state governments.

The Supreme Court's recent actions curtailing tribal sovereignty are thus not merely an extension of recent doctrinal developments that have increased state sovereignty at the expense of federal powers. Rather, they represent affirmative exercises of federal power that strip tribes of inherent powers they previously possessed and transfer those powers to the states, who never had those powers.

This exercise of federal power is especially troubling because it comes not from Congress nor from the President, but from the Supreme Court. It is troubling enough that the Court has interpreted the Constitution as granting Congress plenary power over Indian tribes, effectively depriving them of constitutional protections to which they would be entitled if they were non-Indian institutions. It is far more worrisome that the Supreme Court has itself begun to exercise this plenary power in a manner that limits tribal sovereignty. The Constitution grants Congress the power to regulate Indian affairs[7] and the President the power to enter treaties with Indian nations, with the advice and consent of the Senate.[8] There may well be a role for federal common law to adjudicate disputes among the tribes, the states, and the federal government. In recent years, however, both Congress and the President have affirmatively acted to preserve and expand tribal

7. *See* U.S. CONST. art. I, § 8, cl. 3.

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

sovereignty. The Supreme Court's limitations on tribal sovereignty are contrary to the policy of the other branches. More importantly, the Court's attack on tribal sovereignty is itself a form of conquest—one that is happening today, not long ago.

Why doesn't the Court see things this way? I believe most Americans have the view that the United States conquered the Indian nations long ago and that remaining vestiges of tribal sovereignty are an anomaly. The Supreme Court seems to share this view, at least with regard to purported assertions of tribal power over non-Indians. The Court appears to view tribal governments as racially exclusive and undemocratic, and thus, inherently suspect, particularly because existing laws do not allow federal court review of tribal court judgments. To protect the rights of nonmembers, the Court has slowly chipped away at the retained sovereignty of Indian nations. This trend began in 1978 with a case that stripped tribes of all criminal jurisdiction over non-Indians[9] and continued in 1981 with a case that substantially limited civil jurisdiction over non-Indians.[10]

Hicks continues this line of cases. However, it is not merely an incremental step in the process. *Hicks* has the potential to destroy tribal sovereignty as we have known it. The decision not only misunderstands the historical role of tribal governments in the federal system, but it also misunderstands established federal Indian law principles and treaty obligations. The Supreme Court views itself as engaged in the task of reconciling anomalous tribal governments with the United States Constitution, and the balance of power between state and federal governments, while protecting the civil rights of those who might otherwise find themselves under the power of tribal governments to which they cannot belong and which would not accept them as citizens. I view the situation differently. The Supreme Court has effectively deprived tribes of rights and powers that would have been protected had they been non-Indians.

In Part I below, I will explain the issues in *Nevada v. Hicks* and trace the history of federal Indian law that led up to the decision. I will criticize the reasoning in the case and explain why it misstates precedent, ignores current congressional and presidential policy, and violates existing treaties. Rather than a careful application of existing principles of law, *Hicks* represents a wholesale rewriting of federal Indian law in a manner that is as unexpected and as politically activist as was the Court's decision in *Bush v. Gore*.

In Part II, I will explore the Supreme Court's recent rulings on state

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

10. *See* Montana v. United States, 450 U.S. 544 (1981).

sovereignty. I will consider the interpretive techniques the Court has used to limit congressional power and to create a newly expanded sphere of state sovereign immunity. These recent federalism cases have ignored the text of the Constitution and have relied on the historical context within which the Constitution was adopted and the Court's own views about the proper relations between the federal and state sovereigns. I will then apply these same techniques to the question of tribal sovereignty. I will not argue that the Court's state sovereignty rulings are correct. Rather, I will argue that, if the Court applied the same interpretive techniques to tribal sovereignty that it uses with state sovereignty, it would interpret the Constitution in a manner that would be vastly more protective of tribal sovereignty.

In Part III, I will consider recent Supreme Court rulings on property rights. The Supreme Court has been expanding constitutional protection for property rights. I will argue that, if the Supreme Court granted American Indian nations the same level of protection for their property rights as it grants non-Indians, it would have greater respect for the reserved rights of tribes and their expectations based on both treaties and statutes. These recent property rulings, if consistently applied, would also have led the Court to rule differently in *Hicks*.

Finally, in Part IV, I will make the affirmative case for protecting tribal sovereignty. Whether or not one agrees with the Supreme Court's recent expansion of protection for state sovereignty, it should be understood that protection of tribal sovereignty is in accord with core values underlying the United States Constitution, as well as the basic norms that have been developed over 200 years to regulate the relations between the United States and the various Indian nations. Those core values and norms seek to minimize the injustices associated with conquest. The Supreme Court has not consistently adhered to those norms, and its decision in *Hicks* is a particularly egregious example of the Court having lost its way. The canons of construction in federal Indian law should not support the continuation of conquest; they should do precisely the opposite. In recent memory, the United States went to war to prevent a large, powerful country from swallowing up a weaker one. Tribal sovereignty may appear anomalous to some, but protection of tribal sovereignty is consistent both with American values and our constitutional structure. It is the recent attack on tribal sovereignty by the Supreme Court that represents abandonment of our core principles. We should resist canons of interpretation that would justify or allow the continued conquest of American Indian nations.

I. WHAT THE SUPREME COURT HAS DONE TO TRIBAL SOVEREIGNTY

A. *Nevada v. Hicks*

In *Nevada v. Hicks*,[11] a state game warden received a tip that Floyd Hicks had a killed a California bighead sheep—an endangered species protected by Nevada law— off the reservation. The warden went to state court to obtain a warrant to search Hicks' property on the Fallon Paiute-Shoshone Reservation.[12] The state judge granted the warrant on condition that the warden get a similar warrant from the Fallon Tribal Court.[13] When the Tribal Court granted the warrant, "the warden, accompanied by a tribal police officer, searched [Hicks'] yard, uncovering only the head of a Rocky Mountain bighorn, a different (and unprotected) species of sheep."[14] About a year later, "a tribal police officer reported to the warden that he had observed two mounted bighorn sheep heads in [Hicks'] home. The warden again obtained a search warrant from state court."[15] Although this warrant did not explicitly require the warden to get a tribal warrant, the warden nonetheless did so and a second search was made of Hicks' home by three wardens and additional tribal officers. Again, nothing incriminating was found.[16]

Hicks then sued the tribal judge, the tribal officers, the state wardens in their individual and official capacities, and the State of Nevada, alleging that his sheep-heads had been damaged and that the second search exceeded the scope of the warrant.[17] His claims "included trespass to land and chattels, abuse of process, and violation of civil rights—specifically, denial of equal protection, denial of due process, and unreasonable search and seizure, each remediable under Rev. Stat. § 1979, 42 U.S.C. § 1983."[18] Eventually, all the claims were dismissed voluntarily or involuntarily except Hicks' suit against the state officials in their individual capacities.[19] His major claims were that his property rights had been violated. His claim under tribal law focused on trespass, while his claim under federal civil rights and constitutional law alleged unreasonable search and seizure.

