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UNITED STATES V. COOLEY: A STEP TOWARDS TRIBAL SOVEREIGNTY

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I. INTRODUCTION

Homicide rates against American Indian[1] women are ten times the national average in certain areas, and rates of sexual assault among American Indian women are greater than both African American and White women.[2] And non-Indians commit eighty

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1. The author refers to indigenous peoples and their communities as "Indians" and "tribes" and refers to those who don't belong to these communities as "non-Indians" or "nonmembers." This is because courts and scholars use this terminology when discussing these issues and by keeping this terminology consistent, it is the best way to communicate and understand these issues.

2. RONET BACHMAN ET AL., U.S. DEPT. OF JUST., VIOLENCE AGAINST AMERICAN INDIAN & ALASKA NATIVE WOMEN & THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 5 (2008), www.ojp.gov/pdffiles1/nij/grants/223691.pdf [perma.cc/XD22-LUJM].

percent of sexual assaults against Indians.[3] However, the complex jurisdictional scheme on tribal lands prevents tribes from prosecuting non-native offenders of violent crimes.[4] The development of this confusing, and often contradictory, jurisdictional map is due to the complex relationship tribes have with the United States.[5] The late Supreme Court Justice Scalia summed up the complexity of Federal Indian Law when he stated: "You know, when it comes to Indian law, most of the time we're just making it up."[6]

Part II explores the evolution of federal tribal law. It begins with a discussion about the development of inherent tribal sovereignty through treaties enacted with tribes and the Supreme Court's reasoning in several key cases. It then discusses the shift in federal policy towards assimilation through key pieces of legislation. The next section addresses the rapid shifts in federal policy in the twentieth century between tribal self-determination and termination. This discussion culminates in two key Supreme Court decisions introducing the concept of implicit divestiture, which directly repudiates the long-standing concepts of Indian canons of construction.

Part III analyzes the Court's decision in *United States v. Cooley*. It addresses the factual background surrounding this case and the Ninth Circuit's decision, touches on the parties' oral arguments, and analyses the Supreme Court's application of the second *Montana* exception to this case.

Part IV is the personal analysis of the Court's decision. It first discusses the precedential and real-world implications of the decision. It then address the potential barriers which the current Court's composition presents for future assertions of inherent tribal authority.

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3. David V. Baker, *American Indian Executions in Historical Context*, 20 CRIM. JUST. STUD. 315, 352 (2007).

4. *See* Timothy Williams, *Higher Crime, Fewer Charges on Indian Land*, N.Y. TIMES (Feb. 20, 2012), www.nytimes.com/2012/02/21/us/on-indian-reservations-higher-crime-and-fewer-prosecutions.html [perma.cc/4872-ZGWX] (discussing the lack of federal prosecutions for crimes on tribal lands but the inability for tribes to adequately prosecute themselves).

5. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. 1, 21 (1831) (Johnson, J., dissenting) (stating that "there are strong reasons for doubting the applicability of the epithet state, to a people so low in the grade of organized society as our Indian tribes most generally are. . .").

6. *April Youpee-Roll: Supreme Court Makes Up Indian Law Decisions*, INDIANZ (Feb. 18, 2016), www.indianz.com/News/2016/02/18/april-youpeeroll-supreme-court.asp [perma.cc/77A3-686F].

II. BACKGROUND

A. Inherent Sovereignty and the Treaty Period

The United States Constitution makes only two passing references to its countless sovereign neighbors: the first excludes "Indians not taxed" from apportionment of representation in the House of Representatives, and the second in the Indian Commerce Clause which grants Congress the authority "[t]o regulate Commerce . . . with the Indian Tribes."[7] Both of these clauses recognize that tribes are not part of the United States and are, in fact, distinct sovereign entities.[8] However, this presents one of the earliest questions of federalism: did the states or federal government possess authority over the tribes?

Almost immediately after the Constitution was ratified, Congress vested their power to regulate commerce with the Indian tribes with the Executive Branch.[9] This vested authority was expansive,[10] and presidential administrations used it extensively to establish relations with tribes.[11] Secretary of War Henry Knox was in charge of administering Indian affairs.[12] He espoused a view of federal supremacy in this area and believed that this supremacy was granted by the Constitution.[13]

In 1823, the Supreme Court made its first foray into the so called field of "Indian Law" in *Johnson v. M'Intosh*.[14] The case revolved around whether the United States would recognize two grants made in 1773 and 1775 by chiefs of the Illinois and Piankeshaw Nations to private individuals.[15] Chief Justice Marshall found that European nations respected the right of natives as occupants, but each European Nation asserted ultimate dominion over the lands to themselves, exclusive of all other European nations.[16] The United States inherited this exclusive

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7. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. art. I, § 8.

8. This characterization is simplified for purposes of this Note, but for a more in depth discussion about the complexities of this characterization, see Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1054-58 (2015).

9. An Act To Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790).

10. Jarry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1791*, 115 YALE L.J. 1256, 1299-1300 (2006).

11. *See infra* notes 34-38.

12. Act of Aug. 7, 1789, ch. 7, 1 Stat. 49, 50 (vesting the Secretary of War with "such duties as shall . . . be enjoined on, or entrusted to him by the President of the United States . . . relative to Indian affairs.").

13. *See* Ablavsky, *supra* note 8, at 1040-45 (illustrating the strong belief that the executive branch possessed authority to govern relations among the tribes and preempted any state authority in the area).

14. Johnson v. M'Intosh, 21 U.S. 543, 571 (1823).

15. *Id.* at 571.

16. *Id.*

relationship from Great Britain.[17] This history and general national policy shows that no private individuals may purchase title from tribes as the relationship is exclusive between the United States and tribes.[18]

It was not until 1831 that the Supreme Court explicitly addressed the question of the tribes' place within the federal system in *Cherokee Nation v. Georgia*.[19] Georgia was attempting to execute state laws over the Cherokee Nation, who then filed for injunctive relief arguing that they were a foreign nation.[20] Chief Justice Marshall found that the Cherokee Nation was not a state,[21] nor did they constitute a foreign nation.[22] Rather, he described them as "domestic dependent nations" who fall "completely under the sovereignty and dominion of the United States."[23] However, Chief Justice Marshall refused to address whether the state or federal government held authority in this field.[24]

In 1832, Chief Justice Marshall finally addressed the question of federalism in *Worcester v. Georgia*.[25] He explained that the relationship is one of a nation receiving the protection of another; not one of individuals "abandoning their national character, and submitting themselves as subjects to the laws of a master."[26] Tribes possess a full right to the lands they occupy until that right should be extinguished by the United States.[27] This settled the federalism debate in the federal government's favor, finding that the Constitution "confers on [C]ongress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states and with the Indian tribes."[28]

This is the first instance of the explicit divestiture principle: tribes retain aspects of sovereignty until there is an express divestiture by the federal government.[29] This incorporates two key doctrines: the first asserts that tribal sovereignty is pre-constitutional and extra-constitutional,[30] and the second asserts

17. *Id.* at 584-85.
18. *Id.* at 604-05.
19. Cherokee Nation v. Georgia, 30 U.S. 1, 15 (1831).
20. *Id.* at 15.
21. *Id.* at 16.
22. *Id.* at 20.
23. *Id.* at 17.
24. *Id.* at 20.
25. Worcester v. Georgia, 31 U.S. 515, 555 (1832).
26. *Id.* at 555-56.
27. *Id.* at 559-60.
28. *Id.* at 559.
29. NELL JESSUP NEWTON ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (2019).
30. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 328 (1978) ("[T]he power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority.").

that tribal powers, along with the tribes themselves, are subject to complete divestiture by Congress.[31] To respect this idea of inherent sovereignty, the Court has applied specific canons of construction which require treaties, agreements, statutes, and executive orders be liberally construed in favor of the tribes and any ambiguities should be resolved in their favor.[32]

Prior to the Civil War, tribal relations were dictated through treaties negotiated with the tribes under executive authority and approved by the Senate.[33] These treaties acknowledged tribes as though they were foreign nations and often characterized tribes in terms of signifying their status as foreign nations.[34] Many further recognized the tribe's power to independently make war and conclude peace.[35] Some even recognized independent relationships between a tribe and a separate sovereign.[36]

However, few treaties dealt with the complex issue of jurisdiction over wrongdoers on tribal land and the few treaties which did were not uniform in their application of jurisdiction.[37] One treaty with the Navajo required the tribe to deliver any wrongdoer to the United States, whether they be "white, black, or Indian" and thus conferred federal jurisdiction over all wrongdoers.[38] But a separate treaty with the Cherokee secured the tribe's right "to make and carry into effect all such laws as they may deem necessary" so long as those laws are not "inconsistent with the [C]onstitution of the United States and such acts of Congress."[39] A

31. NEWTON ET AL., *supra* note 29, at § 4.02 (explaining that inherent tribal powers may be limited by lawful federal authority).

32. NEWTON ET AL., *supra* note 29, at § 2.02.

33. U.S. CONST. art. II, sec. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties . . .").

34. *See* Treaty with the Creeks preamble, Aug. 9, 1814, 7 Stat. 120 (using terminology such as "national faith" and "national honor"); Treaty with the Miamis art. 1, Nov. 6, 1838, 7 Stat. 569 (calling the tribe the "Miami [N]ation.").

35. *See* Treaty with the Cherokee preamble, July 2, 1791, 7 Stat. 39 ("The parties being desirous of establishing permanent peace and friendship between the United States and the said Cherokee Nation, and the citizens and members thereof, and to remove the cause of war, by ascertaining their limits and making other necessary, just and friendly arrangements . . . ."); Treaty with the Choctaws art. 5, Sept. 27, 1830, 7 Stat. 333 (prohibiting war "by said Choctaw Nation but by declaration made in full Council, and to be approved by the U.S. unless it be in self-defense . . .").

36. Treaty with the Kioway, Ka-ta-ka, & Ta-wa-ka-ro, Nations of Indians art. 9, May 26, 1837, 7 Stat. 533 ("The Kioway, Ka-ta-ka and Ta-wa-ka-ro nations, and their associated bands of tribes of Indians, agree, that their entering into this treaty shall in no respect interrupt their friendly relations with the Republics of Mexico and Texas . . . ."); Treaty with the Comanche and Witchetaw Indians and their Associated Bands art. 9, Aug. 24, 1835, 7 Stat. 474 (recognizing and respecting the nation's diplomatic ties to the Republic of Mexico).

37. *See supra* note 36.

38. Treaty with the Navajos art. 1, June 1, 1868, 15 Stat. 667.

39. Treaty with the Cherokee art. 5, Dec. 29, 1835, 7 Stat. 478.

treaty with the Wyandot went so far as to confer complete jurisdiction to the tribe over nonmembers on their land.[40] Regardless of a treaty's jurisdictional component, these treaties almost uniformly reflected this theme of inherent tribal sovereignty by leaving internal tribal matters to the tribes themselves.[41]

B. Allotment and Territorial Erosion

In 1871, the policy of the previous century geared towards removal of tribes to the west was no longer tenable.[42] The United States had already settled the land from which tribes were removed and relentlessly marched west, encroaching on land reserved to tribes through treaties.[43] Congress stepped in and began a policy of "civilization and assimilation" that sought to acquire tribal lands and resources through legislation.[44] Congress began exercising their powers to the overall detriment of tribal sovereignty.[45]

The 1871 Indian Appropriations Act saw the formal end of the treaty period.[46] One of Congress' first major incursions into inter-tribal matters was the passage of the Major Crimes Act,[47] which

40. *See* Treaty with the Wyandot, etc. art. 6, Aug. 3, 1795, 7 Stat. 49 ("If any citizen of the United States . . . shall presume to settle upon the lands now relinquished by the United States, such citizen or other person shall be out of the protection of the United States; and the Indian tribe, on whose land the settlement shall be made, may drive off the settler, or punish him in such manner as they shall think fit."). *See also* Treaty with the Choctaw art. 13, Oct. 18, 1820, 7 Stat. 210 (vesting authority in a tribal corps of light-horse to "act as executive officers, in maintaining good order, and compelling bad men to remove from the nation"); Treaty with the Chickasaw art. 5, Jan. 10, 1786, 7 Stat. 24 (stating that any citizen of the United States who settles on land allotted to the Chickasaw "shall forfeit the protection of the United States of America, and the Chickasaws may punish him or not as they please.").

