

**RETURN TO WORCESTER:
DOLLAR GENERAL AND THE RESTORATION OF
TRIBAL JURISDICTION TO PROTECT NATIVE
WOMEN AND CHILDREN**

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INTRODUCTION

The Supreme Court’s recent 4-4 tie-vote in *Dollar General Corp. v. Mississippi Band of Choctaw Indians* signals a distinctive shift away from the incoherent modern framework created by *Oliphant v. Suquamish Indian Tribe*—a framework that stripped Tribal Nations of their inherent authority to protect Native women from non-Indian perpetrated violence.¹ With four Justices voting for—and not against—tribal jurisdiction,² *Dollar General* signals a return to the Court’s 1832 decision in *Worcester v. Georgia*, wherein the Court affirmed the exclusive authority of Tribal Nations to exercise criminal jurisdiction over non-Indians who willingly enter tribal lands.³ For Native women—and the Tribal Nations that seek to protect them—the Court’s 2016 result in *Dollar General* signals a significant victory.

Physical and sexual violence against Native women and children have been used as a weapon of war since 1492. From Columbus to the Sand Creek Massacre,⁴ the various colonial conquests forged on this continent have focused on destroying Tribal Nations by eliminating the women who give life to their citizens. In many instances, this strategy proved nearly successful. But as of 2017, at least 567 sovereign Tribal Nations have survived the onslaught of oppression by the United States.⁵

Despite the survival of these sovereign Nations, non-Indian perpetrated violence against Native women and children continues. What began as a colonial conquest has transformed into a contemporary cultural norm. Native women are more likely to be battered, raped, or sexually assaulted than any

¹ Compare *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159, 2159–60 (2016), with *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

² See *Dollar Gen.*, 136 S. Ct. at 2159–60.

³ *Worcester v. Georgia*, 31 U.S. 515, 553–57, 559–61 (1832).

⁴ Tony Horowitz, *The Horrific Sand Creek Massacre will be Forgotten No More: The Opening of the National Historic Site in Colorado Helps Restore to Public Memory One of the Worst Atrocities Ever Perpetrated on Native Americans*, SMITHSONIAN MAG. (Dec. 2014), <http://www.smithsonianmag.com/history/horrific-sand-creek-massacre-will-be-forgotten-no-more-180953403> [<https://perma.cc/MN6X-3QLK>] (detailing atrocities committed against a Cheyenne village in what is present-day Colorado).

⁵ Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915 (Jan. 17, 2017) (listing all federal recognized tribes).

other female population in the United States.⁶ Likewise, Native children suffer rates of trauma 2.5 times higher than the national average.⁷ The rates of violence that persist against Native women and children today constitute nothing less than a crisis.

Tribal Nations, however, have not merely accepted the violence that accompanied colonial conquest. Instead, during the nineteenth century, many Tribal Nations codified their pre-existing rules, values, and traditions that recognized women as sacred into written laws that rendered acts of violence against women a crime against the Nation.⁸ These laws were not limited to tribal citizens and thus applied to non-Indians and Indians alike.⁹ By the early 1800s, many Tribal Nations exercised jurisdiction over anyone who came onto their lands and committed crimes—regardless of the perpetrator’s race or citizenship.¹⁰

In 1832, the U.S. Supreme Court’s rejection of Georgia’s arguments against tribal jurisdiction on tribal lands affirmed the legitimacy of tribal laws that criminalize the conduct of non-Indians, including non-Indian American citizens.¹¹ At a time when Georgia was attempting to take land and jurisdiction from the Cherokee Nation, the Court considered whether the State of Georgia, or Cherokee Nation alone, could exercise criminal jurisdiction over non-Indian American citizens who willfully enter Cherokee Nation lands.¹² In *Worcester v. Georgia*, the Supreme Court concluded that Georgia could exercise *no* jurisdiction over non-Indians residing on Cherokee Nation’s lands because the authority to exercise such jurisdiction was “exclusive” to Cherokee Nation as a sovereign nation.¹³

The Supreme Court’s decision in *Worcester* articulated three profound ideas. The *Worcester* Court: (1) concluded that the United States’ colonial conquest of Indian Nations did not strip them of their inherent sovereignty;¹⁴ (2) departed from prior practice of describing Indian Nations, and their citi-

⁶ BUREAU OF JUSTICE STATS., OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992-2002, at 7 (2004), <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=203097> [<https://perma.cc/HVL4-QXNH>] [hereinafter AMERICAN INDIANS AND CRIME].

⁷ DOLORES SUBIA BIGFOOT ET AL., *Trauma Exposure in American Indian/Alaska Native Children*, CORINNE WOLFE CTR. FOR CHILD & FAMILY JUSTICE (2008), <http://childlaw.unm.edu/videos/ICWA2012/documents/TraumaFactsheet2009.pdf> [<https://perma.cc/4FN9-UQ9U>].

⁸ *See, e.g.*, Laws of the “Old Settlers” or Western Cherokees: Adopted at Various Periods, § 6 An Act for the punishment of criminal offenses (adopted March 21, 1831), in LAWS OF THE CHEROKEE NATION ADOPTED BY THE COUNCIL AT VARIOUS PERIODS (1852), at 168–69, <https://www.loc.gov/law/help/american-indian-consts/PDF/28014183.pdf> [<https://perma.cc/5KCR-XFAC>] [hereinafter LAWS OF THE CHEROKEE NATION (1852)].

⁹ *See infra*, Section II.

¹⁰ *See infra*, Section II.

¹¹ *See Worcester v. Georgia*, 31 U.S. 515, 553–57, 559–61 (1832).

¹² *See id.* at 540–41.

¹³ *See id.* at 557.

¹⁴ *See id.* at 561 (declaring Cherokee Nation to be a “[N]ation, . . . a distinct community, occupying its own territory, with boundaries accurately described, in which the laws

zens, as racially inferior to the United States and its citizens;¹⁵ and (3) indicated that Indian Nations constitute the exclusive sovereign with authority over their lands.¹⁶ At its core, *Worcester* stands as a complete and total affirmation of tribal sovereignty and jurisdiction.

Nearly one hundred and fifty years later, however, the Court effectively re-wrote—or perhaps attempted to erase—the foundational tenets announced in *Worcester*. In the 1978 decision *Oliphant v. Suquamish Indian Tribe*, the Supreme Court declared that Tribal Nations could no longer exercise criminal jurisdiction over non-Indians who commit crimes on tribal lands.¹⁷ To circumvent the controlling precedent articulated in *Worcester*, the Supreme Court reached back to *Johnson v. M'Intosh*,¹⁸ an 1823 decision that preceded, and arguably was overruled by, *Worcester*.¹⁹ According to the Court in *Johnson*, Tribal Nations could not claim legal title to their own lands because they were uncivilized “heathens”²⁰ and “fierce savages,”²¹ and thus pursuant to the “doctrine of discovery,” superior title to tribal lands vested in the white Christians who discovered it.²² The *Oliphant* Court relied on *Johnson* to conclude that if Tribes could not claim legal title to their land, they could not exercise criminal jurisdiction over the non-Indians who come onto it.²³ For the first time in United States history, in 1978, the Supreme Court stripped Tribal Nations of their inherent right to exercise jurisdiction over everyone who resides on or enters their lands.²⁴

Oliphant not only attempted to re-write *Worcester*, it also re-wrote the historical facts and narrative and that led to the Supreme Court’s 1832 affirmation of tribal jurisdiction. According to the Court in *Oliphant*, as of 1978, the exercise of tribal jurisdiction over non-Indians was “a relatively new phenomenon.”²⁵ A review of pre-removal tribal laws, however, reveals this statement to be far from the truth. What constituted a consistent exercise of jurisdiction over non-Indians as soon as they arrived on the continent in 1492 was formally codified in a series of written laws enacted by the legislatures of Tribal Nations beginning in the early 1800s—a full 150 years before

of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves . . .”).

¹⁵ See *infra* Section III, Part A.

¹⁶ See *Worcester*, 31 U.S. at 557.

¹⁷ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

¹⁸ See *id.* at 209 (quoting *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823)).

¹⁹ See LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICAN DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 133–34 (2005) (asserting that, in *Worcester v. Georgia*, Chief Justice Marshall intended to overrule *Johnson v. M'Intosh*).

²⁰ See *Johnson*, 21 U.S. at 577.

²¹ See *id.* at 590.

²² See *id.* at 576–77 (describing what is now termed the “doctrine of discovery”).

²³ See *Oliphant*, 435 U.S. at 208–10 (citing *Johnson*, 21 U.S. at 574).

²⁴ See Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 36 (1999).

²⁵ See *Oliphant*, 435 U.S. at 196–97.

the Court issued its decision in *Oliphant*.²⁶ Indeed, tribal regulation of non-Indian conduct on tribal lands was—by the mid-nineteenth century—quite extensive and highly developed.

However, because of *Oliphant*, Tribal Nations today have no jurisdiction to prosecute non-Indian perpetrators who rape, abuse, or murder Native women and children on tribal lands.²⁷ As a result, non-Indian perpetrated violence against Native women and children has become a crime that, for the most part, goes un-prosecuted.²⁸ Many perpetrators have learned they can abuse and harm Native women and children with impunity—and they take advantage of the shield *Oliphant* provides them.²⁹

As a result, Native women and youth are more likely to be victims of a violent crime such as rape, robbery, or aggravated assault than any other non-Native population in the United States.³⁰ The trauma in tribal communities is so significant that Native youth suffer rates of Post-Traumatic Stress Disorder (“PTSD”) at the same rate as soldiers returning from the wars in Afghanistan and Iraq.³¹ Recent studies published by the National Institute of

²⁶ See *infra* Section II.