The Supreme Court held that the Tribal Court had no jurisdiction over state law enforcement officials who entered the reservation to investigate

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11. 533 U.S. 353 (2001).
12. *See id.* at 356.
13. *See id.*
14. *Id.*
15. *Id.*
16. *See id.*
17. *See Hicks*, 533 U.S. at 356.
18. *Id.* at 356–57.
19. *See id.*

an off-reservation crime.[20] However, the opinion went beyond this. It came close to holding that tribes have no jurisdiction to regulate the conduct of nonmembers—whether Indian or non-Indian—even if they enter an Indian reservation and trespass on tribal lands. If the opinion in *Hicks* means what it appears to mean, it will transform tribes from sovereigns, who have governmental power over both their members and their territory, into associations that have the power to regulate only those who voluntarily agree to regulation, either by membership or by engaging in consensual relationships with the tribe. This would represent an astonishing incursion on tribal sovereignty.

B. Self-Determination and Judicial Divestment

The *Hicks* case can only be understood in light of history. Over the last 200 years, the United States has reversed itself numerous times on Indian policy. In some periods, it acted affirmatively to protect and strengthen tribal sovereignty. In other periods, it acted affirmatively to destroy tribal government, culture, and religion. In texts on federal Indian law, the current period is generally described as a period supportive of tribal sovereignty and is dubbed the era of Self-Determination. Since around 1960, a relatively consistent policy of both Republican and Democratic administrations, as well as Congress, has been to revitalize tribal governments and to transfer powers from the Bureau of Indian Affairs to those governments. Republicans like tribal sovereignty because it devolves control from the federal government to local government and because the reinvigoration of tribal sovereignty increases the likelihood that tribes will promote economic development in Indian country and, thus, be less dependent on federal dollars. Democrats like tribal sovereignty because Indians represent an oppressed minority who deserve equal respect and dignity and because past policies have represented a form of colonialism and racial injustice.

Both congressional and presidential policy have supported this era of self-determination. Numerous statutes affirm and delegate powers to tribal governments, and appropriations have supported the development of tribal courts and tribal colleges. Executive orders have affirmed that the tribes have a "government-to-government relationship" with the United States and that they are not merely private associations but a third tier of sovereigns within the federal system.

Starting in 1978, however, the Supreme Court has altered the nature of the relations among the tribes, the states, and the federal government. It has affirmed the policies of Congress and the President by recognizing and protecting capacious powers of tribes over their members. At the same

20. *See id.* at 364.

time, the Court has divested tribes of powers they previously enjoyed over nonmembers. We might, therefore, call the period since 1978, the era of Judicial Divestment.

Before 1978, the 1832 case of *Worcester v. Georgia*[21] remained good law. At that time, the Cherokee Nation was physically located within the borders of the State of Georgia. The state of Georgia had passed legislation purporting to abolish the Cherokee Nation government and prohibited any non-Indian from entering Cherokee country without a permit from the State of Georgia.[22] When two ministers defied this Georgia law, they were arrested by the State. The Supreme Court threw out their convictions, holding that the laws of the State of Georgia could not be applied inside Cherokee country.[23] Georgia could regulate neither tribal members nor its own citizens who entered Indian country.[24]

This holding remained the law until 1881, when the Supreme Court held that states had the power to prosecute crimes by non-Indians against non-Indians that occurred in Indian country.[25] This ruling only applied, however, to criminal law and had no effect on civil regulation. Beginning in 1887, with passage of the General Allotment Act (Dawes Act),[26] Congress began to break up tribal land and allot it to tribal members while forcing the tribes to sell so-called "surplus lands" left over after allotment. These surplus lands were purchased by the United States and then sold to non-Indians. Some of the allotments granted to tribal members eventually fell into non-Indian hands as well, when previously enforced restraints on alienation were lifted. The allotment process led to a situation where many non-Indians owned land and/or lived in Indian country.

At the time of the allotment acts, Congress intended eventually, but not immediately, to destroy tribal government, and it provided that tribal land that ended up in non-Indian hands would become subject to state law. However, this provision did not apply to land that remained in tribal hands or in the hands of tribal members. Moreover, the allotment process was deemed a colossal failure and was repudiated fifty years later in 1934 with passage of the Indian Reorganization Act.[27] That Act reversed the allotment policy and sought to revitalize tribal government rather than

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21. 31 U.S. (6 Pet.) 515 (1832).

22. *See id.* at 515–16.

23. *See id.* at 520.

24. *See id.*

25. *See* United States v. McBratney, 104 U.S. 621, 624 (1881).

26. *See* The Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–334, 339, 341–342, 348–349, 354, 381 (2000) (repealed 1934).

27. *See* Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2000)).

destroy it.

A new reversal of policy occurred in the 1940s and 1950s when Congress sought to terminate the government-to-government relationship between many tribes and the United States. However, this policy too was repudiated around 1960. Since that time, both Congress and the President have supported tribal sovereignty and affirmed the government-to-government relationship existing between federally recognized tribes and the United States.

However, the Supreme Court began a process of attacking tribal sovereignty in 1978. It held in *Oliphant v. Suquamish Indian Tribe*[28] that tribes have no power whatsoever to impose criminal penalties on non-Indians. No tribal criminal statute can apply to a non-Indian even if the non-Indian enters the reservation and commits a crime against a tribal member on tribal land. The Court based its ruling partly on its conception of the history of criminal jurisdiction in the United States.[29] Ultimately, however, its conclusion was premised on the notion that, although tribes are recognized sovereigns, their sovereignty is inherently limited.[30] The Supreme Court held that, as "domestic dependent nations" they are not entitled to powers that are "inconsistent with their status."[31] These inherent limitations were not based on legislation, prior precedent, existing congressional policy, or executive practice. Rather, the Court used its power to create federal common law—a power it rarely exercises—to define what it saw as the legitimate scope of tribal sovereignty.[32]

In 1981, the Supreme Court extended the *Oliphant* ruling to civil regulation in the case of *Montana v. United States*.[33] That case held that tribes presumptively have no power to regulate hunting and fishing by non-Indians on land owned by them.[34] However, rather than depriving tribes of all civil powers over non-Indians, the Court limited its new intrusion on tribal sovereignty in two ways. First, it limited its holding to the context of tribal regulation of non-Indians on non-Indian land.[35] It ruled that the tribe's "inherent sovereignty" did not include the power to regulate the conduct of non-Indians on land owned by non-Indians within reservation

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28. 435 U.S. 191 (1978).