41. These treaties still had to be presented to, and confirmed by, the Senate. U.S. CONST. art. II, sec. 2.

42. NEWTON ET AL., *supra* note 29, at § 1.04.

43. *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 8-10 (1995) (discussing the desire for productive land ownership and accelerated assimilation of Indians led to the shift of federal policy from removal to assimilation following the conclusion of the Civil War).

44. NEWTON ET AL., *supra* note 29, at §1.04.

45. The federal government overall became strong supporters of the idea of assimilation of Indians. *See, e.g.*, Ulysses S. Grant, President of the United States, Third Annual Message (Dec. 4, 1871), www.presidency.ucsb.edu/documents/third-annual-message-11 [perma.cc/N9XX-V8DM] ("[The Indians] are being cared for in such a way, it is hoped, as to induce those still pursuing their old habits of life to embrace the only opportunity which is left them to avoid extermination.").

46. Indian Appropriations Act, 16 Stat. 544 (enacted Mar. 3, 1871) ("[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . .").

47. Indian Major Crimes Act, ch. 341 § 9, 23 Stat. 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2022)).

expanded federal criminal jurisdiction over the tribes. Congress passed it in response to the Supreme Court's decision in *Ex Parte Crow Dog*.[48] In that case, two Native Americans murdered a third Native American within the Hoopa Valley Reservation and the Court had to determine who had jurisdiction over the crime.[49] In his opinion, Justice Miller referred to the tribes as "weak and diminished," and discussed the necessity of the exercise of federal power over the tribes for their own protection.[50] Justice Miller noted the shift in federal policy from treaty making to governance by acts of Congress which was embodied by the Indian Appropriations Act.[51] This shift firmly established that Congress had the practical power to administer all aspects of tribal life.[52]

The Court's decision in *United States v. Kagama* ushered in the concept of plenary congressional power over the tribes.[53] In this case, a Native of the Hoopa Valley reservation murdered another Native of the Hoopa Valley reservation and the federal court exercised jurisdiction over the murder pursuant to the Major Crimes Act.[54] The central question was whether the Major Crimes Act was a constitutional exercise of Congressional power.[55] The Court found that such an act could not be passed pursuant to the Indian Commerce Clause because this situation had nothing to do with the regulation of commerce with the Indian tribes.[56] Without any constitutional authority, the analysis turned to the current relationship between tribal nations and the United States and held "[t]hese Indian tribes are the wards of the nation" and "[t]hey are communities dependent on the United States . . . [f]rom their very weakness and helplessness . . . there arises the duty of protection, and with it the power."[57] Simply by virtue of their weakened state, Congress had the constitutional power to legislate at will.

Congress continued to exercise these newly enunciated plenary powers. The next step in breaking down tribal sovereignty and

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48. Ex Parte Crow Dog, 109 U.S. 556, 557 (1883); *see also* Matthew L.M. Fletcher, *Sovereignty and Sustainable Development of Indigenous Peoples; Seventh Tribal Sovereignty Symposium; January 27, 2006: The Supreme Court's Legal Culture War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. 93, 97 (2007) (discussing the Supreme Court's overtly racist reasoning in refusing to apply American law to Indian people and Congress' subsequent passage of the Major Crimes Act).

49. *Crow Dog*, 109 U.S. at 376.

50. *Id.* at 384-85.

51. *Id.* at 382; Indian Appropriations Act, 16 Stat. 544 (enacted Mar. 3, 1871).

52. Fletcher, *supra* note 48, at 97.

53. *See* Ablavsky, *supra* note 8, at 1080-82 (asserting the core of Congress' plenary powers did not rest in the Constitution but had its foundation in the United States' domination of and subjugation of previously sovereign tribes).

54. United States v. Kagama, 118 U.S. 375, 375 (1886).

55. *Id.* at 376.

56. *Id.* at 378-79.

57. *Id.* at 383-83.

hastening assimilation comes through the General Allotment Act of 1887, also known as the Dawes Act.[58] The Dawes Act divided reservation land and allotted a certain number of acres of land to each tribe member.[59] Allotted lands would be held in trust by the federal government for twenty-five years and tribal members were granted a patent in fee simple at which point they could alienate this land.[60] In 1887, American Indian tribes possessed 138 million acres, but fifty years later, that number dwindled to only 48 million.[61]

Section five of the Dawes Act contained an important provision to allow the President to negotiate for the purchase and release of any surplus lands not allocated.[62] An issue soon arose regarding this act and previous treaties with the Kiowa and Comanche tribes. An 1867 treaty between the Kiowa and Comanche tribes provided that no subsequent land transactions would be valid unless three-fourths of the adult male residents of the reservations approved the transaction.[63] It stated that "no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land."[64] However, the government took any surplus lands from the tribes and patented them to non-native settlers, amounting to roughly 2,150,000 acres of land sold off.[65] The Secretary of the Interior openly stated this governmental policy of selling off surplus Kiowa and Comanche lands did not conform to the treaty's terms.[66] The Supreme Court had to address the extent of Congress' authority to acquire tribal land and redistribute it without tribal consent while in direct opposition to a treaty provision.[67]

The Supreme Court, relying on characterizations similar to those in *Kagama*, determined that this congressional exercise of "plenary authority over the tribal relations of the Indians" included

58. General Allotment Act (Dawes Act), ch. 119, 24 Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 331-381 (1983)).

59. Dawes Act, ch. 119, § 1, 24 Stat. 388 (1887). The size of lots varied by individual: each family head received one-quarter of a section; each single adult received one-eighth of a section; each minor orphan received one-eighth of a section; and each minor or individual born after a reservation was allotted received one-sixteenth of a section. *Id.*

60. Dawes Act, ch. 119, § 5, 24 Stat. 388 (1887).

61. NEWTON ET AL., *supra* note 29, at § 1.04.

62. Dawes Act, ch. 119, § 5, 24 Stat. 388 (1887).

63. Treaty with the Kiowa & Comanche art. 12, Oct. 21, 1867, 15 Stat. 581.

64. *Id.*

65. Lone Wolf v. Hitchcock, 187 U.S. 553, 555, 560 (1903).

66. *Id*. at 557 (reasoning that "[i]f eighteen years and over be held to be the legal age of those who were authorized to sign the agreement, the number of persons who actually signed was 87 less than three fourths of the adult male membership of the tribes; and if twenty-one years be held to be the minimum age, then 23 less than three fourths signed the agreement. In either event, less than three fourths of the male adults appear to have so signed.").

67. *Id*. at 564.

the power "to abrogate the provisions of an Indian treaty."[68] The Supreme Court, neither in this case nor in *Kagama*, relied on any constitutional or statutory authority in concluding Congress possessed authority to regulate tribal matters at will.[69]

However, this expansive interpretation of congressional plenary power is not necessarily inconsistent with the previously established Indian law canons of interpretation. In *Winters v. United States*, the Supreme Court considered whether Montana possessed title to a waterway by virtue of their admittance to the Union or whether the tribe possessed title to the waterway on the Fort Belknap Reservation by virtue of the treaty which established the reservation.[70] The Court turned to the general rule that in the "interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians."[71] Since the treaty impliedly reserved the waters for the reservation, Montana's subsequent admission could not have repealed possession by the reservation.[72]

By the early twentieth century, Congress had removed a significant portion of tribal territory.[73] However, Congress' efforts to assimilate had still failed, so Congress passed the Citizenship Act of 1924, making "all non-citizen Indians born within the territorial limits of the United States" American citizens.[74] Through allotment and citizenship, the field of federal Indian law became much more complicated. Reservations were now dotted with plots owned by White settlers and others with tribal members.[75] Furthermore, every tribe member was now subject to the Constitution by virtue of the Citizenship Act.[76]

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68. *Id.* at 565-66.

69. *See* Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law's Brown v. Board of Education*, 38 TULSA L. REV. 73, 78 (2002) (discussing the plenary power doctrine as one that emerged from a backdrop of Indian wardship and racial inferiority rather than any constitutional or statutory provision).

70. Winters v. United States, 207 U.S. 564, 569-70 (1908) (the treaty establishing the reservation was ratified in May 1888 while Montana was incorporated as a state in November 1889).

71. *Id.* at 576.

72. *Id.* at 577-78; *see also* Winans v. United States, 198 U.S. 371, 380-82 (1905) (adopting the canons of Indian interpretation to find a treaty impliedly conferred possession of parts of the Columbia River to the Yakima Nation in 1859 and did not transfer to the state of Washington upon its admission to the Union); United States v. Quiver, 241 U.S. 602, 603-06 (1916) (declining to extend criminal jurisdiction over tribal members for the crime of adultery because the Major Crimes Act of 1887 did not explicitly grant federal jurisdiction over that crime and Congress traditionally allowed tribal customs to dictate domestic relations).

73. *See Lone Wolf*, 187 U.S. at 560.

74. Indian Citizenship Act of 1924, 43 Stat. 253 (enacted June 2, 1924).

75. NEWTON ET AL., *supra* note 29, at § 1.04.

76. For a discussion concerning the Indian Citizenship Act of 1924, see Lance F. Sorenson, *Tribal Sovereignty and the Recognition Power*, 41 A. INDIAN

C. Repudiation, Termination, and Modern Policy

During the 1920s, the federal government began transitioning away from the policies of assimilation.[77] The Secretary of the Interior, tasked with granting patents to allotted land, steadily slowed the granting of applications, and by the early 1930s, had rejected the majority of applications.[78] In 1928, a non-governmental study titled "The Meriam Report" was issued, which reported on the destructive effects of allotment and advocated for a change in federal policy.[79] It advocated for a shift in policy towards one which would "respect the rights of the Indian."[80]

This policy received congressional approval through the enactment of the Indian Reorganization Act in 1934.[81] This act formally ended the policy of allotment and allowed the Secretary of the Interior to restore the remaining surplus lands as they saw fit.[82] Congress promoted the development of tribal governments and provided support for modern and formalized tribal justice systems.[83] Support for tribal courts is recognition of an independent sovereignty within the tribes.[84]

However, the period of repudiation ended almost as quickly as it began. After World War II, the federal government adopted an aggressive policy of termination— "assimilation with a vengeance."[85] This period was characterized by aggressive, albeit limited in scope, efforts to assimilate tribes.[86] One of the key pieces

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L. REV. 69, 114-15 (2017) (explaining the assimilationist goals behind the Indian Citizenship Act without explicitly discarding the notion of tribal authority).

77. This shift came from efforts by organizations and advocates who focused on the practical harms which the previous policies caused—particularly allotment. Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U.L. REV. 958, 982-83 (2011); NEWTON ET AL., *supra* note 29, at § 1.05.

78. Royster, *supra* note 43, at 15.

79. BROOKINGS INST. FOR GOV'T RSCH., THE PROBLEM OF INDIAN ADMINISTRATION 26 (Lewis Meriam ed., John Hopkins Press 1928), files.eric.ed.gov/fulltext/ED087573.pdf [perma.cc/NRX6-7E7Q].

80. *Id.* at 22.

81. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (2006)).

82. Indian Reorganization Act, ch. 576, §§ 1-3.

83. Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M.L. REV. 225, 235-236 (1994).

84. *See* Talton v. Mayes, 163 U.S. 376, 385 (1896) (stating that tribal courts are independent sovereigns exercising power which predates the Constitution); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 94 (8th Cir. 1956) (holding tribes possess the inherent sovereignty to establish tribal courts independently of any congressional act); *see generally* Valencia-Weber, *supra* note 83, at, 232-37 (discussing the importance of tribal courts in advancing and protecting tribal sovereignty and self-government).

85. Royster, *supra* note 43, at 18.

86. *See* NEWTON ET AL., *supra* note 29, at § 1.06 (discussing Congress voted

of legislation passed during this period was Public Law 280.[87] This law transferred civil and criminal jurisdiction over tribes to five states and allowed all other states to assume civil and criminal jurisdiction if they wished.[88]

However, the impact of this act was blunted by several factors. First, the law itself required tribal ordinances and customs, provided there was no conflict with state law, be given "full force and effect" in civil causes of action.[89] Second, the act provided nearly no resources to states who assumed civil and criminal jurisdiction over tribal matters, leaving states who assumed jurisdiction struggling to manage the increased costs.[90]

Another key factor in curtailing the impact of Public Law 280 was the traditional canons of Indian construction. The Supreme Court in *Williams v. Lee* reaffirmed the value of tribal self-government, even during a time of aggressive assimilation.[91] In this case, a non-native store owner who operated a store on the Navajo reservation sued a Navajo Native in Arizona state court to collect a debt.[92] The issue was whether Arizona or the tribal court had jurisdiction to hear the case.[93] The Court determined that Public Law 280 did not explicitly grant Arizona jurisdiction because they had failed to accept such jurisdiction.[94] Absent an affirmative act of Congress, the exercise of state jurisdiction would undermine the authority of tribal courts and the right of tribal members to govern themselves.[95] The Court acknowledged that jurisdiction over nonmembers in civil matters was directly connected with the sovereignty of the Navajo tribe.[96]

By the late 1950s, the government began to abandon termination practices and return to the general policies rooted in the Indian Reorganization Act: self-determination and self-governance.[97] In 1968, Congress enacted the Indian Civil Rights

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to terminate seventy tribes and bands in 1954 and subsequently worked to terminate even more tribes across the country).

87. Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (1953) (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C.).

88. Pub. L. No. 83-280, ch. 505, §§ 2(a), 67 Stat. 588 (1953).

89. Pub. L. No. 83-280, ch. 505, §4(c), 67 Stat. 588 (1953).

90. For a discussion concerning the difficulties and failures associated with implementation of Public Law 280 in various states, see Carol E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 540-42, 551-57 (1975).

91. Williams v. Lee, 358 U.S. 217, 218 (1959).

92. *Id.* at 217-18.

93. *Id.*

94. *Id.* at 222-23.

95. *Id.* at 223.

96. The Supreme Court has also found that unilateral action taken by a tribe to extend civil jurisdiction of tribal matters to state courts is not enough to satisfy § 7 of Public Law 280. Kennerly v. Dist. Ct. of Ninth Jud. Dist., 400 U.S. 423, 427 (1971).

97. NEWTON ET AL., *supra* note 29, at § 1.07.

Act.[98] This Act applied some language from the Bill of Rights to Indian tribes, including the equal protection and due process clauses of the Constitution.[99] It also repealed section seven of Public Law 280, so states may now only assert jurisdiction over tribes when the tribes consent.[100]

During this period of revival, tribes began asserting more authority over natural resources and reservation businesses while developing government and tribal court systems.[101] However, due to the tortured history of assimilation and allotment, reservations were not uniformly inhabited by tribe members, but interspersed with non-Indian landholders.[102] This brought the assertion of tribal authority over nonmembers to the forefront of federal Indian law.

D. Implicit Divestiture Doctrine

The question of tribal criminal jurisdiction over nonmembers did not arise earlier because tribal governments and judicial systems only obtained sophistication and resources to exercise such jurisdiction in the second half of the twentieth century.[103] It arose in the case of *Oliphant v. Suquamish Indian Tribe*.[104] In this case, two non-natives were arrested by the Suquamish Indian Tribe: Daniel Belgarde for allegedly participating in a high-speed race and colliding with a tribal officer's vehicle, and Mark Oliphant for assaulting a tribal officer.[105]

The Supreme Court rejected the doctrinal principles of federal Indian law and instead created something wholly different, the implicit divestiture principal.[106] According to the Court, "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[107] To support this conclusion, the Court assumed the tribes lacked the inherent ability to adequately try nonmembers,[108]

98. Pub. L. No. 90 – 284, 82 Stat. 73 (1968) (codified as amended at 25 U.S.C. §§ 1301-1341).

99. *Id.* at tit. II § 202(a).

100. *Id.* at tit. IV § 403(a)-(b).

101. Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1054-55 (2005).

102. NEWTON ET AL., *supra* note 29, at § 1.04.

103. *Id.* (explaining the growth of tribal institutional development in the mid-twentieth century led to the conflict of tribal exercise of jurisdiction over nonmembers).

104. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 192 (1978).

105. *Id.* at 194.

106. *Id.* at 206; *see also* Addie C. Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. REV. 1638, 1644-45 (2016) (discussing how the Court's conclusion in *Oliphant* was the result of it focusing on federal and state power while making assumptions about tribal power).

107. *Oliphant*, 435 U.S. at 210.

108. *Id.* at 207-08. The Court relied on cherry-picked quotes and treaty

rather than any in-depth analysis of whether Congress had ever divested the tribe of their inherent authority.[109] The Court's decision flew in the face of established federal Indian law and Congressional plenary power.[110] Precedent and correct application of the canons of construction should have led to the correct result—that no treaty or statute had divested the tribe of this power, which was understood as an aspect of retained sovereignty.[111]

The Court extended this new implicit divestiture theory into the civil realm in *Montana v. United States*.[112] The case considered whether the Crow tribe possessed the inherent authority to control hunting and fishing of nonmembers who owned land in fee simple within the reservation.[113] Following the principles of *Oliphant*, the Court stated that 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*."[114] Furthermore, tribes only retain inherent sovereignty to exercise some forms of civil jurisdiction in two cases: (1) they "may regulate through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements,"[115] or; (2) they may retain the "inherent power to exercise civil authority over the conduct of non-Indians" on land owned in fee simple "within its reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe."[116] Since hunting and fishing on land owned in fee simple within the reservation does not involve agreements between the members or nonmembers, and nothing suggests those activities harm the political or economic security, the tribe does not possess the

provisions to support an assertion that the Suquamish "in all probability recogniz[ed] that the United States would arrest and try non-Indian intruders;" *see also* Berger, *supra* note 101, at 1056-58 (discussing the Court's narrow interpretation of treaties, quotes, and precedent to conclude tribes were impliedly divested of criminal jurisdiction over nonmembers).

109. *Oliphant*, 435 U.S. at 206. In analyzing the treaty between the United States and the Suquamish Nation, the Court recognized the treaty was silent as to criminal jurisdiction over nonmembers but that the "historical perspective casted doubt" on granting them criminal jurisdiction over nonmembers.

110. *Kagama*, 118 U.S. at 385 (holding that the federal government "alone can enforce its law on all the tribes.").

111. *See* Phillip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 457-58 (2005) (explaining that the Indian Civil Rights Act actually implicitly conferred criminal jurisdiction over nonmembers by conferring rights to all criminal defendants in tribal courts, provided sentencing guidelines, and allowed federal districts courts to grant habeus corpus relief from tribal court decisions).

112. Montana v. United States, 450 U.S. 544, 545 (1981).

113. *Id.* at 547.

114. *Id.* at 564.

115. *Id.* at 565.

116. *Id.* at 566.

inherent authority to regulate it.[117]

In the decades following the Court's decisions in *Oliphant* and *Montana*, the decisions of the Court were far from uniform. In *Merrion v. Jicarilla Apache Tribe*,[118] the Court returned to the proper canons of construction and found the tribe possessed the "general authority, as sovereign, to control economic activity within its jurisdiction"[119] to tax non-natives who harvest mineral resources from reservation land, and that the federal government had not divested the tribe of its inherent ability to do so.[120]

Then, in *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*,[121] the Court returned to the reasoning of *Oliphant* and *Montana* when addressing whether a tribe possessed the inherent authority to zone all lands within their reservation, including lands owned by nonmembers.[122] The plurality opinion concluded that the tribe did not have the ability to zone those areas held by nonmembers as it "does not imperil any interest of the Yakima nation."[123]

While the Supreme Court oscillated between the principles of explicit and implicit divestiture, Congress has taken steps to recognize the importance of tribal justice systems and their role in tribal sovereignty. In 1991, Congress amended the Indian Civil Rights Act to address tribal jurisdiction over non-member Indians.[124] This amendment was in direct response to the Supreme Court's decision in *Duro v. Reina*, where the Court held that tribes did not have criminal misdemeanor jurisdiction over nonmember Indians.[125] The Court reviewed the constitutionality of this law in *United States v. Lara*.[126] They found that Congress does possess the "constitutional power to lift the restriction on the tribes' criminal jurisdiction"[127] and that Lara's tribal prosecution was an exercise of the tribe's inherent sovereign power.[128]

In 1993, Congress formally codified their support in the Indian Tribal Justice Act with general statements of policy to encourage

117. *Id*. *See also* Royster, *supra* note 43, at 46 (explaining the Court's decision to divest the Crow tribe of their inherent authority to regulate in *Montana* was a direct consequence of allotment).

118. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 131 (1982).

119. *Id*. at 138.

120. *Id*. at 152.

121. Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 409 (1989).

122. *Id*. at 421-22.

123. *Id*. at 432.

124. Act of Oct. 28, 1991, 105 Stat. 646 (codified as amended at 25 U.S.C. 1301).

125. *See* Duro v. Reina, 495 U.S. 676, 679, 698 (1990) (restricting tribal criminal jurisdiction over nonmember Indians).

126. United States v. Lara, 541 U.S. 193, 194 (2004).

127. *Id*. at 200.

128. *Id*. at 210.

the growth and development of tribal justice systems.[129] The most important affirmation of tribal criminal jurisdiction came in 2010 and 2013. In 2010, Congress passed the Tribal Law and Order Act.[130] This act enhanced tribal criminal jurisdiction and sentencing authority by imposing maximum sentencing limits and requiring that defendants have constitutional rights.[131] In 2013, Congress enacted the Violence Against Women Act, which extended tribal criminal jurisdiction over non-native domestic violence perpetrators.[132] Congressional trends towards tribal self-sovereignty indicate a strong intent to allow tribes to exercise authority over members and non-members alike within tribal boundaries.[133]

Congress has continued to evidence an intent to support tribal sovereignty. But the Supreme Court has continued to establish a complex precedential backdrop to govern exercises of tribal authority over nonmembers. And since the Supreme Court's decision in *Oliphant*, the Court has not addressed the issue of a tribal officer's authority when stopping non-Indian suspects.

III. ANALYSIS: UNITED STATES V. COOLEY

This Part analyzes the Supreme Court decision in *United States v. Cooley*. It begins with a recitation of the factual background of the case and the initial procedural posture of the district court. The next section explains the Ninth Circuit holding and subsequent decision in denying rehearing en banc. Then, the Section briefly introduces the parties' arguments, then discuss the Justices' major concerns as they expressed them during oral arguments. The final section analyzes the Court's decision and Justice Alito's concurring opinion.

A. United States v. Cooley Background[134]

On February 26, 2016, Tribal Officer Saylor pulled up to a

129. Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified at 25 U.S.C. §§ 3601-3631).

130. Tribal Law and Order Act, Pub. L. No. 111-211, 124 Stat. 2258 (2010) (codified in scattered sections of 25 U.S.C.).

131. 25 U.S.C. § 1302(a)-(d) (2022).

132. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4 tit. IX § 904, 127 Stat. 54 (codified at 25 U.S.C. § 1304 § 204).

133. *See* Phillip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 34-35 (arguing that under traditional canons of construction, legislative acts which conferred jurisdiction to tribes did not differentiate between members and nonmembers, so the Supreme Court should have found the tribes to possess criminal jurisdiction over nonmembers).