²⁷ In 2013, Congress passed a reauthorization of the Violence Against Women Act (VAWA). That legislation created an “*Oliphant* fix” for cases of domestic violence. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. IX, 127 Stat. 54, 118–26 (2013). Tribal Nations that comply with the requirements of the law are now permitted to exercise inherent criminal jurisdiction over non-Indians. See *id.* However, the scope of the fix is extremely narrow—applying only to crimes of domestic violence, dating violence, and violation of protection orders. *Id.* at 122. The 2013 VAWA reauthorization, therefore, does not restore Tribal Nations’ criminal jurisdiction over non-Indians who commit sexual assault or child abuse on tribal lands. See *id.*

²⁸ See Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1568 (2016) (“[T]he federal government’s limited resources combined with an array of disincentives to investigate and prosecute Indian country crimes means that remarkably few are ever even superficially pursued.”); see also DEWI IOAN BALL, THE EROSION OF TRIBAL POWER: THE SUPREME COURT’S SILENT REVOLUTION 16 (2016) (noting that “[f]ederal authorities were neglecting to investigate thousands of cases – 94 percent of reported crimes”).

²⁹ See HEIDI HEITKAMP, *Jurisdictional No-Man’s Land: Explaining to FBI Director Comey Why Our Tribes Need a Cop on the Beat*, MEDIUM (June 6, 2016), <https://medium.com/@SenatorHeitkamp/jurisdictional-no-mans-land-explaining-to-fbi-director-comey-why-our-tribes-need-a-cop-on-the-e960be5578f1> [<https://perma.cc/6LYT-5B7G>] (“Because major crimes on tribal lands fall under the jurisdiction of federal law enforcement—criminals believe that there is a good chance their crimes will go uninvestigated and unprosecuted—and they’re right. In Indian Country, such jurisdictional issues leave no cop on the beat to stop them . . . Criminals seeking refuge on [tribal] land ha[ve] been ravaging Native communities.”).

³⁰ AMERICAN INDIANS AND CRIME, *supra* note 6, at 7.

³¹ ATT’Y GEN.’S ADVISORY COMM. ON AM. INDIAN/ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT OF JUSTICE, ENDING VIOLENCE SO CHILDREN CAN THRIVE 38 (2014), https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf [<https://perma.cc/E33X-85YG>] [hereinafter ENDING VIOLENCE] (“[O]ne report noted that AI/AN juveniles experience post-traumatic stress disorder (PTSD) at a rate of 22 percent. Sadly, this is the same rate as veterans returning from Iraq and Afghanistan, and triple the rate of the general population.”).

Justice report that of all American Indians who have suffered violence, around ninety percent experienced violence perpetrated by a non-Indian.³² There can be no question that the inability of Tribal Nations to prosecute the non-Indians committing violent crimes against Native people contributes to their persistence. Although violence against Native women and children traces its roots to the origins of colonial conquest, its continued cultural acceptance is made possible by a specious legal framework the Supreme Court put in place in 1978.

The Court in *Oliphant*, however, said nothing about *civil* jurisdiction. That is, although the *Oliphant* Court eliminated tribal *criminal* jurisdiction over non-Indians, the Court left *civil* jurisdiction over non-Indians intact.³³ While later cases did restrict tribal civil jurisdiction in certain circumstances,³⁴ no decision has fully stripped Tribal Nations of civil jurisdiction over non-Indians. This authority, however, was directly challenged in 2015, when a corporation asked the Supreme Court to eliminate *all* forms of tribal jurisdiction over non-Indians.

In *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, the Dollar General Corporation asked the Supreme Court to apply *Oliphant* to a case concerning civil jurisdiction and conclude that Tribal Nations could no longer exercise *any* jurisdiction over non-Indians, civil or criminal.³⁵ The corporation challenged the jurisdiction of the Mississippi Band of Choctaw Indians (“MBCI”) after the parents of a MBCI youth filed a civil lawsuit in Choctaw Civil Court alleging the corporation’s non-Indian store manager sexually assaulted the Choctaw youth during the youth’s internship at the store.³⁶ Although *Oliphant* precluded MBCI from prosecuting the perpetrator, the Supreme Court’s preservation of tribal *civil* jurisdiction over non-Indians left the survivor’s parents with the ability to file a lawsuit in Tribal Court seeking compensation for pain and suffering. This is precisely what the parents did.³⁷

Petitioner Dollar General’s argument in response was simple and profoundly problematic: the Tribal Court could not exercise jurisdiction over the company because the company was a non-Indian and, after *Oliphant*, Tribal Nations have no jurisdiction over non-Indians.³⁸ After four separate courts

³² ANDRÉ B. ROSAY, NAT’L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT. OF JUSTICE, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN: 2010 FINDINGS FROM THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 19 (2016) <https://www.ncjrs.gov/pdffiles1/nij/249736.pdf> [<https://perma.cc/PY2E-V7AY>] (violence is defined as “psychological aggression by intimate partners,” “physical violence by intimate partners,” stalking, or “sexual violence”).

³³ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

³⁴ See *Montana v. United States*, 450 U.S. 544, 565–66 (1981).

³⁵ Brief for Petitioners at 16, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496).

³⁶ Brief for Respondents at 10, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496).

³⁷ *Id.* at 10–11.

³⁸ Brief for Petitioners, *supra* note 35, at 16.

(two Tribal and two lower federal) declared the Tribe able to exercise civil jurisdiction over Dollar General, the company took its plea to the U.S. Supreme Court.³⁹

To be fair, the corporation had a good deal of weight on its side. Since *Oliphant*, the Court has repeatedly noted that Tribal Nations can, technically, continue to exercise civil jurisdiction over non-Indians, but every time a case reaches the Court, the Court concludes that—in that instance and under those particular facts—the Tribe cannot.⁴⁰ Since *Oliphant*, non-Indian litigants have repeatedly scored victories against tribal jurisdiction in the U.S. Supreme Court over the last forty years.⁴¹ No precedent or authority suggested Dollar General’s request could be denied—except for *Worcester*.

Petitioner Dollar General, however, did not cite—or even attempt to distinguish—*Worcester*.⁴² Instead, in its opening brief, Dollar General cited *Oliphant* on nearly every single page.⁴³ The corporation argued that the exercise of tribal civil jurisdiction over non-Indians should be eliminated entirely because the Court should reach “the same conclusion this Court reached regarding criminal jurisdiction in *Oliphant*.”⁴⁴

For the first time in forty years, the Court declined to follow *Oliphant*. In a 4-4 tie, the Court denied Dollar General’s request to strip Tribal Nations of their inherent civil jurisdiction over non-Indians and instead reached a result much closer to *Worcester*. As a result of the Supreme Court’s decision in *Dollar General*, the company must return to Tribal Court and actually litigate the actual merits of the claims brought against it.⁴⁵

For Native women and children, and the Tribal Nations that seek to protect them, the outcome in *Dollar General* is a victory. In 1978, the Su-

³⁹ See Petition for Writ of Certiorari at 1, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496).

⁴⁰ See, e.g., *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 333 (2008) (“Tellingly, with only one minor exception, we have never upheld under Montana the extension of tribal civil authority over nonmembers on non-Indian land.”).

⁴¹ See, e.g., *Nevada v. Hicks*, 533 U.S. 353 (2001) (9-0 decision in favor of Nevada, holding tribal court lacked jurisdiction over a tort claim brought against a state official); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (9-0 decision in favor of Atkinson, holding tribe lacked jurisdiction to impose a tax on non-Native hotel guests on “non-Indian fee land”); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (9-0 decision in favor of A-1 Contractors, holding that the Tribal Nation lacked jurisdiction to adjudicate a civil claim against a negligent driver on a public highway); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) (8-1 decision in favor of Iowa Mutual, holding that tribal jurisdiction was “ultimately subject to review” by a federal court); *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (9-0 decision in favor of NFU, holding that a District Court could determine if a Tribal Court had exceeded limits of jurisdiction).

⁴² See generally Brief for Petitioners, *supra* note 35 (omitting any reference to *Worcester*).

⁴³ See generally *id.* (citing *Oliphant* repeatedly throughout the brief).

⁴⁴ *Id.* at 24.

⁴⁵ See Brief for Petitioners, *supra* note 35 at 10–14 (noting the Mississippi Band of Choctaw Indians (MBCI) Supreme Court’s remand for further proceedings and all subsequent federal court decisions upholding the remand).

preme Court replaced *Worcester* with *Oliphant*, but in 2016, when asked to affirm the doctrine espoused in *Oliphant*, the Court declined to do so. By declining to extend and affirm *Oliphant*, the Supreme Court has turned away from *Oliphant*'s affirmation of the *Johnson* colonial conquest framework and, ultimately, signaled a shift back to *Worcester*. This Article also considers how contemporary threats to tribal sovereignty, including violence and trauma, require the Court to wholly re-consider *Oliphant* and its progeny as unworkable in addition to being inconsistent with long-established law. To this end, we seek to employ a fresh critique of *Oliphant* in light of *Dollar General* and the concurrent emergent activism by Native women to change federal law.⁴⁶ We tell the story of tribal jurisdiction over non-Indians from the perspective of Native women, a perspective often overlooked in contemporary Indian law scholarship.

We also note that, in recent decades, both the executive branch and the legislative branch have shown a trend toward a restoration of inherent tribal authority. New federal legislation, including the Tribal Law and Order Act of 2010⁴⁷ and the 2013 reauthorization of the Violence Against Women Act (VAWA),⁴⁸ affirms the sovereign-to-sovereign framework articulated in *Worcester* in the context of tribal criminal jurisdiction. When combined with the Court's outcome in *Dollar General*, we postulate that *Oliphant*'s days are numbered.