29. *See id.* at 201–06.

30. *See id.* at 208–10.

31. *Id.* at 208 (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)).

32. The Supreme Court's ruling is a common law ruling, and not a constitutional ruling, because it is subject to being changed by Congress, which, if it wished to do so, could exercise its plenary power over Indian affairs to pass legislation expressly authorizing the tribes to exercise those governmental powers.

33. 450 U.S. 544, 565–66 (1981).

34. *See id.* at 566.

35. *See id.* at 563–65.

borders.[36] Second, although it created a presumption against the exercise of tribal power over non-Indians on non-Indian-owned land, it also ruled that this presumption could be rebutted if the non-Indian had a consensual relationship with the tribe, or if the tribe could demonstrate that the non-Indian conduct at issue "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[37]

When *Montana* was decided, many believed or hoped that these exceptions would be broadly applied. In the *Montana* case, the tribe did not articulate a strong reason for exercising regulatory power over hunting and fishing on non-Indian land; if it could have done so, it arguably would have had the power to regulate it. Certainly, no one expected the ruling to apply on tribal land. After all, the ruling was premised on the idea that transfer of property to non-Indian owners, under a statute that suggested that such property would be relegated to state sovereignty, led to displacement of tribal authority by state authority. The case in no way suggested that the tribes had lost the power to regulate their own lands. Indeed, both *Montana* itself and later cases, including *Brendale v. Confederated Tribes and Bands of Yakima Nation*[38] and *South Dakota v. Bourland*,[39] explicitly stated that the tribes retained the power to regulate tribal lands.[40] Indeed, less than a year after the *Montana* decision, the Supreme Court held in *Merrion v. Jicarilla Apache Tribe*[41] that an Indian nation had the power to impose an oil and gas severance tax on a non-Indian company that had leased tribal land.

However, our expectations were dashed by a series of cases since 1981, which effectively held that tribes have no jurisdiction over nonmembers on nonmember land even if substantial tribal interests are at stake.[42] In 1989, the Supreme Court ruled in *Brendale* that tribes generally have no power to impose their zoning laws on non-Indian owners of land within Indian country, despite the fact that no coherent land use policy or zoning law can exist with checkerboard jurisdiction determined by land ownership.[43] Similarly, the Court held in *Strate v. A-1 Contractors*[44] that tribes have no

36. *See id.* at 565.

37. *Id.* at 566.

38. 492 U.S. 408 (1989).

39. 508 U.S. 679 (1993).

40. *See Brendale*, 492 U.S. at 411 (holding that tribes have the power to zone their own property within reservations). *See also Bourland*, 508 U.S. at 689 (noting a tribe's "right of absolute and exclusive use and occupation" of its reservation lands).

41. 455 U.S. 130 (1982).

42. *See, e.g.*, Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); Strate v. A-1 Contractors, 520 U.S. 438 (1997); *Bourland*, 508 U.S. at 697; *Brendale*, 492 U.S. at 425–26.

43. *See Brendale*, 492 U.S. at 409–10.

44. 520 U.S. 438 (1997).

power to apply their tort law to lawsuits between non-Indians for car accidents that take place on state-owned roads inside the reservation, even though the tribe has an interest in regulating driving within reservation borders to protect the safety of its own members who drive on the reservation.[45] Then, in 2001, the Supreme Court ruled in *Atkinson Trading Co. v. Shirley*[46] that tribes have no power to impose taxes on non-Indian owners of land inside the reservation, even if the tribe provides significant services to the owner.[47]

The Supreme Court has not yet addressed the question of whether a tribe has the power to apply tribal tort law to actions by a nonmember in Indian country when that conduct hurts a tribal member. It might conclude that application of tribal tort law is justified in this instance. However, if recent rulings are any guide, the Court is likely to hold that the tribe has no jurisdiction in such cases, because its focus has not been on tribal interests but on the rights of nonmembers to be free from tribal jurisdiction—even when their actions impinge on tribal rights. The exception in *Montana* for economic interests and political integrity has been interpreted exceedingly narrowly.

The *Hicks* case, however, goes substantially beyond the *Montana* line of cases to hold that the tribe has no jurisdiction over a nonmember who enters tribal land. This comes close to extending *Oliphant* to civil jurisdiction, limiting tribal regulatory power to tribal members and nonmembers who agree to such jurisdiction. The Supreme Court attempted to justify this significant departure from prior law in *Hicks* by claiming that it was a mere application of the *Montana* rule, and that the *Montana* rule was based on the *Oliphant* holding that the inherent sovereignty of tribes is substantially limited, and that tribes cannot exercise power over nonmembers unless that power is expressly delegated by Congress, nonmembers agree to such power, or that power is essential to preserving tribal existence.

It is important to note that this reading of prior law is impossible to sustain. The ruling in *Montana* effectively limited or overruled the holding of the foundational 1832 case of *Worcester v. Georgia*[48] that states have no power in Indian country. The *Montana* ruling was not based on longstanding precedent but was itself a substantial change in the law. The dissenters in the later case of *Brendale* pointedly explained this unexpected change in the law.[49] As Justice Blackmun noted, the cases prior to *Montana*

45. *See id.* at 442.

46. 532 U.S. 645 (2001).

47. *See id.* at 647.

48. 31 U.S. (6 Pet.) 515 (1832).

49. *See* Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408,

held precisely the opposite of the ruling announced there.

These cases, landmarks in 150 years of Indian-law jurisprudence, establish a very different "general principle" governing inherent tribal sovereignty—a principle according to which tribes *retain* their sovereign powers over non-Indians on reservation lands unless the exercise of that sovereignty would be "inconsistent with the overriding interests of the National Government."[50]

The Court today implicitly recognizes that the *Brendale* dissenters were right when it characterizes *Montana* as a foundational case.[51] It is a foundational case, although not decided until 1981, because no prior cases stand for the proposition for which it is now routinely cited. This means that the deprivation of sovereignty affected by the line of cases from *Oliphant* to *Montana* to *Hicks* cannot be justified by the fiction that such tribal sovereignty was lost long ago. Rather, that sovereignty is being taken *now* and it is being taken not by congressional action, but by the Supreme Court itself through its rulings on tribal sovereignty.