134. United States v. Cooley, CR 16-42-BLG, 2017 U.S. Dist. LEXIS 17276, at *1 (D. Mont. Feb. 7, 2017).

white pickup truck parked on the side of Highway 212, which crossed through the Crow Reservation in Montana.[135] Joshua Cooley stopped the truck on the highway..[136] Officer Saylor walked up to the truck and observed Cooley, a non-native with bloodshot eyes.[137] He asked Cooley what he was doing out so late and what his business was in a nearby town.[138] Cooley said his vehicle had broken down and that he borrowed it from his friend, named either Thomas Spang or Thomas Shoulderblade.[139] Officer Saylor knew an individual named Thomas Shoulderblade, a tribal officer for the Northern Cheyenne tribe.[140] Officer Saylor also knew an individual named Thomas Spang, a man suspected of drug activity.[141] Officer Saylor suspected Cooley was lying about where he was coming from and why he was stopped and asked him to roll the window down further.[142] Officer Saylor then saw two semi-automatic rifles in the passenger seat and asked Cooley for his identification.[143] Cooley pulled out two to three large wads of cash then hesitated when reaching down again, leading Officer Saylor to draw his service pistol, hold it to his side, and order Cooley to stop and show his hands.[144] He directed Cooley to slowly retrieve his identification and Cooley proceeded to hand Officer Saylor a Wyoming driver's license.[145]

Officer Saylor unsuccessfully attempted to run Cooley's identification, but was unable to connect to radio dispatch through the portable unit.[146] Officer Saylor could reach dispatch from the unit in his vehicle, so he maneuvered his truck around to the passenger side of Cooley's vehicle.[147] Looking in from the passenger side of Cooley's vehicle, Officer Saylor noticed the semi-automatic rifles were both unloaded, but also saw a pistol tucked underneath the folded down center console near Cooley's right hand.[148] He asked Cooley about the pistol and Cooley said he didn't know it was there because it was not his truck.[149] Officer Saylor reached into the truck, grabbed the pistol, and removed the magazine and the round in the chamber.[150] He ordered Cooley out of the truck, patted him down,

135. *Id.* at *1-2.
136. *Id.*
137. *Id.* at *2.
138. *Id.* at *3.
139. *Id.*
140. United States v. Cooley, 919 F.3d 1135, 1139 (9th Cir. 2019).
141. *Id.*
142. *Id.*
143. *Id.* at 1140.
144. *Cooley*, 2017 U.S. Dist. LEXIS 17276, at *4.
145. *Id.*
146. *Id.*
147. *Id.* at *5.
148. *Cooley*, 919 F.3d at 1140.
149. *Id.*
150. *Id.*

then placed him into the back of the squad car.[151] Cooley asked Officer Saylor if he could empty his pockets first, and then proceeded to remove cash, credit cards, and a few empty Ziploc bags, which Officer Saylor knew were commonly used to package methamphetamine.[152]

Officer Saylor radioed dispatch and requested backup and a county unit because Cooley was not native.[153] He then returned to the truck to retrieve the rifles, but when he leaned over the passenger seat to remove the keys from the ignition, he spotted a glass pipe and a plastic bag with white powder in it between the driver seat and middle seat.[154] Once Bureau of Indian Affairs Lieutenant Sharon Brown arrived, she ordered Officer Saylor to seize all contraband in plain view.[155] Subsequent searches uncovered more methamphetamine within the truck.[156]

Cooley was charged with possession of methamphetamine with intent to distribute and possession of a firearm in furtherance of a drug trafficking crime, and moved to suppress the evidence Tribal Officer Saylor had seized, arguing that the stop was beyond the tribal officer's authority.[157] The district court turned to the Ninth Circuit precedent in *Bressi v. Ford*.[158] There, the case involved the extent of a tribal officer's authority over non-natives on a state highway passing through the reservation.[159] The Ninth Circuit held that a tribal officer may only stop a suspect long enough to determine if the violator is not an Indian.[160] If the suspect is not an Indian, the tribal officer may only detain them if there is an apparent violation of state or federal law, and only long enough to turn them over to state or federal authorities.[161] Since Officer Saylor observed Cooley was non-native, he could only detain Cooley if there was an *apparent* violation of state or federal law.[162] There was no "apparent violation" at the time Saylor began speaking with Cooley, so the district court granted Cooley's motion to suppress the

151. *Id.*

152. *Id.*

153. *Cooley*, 2017 U.S. Dist. LEXIS 17276, at *5-6.

154. *Id.* at *6.

155. *Id.*

156. *Id.*

157. *Id.* at *10-11. *See also id.* at *1 (noting Cooley was "charged with Possession of Methamphetamine with Intent to Distribute and Possession of a Firearm in Furtherance of a Drug Trafficking Crime.").

158. Bressi v. Ford, 575 F.3d 891, 894 (9th Cir. 2009).

159. *Id.* at 893-94.

160. *Id.* at 896.

161. *Id.* (citing State v. Schmuck, 850 P.2d 1332, 1337 (Wash. 1993)). *See also Cooley*, 2017 U.S. Dist. LEXIS 17276 at *7 (recognizing "*Bressi* uses 'apparent' and 'obvious' interchangeably. . ." (citing *Bressi*, 575 F.3d at 896-97)).

162. Since the Ninth Circuit never defined what "apparent" or "obvious" was, the district court concluded that the "apparent and obvious standard" was "notably higher than probable cause." *Cooley*, 2017 U.S. Dist. LEXIS 17276, at *8 (internal citations omitted).

evidence obtained by Officer Saylor.[163]

B. Ninth Circuit Court of Appeals[164]

On appeal, the Ninth Circuit noted that tribes have no criminal jurisdiction over nonmembers,[165] and their power over nonmembers in these circumstances would be limited to their inherent power to exclude from tribal lands.[166] However, public rights of way through reservations are not tribal land, so the tribe is unable to exclude in this context.[167] The Ninth Circuit then turned to the test established in *Bressi*, and determined that because Officer Saylor never attempted to ascertain whether Cooley was an Indian,[168] and there was no apparent violation of state or federal law, Saylor was not allowed to detain Cooley and search his vehicle.[169]

The United States then filed a petition for rehearing en banc,[170] which was denied by a split Ninth Circuit.[171] Judge Berzon, who wrote the opinion in the original decision of the Ninth Circuit, authored a concurring opinion in which he articulated that there are only two sources of authority available to tribal officers,[172] but neither apply to Officer Saylor here.[173] Without this inherent power,

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163. *Id.* at *11.

164. *Cooley*, 919 F.3d at 1141.

165. Berger, *supra* note 101, at 1054-55.

166. *Cooley*, 919 F.3d at 1141 (citing *Duro*, 495 U.S. at 696-97).

167. *Id.* at 1141-42 (citing Strate v. A-1 Contrs., 520 U.S. 438, 454 (1997)).

168. The Ninth Circuit found that Indian status is a political classification rather than an ethnic or racial one, so a tribal officer may not rely on physical characteristics in determining one's Indian status. *Id.* at 1142-43. For an in-depth discussion about the history of how tribal membership is determined, see Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D.L. REV. 1 (2006); *see also* Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243 (2008/2009).

169. The Ninth Circuit further noted that even though they never elaborated on the "apparent" or "obvious" standard, Officer Saylor would not have had the authority to search a known non-Indian for evidence of a crime. *Id.* at 1142 (citing *Bressi*, 575 F. 3d at 896-97).

170. The United States argued that the Ninth Circuit's decision conflicts with inherent tribal sovereignty of tribes to police right of ways, inhibits tribes' ability to protect their members, and creates numerous practical problems for tribal law enforcement. United States' Petition for Rehearing En Banc at 8-17, *Cooley*, 919 F.3d 1135 (2019) (No. 17-30022), 2017 U.S. 9th Cir. Briefs LEXIS 5132, at *7-16.

171. The denial of the United States' motion was a 5-4 decision. United States v. Cooley, 947 F.3d 1215, 1216 (9th Cir. 2020).

172. The first is inherent tribal authority to enforce criminal law. *Cooley*, 947 F.3d at 1216 (citing *Oliphant*, 435 U.S. at 195). The second source is the inherent authority to exclude non-Indians from tribal land. *Id.* at 1216-17 (citing *Duro*, 495 U.S. at 696).

173. The Supreme Court in *Oliphant* stripped officers of criminal jurisdiction over non-Indians and the power to exclude would not apply because public rights-of-way are not considered tribal land. *Id.* at 1217 (citing *Strate*,

tribal officers may only briefly detain a non-native for apparent violations and deliver them to the proper authorities.[174]

The dissenting opinion argued that the authority to conduct traffic stops and investigations was not revoked by the Supreme Court's decision in *Oliphant*.[175] In fact, the Ninth Circuit upheld the power of tribal officers to conduct these types of investigations as a part of their inherent sovereign powers.[176] A number of other jurisdictions have also found tribal officers retain this authority.[177] Since the authority to investigate and detain is straightforward, tribal officers may do so based on the reasonable suspicion standard.[178] The Ninth Circuit's implementation of a new, undefined, "obvious" violation standard for non-natives creates a new and complex set of standards governing tribal officer authority over non-natives.[179] The Supreme Court granted certiorari to determine the extent of a tribal officer's authority over nonmembers on public rights of way through reservations.[180]

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520 U.S. at 454, 456).

174. This minor grant of authority over non-Indians on public rights-of-way is necessary for effective policing over public highways and the rule established in *Bressi* conforms to Supreme Court precedent. *Id*. at 1217-18.

175. *Id.* at 1220 (Collins, J., dissenting).

176. In *Ortiz-Barraza v. United States*, the Ninth Circuit held that any holdings which may have revoked criminal jurisdiction over non-Indians did not revoke the sovereign power of tribal authorities to investigate violations of state and federal law within reservation boundaries and deliver the offender to proper authorities. Ortiz-Barraza v. United States, 512 F.2d 1176, 1179-80 (9th Cir. 1975).

177. *See* State v. Pamperien, 967 P.2d 503, 506 (Or. Ct. App. 1998) (holding that "tribal law enforcement officers have the authority to investigate on-reservation violations of state and federal law as part of the tribe's inherent power as sovereign and may detain violators and turn them over to the proper officials" if prosecutorial jurisdiction "rests outside the tribe"); United States v. Terry, 400 F.3d 575, 579-80 (8th Cir. 2005) (explaining that "tribal officers do not lack authority to detain non-Indians whose conduct disturbs the public order on their reservation" and that "the power of tribal authorities to exclude non-Indian law violators from the reservation would be meaningless if tribal police were not empowered to investigate such violations" but noting that such investigations must avoid unconstitutional searches or seizures); *Schmuck*, 850 P.2d at 1344 (upholding the Suquamish Indian Tribe's "inherent authority to stop and detain a non-Indian who has allegedly violated state and tribal law while traveling on a public road in the Reservation, until he or she can be turned over to state authorities for charging and prosecution"); State v. Haskins, 887 P.2d 1189, 1195 (Mont. 1994) ("Since tribal police officers have authority to investigate unlawful criminal activity on the reservation, then it is reasonable that they would also have authority to conduct a proper and thorough investigation, to gather the evidence necessary for a successful prosecution and then, in due course, to turn that evidence over to the proper jurisdiction with the authority to prosecute any non-Indians involved.").

178. *Cooley*, 947 F.3d at 1220.

179. *Id.* at 1220-22.

180. United States v. Cooley, 141 S. Ct. 870 (mem.) (2020).

C. Parties' Arguments

The United States ("Petitioner") relied extensively on the inherent sovereignty of the tribes to police public rights-of-way.[181] Since Congress has not divested the tribes of their inherent authority to police and investigate, they may do so pursuant to their inherent sovereign authority.[182] Importantly, the Petitioner distinguished the authority divested from the tribes in *Oliphant*[183] from the issue here—since policing and investigating are not the exercise of criminal jurisdiction over non-natives, implicit divestiture would not apply.[184] The Crow tribe had the historical power to apprehend and deliver non-natives to relevant authorities,[185] and Supreme Court precedent has acknowledged this inherent authority.

Cooley responded by arguing that the Court's decisions in *Duro* and *Strate*[186] only recognized a limited authority to detain and transport in narrow circumstances.[187] Furthermore, any potentially inherent authority that the tribe may have had in these

181. Brief of Petitioner at 3-4, 13, 16-21, United States v. Cooley, 141 S. Ct. 1638 (2021) (No. 19-1414).

182. *Id.* at 8.

183. The Petitioner argued that *Oliphant* divested criminal jurisdiction over nonmembers because non-Indians lack membership in the political community of any tribe, but this situation does not involve any criminal adjudication, merely authority to detain temporarily and hand over to the proper authorities. *Id.* at 10-11 (citing *Oliphant*, 435 U.S. at 212).

184. Eight current and former members of the Senate and House of Representatives, which included current members and leaders of the Senate Committee on Indian Affairs and the House Natural Resources Subcommittee for Indigenous Peoples of the United States, submitted a brief as Amicus Curiae. In it, they argued that the correct analysis should be whether Congress had explicitly divested the tribe of this inherent sovereignty and here, Congress had never intended to divest them of this authority. Brief of Current and Former Members of Congress as Amici Curiae Supporting Petitioner at 4, *Cooley*, 141 S. Ct. 1638 (No. 19-1414).

185. *Id.*; *see also* Brief of the Lower Brule Sioux Tribe, et al., as Amici Curiae Supporting Petitioner at 5, *Cooley*, 141 S. Ct. 1638 (2021) (No. 19-1414) (interpreting the text of the 1868 treaty with the Crow to confirm the investigative and detention power of the Crow tribe); Brief for Indian Law and Policy Professors as Amici Curiae Supporting Petitioner at 4-8, *Cooley*, 141 S. Ct. 1638 (2021) (No. 19-1414) (examining the long history of tribes policing non-Indians and finding historical support for the type of authority Officer Saylor exercised in these circumstances).