This Article proceeds in six parts. Part I examines the introduction of non-Indian perpetrated violence against Native women as a strategic and purposeful means to destroy tribal sovereignty and eradicate Tribal Nations, detailing the history of violence committed against Native women and children by Europeans and Americans dating back over 500 years. This foundation allows us to consider cases like *Worcester*, *Oliphant*, and *Dollar General* through a gendered lens wherein tribal sovereignty constitutes more than mere rhetoric; for Native women, sovereignty often marks the difference between life and death.

Part II reveals that the exercise of modern forms of tribal criminal jurisdiction over non-Indians is not a "relatively new phenomenon" as Justice Rehnquist wrote in *Oliphant*—but rather, tribal jurisdiction constitutes a

⁴⁶ Activism by Native women is often credited as the one of the most important aspects of federal law reform—namely the Tribal Law and Order Act and the Violence Against Women Act. See generally JACQUELINE AGTUCA, SAFETY FOR NATIVE WOMEN: VAWA AND AMERICAN INDIAN TRIBES (2014) (describing the history of Native women lobbying to pass VAWA and its various reauthorizations).

⁴⁷ Tribal Law and Order Act, Pub. L. No. 111-211, 124 Stat. 2258 (2010) (restoring the authority of Tribal Nations to sentence to individuals convicted of crimes in Tribal Courts to more than a one-year sentence, as previously limited by the Indian Civil Rights Act).

⁴⁸ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. IX, 127 Stat. 54, 118-26 (2013) (restoring the inherent jurisdiction of Tribal Nations over non-Indians who commit crimes on tribal lands, as historically recognized in numerous treaties signed by Tribal Nations and the United States, and ratified by the United States Senate).

practice that was firmly entrenched almost 200 years ago, well before Andrew Jackson’s forced Indian Removal and other federal policies attempted to eliminate the governmental functions of Tribal Nations altogether.

Part III of this Article details the Supreme Court’s decision in *Worcester v. Georgia*, wherein the Court upheld the exercise of tribal criminal jurisdiction as the “exclusive” authority over non-Indians who willingly enter tribal lands.⁴⁹

In Part IV, we explain how the *Oliphant* Court relied on the 1823 decision in *Johnson v M’Intosh* to effectively—although not blatantly—overturn *Worcester*. Part V examines the ways in which *Oliphant*’s elimination of tribal criminal jurisdiction over non-Indians has contributed to the current crisis of non-Indian perpetrated violence against Native women and children, and ultimately threatened the continued sovereignty of Tribal Nations.

Finally, in Part VI, we consider Dollar General’s request that the Supreme Court rely on *Oliphant* to eliminate Tribes’ civil jurisdiction over non-Indians—and the Court’s refusal to do so. When placed in its proper historical and contemporary contexts, it is clear that *Dollar General* signals a return to *Worcester*.

I. NON-INDIAN PERPETRATED VIOLENCE AGAINST NATIVE WOMEN WAS DESIGNED TO SECURE COLONIAL CONQUEST AND THE DESTRUCTION OF TRIBAL NATIONS

From its very inception, non-Indian perpetrated violence against Native women has been used purposefully as a tool to secure the destruction of Tribal Nations. Understanding the connection between safety for Native women and tribal sovereignty, therefore, highlights the damage caused by a decision such as *Oliphant*—a decision that truncates a Tribal Nation’s inherent right to protect its women and children from the majority of violent assaults perpetrated against them.

A. *Native Women Form the Foundation of Tribal Sovereignty*

The Nation shall be strong so long as the hearts of the women are not on the ground.

TSISTSISTAS (CHEYENNE)⁵⁰

The connection between safety for Native women and tribal sovereignty has been articulated in many forms and fashions. Various oral histories from modern Tribal Nations confirm that respect for women constituted

⁴⁹ *Worcester v. Georgia*, 31 U.S. 515, 553–57, 559–61 (1832).

⁵⁰ Telephone Interview with Suzan Shown Harjo, Cheyenne citizen, Cheyenne & Arapaho Tribes (December 6, 2015).

both tradition and law.⁵¹ It has long been recognized that without women and children, Tribal Nations would simply cease to exist. As former Eastern Band of Cherokee Indians Secretary of State Terri Henry explains:

[S]overeignty and safety are hand and glove. The sovereignty of Indian Tribes is connected to the safety of Native women. This connection is the natural relationship of a People to their nation. It is also the natural relationship of a government to protect and safeguard the lives of its citizens.⁵²

United States government officials have acknowledged the connection between safety for Native women and children and the preservation—or restoration—of tribal sovereignty.⁵³ For instance, in 2014, former Senator Byron Dorgan, who headed the Attorney General’s Advisory Committee on American Indian and Alaska Native Children Exposed to Violence, concluded that “[t]here is a vital connection between tribal sovereignty and protecting [Native] children.”⁵⁴

Non-governmental organizations have likewise recognized and affirmed the connection between safety for Native women and children and the restoration of tribal jurisdiction and sovereignty. In 2007, Amnesty International published its report, *Maze of Injustice*, documenting the incredibly high rates of violence against Native women in the United States.⁵⁵ In its report, Amnesty International recognized that “[a]s citizens of particular Tribal Nations, the welfare and safety of American Indian and Alaska Native women are directly linked to the authority and capacity of their nations to address such violence.”⁵⁶ So long as the inherent authority of Tribal Nations to prosecute violent crimes remains constrained by the legal framework the Supreme Court has put in place, the safety of Native women and children will continue to be diminished. For Tribal Nations, this continued threat to

⁵¹ See generally Tarrell Awe Agahe Portman & Roger D. Herring, *Debunking the Pocahontas Paradox: The Need for a Humanistic Perspective*, 40 J. HUMANISTIC COUNSELING, EDUC. & DEV. 185, 188 (2001) (stating that “Native American Indian women were considered equally essential to the functioning of tribal societies as they were in the period after contact with Europeans”).

⁵² Phone Interview with Terri Henry, Secretary of State, Eastern Band of Cherokee Indians (Sept. 14, 2015).

⁵³ ENDING VIOLENCE, *supra* note 31, at 7. Likewise, in 2001, Larry EchoHawk, who later became Assistant Secretary of Indian Affairs in the Obama administration, wrote that, “nothing is more important than protecting the health, safety, and welfare of . . . [Native] children. Without physically and mentally healthy children, there is no bright future.” Larry EchoHawk, *Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation?*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 83, 84 (2001).

⁵⁴ ENDING VIOLENCE, *supra* note 31, at 7.

⁵⁵ See generally AMNESTY INT’L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007), <http://www.amnestyusa.org/pdfs/mazeofinjustice.pdf> [<https://perma.cc/D376-KHWA>] (demonstrating high rates of sexual violence against Native women in the United States).

⁵⁶ *Id.* at 1.

women and children undermines the survival of their Nations politically, economically, physically, and spiritually.

Because the Court's decision in *Oliphant* restricted the right of Tribal Nations to prosecute non-Indians who commit acts of violence against Native women and children on tribal lands,⁵⁷ *Oliphant* threatens nothing less than the continued existence of Tribal Nations.

B. Non-Indian Perpetuated Violence Was Purposefully Used Against Native Women and Children as a Form of Colonial Conquest

Although Native women and children endure some of the highest rates of violence, assault, rape, and murder in the United States today,⁵⁸ these high rates of violence did not form overnight—or even in the last few decades. Instead, these high rates of violence are centuries old and trace their origins to the inception of the United States as a nation and colonial conqueror. Understanding the violence perpetrated against Native Women in the fifteenth through nineteenth centuries is critical to understanding the violence that continues today, as well as the full impact of a legal framework that prohibits Tribal Nations from protecting their women from crimes that trace their origins to the United States' colonial conquest.

The first non-Indians to arrive on what now constitutes United States soil recognized the connection between safety for Native women and tribal sovereignty, and with this recognition, purposefully used violence against Native women in an attempt to conquer and destroy Tribal Nations. Europeans targeted Native women for assault and annihilation from the very early days of contact dating to the late fifteenth century.⁵⁹ On the second voyage of Columbus, Michele de Cuneo, an aristocratic shipmate, boasted of kidnapping, beating, and raping a Carib (Native) woman.⁶⁰ From that point forward, rape and murder were utilized as two of the primary techniques to attack and conquer Tribal Nations, and were strategically deployed on a massive scale, coloring nearly every conflict between Europeans and Native people.⁶¹ Following Columbus, the Spanish conquest of North America was

⁵⁷ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

⁵⁸ AMERICAN INDIANS AND CRIME, *supra* note 6, at 7.

⁵⁹ “The rape of female Indian prisoners of war and the sexual abuse of Indian women through luxuries, prestige, and better treatment are so common in American military history that the point hardly needs to be made.” David R. Wrone & Russell S. Nelson, Jr., *Introduction to WHO’S THE SAVAGE?: A DOCUMENTARY HISTORY OF THE MISTREATMENT OF THE NATIVE NORTH AMERICANS* 17 (David R. Wrone & Russell S. Nelson, Jr. eds., 1982).

⁶⁰ Michele de Cuneo, *Letter to a Friend*, in *THE DISCOVERY OF AMERICA AND OTHER MYTHS: A NEW WORLD READER* 129 (Thomas Christensen & Carol Christensen eds., 1992).