This deprivation of tribal sovereign power flies in the face of consistent congressional and presidential policy, as well as violating existing treaties with Indian nations. Those treaties established a government-to-government relationship between the United States and the tribes. They also formed the process by which most Indian nations became legally associated with the United States and partially incorporated into the federal system. Because the tribes did not sign the Constitution, the treaties represent the only consent they ever gave to a legal relationship with the United States; they therefore represent quasi-constitutional documents.[52] To strip tribes of pre-existing sovereign powers without renegotiation of those treaties, and without any formal act of Congress taking such a drastic step, constitutes a violation of those treaties and a shameful breach of what the tribes understood as sacred obligations.[53]

II. SOVEREIGNTY

In recent years, the Supreme Court has substantially increased the reserved protections granted to state sovereignty from imposition or control

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450 (1989) (Blackmun, J., dissenting).

50. *Id.* at 450 (Blackmun, J., dissenting).

51. *See* Nevada v. Hicks, 533 U.S. 353, 358 (2001) (calling *Montana* the "pathmarking case" on tribal power over nonmembers).

52. *See generally* ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800 (1997); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

53. *See generally* WILLIAMS, *supra* note 52.

by the federal government. How would the tribes fare if the Supreme Court applied the same reasoning to them? In *Alden v. Maine*,[54] for example, the Supreme Court held that Congress has no power to subject states to suits for damages in state courts to enforce federally protected anti-discrimination rights that are founded on the Commerce Clause rather than on the Fourteenth Amendment. This ruling is based not on the text of the Constitution, but on the Supreme Court's view of the history of the Constitution, the understandings of the Framers of the Constitution at the time it was adopted, and extra-textual indications of what the common law provided at the time the Constitution was adopted.[55]

The Court did not base its ruling on the text of the Eleventh Amendment because that amendment speaks only to suits by one citizen against a different state in federal court.[56] The Court had long ago ruled that the Eleventh Amendment prohibited suits by one citizen against her own state in federal court, thus going beyond the text.[57] However, it had never previously held that the Eleventh Amendment applied in state court. Nor did it base its ruling on the text of the Tenth Amendment, which merely provides that the states retain any rights not taken away by the Constitution, since the question was whether the right to sovereign immunity from otherwise lawful federally created rights in state court is a retained right of state sovereignty.[58] Rather, the Supreme Court ruled that the Constitutional structure and the original understanding supported state sovereign immunity. According to the Court, states have plenary governmental power, while the federal government has limited and enumerated powers.[59] Even when the Constitution expressly grants Congress the power to regulate interstate commerce, Congress' power is limited when exercise of that power would infringe on the Court's own understanding of the retained rights of state sovereigns.

The Supreme Court ruled in *Alden* that the federal government cannot force states to defend suits by private citizens in state courts because "the States entered the federal system with their sovereignty intact."[60] This means, according to the Supreme Court, that states retain sovereign immunity from suits, without their "consent," unless there has been a

54. 527 U.S. 706 (1999).

55. *See id.* at 713–16.

56. *See* U.S. CONST. amend. XI.

57. *See* Hans v. Louisiana, 134 U.S. 1, 21 (1890).

58. *See* U.S. CONST. amend. X.

59. *See Alden*, 527 U.S. at 713. "The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design." *Id.*

60. *Id.* (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991)).

"surrender" of that immunity "in the plan of the convention."[61] Retention of powers not expressly given up by the states when they ratified the Constitution is required by the "dignity" that is consistent with their status as sovereign entities.[62]

If we apply this method of reasoning to the tribes, we reach a similar conclusion that exempts the tribes from infringement of their sovereignty. To begin with, tribes, like states, have inherent sovereignty. They are not governments with limited and enumerated powers. Rather, they have all the powers that are exercised by states. They can pass legislation on any subject and have the power to regulate both persons and property within their borders. Now it is true that the Supreme Court has held that tribal sovereignty has been limited and that tribes are "domestic[,] dependent nations" rather than foreign nations.[63] They cannot enter treaties with foreign nations, and if the federal government takes lawful actions that limit their powers, they are obligated under current law to comply with federal law as the supreme law of the land.[64] However, these limitations on tribal power do not differentiate tribes from states. States are similarly disabled by the Constitution from entering treaties with foreign nations.[65] State law is similarly subject to the Supremacy Clause.[66] Thus, the Supreme Court's view that tribes have limited sovereignty in these respects does not distinguish them from the states.

The tribes' relation to the federal government is indeed different from the states' relation to the federal government. The states are the ratifying parties to the Constitution, and they are the structural bases for representation in Congress. They also have rights that are expressly protected by the Tenth and Eleventh Amendments, although the exact scope of those rights is unclear. The tribes are unprotected by the Tenth Amendment. Moreover, although the Supreme Court has recently interpreted federal power under the Interstate Commerce Clause to be limited to commercial matters, it has interpreted the Indian Commerce Clause to give Congress plenary power to pass any legislation it deems necessary to regulate Indian affairs.[67] Thus, with respect to Indian affairs,

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61. Fed. Mar. Comm'n v. S.C. State Port Auth., 535 U.S. 743, 752 (2002) (quoting *Alden*, 527 U.S. at 730 (quoting Alexander Hamilton approvingly)).

62. *See Alden*, 527 U.S. at 714.

63. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

64. *But see* Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 132–133 (2002) (arguing the contrary).

65. *See* U.S. CONST. art. I, § 10, cl. 1. "No State shall enter into any treaty, alliance, or confederation ...." *Id.*

66. *See* U.S. CONST. art. VI, cl. 2.

67. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996). "If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the

the Supreme Court has held that Congress has, not limited powers, but plenary powers. Another way to say this is that plenary power over Indian affairs is one of the enumerated powers granted by the states to Congress.

The plenary power granted by the Constitution to Congress over Indian affairs has important consequences. A central effect of this delegation of power by the states to the federal government is a simultaneous loss of power by the states over Indian affairs.[68] The Articles of Confederation similarly granted Congress the exclusive right to manage Indian affairs.[69] However, it contained two vague, and indeed incomprehensible, exceptions. It preserved state jurisdiction over Indians who were "members" of the states and had provided that the "legislative right" of states within their borders would not be infringed.[70] James Madison made fun of this provision in Federalist Paper No. 42, noting that it was contradictory and unclear to grant the federal government exclusive powers over Indians while reserving undefined powers in the states.[71] One of the

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Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes." *Id. See also* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989). "It is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Id.* (citations omitted).

68. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 207–16, 259–79 (1982 ed.).