186. In *Strate v. A-1 Contractors*, the Supreme Court declined to "question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers' nonmembers stopped on the highway for conduct involving state law." *Strate*, 520 U.S. at 456. In *Duro v. Reina*, the Court acknowledged tribal power to detain an offender and transport him to proper authorities. *Duro*, 495 U.S. at 697.

187. Brief for Respondent at 21-23, *Cooley*, 141 U.S. 1638 (No. 19-1414).

circumstances was divested by the Court in *Oliphant*.[188] The police power that Officer Saylor exercised in this instance is the same as if the tribe had exercised criminal jurisdiction over a nonmember.[189]

D. Petitioner's Oral Argument

During oral arguments, every Justice struggled with what exactly was precedential in this situation. The Petitioner argued that the correct analysis should be one of sovereign authority and that the tribe had never been explicitly divested of this authority.[190] The first question posed by Chief Justice Roberts was whether the correct analysis should be based on *Montana v. United States*.[191] The Petitioner responded by arguing that *Montana* only applied to civil, adjudicatory, and legislative contexts where tribes are attempting to extend their authority, but this situation only involves tribal policing of state and federal law.[192] Justice Sotomayor even expressed her opposition to an analytical framework based on inherent tribal sovereignty to decide this question.[193]

Justice Kagan expressed concern about the precedential effect of this decision, particularly the impact of proceeding based on inherent sovereignty or applying the second *Montana* exception.[194] Justice Gorsuch agreed with the explicit divestiture principle in this case, but was concerned if statutes[195] had actually divested the tribes of this power.[196] Justice Barrett later voiced similar concerns

188. The Respondent construed the authority to investigate and temporarily detain with the exercise of criminal jurisdiction over non-Indians as divested by the Court in *Oliphant*. *Id.* at 10-11 (citing *Oliphant*, 435 U.S. at 195).

189. *Id.* at 9.

190. Oral Argument at 00:33, *Cooley*, 141 S. Ct. 1638 (2021) (No. 1914-14), www.c-span.org/video/?508645-1/united-states-v-cooley-oral-argument [perma.cc/BKR7-VU95].

191. *Id.* at 2:36 (asking why to follow the proposition that tribes have generally been divested of their sovereign authority over non-Indians).

192. *Id.* at 4:58, 8:10.

193. *Id.* at 16:31. Justice Sotomayor posed the question "shouldn't we be looking at what rights the Indians, the tribal Indians, have been given?" *Id.*

194. *Id.* at 19:58. "[T]here are these two alternate ways that you could have written your brief and one is the inherent authority way . . . the other is the *Montana* exception . . . what are the different consequences of the Court proceeding along either of these paths?" *Id.*

195. Major Crimes Act, 18 U.S.C. § 1153 (2022). *See also* Cross-Deputization Statute, 25 U.S.C. § 2804 (2022) (granting the Secretary of the Interior authority to enter into agreements with tribes allowing them to enforce federal law on tribal land).

196. Oral Argument, *supra* note 190, at 23:33-47, 25:48 (proposing that, "the relevant question here is, what does the Major Crimes Act do to Indian sovereignty?" and in response to Petitioners' argument that the act permits limited tribal detention and investigation in light of the Cross-Deputization statute but stops short of authority to arrest, asking, "well, if you're going to look to the Deputization statute, why doesn't that just foreclose, even a Terry

about where the line between sovereignty and divestiture is in this situation.[197] Justice Kavanaugh focused his attention on fundamental questions of federal Indian law[198] and issues concerning separation of powers.[199]

E. Respondent's Oral Argument

Respondent argued that Officer Saylor's actions amounted to an exercise of criminal jurisdiction by a tribe over a non-native, and that such authority had been implicitly divested from the tribes.[200] The Justices conveyed a general apprehension over the implication of the "apparent" standard the Ninth Circuit created to govern these circumstances.[201]

Chief Justice Roberts turned to the second *Montana* exception again and questioned whether it would or would not apply under these circumstances.[202] The Respondent advocated for a restricted view of tribal sovereignty limited to "managing tribal land, protecting tribal self-government, and controlling internal relations, none of [which are] implicated here."[203]

Justice Thomas focused strongly on the actual impact of this new standard on the well-being of the tribe.[204] If this apparent standard applies, would a tribal officer have any power to detain a

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stop?").

197. *Id.* at 31:12. Justice Barrett was concerned because it appeared "[the temporary detention] would mature into an arrest" and arrest authority is something implicitly divested from the tribes. *Id.*

198. *See* Sorenson, *supra* note 76, at 71-72 (explaining how the same questions which perplexed the Framers and interpreters continue to pose issues for modern Justices, particularly how the tribes fit into our constitutional framework, how much sovereignty do the tribes retain, and even who should be allowed to decide these issues).

199. Oral Argument, *supra* note 190, at 27:40, 29:00 (asking, "does [inherent sovereignty] come from the Constitution or how does that fit within the Constitution?", and explaining that, "the other side says this is in effect a separation of powers case and . . . we should let Congress and the executive fill any public policy holes that exist.").

200. *Id.* at 35:01; *see also Oliphant*, 435 U.S. at 210.

201. *See* Oral Argument, *supra* note 190, at 45:02.

202. *Id.* at 36:58. "I understand your argument to be that under *Montana* . . . there is no inherent authority. But even under *Montana*, there are exceptions in which we've recognized there is continuing inherent authority, and I wonder why the second exception doesn't apply here." *Id.* at 37:22.

203. *Id.* at 38:58. Respondent asserted that since Officer Saylor was enforcing non-tribal laws against a non-Indian on a public right-of-way, it had nothing to do with internal relations of the tribe or tribal self-government. *Id.*

204. The Amicus Brief of Former and Current United States Attorneys expressed concern over the real-world impact of the Ninth Circuit's standard and how it would seriously impair any policing over non-Indian and policing over land owned by non-Indians in fee simple on reservation land. Brief for Dennis K. Burke, Former United States Attorney, et al. as Amici Curiae in Support of Petitioner at 41-46, United States v. Cooley, 141 S. Ct. 1638 (2021) (No. 19-1414).

non-native who they suspect of being a wanted criminal by state or federal authorities?[205] Justice Breyer centered his inquiries on situations where a tribal officer would be unable to ascertain the tribal status of a suspect.[206] The Respondent argued that the difficulties are remedied by the cross-deputization statute and do not require any extension of tribal sovereignty.[207]

Justice Alito took up this line of reasoning and posed a question regarding the authority of a tribal officer who suspects a non-native is driving under the influence.[208] The Respondent argued that merely suspecting a violation of law is not enough and the tribal officer may only detain a suspect when their "conduct rises to the level of a potential ongoing active breach of the peace where public safety is in jeopardy."[209] Justice Barrett openly expressed her concern about the new apparent and obvious standard.[210]

F. Court's Opinion

The Supreme Court ultimately turned to the second *Montana* exception in their decision to uphold the tribal officer's authority to conduct the stop.[211] The adoption of *Montana's* principle that "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers"[212] appears to limit tribal sovereignty, but reliance on the second exception simultaneously recognizes tribal sovereignty over activities of nonmembers.[213] The Court also recognized the "plenary authority of Congress"[214] in this area, yet proceeded to expand a judicially created concept in defiance of the concept of congressional plenary power.[215] The final important note

205. Oral Argument, *supra* note 190, at 39:52. The hypothetical posed swapped out Cooley with a known serial killer and the concern was whether Officer Saylor had any authority to detain him under the "apparent" standard established by the Ninth Circuit. *Id.*

206. *Id.* at 43:18. The Ninth Circuit's standard did not allow an officer to make a determination of tribal status based on physical appearance so it required some confirmation by a tribal officer of the suspect's status first. *Cooley*, 919 F.3d at 1142-43.

207. Oral Argument, *supra* note 190, at 45:02.

208. *Id.* at 46:39.

209. *Id.* at 47:24. The conceptual difficulties of what authority a tribal officer has under the "apparent" standard is because the Ninth Circuit never enunciated or defined "apparent" violation. *See Cooley*, 2017 U.S. Dist. LEXIS 17276, at *8 (stating that the Ninth Circuit never expanded on what is "apparent" but it was likely not met under these circumstances).

210. Oral Argument, *supra* note 190, at 1:03:58. "We have reasonable suspicion, we have probable cause. How do you tell if something's an apparent obvious violation of the law?" *Id.* at 1:04:24.

211 *Cooley*, 141 S. Ct. at 1643 (citing *Montana*, 450 U.S. at 565).

212. *Id.*

213. *Id.*

214. *Id.* (citing Michigan v. Bay Mills Indian Comty., 572 U.S. 782, 788 (2014)).

215. Brief of Current and Former Members of Congress, *supra* note 184, at

is the generally respectful tone the Court adopts in its opinion, a welcome break from past traditions.[216]

1. Adoption of Montana as Precedent

The Court primarily had two analyses to affirm tribal sovereignty to stop and investigate non-natives. The first applied strict adherence to the explicit divestiture principle as the Petitioner and numerous Amici advocated.[217] This option is also strengthened based on the Court's dicta in *Strate*, where they stated "[w]e do not question the authority of tribal police to patrol roads within a reservation, including rights-of-way . . . and to detain and turn over to state officers' nonmembers stopped on the highway for conduct violating state law."[218]

Under the inherent sovereignty analysis, the Court would first look to see whether any treaties or statutes had divested the tribe of this authority.[219] The 1868 treaty with the Crow provided that:

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent, and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.[220]

The power to investigate suspected crimes is consistent with the 1868 treaty's promise to punish "upon proof made" because it would be impossible for the tribe to make such proof without any investigative authority.[221] The Court here also recognized that "no treaty or statute has explicitly divested Indian tribes of the policing authority at issue."[222] This is where the inquiry would have ended

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2-3 (arguing that the lower court's decision "intrudes on Congress's [plenary authority] and on tribal sovereignty by creating "a novel standard restricting" tribal authority "to temporarily detain and search a non-Indian on a public reservation right-of-way absent an 'apparent' violation of state or federal law" which is "inconsistent with history, precedent, and legislation.").

216. *See generally* Anne E Tweedy, "*Hostile Indian Tribes . . . Outlaws, Wolves . . . Bears . . . Grizzlies and Things Like That?" How the Second Amendment and Supreme Court Precedent Target Tribal Self-Defense*, 13 U. PA. J. CONST. L. 687, 712-22 (2011) (discussing the historical use of the term "savage" and its continued use in precedential cases in Indian law).

217. *See* discussion *supra* note 186.

218. *Strate*, 520 U.S. at 456.

219. NEWTON ET AL., *supra* note 29, at § 2.02.

220. Treaty with the Crow Indians art. I, May 7, 1868, 15 Stat. 649.

221. *See* Brief of the National Congress of American Indians, et al., as Amicus Curiae in Support of Petitioner at 40-43, United States v. Cooley, 141 S. Ct. 1643 (2021) (No. 19-1414) (explaining how these treaties clauses imply an ancillary authority to investigate and are necessary for effective policing of Indian country).

222. *Cooley*, 141 S. Ct. at 1643.

had the Court relied on tribal sovereignty and the explicit divestiture principle.

The second option available to the Court was the second *Montana* exception and the Court did turn to this to affirm tribal authority. Even though "no treaty or statute has explicitly divested Indian tribes of the policing authority at issue," Court precedent supports "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers."[223] *Montana*'s second exception states that:

> A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation *when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe*.[224]

The Court found that this exception "fits the present case, almost like a glove" because to "deny a tribal police officer authority to search and detain for a reasonable time *any person* he or she believes may commit or has committed a crime" would prevent tribes from being able to protect themselves.[225]

Cooley marks the first time that the second *Montana* exception was applied to affirm tribal sovereignty over non-natives.[226] The Court's prior cases denying tribal jurisdiction over non-natives relied on the reasoning that the exercise of tribal jurisdiction imposes tribal laws on non-natives who have no say in the creation of the laws being applied against them.[227] Importantly, these were limited to cases where a tribe attempted to extend criminal jurisdiction over non-natives,[228] or where a tribe tried to exercise civil authority.[229] The Court even recognized that policing public rights of way do not fall under either of these categories, but still decided that policing authority over non-natives' rights falls under the second *Montana* exception.[230] The Court first adopted the "general proposition" that tribes' inherent sovereign powers do not

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223. *Id.* (quoting *Montana*, 450 U.S. at 565).

224. *Id.* (quoting *Montana*, 460 U.S. at 566).