⁶¹ See, e.g., DAVID PETERSON DEL MAR, *BEATEN DOWN: A HISTORY OF INTERPERSONAL VIOLENCE IN THE WEST* 13 (2002).

continually marked by sexual violence.⁶² Historic accounts of DeSoto's army are brutal and graphic.⁶³ These episodes of massacres followed by mass rapes are well-documented and widespread.⁶⁴ In fact, "[m]any Indian women first knew the white man as a violent creature who killed their men-folk and seized by all force all young and good-looking females."⁶⁵

Non-Indian perpetrated violence against Native women has constituted a significant threat to tribal sovereignty from its very inception in part because, prior to colonial contact, it was extremely rare. Much like smallpox, widespread, rampant violence against Native women was something Tribal Nations had never experienced, and thus were not immediately prepared to handle.⁶⁶ Prior to colonial contact, most Tribal Nations had extremely low rates of interpersonal violence, including domestic violence and sexual assault.⁶⁷

One theory as to why gendered violence was so rare has to do with the gendered cosmology of Native people. In contrast to Native women, European women were often seen as property under the laws of their nations and as such, European women were largely disenfranchised and oppressed—the perfect precursor to justify violence and abuse.⁶⁸ Native women were largely free from systemic oppression because, in contrast to European women, the traditional laws of Tribal Nations honored and protected the role of women

⁶² Susan Armitage, *Women and the New Western History*, 9 *ORG. AM. HIST. MAG. HIST.* 23 (1994) ("It is well documented that Spanish-Mexican soldiers in Spanish California and New Mexico used rape as a weapon of conquest.").

⁶³ See, e.g., David H. Dye, *Death March of Hernando de Soto*, 42 *ARCHEOLOGY* 26, 29 (1989) ("The impact on the Indians of guns, war dogs, horses, and men with cross-bows, halberds, lances, swords, and knives was devastating.").

⁶⁴ See, e.g., Charles C. Mann, *1491*, *ATLANTIC* (Mar. 2002), <https://www.theatlantic.com/magazine/archive/2002/03/1491/302445/> [<https://perma.cc/64MC-MVKE>] ("For four years [de Soto's] force, looking for gold, wandered through what is now Florida, Georgia, North and South Carolina, Tennessee, Alabama, Mississippi, Arkansas, and Texas, wrecking almost everything it touched. The inhabitants often fought back vigorously, but they had never before encountered an army with horses and guns. Soto died of fever with his expedition in ruins; along the way his men had managed to rape, torture, enslave, and kill countless Indians.").

⁶⁵ WALTER O'MEARA, *DAUGHTERS OF THE COUNTRY: THE WOMEN OF THE FUR TRADERS AND MOUNTAIN MEN* 109 (1968).

⁶⁶ DEL MAR, *supra* note 61, at 13, 18–19 (describing varied levels of intermarriage abuse against Native women pre-colonial contact, but generally harmonious marriages and an "intolerance for wife beating").

⁶⁷ DEL MAR, *supra* note 61, at 13. See also KATHLEEN A. EARLE, *NAT'L INDIAN CHILD WELFARE ASS'N, CHILD ABUSE AND NEGLECT: AN EXAMINATION OF AMERICAN INDIAN DATA* 16 (2000), <http://muskie.usm.maine.edu/helpkids/rcpdfs/B060041.pdf> [<https://perma.cc/GY4L-46FN>] (noting that a side effect of forcible placement of Native children in boarding schools was "the learned physical and sexual abuse of others previously unknown among American Indian/Alaska Native people who traditionally treated children with great respect" (internal citations omitted)).

⁶⁸ See generally Olwen Hufton, *THE PROSPECT BEFORE HER: A HISTORY OF WOMEN IN WESTERN EUROPE 1500-1800* (1995) (exploring how few legal rights European women had).

in both family and government.⁶⁹ Accordingly, it is not surprising that Native women from the Haudenosaunee Confederacy provided input and guidance to nineteenth century white feminists seeking to start a suffrage movement in the United States.⁷⁰

These understandings are confirmed by the Europeans and Americans who wrote journals or reports memorializing their experience living amongst Native people.⁷¹ William Bartram, a botanist who lived among the Mvskoke and Cherokee people in the late eighteenth century, wrote: “An Indian never attempts,—nay, he can’t use a woman of any description amongst them with indelicacy or indecency, either in action or language. I never saw nor heard of an instance of an Indian beating his wife or any female, or reproving them in anger or harsh language.”⁷²

Another theory addressing the low crime rates pre-colonial contact amongst Tribal Nations highlights the significant consequences Tribal Nations imposed on those who broke tribal law and mistreated women and children.⁷³ Dakota scholar Elizabeth Cook-Lynn explains, “[m]en who caused stress in the community or risk to the survival of the tribe by dishonoring women were held accountable by the people. They could not carry the sacred pipe, nor could they hold positions of status.”⁷⁴ Likewise, observers documented community responses to violence against women and children.⁷⁵ Taken as a whole, the widespread attacks on Native women and children introduced a new and unprecedented threat to the continued survival of Tribal Nations.

Given the central role of women in tribal cultures and government, any threat to Native women necessarily implicates political sovereignty. The Dakota, for instance, believed that “[n]o people goes down until their women are weak and dishonored, or dead upon the ground.”⁷⁶ However, attacks on Native women threatened not just political sovereignty, but cultural sovereignty as well—the very existence of Tribal Nations as distinct political and

⁶⁹ See, e.g., Jessica Nordell, *Millions of Women Voted This Election. They Have the Iroquois to Thank*, WASH. POST (Nov. 24, 2016), <https://www.washingtonpost.com/post/everything/wp/2016/11/24/millions-of-women-voted-for-hillary-clinton-they-have-the-iroquois-to-thank> [<https://perma.cc/V544-PK8P>] (describing the political authority and importance given to women of the Iroquois Confederacy).

⁷⁰ *Id.*

⁷¹ Cf. DEL MAR, *supra* note 61, at 18 (detailing intolerance for spousal abuse in Native Communities).

⁷² WILLIAM BARTRAM, OBSERVATIONS ON THE CREEK AND CHEROKEE INDIANS (1789), reprinted in WILLIAM BARTRAM ON THE SOUTHEASTERN INDIANS 139, 152 (Gregory A. Waselkov and Kathryn E. Holland Braund eds., 1995).

⁷³ See, e.g., JAMES AXTELL, THE EUROPEAN AND THE INDIAN: ESSAYS IN THE ETHNOHISTORY OF COLONIAL NORTH AMERICA 182 (1981) (noting that some tribal nations historically imposed the death penalty for rape).

⁷⁴ Elizabeth Cook-Lynn, *The Big Pipe Case*, in WHY I CAN’T READ WALLACE STEGNER AND OTHER ESSAYS: A TRIBAL VOICE 110, 115 (1996).

⁷⁵ DAVID PETERSON DEL MAR, WHAT TROUBLE I HAVE SEEN: A HISTORY OF VIOLENCE AGAINST WIVES 27 (1996).

⁷⁶ MARIE SANDOZ, THESE WERE THE SIOUX 95 (1961).

ethnic entities. In the Southeastern region of what is now the United States, for example, the women were “situated at the center of economic, social, and cultural activities.”⁷⁷ Moreover, Southeastern culture was both matrilineal and matrilocal, which centers the women’s lineage as the primary source of identity for herself and her children.⁷⁸ Historian Rose Strelau notes, for example, that “Cherokees were a people of mothers. . . .”⁷⁹ Because Native women and men were valued equally in the political, social, and cultural frameworks of Tribal Nations, the occurrence of domestic, gendered violence was very low.

While rape and sexual assault were used to deliberately oppress Tribal Nations, there is little evidence that Tribal Nations attempted the same on citizens of the United States.⁸⁰ There are very few historical accounts of Native men raping white women, even in times of war.⁸¹ Tribal leaders reflected on this distinction. For example, Nez Perce Chief Joseph famously referenced the sexual assault committed by white soldiers against Native women prisoners, comparing his own people’s treatment of white women prisoners:

On the way we captured one white man and two white women. We released them at the end of three days. They were treated kindly. The women were not insulted. Can the white soldiers tell me of one time when Indian women were taken prisoners, and held three days and then released? Were the Nez Perce’s women who fell into the hands of General Howard’s soldiers treated with as much respect?⁸²

Members of the military regularly employed gendered violence as a technique to control and terrorize Native women through the nineteenth century. In December 1863, the Seventh Iowa Cavalry rode into a Ponca camp and demanded that the women sleep with them.⁸³ A grisly account follows:

Alarmed, the Ponca fled through the back of their tipis The soldiers destroyed the tipis, set their blankets and saddles on fire,

⁷⁷ Catherine E. Burnette, *Indigenous Women’s Resilience and Resistance to Historical Oppression: A Case Example from the United States*, 30 *AFFILIA* 1, 3 (2015).

⁷⁸ *Id.*

⁷⁹ ROSE STRELAU, *SUSTAINING THE CHEROKEE FAMILY: KINSHIP AND THE ALLOTMENT OF AN INDIGENOUS NATION* 47 (2011).

⁸⁰ *Cf.* SHARON BLOCK, *RAPE AND SEXUAL POWER IN EARLY AMERICA* 82 (2006) (describing a much greater incidence of European men sexually abusing Native women than of Native men sexually abusing European women).

⁸¹ *Cf.*, AXTELL, *supra* note 73, at 181–83 (describing some of the reasons, religious, aesthetic, and otherwise, why Native Americans would not have raped female captives or others encountered during war and recounting that “[m]any redeemed prisoners made a point of insisting that . . . the Indians never affronted them sexually”).