69. ROBERT N. CLINTON, NELL JESSUP NEWTON, & MONROE E. PRICE, AMERICAN INDIAN LAW: CASES AND MATERIALS 141–42 (1991).

70. *Id.*

71. Madison wrote:

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What descriptions of Indians are to be deemed members of a State, is not yet settled; and has been a question of frequent perplexity and contention in the Federal Councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles of confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.

THE FEDERALIST NO. 42, at 284–85 (James Madison) (J.E. Cooke ed., 1961) (quoted in

major purposes of the Constitution was to excise these references to state power over Indian affairs and to grant the federal government *exclusive* power to regulate Indian tribes.

The history of the period supports this interpretation.[72] The states were failing to prevent non-Indians from invading tribal lands after ratification of the Articles of Confederation in 1781 and the signing of the Treaty of Paris of 1783. The United States was militarily weak after 1783 and, although it at first treated the tribes as conquered nations, it quickly reversed itself, developing the policy of compensating tribes for any land it took and arranging for treaties between tribes and the federal government to effect any transfers of property.[73] The tribes were upset at the United States' highhanded policy after the war, which threatened the security of the United States. It was evident to everyone at the Constitutional Convention that the states could not be trusted to manage Indian affairs or to protect the tribal lands from invasion by non-Indians. The Constitution centralized power over Indian affairs in the Congress, thereby stripping the states of their pre-existing sovereign powers that might have existed in Indian country.

Plenary power over Indian affairs, therefore, exists in Congress and not in the states. This was the basis of the 1832 holding in *Worcester v. Georgia*[74] to the effect that state laws have no effect in Indian country. Plenary power does not mean that tribes have no reserved rights. They have all the inherent powers of any sovereign government until they are taken away by Congress. This sovereignty is recognized and affirmed in the Constitution and in many Supreme Court opinions. Tribes are mentioned along with the states and foreign nations in the Commerce Clause. They are treated as nations capable of entering into treaties with the United States, and only governments or sovereigns are capable of entering treaties. Although Congress passed a law in 1871 that said tribes were not sovereigns for the purpose of entering new treaties with the United States, Congress did not repeal the treaties already made. Those treaties recognize and affirm the pre-existing inherent sovereignty of Indian nations. Moreover, Supreme Court precedent and congressional and presidential policy affirm the continued existence of tribal governmental powers.

Alden v. Maine held that the structure of the Constitution, and the original understanding of the Framers, protected a realm of state

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Clinton, *supra* note 64, at 132–33).

72. *See generally* REGINALD HORSMAN, EXPANSION AND AMERICAN INDIAN POLICY, 1783-1812 (1967).

73. *See generally id.*

74. 31 U.S. (6 Pet.) 515 (1832).

sovereignty that was not taken away by the Constitution.[75] Similarly, both the structure of the Constitution and the original understanding of the Framers were that the states have no inherent powers in Indian country. Further, nowhere did tribes consent to be governed by the states. Only Congress itself—and not the Supreme Court—has the power to pass laws limiting tribal sovereignty. Moreover, the states joined the United States by ratifying the Constitution or by subsequently voting to do so. The tribes never signed the Constitution; they were brought into the federal system involuntarily. To the extent they agreed, they did so through signing treaties that affirmed their prior powers. The Constitution itself has been interpreted to preserve inherent tribal sovereignty, except to the extent Congress acts expressly to limit it.

This means that tribes have retained sovereign rights within the Constitutional structure. They also have rights affirmatively recognized by Congress through treaty or statute. States, on the other hand, do not have inherent powers in Indian country. The Constitution stripped them of those powers when the country repudiated the Articles of Confederation and adopted the United States Constitution.

One might argue that Congress acted to transfer tribal powers to the states when it opened up Indian country to non-Indian settlement. I will argue below that this policy was repudiated when Congress ended allotment in 1934 with the Indian Reorganization Act.[76] Be that as it may, there is no warrant for concluding that states have powers over tribal land in Indian country that would justify stripping tribal courts of powers to protect tribal members at home on tribal land from trespass by state officials. Nor is there any law enforcement need to grant states these powers. The Supreme Court has interpreted the Constitution to grant Congress—and not the states—plenary power over Indian affairs. If tribal jurisdiction needs to be limited to protect the rights of non-Indians, or to promote law enforcement in the states, then Congress is fully capable and empowered to accomplish these ends. It has done so before by taking jurisdiction over affairs in Indian country.[77] The Constitution preserved and affirmed tribal sovereignty as did the original understanding of the Framers. The history of the early years of this country, as well as foundational Supreme Court precedents, affirmed that tribal powers persisted unless limited by congressional action, while state powers did not

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75. 527 U.S. 706, 713–16 (1999).

76. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–479 (2000)).

77. *See* Major Crimes Act, ch. 645, 62 Stat. 758 (1948) (codified as amended at 18 U.S.C. § 1153 (2000)). *See also* Act of April 11, 1968, Pub. L. No. 90-284, Title II, § 201, 82 Stat. 77 (codified as amended at 25 U.S.C. § 1301 (2000)) (also known as the Duro-fix legislation).

extend to regulating Indian country, especially when tribal members and tribal land were at issue.

The Supreme Court's ruling in *Nevada v. Hicks* represents a massive shift in this received understanding.[78] It reverses the presumption of *Worcester v. Georgia* entirely, concluding that states have "inherent" powers in Indian country.[79] The history and structure of the Constitution support the opposite conclusion. The Constitution took state power away from Indian country and vested it in Congress. The Supreme Court has, in *Hicks,* transferred a large portion of that power back from Congress to the states. In so doing, it has violated existing treaties and engaged in an act of conquest. This loss of tribal sovereignty is not something that happened long ago; it was accomplished by the nine Justices of the United States Supreme Court in their 2001 ruling in *Hicks.*

In the case of state sovereignty, the Supreme Court appeals to original intent and the understanding of the Framers in 1789 at the time of the adoption of the Constitution, and in 1791, when the Eleventh Amendment was passed. However, in the case of tribal sovereignty, the Court decided to forego the original intent analysis or the situation at the time of the adoption of the Constitution, and instead appealed to the policies underlying the General Allotment Act of 1887—an Act that was later repudiated by the Indian Reorganization Act of 1934—whose policies of termination of tribal government are flatly inconsistent with current congressional and executive policy. Why does the Supreme Court reject looking at the Framers' original intent in the case of Indian nations? It does so because it believes the parameters of tribal sovereignty must be defined "in light of ... subsequent alienations" of land to non-Indian purchasers, despite the fact that the policy of "destroy[ing] tribal government" in the General Allotment Act was repudiated by later law and policy.[80] I will address below the suggestion that non-Indian purchasers had vested rights to be free from tribal regulation. For now, it is crucial to see that the Court interprets the legal dimensions of tribal sovereignty as crucially affected by later events and the course of history. In contrast, when state sovereign immunity is at issue, the Court is uninterested in later events that substantially changed the relations between the states and the federal government, including such minor events as the Civil War, passage of the Reconstruction Amendments, and the New Deal. Rather, what matters in the area of state sovereignty is original intent alone.