225. *Id.*

226. The Court noted that other federal courts have held that tribal officers possess this authority, but those cases did not base their decisions on the second *Montana* exception. *Id.* The Supreme Court never addressed this analytical inconsistency in this opinion. *See Schmuck*, 850 P.2d at 1341 (stating that a tribe's authority to stop and detain on public rights of way can be based on their power to exclude non-Indians from tribal lands, or it may be derived from their general authority as a sovereign); *Ortiz-Barraza*, 512 F.2d at 1180-81 (holding that the power to exclude would be meaningless if tribal police did not have the power to investigate suspected violations).

227. *See, e.g.*, Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 337 (2008) (explaining that nonmembers have no say in tribal government so they may not be subject to tribal regulations unless they fall under one of the two *Montana* exceptions (citing *Montana*, 450 U.S. at 564)).

228. *Oliphant*, 435 U.S. at 210.

229. *Montana*, 450 U.S. at 565-66.

230. *Cooley*, 141 S. Ct. at 1644-45.

extend over nonmembers.[231] Then the Court recognized that this authority is an exception to that general proposition.[232] This could signal that *any* exercise of tribal authority over non-natives falls under this general proposition.

2. Plenary Authority of Congress and Separation of Powers

A key component of federal tribal law is the plenary power of Congress over all tribal matters.[233] Here, the Court again recognized this principle by holding that "[i]n all cases, tribal authority remains subject to the plenary authority of Congress."[234] The Respondent made a forceful argument that Congress had exercised their plenary authority in passing the cross-deputization statute.[235] Since Congress had addressed the "jurisdictional gap in this case," the Court should defer to Congress.[236] The Court did not agree with this argument and held that the cross-deputization statute "did not easily fit the present circumstances."[237]

First, the cross-deputization statute is overinclusive because it "encompass[es] the authority to arrest,"[238] which is not at issue in this case. Second, the statute is also underinclusive as it only governs violations of federal law, so "tribes would still need to strike agreements with a variety of other authorities to ensure complete coverage."[239]

However, this recognition and respect for Congress' plenary power in the field of Indian affairs is also contradicted by the expansion of this implicit divestiture principle established in *Montana* and *Oliphant*.[240] Implicit divestiture replaces Congress' role in delineating the powers of tribes and instead substitutes the Court's belief about where to draw those lines.[241]

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231. *Id.* at 1643 (citing *Montana*, 450 U.S. at 565).

232. *Id.*

233. *See* Phillip P. Frickey, *supra* note 133, at 11-12 (explaining the extent of Congress' plenary powers and Court's recognition of such powers).

234. *Cooley*, 141 U.S. at 1643.

235. Brief for Respondent, *supra* note 187, at 25-26; 25 U.S.C. § 2804 (2022).

236. Brief for Respondent, *supra* note 187, at 12.

237. *Cooley*, 141 S. Ct. at 1645.

238. *Id.* (citing 25 U.S.C. § 2803(3)).

239. *Id.* at 1645-46 (citing Brief for Cayuga Nation et al. as Amici Curiae, 7-8, 25-27, *Cooley*, 141 S. Ct. 1638 (No. 1914-14)).

240. Brief of Current and Former Members of Congress, *supra* note 184, at 8-9 ("[J]udicial interference about what aspects of sovereignty have been divested is an intrusion into the plenary and exclusive authority that the Legislative Branch possesses in Indian affairs.").

241. Congress passed no law or statute depriving the Suquamish of their criminal jurisdiction over non-members but the Court, on its own, divested the tribe of that authority. *Oliphant*, 435 U.S. at 210.

3. Tone and Recognition of Real-World Impact

Perhaps the most striking aspect of the *Cooley* opinion is the Court's generally respectful tone and focus on the real-world impact of their decision. The Court traditionally views tribes in a disparaging way.[242] In one of the earliest decisions regarding tribes, Chief Justice Marshall characterized Indians as "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest."[243] Even precedential cases influential in *Cooley's* outcome adopted disparaging characterizations. In *Oliphant*, the Court held that the tribes were characterized by a want of fixed laws and competent tribunals of justice in 1834 and that principle "should be no less obvious today."[244]

However, the Court here maintained a generally respectful tone throughout their opinion. Justice Breyer noted the necessity of allowing the tribe to "protect themselves against ongoing threats."[245] He also acknowledged the importance of tribal officers in the national web of policing.[246] While tone, by itself, may not hold any legal significance, it is indicative of a shift in attitudes towards issues surrounding tribal nations.

The most striking aspect of the Court's opinion is their attention to and treatment towards the real-world impact of their decision. The Court held that the Ninth Circuit's standard is unworkable.[247] The first requirement, to ascertain the status of a suspect, would "produce an incentive to lie."[248] Second, the "apparent" standard is not an established standard and would result in serious interpretation issues because "most of those who live on Indian reservations are non-Indians."[249] This is a stark departure from the Court's decision in *Oliphant* where they stated:

> [W]e are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians. But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians. They have little relevance to the principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to

242. *See* Brief of the National Congress of American Indians, et al., *supra* note 221, at 40-43.

243. *M'Intosh*, 21 U.S. at 590.

244. *Oliphant*, 435 U.S. at 210.

245. *Cooley*, 141 S. Ct. at 1643.

246. *Id.* at 1645-46. *See also* Brief of National Indigenous Women's Resource Center, et al., as Amici Curiae in Support of Petitioner at 19-20, *Cooley*, 141 S. Ct. 1643 (No. 1914-14) (discussing the importance of tribal policing to enforce the Violence Against Women Act and protect women on reservations).

247. *Cooley*, 141 S. Ct. at 1645.

248. *Id.* (citing *Cooley*, 919 F. 3d at 1142).

249. *Id.* (citing Brief for Dennis K. Burke, Former United States Attorney, et. al. at 24, *Cooley*, 141 S. Ct. 1645 (No. 19-1414)).

try and punish non-Indians.[250]

Throughout oral arguments, the Justices took seriously the actual impact of denying officers this authority over non-natives.[251] The main driving factor behind the recognition of this inherent power arose from the need to protect the public, which includes both tribal members and non-natives.[252]

4. Justice Alito's Concurrence

The Court's opinion found that the policing at issue was part of inherent sovereign authority because it was necessary to protect the "health or welfare of the tribe."[253] Justice Alito authored a concurring opinion to ensure that this holding would be interpreted as narrowly as possible. His single paragraph concurrence simply states that he understands the Court's opinion holds no more than the following:

> On a public right-of-way that traverses an Indian reservation and is primarily patrolled by tribal police, a tribal police officer has the authority to (a) stop a non-Indian motorist if the officer has reasonable suspicion that the motorist may violate or has violated federal or state law, (b) conduct a search to the extent necessary to protect himself or others, and (c) if the tribal officer has probable cause, detain the motorist for the period of time necessary for a non-tribal officer to arrive on the scene.[254]

Justice Alito's concurrence narrowly construes the Court's opinion and expresses it should only confer limited authority to tribal officers in these limited circumstances.[255]

This is the first time the Supreme Court has explicitly interpreted the second *Montana* exception. The Court's functional interpretation may also present future opportunities for exercises of tribal authority.

IV. PERSONAL ANALYSIS

The *Cooley* Court sought to uphold tribal authority in the narrowest sense while attempting to avoid the creation of any meaningful precedent.[256] The lack of any meaningful precedential effect may be heightened by the 2020 Supreme Court decision in *McGirt v. Oklahoma*.[257] In light of *Cooley*, meaningful action must

250. *Oliphant*, 435 U.S. at 212.
251. *See* discussion *supra* Parts III.D & III.E.
252. *Cooley*, 141 S. Ct. at 1645.
253. *Id.* at 1641.
254. *Id.* at 1646 (Alito, J., concurring).
255. *Id.*
256. *Id.* at 1641 (stating without any further explanation "[w]e believe this statement of law governs here." (citing *Montana*, 450 U.S. at 566)).
257. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

be taken to firmly address the issue of crime on tribal land. Section A discusses the precedential impact of this decision and how much of an actual impact on future tribal cases it may have. Section B examines *Cooley's* impact on lower courts and state courts and how they grapple with issues surrounding tribal officers' interactions with nonmembers. Section C looks at the real world impact this decision has had and will have in the future for tribes and tribal officers. Section D considers future roadblocks that remain within the Supreme Court and solutions to recognizing this type of authority over nonmembers in the future.

A. Contradictory Victories

Tribal victories following *Oliphant* were few and far between. From 1988 to 2006, the tribes lost every case where they attempted to exert criminal or civil jurisdiction over non-members.[258] Once Chief Justice Roberts joined the Court in 2005, things turned even more abysmal. From 2005 to 2010, tribes brought seven cases before the Supreme Court and lost all seven on the merits.[259] Due to the high stakes of these cases, the Tribal Supreme Court Project[260] shifted focus to the lower courts where their chances of success were far greater.[261]

However, the Supreme Court's hostility towards tribal interests appears to be waning. The decision in *Cooley* relied on the implicit divestiture principle established by the Supreme Court in *Oliphant* and *Montana*.[262] This decision directly follows another

258. *See Duro*, 495 U.S. at 697 (holding that tribes have no criminal jurisdiction over nonmember Indians); S.D. v. Bourland, 508 U.S. 679, 697-98 (1993) (holding that the Flood Control Act abrogated the Cheyenne's power to license non-Indian use of the lands); *Strate*, 520 U.S. at 456-57 (citing *Montana* to find that tribes were implicitly divested of their jurisdiction over civil suits against nonmembers); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001) (holding that a tribe's imposition of a tax on nonmembers on non-Indian fee land within a reservation is presumptively invalid); Nevada v. Hicks, 533 U.S. 353, 374 (2001) (holding that tribal courts have no authority to adjudicate cases brought by tribal members against non-Indians for harm done on reservation land).

259. TRIBAL SUPREME COURT PROJECT: TEN YEAR REPORT, NATIVE AM. RTS. FUND 3 (Dec. 2011), www.sct.narf.org/updatememos/tsct-10-year-report.pdf [perma.cc/BR27-L35E] [hereinafter TRIBAL SUPREME COURT PROJECT REPORT].

260. The Tribal Supreme Court Project was created in 2001 following two "devastating" tribal losses in *Atkinson* and *Hicks*. *Tribal Supreme Court Project*, NATIVE AM. RTS. FUND, www.sct.narf.org/ [perma.cc/GR5E-6DXX] (last visited Mar. 31, 2023). Tribal Leaders established the Project to "strengthen tribal advocacy . . . by developing new litigation strategies . . . and to ultimately improve the win-loss record of Indian tribes." *Id.*

261. TRIBAL SUPREME COURT PROJECT REPORT, *supra* note 259, at 5. Tribal interests have met with a nearly fifty percent win rate in lower federal and state courts while only mustering a twenty percent win rate at the Supreme Court. *Id.*

262. See *supra* notes 104-10, 112-117.

major victory in *McGirt v. Oklahoma.*[263] In that case, the Supreme Court determined whether the sale of surplus lands through allotment had diminished or disestablished[264] the Creek reservation in Eastern Oklahoma.[265] Justice Gorsuch, writing for the 5-4 majority, adopted the explicit divestiture principle to conclude that the Creek reservation in Eastern Oklahoma had not been disestablished.[266]

Both *Cooley* and *McGirt* appear to show a more deferential Court than in previous terms, but for different reasons. *McGirt* was a 5-4 decision rooted in precedent.[267] This precedent pointed the Court directly towards the explicit divestiture principle. However, *Cooley* had no obvious precedent to follow. Rather, the Court relied on the implicit divestiture precedent established in *Montana* and its second exception out of necessity.[268] In previous decisions, the Court turned away from the impact of their holdings, but due to facts presented before the Court, they simply could not do so here.[269]

Although the Court did not discuss it in their opinion, another key factor for utilizing this second *Montana* exception was congressional intent.[270] Absent clear congressional intent to abrogate the authority at issue, inherent tribal authority should be preserved.[271] The congressional intent to pass the cross-deputization statute was not to divest the tribes of the authority to conduct these investigatory stops against nonmembers.[272] Rather, the passage of the Indian Civil Rights Act, the Tribal Law and Order

263. *McGirt*, 140 S. Ct. at 2452.

264. "Diminished" or "disestablished" refers to the elimination or restriction of reservation land. Ann E. Tweedy, *Has Federal Indian Law Finally Arrived at 'The Far End of the Trail Of Tears,'* 37 GA. ST. U.L. REV. 739, 748 (2021). The question usually revolves around whether the Dawes Act had the effect of eliminating or restricting the reservation land. *See id.* at 748-49.