⁸² Young Joseph, Chief of the Nez Perce, *An Indian’s Views of Indian Affairs*, CCLXVI *NORTH AM. REV.* 426 (1879), *reprinted in WHO’S THE SAVAGE*, *supra* note 59, at 133.

⁸³ JOE STARITA, *I AM A MAN: CHIEF STANDING BEAR’S JOURNEY FOR JUSTICE* 30–31 (2009).

shot up their cooking kettles, and threw away their corn. . . . As one woman fled carrying her child, a trooper shot her in the side, the bullet lodging in the child's thigh. . . . Not far away, two soldiers found a group of women and children hiding in the bush. They dismounted, walked up to the women, and shot three of them in the face. Then they turned their revolvers on a twelve-year-old girl, riddling her breasts at point blank range.⁸⁴

Sadly, the attack on the Ponca Tribe is not a lone instance of the United States' nineteenth-century use of military violence against Native women and children. On November 29, 1864, seven hundred American cavalry troops attacked a peaceful Cheyenne and Arapaho village at Sand Creek in present day Colorado, murdering two hundred men, women, and children.⁸⁵ The American troops murdered pregnant women and paraded their genitalia as trophies.⁸⁶

Violence against Native women was also used during forced Indian removals. While the 1830s era "Trail of Tears" is the most well-known reference to forced migration of Tribal Nations, many removals—often forced—took place hundreds of times in the history of the United States.⁸⁷ During the forced removal of Cherokee Nation, for example, "[a] Methodist missionary reported the case of a 'young married woman' who had been 'caught' by soldiers, 'dragged about,' plied with liquor, and 'seduced away.'"⁸⁸ According to the same source, "many [others] of the poor captive women are thus debauched through terror and seduction."⁸⁹

Once confined to reservations, many soldiers took advantage of the hunger, fatigue, and fear that had become commonplace among many Native people. A Yankton Dakota chief named The-Man-that-was-Struck-in-the-face-by-the-Ree spoke to a federal commission in 1865 about the nature of this exploitation: "Before the soldiers came along we had good health; but once the soldiers come along they go to my squaws and want to sleep with them, and the squaws being hungry will sleep with them in order to get something to eat."⁹⁰ Indeed, the translation alone highlights the violence inflicted by American colonial conquest, as there is no word for "squaw" in Dakota. Instead, the interpreter for the federal commission translated the

⁸⁴ *Id.* at 30–31.

⁸⁵ Horowitz, *supra* note 4.

⁸⁶ *Id.*

⁸⁷ Lindsay Glauner, *The Need for Accountability and Reparations: 1830–1976 the United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide against Native Americans*, 51 DEPAUL L. REV. 911, 929 (2002).

⁸⁸ John Demos, *The Tried and the True: Native American Women Confronting Colonization* (1995), reprinted in, NO SMALL COURAGE 43 (Nancy F. Cott ed., 2000).

⁸⁹ *Id.*

⁹⁰ CONDITION OF THE INDIAN TRIBES: REPORT OF THE SPECIAL COMMITTEE APPOINTED UNDER JOINT RESOLUTION OF MARCH 3, 1865, S. REP. NO. 39-156, at 370–71 (1867) (statement of The-Man-that-was-Struck-in-the-face-by-the-Ree, a Principal Chief of the Yankton Sioux), reprinted in WHO'S THE SAVAGE, *supra* note 59, at 114.

Yankton Dakota Chief's reference to "women" into the American colonial phrase "squaws"—a demeaning word used to dehumanize Native women and justify the violence committed against them.⁹¹

C. The Violence that Began as Colonial Conquest Transformed into a Practice Culturally Accepted and Perpetuated by the Dominant American Culture

The violence that began as a form of military conquest in the sixteenth and seventeenth centuries became—by the eighteenth and nineteenth centuries—culturally accepted conduct practiced by European and American *civilians*—unassociated with the United States military. Furthermore, non-Indian violence against Native women was not only accepted, it was often rewarded. As contact between non-Indians and tribal citizens increased, violence committed by non-Indians against Native women became more common.⁹²

Dollar General is not the first company to set up shop in Indian country, nor is the general manager the first employee of such a business to be accused of sexual misconduct. Commerce and trade with and by non-Indians from the seventeenth through the eighteenth and nineteenth centuries was marked by instances of store owners and traders showing disrespect for the laws of Tribal Nations by cheating Indians out of money, plying Indians with alcohol and—sometimes not as often discussed—instances of violence against Native women and children.⁹³ The problem has been documented as an issue with English and French traders in pre-colonial days⁹⁴ as well as American fur-traders beginning in the eighteenth century and continuing throughout the nineteenth century. In that sense, the dynamics at play in *Dollar General* are nothing new to tribal communities.

In the eighteenth century, for example, many traders stole Indian women for "wives"—without the consent of the victim or her family. One contemporary account describes a trader who "took a young Indian against her Will for his Wife, and cruelly whipped her and her Brother for accepting a few Beades from her, to the great Grief of the Indians there present."⁹⁵ Tribal leaders spoke out about these trader abuses; for instance, in 1764, a

⁹¹ See generally C. Richard King, *De/Scribing Squaw: Indigenous Women and Imperial Idioms in the United States*, 27 AM. INDIAN CULTURE AND RES. J. 1 (2003) (exploring the racial and misogynist implications of the word "squaw").

⁹² See, e.g., Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J. L. & PUB. POL'Y 121, 132 (2004) (explaining that "sexual assault of Native women by non-Native men was not isolated to any particular geographic area, but was widespread").

⁹³ See, e.g., ROBERT E. BIEDER, *NATIVE AMERICAN COMMUNITIES IN WISCONSIN 1600–1960: A STUDY OF TRADITION AND CHANGE* 62 (1995) (noting that French traders were accused of "despoil[ing] the Indians with liquor and sexual abuse").

⁹⁴ See *id.*

⁹⁵ Journal of the Commissioners of the Indian Trade September 20, 1710–August 29, 1718, at 3–4, 5, 10–11, reprinted in WHO'S THE SAVAGE, *supra* note 59, at 43.

Creek leader formally complained to the British that white men were engaged in the sexual exploitation of Native women.⁹⁶

Throughout the nineteenth century, missionaries and Indian agents often wrote about the mistreatment of Native women by white men at forts and on reservations. Joseph Williams, a Methodist minister, visited Fort Wintey (Utah) in 1842.⁹⁷ He wrote of “the debauchery of the [white] men among the Indian women. They would buy and sell them to one another.”⁹⁸ Reverend Williams also noted that the primary Fort Wintey trader was engaged in trafficking Native women, noting that he “had collected several of the Indian squaws and young Indians, to take to New Mexico, and kept some of them for his own use. The Spaniards would buy them for wives.”⁹⁹

Miners in California in the mid-nineteenth century developed a horrific reputation of stealing, beating, and killing Native women and children.¹⁰⁰ In 1853, E.A. Stevenson, a special federal Indian agent in El Dorado County (present day California), wrote with despair to Thomas Henley, Superintendent of Indian Affairs in San Francisco, that white miners were wreaking havoc on the small Indian communities under his oversight.¹⁰¹ Most of the incidents he described dealt with the kidnapping of Native women: “Two miners had seduced a couple of squaws and were living with them or keeping them as prostitutes. The Indians went to the cabin and demanded their women, when they were fired upon by the miners which resulted in the immediate death of one and dangerously wounding another.”¹⁰²

Stevenson continued by explaining how these white men could expect to escape legal punishment: “[T]here was nothing but Indian evidence that could be obtained to punish these villains, and as the Indian’s evidence is not allowed as against a White man in this State, they could not be convicted.”¹⁰³ Indian agents felt helpless to stop this trend. Another special Indian agent in Sonoma, M.C. Dougherty, wrote in 1854: “I am compelled to state that a band of scoundrels, generally fugitive Americans and Spaniards, are in the habit not only of carrying off Indian children, but also committing

⁹⁶ See BLOCK, *supra* note 80, at 3.

⁹⁷ JOSEPH WILLIAMS, NARRATIVE OF A TOUR FROM THE STATE OF INDIANA TO THE OREGON TERRITORY IN THE YEARS 1841–42, at 28, 80 (1921) (referring to the Fort Wintey by its other name, “Rubedeau’s [sic] Fort”).

⁹⁸ *Id.* at 80.

⁹⁹ *Id.* at 81.

¹⁰⁰ David R. Wrone & Russell S. Nelson, Jr., *Introduction to pt. IV: Age of Expansion*, in WHO’S THE SAVAGE?, *supra* note 59, at 80.

¹⁰¹ Letter from E.A. Stevenson to Thomas J. Henley (Dec. 31, 1853), in ROBERT F. HEIZER, THE DESTRUCTION OF CALIFORNIA INDIANS: A COLLECTION OF DOCUMENTS FROM THE PERIOD 1847 TO 1865 IN WHICH ARE DESCRIBED SOME OF THE THINGS THAT HAPPENED TO SOME OF THE INDIANS OF CALIFORNIA 16 (1993).

¹⁰² *Id.* at 17.