It is not unusual for the Supreme Court—or any other court—to be

78. 533 U.S. 353 (2001).

79. *See id.* at 360–66.

80. Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408, 409 (1989).

inconsistent. However, it is incumbent on the Court either to distinguish the two cases—of state and tribal sovereignty—or to acknowledge that a tension exists between competing theories, principles, and interests, and to justify the resulting choices by contextual explanations. However, the Supreme Court has failed to do either of these things in *Hicks.* The Court rejects the original understanding of tribal sovereignty embedded in the Constitution and precedents of the Supreme Court that prevailed from 1832, when *Worcester* was decided, to 1978, when *Oliphant* was decided. The 1981 case of *Montana* is now hailed as the hallmark defining tribal sovereignty over nonmembers. The Court suggests that tribes cannot have inherent sovereignty over nonmembers because this is "inconsistent with the dependent status of the tribes"[81]—as if this were something that had been true for 200 years. But this is not true. For example, in Justice Marshall's opinion in the 1823 case of *Johnson v. M'Intosh,*[82] the Court suggested that a non-Indian "who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws."[83] In other words, nonmembers would be subject to tribal law and sovereignty if they entered Indian country, unless a federal statute or treaty had effectively limited tribal powers.

The Supreme Court has failed to provide tribes protection for their sovereignty that would have been provided to them had they been states. If the Court used the same methods of analysis it used to vindicate state sovereignty in *Alden v. Maine,* it would have decided *Hicks* differently. In failing to accord tribes the same protections it has accorded the states, the Supreme Court not only treated the tribes unequally but also rewrote the Constitution in a manner that authorizes the conquest of Indian nations today.

III. PROPERTY

Suppose we think about tribal rights through the lens of property rather than sovereignty. Why might we do this? Treaties and statutes set up Indian reservations. Treaties are contracts that recognize or affirm both pre-existing tribal sovereignty and property rights and constitute an exchange of promises. Statutes do not represent agreements, but they nonetheless may establish vested rights, especially when they include the transfer of property rights to a tribe or the recognition of preexisting rights.

In recent years, the Supreme Court has been increasing constitutional

81. *Hicks*, 533 U.S. at 359.

82. 21 U.S. (8 Wheat.) 543 (1823).

83. *Id.* at 593. *See generally* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (holding that state law has no force in Indian country).

protection for property rights. One of its most recent rulings on regulatory takings was the 2001 case of *Palazzolo v. Rhode Island*[84]—decided the same term as *Hicks*. In *Palazzolo*, a property owner acquired title to property after the state of Rhode Island had passed a regulatory law limiting development of his wetlands.[85] The Supreme Court of Rhode Island held that the wetlands law at issue could not constitute a taking of his property rights because he took title knowing that the lands were restricted.[86] Thus, he could not have had a reasonable expectation of being able to develop the lands in violation of existing statutory limitations; moreover, any investment in the lands would have been discounted by the knowledge that the land use was restricted. State law, such as environmental law, defines property rights and restrictions on use that are designed to prevent substantial public harm; they form the backdrop against which property rights exist. Since the owner in *Palazzolo* never had any pre-existing property rights taken by state law, the regulations could not have effectuated a taking of his property rights.

The Supreme Court reversed, disagreeing with the analysis of the Rhode Island Supreme Court.[87] Justice Kennedy noted that, if the state supreme court's argument was taken to the extreme, a state could effectively repeal the takings clause by enacting prospective general legislation announcing that all property in the state is subject to regulation in the public interest, thereby immunizing itself from any claims for regulatory takings by future purchasers or property owners in the state.[88] The Supreme Court held that states should not be able to prospectively repeal the takings clause merely by passing legislation.[89] In effect, the court held that the owner did have expectations about the land use that were independent of what positive legislation said was permissible. Thus, he had reasonable investment-backed expectations, despite the fact that the law prohibited him from doing what he proposed to do with the land, and despite the fact that the prohibition was designed to protect both other property owners and the public at large. The Court held that his property rights were defined by his justified expectations as determined by customary understandings of what it means to own property, even if those customary understandings were contradicted by legislation.

This ruling creates a paradox. The Supreme Court has said that property

84. 533 U.S. 606 (2001).

85. *See id.* at 611.

86. *See id.* at 616.

87. *See id.* at 632.

88. *See id.* at 627.

89. Of course, in this case, the statute was not a general repeal of the takings clause but rather a regulation designed to prevent harm to public resources in water; it arguably prevented a public nuisance as defined by the common law.

rights are rooted in state, not federal law. Thus, the states are allowed to define what property rights entail, including what limitations exist on those rights. However, the takings clause prevents the states from retroactively altering those rights in a manner that strips owners of what used to be called "vested rights"—referred to today as legitimate investment-backed expectations. Moreover, there are certain rights so central to traditional understandings of property that states are not allowed to take them away even prospectively, such as the right to be free from a forced physical invasion of property by a stranger.[90] This means that the Constitution does place some limits on the ability of the states to define and redefine property. These limitations are justified by the Supreme Court because they rest on social expectations about the meaning of property that the Court believes are independent of law and that are justifiable regardless of what state law actually says.

Now let us apply this understanding to the case of tribal sovereignty. When the United States entered treaties with Indian nations, it generally took some of their real property in exchange for promises to respect the tribe's powers over the property they retained, as well as a recognition of the government-to-government relationship between the tribe and the United States and the tribe's concomitant power to exercise its sovereign authority within the area it retained. In some cases, where the United States removed tribes from their ancient lands and resettled them in the West, the United States granted lands to the tribes rather than the tribe granting lands to the United States. The deal was, however, the same. In return for agreeing to leave their lands, the United States granted these tribes new lands they would both own and have the power to govern. When Congress passed a law ending treaty-making with Indian nations in 1871, Congress substituted statutes for treaties to establish or affirm Indian reservations. The use of a statute rather than a treaty means that we no longer have a deal; there is no contract between the parties. We *do*, however, have a grant or affirmation of property rights, and the terms of the grant remain the same: a congressional recognition of tribal property, or a grant of property to a tribe for the purpose of establishing an Indian reservation, presumes not only a recognition of property rights but the recognition of tribal sovereignty within the territory in question. After all, ownership of the land was in the tribe, and the tribe is a political entity that would determine how to use the land by exercising its sovereign regulatory powers and not just its ownership rights. The tribal political processes and property laws would determine the use of tribal land. For this reason, reservations established by statute have been treated in federal Indian law exactly the same as

90. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982). *But see* PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

reservations established by treaty.