265. *McGirt*, 140 S. Ct. at 2459.

266. *Id.* ("Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.").

267. In Nebraska v. Parker, 577 U.S. 481, 494 (2016), the Supreme Court unanimously held that the Dawes Act did not diminish the Omaha Indian Reservation. *See also*, Tweedy, *supra* note 264, at 752-55 (discussing the precedent *Parker* established and the Court's adherence to *McGirt*).

268. *See* discussion *supra* notes 223-232.

269. Online Interview with Lauren Van Schilfgaarde, San Manuel Band of Mission Indians Tribal Legal Development Clinic Director, UCLA School of Law (Nov. 19, 2021) [hereinafter Van Schifgaarde Interview] (notes on file with author). The goal is to place compelling facts in front of the Supreme Court, and these were compelling facts. *Id.* To deny a tribal officer authority to address situations like the one Officer Saylor faced would pose too grave of a threat. *Id.*

270. *See* Santa Clara Pueblo v. Martin, 436 U.S. 49, 60 (1978) ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we treat lightly in the absence of clear indications of legislative intent.").

271. NEWTON ET AL., *supra* note 29, at §2.02.

272. *Cooley*, 141 S. Ct. at 1646.

Act, and the Violence Against Women Act all represent a congressional intent to permit the policing at issue here.[273]

This presents a unique opportunity for tribal interests because now there are several Supreme Court cases upholding tribal sovereignty both based on explicit and implicit divestitures. This was also the first time the Supreme Court applied the second *Montana* exception.[274] Furthermore, the adoption of this exception takes on a functionalist tone, rather than an overly formalistic and narrow view.[275] One of the reasons the United States did not argue for the second *Montana* exception was because of its rigid application in earlier contexts.[276] The Court took the momentous step of reigning in the rigid application of the second exception and merely giving its words meaning.[277] The application in this instance would suggest that tribes would have expanded room to exercise authority over non-natives where they are engaged in activities which generally threaten the tribe.[278] While adoption of the explicit divestiture principle would have made for stronger precedent, the narrow holding in *Cooley* was still a major victory for tribal interests.

B. Clearing the Morass of Tribal Authority

While the precedential value of *Cooley* in the Supreme Court remains unclear, it has already made an impact on the judicial system. In *Hartsell v. Schaaf*, Charles Hartsell was detained by the Pokagon Tribal Police at a casino and Hartsell initiated a suit under 42 U.S.C. § 1983 against the tribal officers for alleged civil rights violations.[279] The Court held that the tribal officers were not protected by sovereign immunity, but if the tribal officers had acted within their inherent tribal authority, then they were not state

273. Brief of Current and Former Members of Congress, *supra* note 184, at 8-23.

274. *See supra* text accompanying note 226.

275. *Cf. Strate*, 520 U.S. at 458 (finding that a reckless driver on a reservation would endanger the safety of tribal members but holding this danger alone is not sufficient to meet the second *Montana* exception).

276. Brief for the United States at 25-26, *Cooley*, 141 S. Ct. 1638 (No. 19-1414) (relying on the second *Montana* exception only to the extent it reflected the general principles that tribes have the modest ability to protect themselves from imminent danger and aid federal and state law enforcement).

277. *See* discussion *supra* note 266.

278. *Cooley*, 141 S. Ct. at 1643 (noting the danger posed by "non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation."). However, the lack of explanation in the Court's adoption of this second exception could also suggest that it only applies in this one narrow circumstance as Justice Alito mentions in his concurring opinion.

279. Hartsell v. Schaaf, 3:20-CV-505-JD-MGG, 2021 Dist. LEXIS 153653, at *2 (N.D. Ind. 2021).

actors subject to the Constitution.[280] Now that the Court has identified the types of authority tribal officers have, the second *Montana* exception works to more broadly protect the inherent authority of everyday tribal officers.

In *State v. Suelzle*, Benjamin Suelzle was pulled over by a federal officer within the Fort Berthold Indian Reservation after she noticed Suelzle's vehicle swerve over the center line multiple times.[281] The federal officer determined Suelzle was not a tribe member and called for a county sheriff because she did not have authority to arrest a non-native on the reservation.[282] Suezle filed a motion to suppress the evidence the federal officer seized and to dismiss the charges, arguing that the federal officer did not have the authority to detain non-natives.[283] The unanimous North Dakota Supreme Court held:

> In light of the Supreme Court's decision in *Cooley*, we conclude the federal law enforcement officer working as an agent for the tribal drug enforcement agency had jurisdiction to detain Suelzle for a reasonable time while awaiting a state officer and affirm the district court's denial of his motion to suppress related to his detention by the federal law enforcement officer.[284]

It already appears that *Cooley* is working to fight the "exceptionally complex and unwieldy"[285] issue of jurisdiction in Indian country.[286]

In *Texas v. Astorga*, Tribal Officer Alarcon pulled over Astorga for failing to use a turn signal when making a turn.[287] Tribal Officer Alarcon noticed open alcohol containers in the vehicle and conducted a pat down of Astorga.[288] When Tribal Officer Alarcon retrieved the containers from the vehicle, he noticed a clear glass pipe used to smoke methamphetamine.[289] The tribal officer conducted a more thorough search of Astorga's person, and then transported him to tribal police headquarters where he was searched again.[290] The tribal officers found methamphetamine on Astorga's body and contacted El Paso police.[291] The court found that this factual situation did not fit *Cooley* because the tribal officers

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280. *Id.* at *5 (citing *Cooley*, 141 S. Ct. at 1638).

281. State v. Suelzle, 965 N.W.2d 855, 857-58 (N.D. 2021).

282. *Id.* at 858.

283. *Id.* at 857-58.

284. *Id.* at 860.

285. Brief for Dennis K. Burke, Former United States Attorney, et al., *supra* note 204, at 10.

286. While *Cooley* is having an impact now, the blurring of the lines between civil and criminal Indian law jurisprudence may pose a problem in future jurisdictional cases.

287. Texas v. Astorga, 642 S.W.3d 69, 73 (Tex. App. 2021).

288. *Id.* at 73-74.

289. *Id.* at 74.

290. *Id.*

291. *Id.*

waited several hours prior to contacting the appropriate authorities, and also conducted a strip search of Astorga prior to contacting the appropriate authorities.[292] Had the tribal officer contacted the authorities prior to detaining Astorga and transporting him to tribal police headquarters, this situation would have neatly fit within *Cooley*.[293]

Tribal officers will continue to conduct investigatory stops on highways through their reservations in pursuit of public safety. *Cooley* has already provided these tribal officers clear guidance on what actions they may take when the drivers they encounter are non-native.[294] It has also provided guidance on when tribal officers overstep the limits of their authority. The clarity provided to govern these interactions will help both tribal officers and those who are stopped.

C. Giving Context to the Tribal Victory

In the Chicagoland area, residents have the luxury of calling 911 and having an officer arrive at their door within minutes. For residents living on reservations, this is not the case. When they dial 911, there may not be anyone there to pick up.[295] There are 2,380 Bureau of Indian Affairs and tribal officers serving 1.4 million Indians on over 56 million acres of tribal lands—this means there are only 1.3 officers per 1,000 citizens.[296] It could take hours for a tribal officer to arrive at a scene where they may not even have jurisdiction to act.[297]

While our nation is currently embroiled in our own struggles in deciding whether to defund the police, tribal nations in *Cooley* face the question of whether their officers can even exercise their authority.[298] Had the Court found tribal officers did not possess

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292. *Id.* at 82.

293. *Id.*

294. *Cooley*, 141 S. Ct. at 1644 (recognizing that tribal officers may exercise their power to detain a non-Indian and transport them to the proper authorities and that the authority to search is ancillary to this authority).

295. Van Schilfgaarde Interview, *supra* note 269.

296. *Tribal Law Enforcement*, TRIBAL L. & POL'Y INST., www.tribal-institute.org/lists/enforcement.htm [perma.cc/C92N-YZ3P] (last accessed Mar. 7, 2023). However, the average ratio in cities with a population greater than 250,000 is 3.3 officers per 1,000 inhabitants and those officers serve a geographic area far smaller than tribal officers. *Full-time Law Enforcement Employees*, FEDERAL BUREAU OF INVESTIGATIONS (2015), ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-70 [perma.cc/SB32-TK5Q].

297. Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away With Almost Anything*, THE ATLANTIC (Feb. 22, 2013), www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/ [perma.cc/EYQ4-TMQH].

298. This Note is not calling into question any of the merits of the "Defund the Police" movement; it is simply comparing the situations that tribal members and non-tribal members are facing in their current policing situations.

authority to detain non-members for these types of incidents, reservations would have *no* way to protect their communities from non-members. Cooley, clearly in possession of firearms and illegal substances, could simply continue on his way and the officer would have to allow it. This is because tribal crimes are often a low priority for deputies and sheriffs who are already overworked solving crimes outside of the reservation's borders.[299]

Although Congress has the power to legislate around these issues, they have generally neglected to take any action. The passage of the Violence Against Women Act is the only legislative act which attempts to alleviate the crippling rates of crime on reservations by providing tribes the authority to prosecute.[300] The solution rests in Congress to address the issue of crime, but they have failed to do so. This is, in part, due to the fact that there is no tribal representation in Congress.[301] Although tribes have the right to vote in federal elections, their population is too small to obtain any major victories in popular elections alone.[302] While the 2020 election saw a record turnout for tribal members, only six Congressional seats are held by representatives who belong to a tribe.[303] Even at the state level, it was not until 2018—when Peggy Flanagan was elected as Lieutenant Governor of Minnesota—that *any* state elected an American Indian to executive office.[304] Without adequate representation, Congress will continue to neglect its duties to address crime on reservations.

While *Cooley* represents a victory for tribal officers in their exercise of limited authority over non-natives, it does little to nothing to address the underlying problems of violence on reservations. A report asked American Indian victims of violent crime the race the offender, and approximately seventy-five percent

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299. U.S. DEP'T OF JUST., INDIAN COUNTRY INVESTIGATIONS AND PROSECUTIONS 10 (2019), www.justice.gov/otj/page/file/1405001/download# [perma.cc/66F9-EYQ2] (finding that around 65% of Indian country criminal investigations opened by the FBI were referred for prosecution).

300. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4 tit. IX, 127 Stat. 54 (codified at 25 U.S.C. § 1304).

301. The Cherokee Nation has a treaty right to send a nonvoting delegate to Congress but have never done so. *See* Treaty with the Cherokee, art. 12, Nov. 28, 1785, 7 Stat. 18 ("Indians may send deputy to Congress.").

302. *See* TINA NORRIS, ET AL., U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, 2010 CENSUS BRIEFS 4 (Jan. 2012), www.census.gov/history/pdf/c2010br-10.pdf [perma.cc/7AHL-6SKE] (finding the census results show that only 1.5% of the nation identified as American Indian or Alaska Native).

303. Erica Belfi, *Historic Number of Native Americans Elected to U.S. Congress*, CULTURAL SURVIVAL (Nov 17, 2020), www.culturalsurvival.org/news/historic-number-native-americans-elected-us-congress [perma.cc/3NEQ-Z7DG].

304. Camille Erickson, *MN Elects First Native Lt. Governor*, CIRCLE: NATIVE AM. NEWS & ARTS (Dec. 2018), thecirclenews.org/cover-story/mn%E2%80%88elects-first-native-lt-governor/ [perma.cc/Z2UJ-Z72F].

of them said the offender was non-native.[305] Since the *Oliphant* decision, tribes do not have the right to prosecute these individuals, proper authorities may be hours away, and federal or state prosecutors do not have the resources to appropriately respond.[306] The result is that non-native offenders may avoid punishment and continue to pose a threat to vulnerable Native women.[307] While the authority to stop, search, and detain temporarily with probable cause is important, it is not enough to stop the continuing violent crimes perpetrated by non-natives on tribal reservations.

D. What the Future Holds: The New Supreme Court

The decisions in *McGirt* and *Cooley* were welcome wins for tribal interests and appear to reflect a new judicial policy towards federal Indian law centered around doing no harm.[308] This policy also reflects the Court's respect towards Congress' plenary powers over the tribes.[309] But Justices Barrett,[310] Kavanaugh,[311] Gorsuch,[312] and Jackson[313] are all still new to the Court bench. It is yet to be determined how their personal beliefs and attitudes toward tribal issues will shape Indian law.