¹⁰³ *Id.*

outrages against their women, and I have not as yet the power to suppress it."¹⁰⁴

California Indian history is replete with examples of miners and other white men attacking and killing entire communities of Native people—under the justification that Native men had taken up arms to try to rescue kidnapped women and children. A San Francisco newspaper article from 1860 described one of the attacks that took place in Humboldt County, where white people specifically targeted women and children while the men were away, as one witness recorded: “The perpetrators seem to have acted with deliberate design to exterminate the Indian race.”¹⁰⁵ Miners routinely captured Indian women who were “either held as concubines by their kidnappers or sold to other white men for their personal use.”¹⁰⁶

Federal Indian agents themselves were sometimes part of the problem. In 1859, eleven white citizens of Tehama County complained to the Secretary of Interior that the Indian agent in their community, V.E. Geiger, was the source of many of the problems faced by Native women in their community.¹⁰⁷ They wrote, among other things, that the agent and his staff compelled “the squaws, even in the presence of their Indian husbands, to submit to their lecherous and beastly desires.”¹⁰⁸

In the twentieth century, violence against Native women and children continued as a culturally accepted American practice. Violence and oppression was a constant undercurrent of formal assimilation policies. For example, one of the driving forces behind the federal allotment policy, consummated in the Dawes Act, was to create “male-dominated households.”¹⁰⁹

Beyond the transplantation of patriarchy into the family laws of Tribal Nations, literal violence was played out on the bodies and spirits of children through the federal government’s boarding schools. There are numerous documented incidents of physical and sexual abuse perpetrated against Indian children in government and church boarding schools,¹¹⁰ where children were physically forced to relinquish their cultural and spiritual identities. For instance, in 1929, a teacher from the Pine Ridge reservation school testified in front of the Senate Committee on Indian Affairs that young Lakota boys were whipped, put in ball and chain, and locked in a room for weeks on end

¹⁰⁴ Letter from M.C. Dougherty to Thomas J. Henley (Dec. 12, 1854), in HEIZER, *supra* note 102, at 26.

¹⁰⁵ “EXTERMINATE THEM”: WRITTEN ACCOUNTS OF THE MURDER, RAPE, AND SLAVERY OF NATIVE AMERICANS DURING THE CALIFORNIA GOLD RUSH, 1848–1868, at 129 (Clifford E. Trafzer & Joel R. Hyer eds., 1999) (citing *Indian Butcheries in California*, S.F. BULL. (June 18, 1860)).

¹⁰⁶ TOMÁS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA 120 (1994).

¹⁰⁷ Petition from Tehama County citizens to Secretary of the Interior, in HEIZER, *supra* note 102, at 137–39.

¹⁰⁸ *Id.*

¹⁰⁹ STREMLAU, *supra* note 79, at 86.

¹¹⁰ Earle, *supra* note 67, at 14.

after trying to escape the school.¹¹¹ Sexual abuse was extremely common at the Wrangell Institute in Alaska, where children were beaten for speaking their language.¹¹² Even well into the mid-twentieth century, the majority of children at Wrangell “had no effective avenue of reporting abuse.”¹¹³

II. TRIBAL NATIONS EXERCISE THEIR SOVEREIGNTY TO PROTECT THEIR WOMEN FROM COLONIAL CONQUEST

Following the arrival of non-Indians on tribal lands, Tribal Nations did not simply passively accept the influx of colonial violence and assaults on their citizens. Instead, Tribal Nations exercised their inherent sovereignty and codified laws that protected their women and children from the increasing number of assaults they faced.¹¹⁴ By the late eighteenth century, many Tribal Nations were able to reconfigure their longstanding laws prohibiting the mistreatment of women and children into a contemporary structure that could be understood by non-Indians.¹¹⁵

In the early 1800s, Tribal Nations in the Southeast, where the non-Indian desire for Indian land resulted in high levels of violence against tribal citizens,¹¹⁶ had a clear understanding that in order to protect their women and children from such violence, they must exercise criminal jurisdiction over *all* perpetrators of violence on tribal lands, both Indian and non-Indian. This understanding is evidenced by the extensive development of tribal laws governing the conduct, property, and contractual relations of non-Indian husbands. For example, white men who married Native women understood that the rules and laws of her Tribal Nation would govern their relationship and the rights of their children.¹¹⁷ Historian Michelle LeMaster notes that, “[n]ative rules prevailed in intermarriage . . . and European men had to adapt to the realities of matrilineal inheritance systems that denied them au-

¹¹¹ Survey of Conditions of the Indians of the United States: Hearings on S. Res. 79 before S. Comm. on Indian Affairs, 71st Cong. 2833–35 (1930) (testimony of Rose Ecofey), reprinted in *WHO’S THE SAVAGE?*, *supra* note 59, at 154.

¹¹² See Diane Hirshberg & Suzanne Sharp, *Thirty Years Later: The Long-Term Effect of Boarding Schools on Alaska Natives and Their Communities*, UNIV. OF ALASKA ANCHORAGE, INST. OF SOC. & ECON. RESEARCH, at iii (2005), <http://www.iser.uaa.alaska.edu/Publications/boardingschoolfinal.pdf> [<https://perma.cc/22DS-4W3E>].

¹¹³ *Id.* at 11.

¹¹⁴ See, e.g., Resolution by the National Committee and Council on Nov. 2, 1819 in *LAWS OF THE CHEROKEE NATION* (1852), *supra* note 8, at 10.

¹¹⁵ See Melanie Beth Oliviero & A. T. Skibine, *The Supreme Court Decision That Jolted Tribal Jurisdiction*, *AM. INDIAN J.*, MAY, 1980, at 2 (1980).

¹¹⁶ Oral history passed down by those who survived the Trail of Tears and the genocide perpetrated by the United States government against the citizens of many Tribal Nations including Cherokee Nation, Seminole Nation, Chickasaw Nation, Creek Nation, and Choctaw Nation, among others.

¹¹⁷ Michelle LeMaster, “*Thorough-Paced Girls*” and “*Cowardly Bad Men*”: *Gender and Family in Indian-White Relations in the Colonial Southeast, 1660–1783*, 332 (Sept. 2001) (unpublished Ph.D. dissertation, Johns Hopkins University).

thority over their wives and children.”¹¹⁸ Undoubtedly, this exercise of authority over non-Indians suggests that tribal laws would apply when these non-Indian husbands chose to use violence against their wives.

Both the Creek Nation and the Cherokee Nation passed laws to protect the rights of Native women who married white men. For instance, on November 2, 1819, the Cherokee Nation passed a law stipulating:

That any white man who shall marry a Cherokee woman, the property of the woman so marry, shall not be subject to the disposal of her husband, contrary to her consent, and any white man so married and parting from his wife without just provocation, shall forfeit and pay to his wife such sum or sums, as may be adjudged to her by the National Committee and Council for said breach of marriage By order of the National Committee.¹¹⁹

Whereas a woman living across the border in Georgia risked losing all rights to any property or wealth after divorce,¹²⁰ Cherokee Nation law protected the rights of Cherokee women against exploitation to ensure that divorce would not render them destitute. The 1818 Creek version of a similar law provides some legislative history about the problem for the Creek Nation when white men married, and then abandoned, Creek women: “Should a White man take an Indian woman as a wife and have children by her and he goes out of the Nation he shall leave all his property with his children for their support.”¹²¹ Antonio Waring provides an explanatory parenthetical in a published collection of the Creek Nation laws circa 1818: “The trader and the Indian countryman often abandon their Indian families and returned to the settlements. McIntosh’s own father, William McIntosh of Mallow, did so.”¹²²

Following the Nation’s forced removal to present day Oklahoma, Cherokee Nation’s laws protecting its women—and its Nation—from the non-Indians who marry Cherokee women became even stricter. In 1855, Cherokee Nation passed a law requiring non-Native men to obtain a license before marrying a Cherokee woman. To be issued the license, a non-Native man needed to present “a certificate of good moral character, signed by at least seven respectable Cherokee citizens,” pay a substantial fee, and swear an oath to “honor, defend, and submit to the constitution and laws of the Chero-

¹¹⁸ Michelle LeMaster, *Pocahontas Doesn’t Live Here Anymore: Women and Gender in the Native South before Removal*, 7 NATIVE SOUTH 1, 10 (2014).

¹¹⁹ Resolution by the National Committee and Council on Nov. 2, 1819 in LAWS OF THE CHEROKEE NATION (1852), *supra* note 8, at 10.

¹²⁰ See Eleanor M. Boatwright, *The Political and Civil Status of Women in Georgia, 1783–1860*, 25 GA. HIST. Q. 301, 318, 322–23 (1941).

¹²¹ LAWS OF THE CREEK NATION (1818) (submitted to Indian Agent D.B. Mitchell by General William McIntosh), in LAWS OF THE CREEK NATION 1 20 (Antonio J. Waring ed., 1960) [hereinafter LAWS OF THE CREEK NATION (1818)]. For the original 1818 document, which is part of the D.B. Mitchell papers held by the Newberry Library, see *David Brydie Mitchell Papers, 1777–1843, bulk 1807–1822*, ARCHIVEGRID, <https://beta.worldcat.org/archivegrid/collection/data/38867180> [<https://perma.cc/DJ3J-3RMB>].

¹²² LAWS OF THE CREEK NATION (1818), *supra* note 121, at 20.

kee Nation.”¹²³ Thus, before the Supreme Court’s decision in *Oliphant*, to marry a Cherokee woman, a man had to first consent to Cherokee Nation jurisdiction.

Furthermore, to enforce their laws over non-Indians working and residing on tribal lands, Cherokee Nation established its own court system decades before the state of Georgia established its own courts. In 1821, Cherokee Nation formally established its lower courts,¹²⁴ and by 1822, the Nation authorized its Supreme Court.¹²⁵ By way of comparison, the state of Georgia did not establish its respective Supreme Court until 1845.¹²⁶ Cherokee Nation law declared that “the judiciary of the Nation shall be independent and their decisions final and conclusive.”¹²⁷ Furthermore, in contrast to the United States federal courts—which constitute courts of limited jurisdiction—Cherokee Nation law made clear that the Cherokee Nation Courts maintained jurisdiction over any crime committed on Cherokee Nation lands, exempting only murder.¹²⁸ Cherokee Nation Courts utilized a jury system,¹²⁹ and the Cherokee Nation Constitution provided for the protection of

¹²³ Act Regulating Intermarriages with White Men on Oct. 15, 1855, in *Laws of the Cherokee Nation Passed During the Years 1839–1867*, at 104–05 (Missouri Democrat Print, 1868), <https://www.loc.gov/law/help/american-indian-constats/PDF/28014181.pdf> [<https://perma.cc/7RG7-2VMC>] [hereinafter *LAWS OF THE CHEROKEE NATION (1839–1863)*].