What expectations did the tribes have based on these treaties and statutes? The answer is clear. In return for giving up roughly 98% of the land in the United States, the tribes were promised the right to retain the lands they had left and *the right to govern those lands.* These promises were contradicted by later legislation. The allotment laws enacted between the 1880s and the 1930s, for example, divided tribal property into individual holdings while forcing a sale of "surplus" lands. The introduction of non-Indians into Indian country might be thought to have changed everything, particularly because the allotment laws provided that lands transferred into non-Indian hands would become subject to state law.[91] However, this policy of destroying tribal sovereignty was *repudiated* by the Indian Reorganization Act of 1934 which explicitly ended allotment and provided for the drafting of tribal constitutions that affirmed the power of tribes to govern their territory.[92]

The Supreme Court, however, held in the 1981 *Montana* case that the repudiation of the allotment policy did not alter the fact that non-Indians were living in Indian country.[93] This fact was treated as irreversible and as necessarily leading to the conclusion that tribes could not exercise powers over non-Indian actions on non-Indian land. In effect, the court treated the right of non-Indians to be free from tribal regulation as a vested property right that was not, and could not have been, repealed by passage of the subsequent Indian Reorganization Act. This conclusion was supported by the democratic argument that it is wrong to subject property owners to regulation by governments in which they are not, and cannot become, citizens. If non-Indian owners cannot vote in the tribal elections for the governments that regulate their property, it is undemocratic for those governments to regulate their property.

Are these conclusions justified? The answer is no. First, there is no right recognized by the Supreme Court to vote in the government that regulates your property. I am a citizen of Massachusetts and if I buy property in Vermont, I will be subject to Vermont zoning and environmental law despite the fact that I cannot vote in Vermont. Nor is there a recognized constitutional right not to have one's real property transferred to the regulatory jurisdiction of another government entity. If the Commonwealth of Massachusetts saw fit to move the boundary between Somerville and Cambridge, subjecting a Somerville resident to regulation by Cambridge,

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91. *See* County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) (holding that lands allotted under the Dawes Act that were held in fee by the tribe or its members were subject to state property taxation).

92. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2000)).

93. *See* Montana v. United States, 450 U.S. 544, 557–63 (1981).

the resident would have no constitutional right to be protected from the change. There is no recognized vested property right or democratic right to be protected from such changes. Nor is there a recognized right to vote to control the government that regulates one's land when one buys land subject to federal jurisdiction. Recall that Washington, D.C. was long run by Congress rather than local government, even though its citizens have no voting representatives in Congress. Similarly, Puerto Rican citizens are not entitled to vote in presidential elections. Thus, the Supreme Court's treatment of non-Indian purchases of lands in Indian country as irrevocably altering tribal sovereignty has no support in the law generally.

Moreover, if non-Indian landowners have vested rights not to be subject to tribal jurisdiction, then it must similarly be true that the tribes originally had vested rights not to be subject to state regulation. When tribal rights are recognized by treaty or statute, they are subject to constitutional protection from uncompensated takings.[94] The Supreme Court cannot have it both ways. If the rights of non-Indian owners to state jurisdiction cannot be changed by subsequent legislation, then the tribes similarly have vested property rights in being free from state jurisdiction in Indian country.

Consider also whether non-Indian purchasers of land inside reservation borders have legitimate expectations to be free from tribal regulation. They may not know about federal Indian law, and they may not know that the Indian Reorganization Act repealed the allotment policy. They may believe that they are subject only to state jurisdiction. Generally, however, ignorance of the law is no excuse. An owner who buys property that is subject to restrictive covenants enforceable by a homeowners association is subject to such covenants even if she did not know about them. An owner who seeks to use land in a manner prohibited by local zoning or environmental law is not excused from compliance because she failed to discover those laws before she purchased the land.

In addition, the case of *Nevada v. Hicks* involved tribal land. No vested non-Indian rights were at issue there. Floyd Hicks was at home on tribal land within Indian country. The statute setting up the Fallon Paiute-Shoshone Reservation vested both property and sovereignty rights in the tribal government. At the time the statute was passed, *Worcester v. Georgia* remained good law, depriving the state of Nevada of the power to regulate in Indian country. Moreover, until the *Hicks* decision itself, the Supreme Court had almost never before ruled that a state could exercise jurisdiction over Indians in Indian country.

The *Hicks* case deprived the tribe of the ability to apply tribal law in tribal courts to protect its land and its people from invasion by state

94. This was not always the case. *See generally* Lone Wolf v. Hitchcock, 187 U.S. 553, 564 (1903).

governmental officials. It prevented the tribe from formulating and applying tribal trespass law to protect its members and its lands from state incursion. If the statute setting up the reservation did anything, it affirmed the property rights of the tribe, as well as its sovereign power to enforce those rights to protect its members and its territory from invasion.[95]

The Supreme Court held that Anthony Palazzolo had justified expectations in being able to develop his property even though the law prohibited that development at the time he acquired the property, and even though that development would substantially harm both other owners and the public. The Court did not hold that he had a constitutionally protected right to be free of the development restriction; the case was remanded in order to determine that question. If we apply this same reasoning to *Hicks*, it is evident that tribes have justified expectations in being free from state incursion on tribal property that is recognized by federal legislation and treaties. Not only that, but the tribes have justified expectations, based on treaties and statutes, that they will be able to exercise governmental powers within their territory to protect their land from invasion and their members from trespass to their property rights and personal interests in privacy. Indeed, the tribe's expectations are arguably much stronger than those of Anthony Palazzolo because they are based, not merely on customary understandings, but on a statutory recognition of rights.

IV. THE CASE FOR TRIBAL SOVEREIGNTY

The Supreme Court has often held that tribes retain rights to their property and sovereignty unless they are taken away by express congressional action. Even when Congress does limit tribal rights, its power to do so, while plenary, is not unlimited. Tribes have the right to be protected by the Constitution from deprivation of property without just compensation, and they also have the right to exercise sovereign powers in a manner that is consistent with the fact that they are domestic, rather than foreign, nations.