Forecasting how the Justices will vote on Indian law issues is especially difficult because they do not vote along traditional ideological lines. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, the Court allowed a tribe to raise sovereign immunity as a defense to a breach of contract claim in which Justices Stevens, Souter, and Thomas dissented.[314] Even in *McGirt*, the majority

305. STEVEN W. PERRY, U.S. DEP'T OF JUST.: BUREAU OF JUST. STATS., AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992-2002 9 (Dec. 2004), www.bjs.ojp.gov/content/pub/pdf/aic02.pdf [perma.cc/2HX8-X4CA].

306. *See* S. REP. NO. 112-153, at 9 (2012) (reporting barriers to protecting Indian women from violence).

307. *Id.* (explaining that where violence against Indian women is perpetrated by non-Indian men, tribes have no authority to prosecute those offenders, even in situations of domestic abuse).

308. Oral Argument, *supra* note 190, at 59:10. Justice Kavanaugh noted during oral arguments that "one of the things we should be trying to do here is to do no harm . . . it's a narrow result that does not make the morass as it was described any worse." *Id.*

309. *Cooley*, 141 S. Ct. at 1643 (stating "[i]n all cases, tribal authority remains subject to the plenary authority of Congress.").

310. *Amy Coney Barret*, OYEZ, www.oyez.org/justices/amy_coney_barrett [perma.cc/576H-F5K8] (last visited Mar. 7, 2023) (sworn in on Oct. 26, 2020).

311. *Brett M. Kavanaugh*, OYEZ, www.oyez.org/justices/brett_m_kavanaugh [perma.cc/2QT2-8HWQ] (last visited Mar. 7, 2023) (sworn in on Oct. 6, 2018).

312. *Neil Gorsuch*, OYEZ, www.oyez.org/justices/neil_gorsuch [perma.cc/H6LD-FQKZ] (last visited Mar. 7, 2023) (sworn in on Apr. 10, 2017).

313. *Ketanji Brown Jackson*, OYEZ, www.oyez.org/justices/ketanji_brown_jackson [perma.cc/U8Q6-FGAN] (last accessed April 23, 2023) (sworn in on June 30, 2022).

314. Kiowa Tribe of Oklahoma v. Mnfg. Techs., Inc., 523 U.S. 751, 759-60 (1998).

opinion was drafted by Justice Gorsuch, a conservative justice, and joined by the liberal justices on the Court.[315]

The appointment of conservative Justice Gorsuch in 2017 following the passing of late Justice Antonin Scalia[316] gave tribal interests an unlikely champion on the Supreme Court. Since his appointment, he has voted in favor of tribal interests in five out of the six federal Indian law cases he has heard.[317] The only case Justice Gorsuch did not rule in favor of tribal interest was in *Patchak v. Zinke*.[318]

The primary reason for this impressive record is due to his familiarity with federal Indian law. Justice Gorsuch served on the Tenth Circuit encompassing six states and the territory of seventy-six federally-recognized Indian tribes.[319] While serving on the Tenth Circuit, Justice Gorsuch participated in forty-two cases relating to federal Indian law and Indian interests and authored eighteen opinions on the topic.[320]

A couple of his decisions on the Tenth Circuit illustrate his depth of knowledge in regard to federal Indian law. In *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, the tribe brought suit alleging that Utah was prosecuting tribal members in state court for offenses committed on tribal land and displacing the tribe's authority to do so.[321] Justice Gorsuch wrote that "the harm to tribal sovereignty in this case is perhaps as serious as any to come our way in a long time" and that the fact this prosecution comes after numerous prior cases "suggests it is part of a renewed campaign to undo the tribal boundaries."[322] Justice Gorsuch understands tribal jurisdiction and is willing to uphold precedent favoring tribal interests.

In *Fletcher v. United States*, the Osage nation brought a suit to seek an accounting to determine whether the United States had fulfilled the fiduciary obligations it owed to the tribe.[323] Justice Gorsuch's opening remarks to this opinion demonstrate his knowledge of the tortured history between this tribe and the United States:

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315. *McGirt*, 140 S. Ct. at 2452.

316. *Antonin Scalia*, OYEZ, www.oyez.org/justices/antonin_scalia [perma.cc/UJ7Q-L4FM] (last accessed Mar. 7, 2023) Justice Scalia passed away on February 13, 2016, and his seat was later filled by Justice Gorsuch. *Id.*

317. *See Cooley*, 141 S. Ct. at 1649; *McGirt*, 140 S. Ct. at 2452; Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019); Herrera v. Wyoming, 139 S. Ct. 1686 (2019); and Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649 (2018).

318. Patchak v. Zinke, 138 S. Ct. 897, 914 (2018) (Gorsuch J., dissenting).

319. John Dossett, *Justice Gorsuch and Federal Indian Law*, 43 HUM. RTS. 7, 7 (2017).

320. *Id.* at 10.

321. Ute Indian Tribe v. State of Utah, 790 F.3d 1000, 1005 (10th Cir. 2015).

322. *Id.*

323. Fletcher v. United States, 730 F.3d 1206, 1207 (2013).

> After settlers displaced the Osage Nation from its native lands, the federal government shunted the tribe onto the open prairie in Indian Territory, part of what later became the State of Oklahoma. At the time, the government had no idea those grasslands were to prove a great deal more fertile than they appeared. Only years later did the Osages' mammoth reserves of oil and gas make themselves known. When that happened, the federal government appropriated for itself the role of trustee, overseeing the collection of royalty income and its distribution to tribal members.[324]

Justice Gorsuch then turned to the traditional canons of construction to support his conclusion the United States owed a fiduciary duty to the Osage: "[i]f any doubt remains (and we harbor none), we would still reach the same conclusion because, again, statutory ambiguities in the field of trust relations must be construed for, not against, Native Americans."[325]

His deep understanding of the particularly acute injustices faced by tribes is best demonstrated in his opinion in *McGirt*. In the opening lines of this landmark decision he wrote, "[o]n the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever."[326] He is a Colorado native and his long tenure on the Tenth Circuit means he is familiar with tribal issues and understands that tribes are sovereign entities.[327]

Neither Justice Kavanaugh, Justice Barrett, nor Justice Jackson have the depth of expertise that Justice Gorsuch possesses on tribal law. Justice Kavanaugh was appointed to the D.C. Circuit in 2006 but only wrote one opinion in an Indian law case. In *Vann v. Department of the Interior*, a group of Freedmen filed for injunctive and declaratory relief after the Cherokee Nation decided they were no longer members of the tribe in violation of an 1866 treaty.[328] Justice Kavanaugh permitted the Freedman to proceed in their suit against the Principal Chief of the Cherokee nation in his official capacity, relying on the precedent established in *Ex Parte Young*.[329] Although he ruled against tribal interests in this case, there is no indication of any anti-tribal attitudes.

Since joining the Supreme Court in 2018, Justice Kavanaugh has ruled against tribal interests in four Indian law cases but only

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324. *Id.*

325. *Id.* at 1212.

326. *McGirt*, 140 S. Ct. at 2459.

327. *See* Bethany Berger, *Hope for Indian Tribes in the U.S. Supreme Court?*: *Menominee, Nebraska v. Parker, Bryant, Dollar General . . . and Beyond*, 2017 U. ILL. L. REV. 1901, 1941-42 (2017) (discussing Justice Gorsuch's record in the Tenth Circuit).

328. Vann v. United States Dep't of Interior, 701 F. 3d 927, 928 (2012).

329. *Id.* at 929-30 ("As a practical matter, therefore, the Cherokee Nation and the principal Chief in his official capacity are one and the same in an *Ex parte Young* suit for declaratory and injunctive relief.").

once in favor.[330] In none of these cases did Justice Kavanaugh author an opinion, hence, it is difficult to discern why he voted the way that he did.

Justice Barrett appears to have even less experience with Indian law than Justice Kavanaugh. In her brief three-year tenure on the Seventh Circuit, she did not participate in a single case involving an Indian Tribe or an Indian law issue. She did participate in *Schlemm v. Carr*, in which an incarcerated Indian brought a religious liberty claim against the prison because they brought him dried meat instead of fresh meat for a religious ceremony.[331] The per curiam decision held that Schlemm failed to show denial of fresh game meat substantially burdened his religious exercise and, even if it did, dried meat was an appropriate accommodation.[332]

The most substance we can look to concerning her Indian law policies is her time as a law clerk for the late Justice Antonin Scalia. Justice Barrett has described her judicial approach as consistent with that of Justice Scalia and believes a judge should adhere to the text as it was understood at the time it was written. But Justice Scalia had an infamous freewheeling approach when deciding Indian law cases.[333] If Justice Barrett decides to take up this approach to Indian law, it would bring far more uncertainty to the field.

Justice Jackson appears to have even less experience with Federal Indian law than Justice Barrett. She served as a federal judge for the U.S. District Court for the District Court of Columbia from 2013 to 2021, and on the U.S. Court of Appeals for the D.C. Circuit from 2021 to 2022.[334] Justice Jackson authored more than 500 opinions while serving as a district judge, but only two involved Indian tribes or Indian law issues.

In *Fredericks v. United States Department of the Interior*, a member of the Fort Berthold Reservation had a lease with the Department of the Interior ("DOI") allowing oil and gas development on lands he held in trust for his children.[335] The member passed away and his children asked the DOI to declare the lease invalid, but the DOI determined the lease was validly executed, so the children sought a preliminary injunction

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330. *McGirt*, 140 S. Ct. at 2482 (voting against tribal interests); Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. at 1022 (voting against tribal interests); *Herrera*, 139 S. Ct. at 1703 (voting against tribal interests); *cf. Cooley*, 141 S. Ct. at 1641 (voting in favor of tribal interests).

331. Schlemm v. Carr, 760 Fed. Appx. 431, 433 (2019).

332. *Id.* at 436-37.

333. *See* Tweedy, *supra* note 264, at 746-48 (discussing Justice Scalia's view that precedent has less force in Indian law and can be disregarded when warranted).

334. *Ketanji Brown Jackson*, *supra* note 313.

335. Fredericks v. United States DOI, No. 20-cv-2458, 2021 U.S. Dist. LEXIS 123714, at *1 (D.D.C. July, 1 2021).

preventing the release of lease proceeds.[336] Then Judge Jackson found the children were unlikely to succeed on the merits and no irreparable harm would come by releasing the proceeds, denied the preliminary injunction.[337]

In *Mackinac Tribe v. Jewell*, the Mackinac Tribe sought a declaration they were a federally recognized tribe and thus entitled to benefits under the Indian Reorganization Act.[338] There, Judge Jackson found that the Mackinac Tribe failed to seek an agency decision through the DOI regarding recognition before filing in federal court, and so granted judgement against the tribe.[339]

Neither of these decisions involved any extensive dive into Federal Indian Law principles, but instead turned on interpretations of agency action. Since Justice Jackson has such a limited record, it is nearly impossible to predict how she will approach these Federal Indian Law issues.[340]

V. CONCLUSION

Cooley may signal the start of something new, a Supreme Court no longer blind to the impact of its Indian law decisions on the millions of people those decisions affect. The Court's focus on the necessity of tribal policing and attention to the need for safety of tribal officers and tribal governments is remarkable. This new judicial philosophy is best characterized by "do no harm."

Although the *Cooley* decision is a narrow one, it establishes valuable precedent in a field of law which is historically neglected. The functionalist view the Court takes surrounding the second *Montana* exception may prove to be a tool for future expansions of tribal sovereignty. If Justice Gorsuch is able to exercise his authority and knowledge on the Supreme Court, we could also see continued gains for tribal interests. While tribal sovereignty, and even tribal safety, face serious obstacles to overcome in the future, there is a future.

336. *Id.* at *1-2.

337. *Id.* at *2-3.

338. Mackinac Tribe v. Jewell, 87 F. Supp. 3d 127, 133 (D.D.C. 2015).

339. *Id.* at 144.

340. *See* Memorandum from Joel West Williams, Senior Staff Att'y, Native Am. Rts. Fund, to Tribal Leaders, Nat'l Cong. of Am. Indians (March 17, 2022), sct.narf.org/articles/indian_law_jurispurdence/Ketanji%20Brown%20Jackson%20-%20Indian%20Law%20(final).pdf [perma.cc/SJ6K-K9TV] (discussing Justice Jackson's background and judicial history in the context of Federal Indian Law).