¹²⁴ Resolution by the National Committee and Council on Oct. 26, 1821, in *LAWS OF THE CHEROKEE NATION (1852)*, *supra* note 8, at 18 (“That a court be convened at the present session, to be composed of the Circuit and District Judges, and the Marshals of the several Districts, to adjust and settle all such cases as may be submitted to them by the Committee.”).

¹²⁵ Resolution by the National Committee and Council on October 18, 1828, in *LAWS OF THE CHEROKEE NATION (1852)*, *supra* note 8, at 90 (repealing a law passed on November 12, 1822 which authorized the circuit judges to preside over the Supreme Court and replacing this arrangement with the structure established by the nation’s 1827 Constitution).

¹²⁶ *The Supreme Court of Georgia History*, SUP. CT. GA., <http://www.gasupreme.us/court-information/history/> [<https://perma.cc/J4LA-KJZB>].

¹²⁷ Resolution by the National Committee and Council on Oct 14, 1825, in *LAWS OF THE CHEROKEE NATION (1852)*, *supra* note 8, at 44–46.

¹²⁸ Resolution by the National Committee and Council on Nov. 8, 1828, in *LAWS OF THE CHEROKEE NATION (1852)*, *supra* note 8, at 98 (“That this Court shall have full and complete jurisdiction over all civil cases, when the amount shall not exceed one hundred dollars, and shall also have complete criminal jurisdiction, (except in cases of murder,) and that it shall be the duty of the District Judge, during the recess of the Courts, to try all criminals, save murderers, who may be brought before them as the Constitution directs.”).

¹²⁹ Resolution by the National Committee and Council on Oct. 14, 1825, in *LAWS OF THE CHEROKEE NATION (1852)*, *supra* note 8, at 44 (“That the circuit Judges shall have power to order the Marshals, Sheriffs of Constables, to select and empanel [sic] five disinterested men of good characters and judgment, to act as jurors in the courts of their respective districts, and in no case shall a Marshal, Sheriff or Constable, who may be interested in any cause, be competent to make a selection and empanel jurors to sit upon that particular case.”).

many rights and liberties that United States citizens today mistakenly believe are exclusive to the United States Constitution.¹³⁰

Long before Dollar General set foot on the Mississippi Band of Choctaw Indians Reservation in present day Mississippi, Tribal Nations were utilizing civil and criminal jurisdiction to regulate the circumstances under which non-Indians could enter tribal land and conduct business with tribal citizens. In 1820, Cherokee Nation passed a law rendering the lawful employment of non-Indians within Cherokee Nation contingent upon the receipt of a permit; that is, the law stipulated that “single white men are hereby admitted to be employed as clerks to any of the stores . . . in this Nation [] on condition [] that the employer obtains a permit and becomes responsible for the good behavior of such clerks.”¹³¹ In 1825, the Creek Nation went even further by codifying a law that read: “No person shall permit a White into the Nation to live except the hole [sic] Nation agree to it.”¹³²

Pre-Removal Laws that Outlaw Rape

In addition to circumscribing the rights of white men who married into or did business with a Tribal Nation, several Tribes began codifying laws concerning rape—thus staking a claim to criminally prosecute non-Indian men who committed sexual assault on tribal lands.

Cherokee Nation was one of the first Tribal Nations to codify its law criminalizing rape. On November 10, 1825, Cherokee Nation’s National Committee and Council (effectively, the Cherokee Nation’s legislature)¹³³ passed the following law, stipulating:

That *any person or persons, whatsoever*, who shall lay violent hands upon any female, by . . . abusing her person and committing a rape upon such female, he or they, so offending, upon conviction before any of the district or circuit Judges, for the first offence, shall be punished . . .¹³⁴

The phrase “any person or persons” renders the law applicable to “any persons” regardless of race or citizenship. Accordingly, in 1825, Cherokee Na-

¹³⁰ See, e.g., CHEROKEE NATION CONST. art. V § 11 (1827) (“In all criminal prosecutions, the accused shall have the right of being heard, of demanding the nature and cause of the accusation against him, of meeting the witnesses face to face, of having compulsory process for obtaining witnesses in his favor: and in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; nor shall he be compelled to give evidence against himself.”).

¹³¹ Resolution by the National Committee and Council on Oct. 25, 1820, in LAWS OF THE CHEROKEE NATION (1852), *supra* note 8, at 11.

¹³² Law 49th, in LAWS OF THE CREEK NATION, *supra* note 121, at 26.

¹³³ Oral History Passed Down Intergenerationally to Author from Frances Polson Ridge, President of the Cherokee Nation’s National Committee and Council during the 1820s.

¹³⁴ Resolution by the National Committee and Council on Nov. 10, 1825, in LAWS OF THE CHEROKEE NATION (1852), *supra* note 8, at 53–54 (emphasis added).

tion announced it would prosecute anyone—including citizens of the United States—who committed a rape against a woman on Cherokee Nation lands.¹³⁵ As discussed later, in 1978, Justice Rehnquist claimed the jurisdiction over non-Indians was a relatively “new phenomenon,” apparently missing (or denying) that tribal jurisdiction over non-Indians had been in existence for centuries.¹³⁶

The same year that Cherokee Nation passed its rape law, the Mvskoke (Creek) people codified a similar rape law in its list of fifty-six laws that were reduced to writing by Chilly McIntosh, the son of a well-known chief. The Mvskoke law reads:

And be it farther enacted if any person or persons should under take [sic] to force a woman and did it by force, it shall be left to the woman what punishment she Should [sic] [be] satisfied with to whip or pay what she say it be law.¹³⁷

Again, the use of the term “person” as a defendant, as opposed to Indian or Native, establishes that the law’s application is not limited to American Indians or Mvskoke citizens. Moreover, the Mvskoke law demonstrates a sharp distinction between Anglo-American rape laws in that the woman is consulted regarding the proper punishment for the perpetrator who committed the crime against her. The Anglo-American system does not have a mechanism allowing a victim to dictate the punishment of her perpetrator, and American law has a long history of denying women a voice in the court system.¹³⁸

Choctaw Nation likewise codified its law outlawing rape. On August 18, 1828, the Choctaw Nation Tribal Council officially criminalized the rape of a woman on Choctaw Nation’s lands, criminalizing conduct where “a woman is unwilling[] and a man violates her by raping her.”¹³⁹ Like the contemporaneous laws of other Tribal Nations, Choctaw Nation’s law did not limit its application to citizens of Choctaw Nation, and as a result, Choctaw Nation’s law criminalizing rape applied to citizens of the United States who lived in or entered Choctaw Nation’s lands and raped women.

The Western Cherokee Nation¹⁴⁰ also codified a law criminalizing rape. On September 16, 1831, Western Cherokee Nation’s Tribal Council resolved

¹³⁵ *Id.*

¹³⁶ See *infra* note 142 and accompanying text.

¹³⁷ Law 35th, in LAWS OF THE CREEK NATION (1818), *supra* note 121, at 24.

¹³⁸ See, e.g., Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 359 (1989) (detailing how American women were traditionally denied the ability to sue their husbands for tort claims); see also James W. Fox, Jr., *Citizenship, Poverty, and Federalism: 1787–1882*, 60 U. PITT. L. REV. 421, 556–57 (1999) (explaining how American courts denied women the opportunity to participate fully in the legal process).

¹³⁹ PETER PERKINS PITCHLYNN, RECORDS OF THE CHOCTAW COUNCIL MEETINGS (June 12, 1828), *reprinted and translated in* A GATHER OF STATEMENT, RECORDS OF THE CHOCTAW COUNCIL MEETINGS, 1826–1818 80 (Marcia Hagg & Henry J. Willis eds., 2013).

¹⁴⁰ Having separated from the Cherokee Nation which was, at that time, still located in what is now present-day Tennessee, Georgia, and North Carolina, the Western Chero-

“that if any person shall commit a rape upon a female, and proof of the same be satisfactorily made before any [] Judge he shall be punished.”¹⁴¹ Like the five aforementioned laws, the law of the Western Cherokee Nation applied equally to citizens and non-citizens alike.

The *Oliphant* Court, therefore, incorrectly claimed that the exercise of tribal jurisdiction over non-Indians must be “a relatively new phenomenon.”¹⁴² Even a cursory review of the tribal legal framework in place at the time of Supreme Court’s decision in *Worcester* reveals that the exercise of tribal jurisdiction over non-Indians was well-established by 1832, a good 146 years before the Supreme Court decided *Oliphant* in 1978.¹⁴³ The *Oliphant* Court’s classification of tribal jurisdiction over non-Indians as “a relatively new phenomenon,” therefore, is not only wrong, it is predicated on a purposeful disregard for historical facts and records readily available and at the Court’s disposal.¹⁴⁴ By the time *Worcester v. Georgia* reached the Supreme Court, hundreds of thousands of American citizens lived in or near a sovereign Tribal Nation that could—and would—criminally prosecute them if they raped or abused a Native woman on tribal lands.