This notion of retained inherent sovereignty is not only longstanding but is compatible with core American values. International law condemns aggression by one nation against another. The United States acted to protect Kuwait from being absorbed and invaded by Iraq even though Iraq claimed that Kuwait was historically part of Iraq. The United States has protected Taiwan from being absorbed into China despite a strong policy

95. Of course, Hicks could have tried to sue the state wardens in state court if he could convince a state judge to apply tribal law to determine whether a trespass occurred; but then it would have been a state judge, not a tribal judge, who would have defined what tribal law is—a substantial deprivation of lawmaking power that would otherwise inhere in tribal governmental institutions.

by China that Taiwan is a rogue province. Colonialism and imperialism have long been condemned by the United States. Although some may believe that the tribes were conquered long ago and lost their sovereignty, this is not true. Federal Indian law has consistently held that tribes retain their original sovereignty within the federal system. That sovereignty is recognized by the United States Constitution, by numerous treaties, statutes, executive orders, and by many precedents, all of which subsist to this day.

The notion of retained property and contract rights is a long-standing American tradition. A contract with a private entity cannot be repudiated by the United States without violating the takings clause.[96] If a tribe were granted rights similar to those granted to business corporations, then Congress could not abrogate a treaty without compensation. Nor would the Supreme Court ever hold that a statute conferring property rights should be ignored because those rights were contrary to the public interest.

The big concern with tribal sovereignty over nonmembers is that tribes are not directly subject to the Bill of Rights; they are regulated only by the 1968 Indian Civil Rights Act.[97] That Act does impose some version of the Bill of Rights on tribes. However, by interpretation of the Supreme Court in the 1978 case of *Santa Clara Pueblo v. Martinez,*[98] there is no right of action in federal court to enforce these civil rights.[99] Nor is there a right to remove a tribal court case to federal court, as there is in the case of lawsuits in state court that involve federal constitutional questions. Nor is there a right of review, by certiorari or otherwise, in the United States Supreme Court, as there is in the case of state supreme court decisions that adjudicate federal questions. With no federal oversight of tribal court decisions there comes a danger of fundamental unfairness and discriminatory treatment of nonmembers, both Indian and non-Indian alike.

It is possible that tribal courts may be unfair to nonmembers. However, it is also true that state courts may be unfair to tribal members, especially in states where state court judges are elected and subject to political pressure

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96. *See* United States v. Winstar Corp., 518 U.S. 839, 875–76 (1996). "Although the Contract Clause has no application to acts of the United States, it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights." *Id.* (citations omitted).

97. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301–1303 (2000)). *See also* Santa Clara Pueblo v. Martinez, 520 U.S. 438 (1997).

98. 436 U.S. 49 (1978).

99. The sole exception is that there is a right of habeas corpus in criminal cases, but of course, *Oliphant* held that tribes have no criminal jurisdiction over non-Indians—the only parties protected by this provision are nonmember Indians. *See* Oliphant v. Suquamish Indian Tribe, 439 U.S. 191 (1978).

to limit tribal jurisdiction and property rights. More important, the Supreme Court has interpreted the Constitution as granting Congress plenary power over Indian affairs. It is Congress, after all, that passed the Indian Civil Rights Act and chose not to create a right of action in federal court to review tribal court actions. Under current interpretations of the Constitution, Congress is fully free to create federal court review of tribal court decisions. If tribes are acting unfairly to non-Indians, Congress has the power to respond. It is not clear why the Court should step in to remedy a problem that Congress has not determined exists. Even if the problem exists, the Supreme Court could have handled this problem by creating a limited constitutional right to challenge tribal court actions in federal court to vindicate fundamental constitutional rights. The Court did not need to protect non-Indian rights by stripping tribes entirely of jurisdiction over non-Indians, particularly where this infringement on tribal sovereignty violates both congressional and executive policy and constitutes a breach of existing treaties.

It also rings hollow to have the Supreme Court indulge in hand wringing about civil rights. The Rehnquist Court is not generally known as a great champion of civil rights. It has turned habeas corpus into a hollow remedy in most cases and has generally limited the reach of the Equal Protection Clause and the Due Process Clause, except where they impinge on property rights, where the Court has been more receptive to such claims. To become anxious about violation of civil rights by tribes, while generally remaining indifferent to such claims when non-Indians bring them against non-Indian governments, suggests that an intentional or unintentional double standard is being used. State governments are generally trusted by the Supreme Court to exercise their powers wisely—even when those powers are exercised over racial minorities and Indians. However, its recent judicial divestment policy suggests that the Court does not trust tribal governments to be sensitive to the rights of non-Indians. This fear is wholly unrealistic—at least as a general matter. The tribes know that at various periods of United States' history, the federal government has acted to diminish or abolish tribal government. Tribes know that the Supreme Court has granted Congress plenary power to do this. Tribes have not historically been protected by the Tenth or Eleventh Amendments. Tribes have, in other words, extremely strong incentives to act fairly to non-Indians in their dealings. If they do not, Congress has the power to take away their sovereign powers entirely.

The Supreme Court should return to foundational principles, not only of federal Indian law, but of American law generally. Tribes retain whatever rights are not expressly taken away by Congress. Those rights include property rights and sovereignty. If Congress wants to restrict tribal sovereignty, let it do so in express legislation—legislation that can later be

reviewed by the Supreme Court for constitutionality. The Supreme Court should not, on its own initiative, limit tribal power in a manner that breaches existing treaties and takes retained tribal property rights. If a tribe engages in unfair behavior, the Supreme Court can step in at that point, either to let Congress know that it thinks Congress should pass legislation to protect the rights of nonmembers in tribal courts or to pass more limited restrictions on tribal sovereignty designed to protect fundamental rights. The Court does not need to strip tribes of their sovereignty without congressional authorization or tribal consent. Such attacks on tribal sovereignty are contrary to American values and longstanding legal principles.

It is not possible to reconcile a colonial process with democratic norms. Federal Indian law has attempted—not always successfully and not always consistently—to minimize the injustices associated with colonialism. Basic American values of respect for human rights, including property and contract rights, as well as international norms protecting the sovereignty of nations from external attack, demand that the United States assiduously honor both its treaty commitments and existing legal principles that respect preexisting tribal sovereignty and property rights. Neither Congress, the President, nor the Supreme Court has consistently adhered to these principles. Yet, as often as they are submerged or ignored, they are revived and revitalized, and they remain the foundation of the relations between the United States and the tribes. The United States has, in recent memory, gone to war to protect a small nation from being swallowed up by a larger, more powerful one. Whether the United States can be true to its first principles is the question that is at the heart of federal Indian law.