An article praising Tribal Nations for their progressive nineteenth-century laws protecting the rights of women from abuse and sexual assault cannot overlook the laws these very same Nations passed to legalize and incorporate the American institution of chattel slavery, an institution predicated on the prejudice that one race is inferior to another. The incorporation of the American institution of slavery is evident in numerous tribal laws. For instance, although Native Nations like Cherokee Nation prescribed the circumstances under which a non-Indian white man would be permitted to

kee Nation constituted—at that time—a separate, sovereign Tribal Nation recognized by the United States Federal Government with territory in what is now present-day Arkansas. The Western Cherokee Nation and the Cherokee Nation formally converged as one sovereign Tribal Nation on September 6, 1839, when the citizens of Cherokee Nation that survived the Trail of Tears negotiated and agreed upon a new Constitution with the Western Cherokee Nation. Today, the two once again constitute one Cherokee Nation. See Will Chavez, *1839 Cherokee Constitution Born from Act of Union*, CHEROKEE PHEONIX (Aug. 26, 2014), <http://www.cherokeephoeenix.org/Article/index/8468> [https://perma.cc/EQ7W-5RQ6].

¹⁴¹ Resolution of Council (Sept. 16, 1831), in JOHN ROSS PAPERS, GILCREASE MUSEUM, https://collections.gilcrease.org/object/4026101?position=70&list=90QGaOpk-X_m1fO4CsZEhcHWOozjJna9Rn9b0jc4gU [https://perma.cc/5W42-NT3J].

¹⁴² *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 (1978).

¹⁴³ Oliviero & Skibine, *supra* note 115, at 4 (1980) (“Tribes did indeed operate under formal, defined and effective systems of justice.”). Oliviero and Skibine also write: “The most consistent language of the early treaties is contained in explicit provisions recognizing the power of Indian tribes to expel and punish white intruders.” *Id.* See also *id.* at 8 (“Tribes had justice systems and recorded their laws on wampum belts long before the arrival of the white man, a fact discounted by the Court in *Oliphant*.”).

¹⁴⁴ This inaccuracy has been challenged by members of Congress as well. See, e.g., *Examining the Prevalence of and Solutions to Stopping Violence Against Indian Women: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 2 (2007) (statement of Sen. Byron Dorgan, Chairman, S. Comm. on Indian Affairs) (noting that “Indian tribes historically exercised authority over anyone who entered their lands, regardless of whether the perpetrator was Indian or not”).

marry a Cherokee woman and live within Cherokee Nation, the Nation simultaneously passed laws prohibiting intermarriage with freed and/or enslaved blacks on Cherokee Nation lands.¹⁴⁵

Laws such as these constitute a desperate and unconscionable attempt to conform to the laws and customs of the colonial power that brought trans-continental slavery to indigenous soil.¹⁴⁶ At that time, the most powerful corporate and elected leaders were advocating the removal and extermination of Tribal Nations in the Southeast as a means for expanding the South's booming cotton industry—an industry whose expansion depended on the concurrent expansion of slavery in the South.¹⁴⁷ Tribal Nations in the Southeast came to believe that in order to justify their continued, separate, sovereign existence to an all-white United States Congress and President, they must adopt the institution of slavery and the American system of hierarchical racial order.¹⁴⁸

Without a doubt, the adoption of slavery and classification based on race in Cherokee Nation laws constitutes one of Cherokee Nation's darkest periods. It constitutes a stark departure from Cherokee values and culture. And, in the end, despite their adoption of the institution of slavery, President Andrew Jackson still removed these Tribal Nations on the basis that he deemed American Indians to be “[e]stablished in the midst of another and a superior race,” without the ability to “appreciat[e] the causes of [their] inferiority.”¹⁴⁹

There are many lessons to be learned from the adoption of slavery in Tribal Nations. Perhaps the most obvious lesson is that a colonial government whose own sovereignty is built upon the proclaimed inferiority of other nations and their peoples will never respect a nation it deems inferior simply because that nation adopts its racist views, laws, and institutions. By incorporating the institution of slavery into tribal law, Tribal Nations not only committed an unspeakable horror against an entire race of people—these Nations also sacrificed a part of their inherent sovereignty. Indeed, when

¹⁴⁵ Fay Yarbrough, “Those Disgracefull and Unnatural Matches”: Interracial Sex and Cherokee Society in the Nineteenth Century 87 (Aug. 6, 2003) (unpublished Ph.D. dissertation, Emory University) (“Racial considerations crept into the laws regulating marriage early and articulated a racial hierarchy in the Cherokee Nation that resembled that of the larger American South. An 1824 law declared that ‘intermarriages between negro slaves and Indians, or whites, shall not be lawful’”).

¹⁴⁶ *Id.* at 24 (stating that “by the nineteenth century, Cherokees were attempting to write themselves into an existing Southern racial order while simultaneously protecting the existence of the Nation as a separate political entity”).

¹⁴⁷ GAVIN WRIGHT, *SLAVERY AND AMERICAN ECONOMIC DEVELOPMENT* 86 (2006).

¹⁴⁸ Yarbrough, *supra* note 145, at 24 (“If native groups could establish themselves as occupying the same racial status as whites, however, Indians could justify a continued autonomous existence.”). Yarbrough also states: “Race, in the Cherokee instance, was clearly a political and social construction designed to protect and proclaim the sovereignty of the Cherokee Nation.” *Id.* at 24.

¹⁴⁹ President Andrew Jackson, Fifth Annual Message (Dec. 3, 1835), in *THE AMERICAN PRESIDENCY PROJECT* (Gerhard Peters & John T. Woolley, eds.) <http://www.presidency.ucsb.edu/ws/index.php?pid=29475> [<https://perma.cc/55V5-S5F2>].

Tribal Nations adopt the United States' view that other nations and/or people are inferior, everyone—except the United States—suffers.

III. *WORCESTER V. GEORGIA*

The exercise of tribal jurisdiction over non-Indians came to the forefront in 1832, when the Supreme Court was faced with the following question: Who could exercise criminal jurisdiction over United States citizens residing on Cherokee Nation lands?¹⁵⁰ The state of Georgia? Or Cherokee Nation? In the seminal decision of *Worcester v. Georgia*, the Supreme Court held that the Cherokee Nation—and the Cherokee Nation alone—could exercise jurisdiction on the Cherokee Nation's lands.

The Court affirmed Cherokee Nation's exercise of jurisdiction based on the United States' conduct and interaction with Indian Nations affirming their inherent sovereignty.¹⁵¹ Specifically with regards to Cherokee Nation, it was clear to the Court that the "United States considered the Cherokees as a nation."¹⁵² To reach this conclusion and affirm the exercise of tribal jurisdiction on tribal lands, the *Worcester* Court established the three foundational conclusions that the Court later denied in *Oliphant* when the Court stripped Tribal Nations of their inherent criminal jurisdiction over non-Indians. Specifically, the *Worcester* Court: (1) concluded that the colonial conquest of Indian Nations did not strip them of their inherent sovereignty;¹⁵³ (2) departed from prior practice of describing Indian Nations, and their citizens, as racially inferior to the United States and its citizens;¹⁵⁴ and (3) indicated that Indian Nations constitute the exclusive sovereign with authority over their lands.¹⁵⁵ These three holdings are remarkable because they constitute a departure from the Court's prior federal Indian law precedent—in particular, the precedent previously announced in the Court's 1823 decision *Johnson v. M'Intosh*.¹⁵⁶

A review of *Worcester's* doctrinal underpinnings and origins renders the *Oliphant* Court's 1978 departure from these conclusions all the more remarkable, questionable, and transparent as a purposeful reinstatement of a problematic colonial framework predicated on the racial inferiority of a Tribal Nation's citizens.

¹⁵⁰ See *Worcester v. Georgia*, 31 U.S. 515, 557, 561 (1832).

¹⁵¹ See *id.* at 557.

¹⁵² *Id.* at 553.

¹⁵³ See *id.* at 557.

¹⁵⁴ See *infra* Section III, Part a, Subsection ERROR! REFERENCE SOURCE NOT FOUND..

¹⁵⁵ See *Worcester*, 31 U.S. at 557, 561. See also Oliviero & Skibine, *supra* note 115, at 4 (stating "we must conclude that Justice Marshall thought Indian nations had exclusive territorial jurisdiction over their country").

¹⁵⁶ See *Johnson v. M'Intosh*, 21 U.S. 543, 586, 590 (1823). See also ROBERTSON, *supra* note 19, at 133–34 (describing how *Worcester* overruled the part of *Johnson* that assigned sovereignty of a territory to the discovering sovereign at the expense of tribal sovereignty).

A. *The Historical Context for the Court's Decision*

Understanding the historical context that gave rise to a non-Indian's challenge to the state of Georgia's attempt to exercise jurisdiction over his conduct on Cherokee Nation lands is critical to understanding the significance of the Supreme Court's conclusion that Cherokee Nation—and not Georgia—could exercise jurisdiction on Cherokee lands. By the time *Worcester v. Georgia* reached the U.S. Supreme Court, the state of Georgia had resorted to nothing short of warfare to remove the sovereign Cherokee Nation from the lands Georgia wanted to claim as its own.

In 1829, Georgia constituted the largest state of twenty-seven, with a population of half a million.¹⁵⁷ Cherokee Nation, on the other hand, counted only 8,000 citizens living within what is now present-day Georgia.¹⁵⁸ As the most populous state in the United States, Georgia had a great deal of confidence its cries would be heard by the federal government. The booming cotton and slave trade, coupled with the discovery of gold on Cherokee Nation lands, served as economic incentives for the Georgia General Assembly's desire to permanently remove the Cherokee Nation.¹⁵⁹ In the late 1820s, Georgia began to pass laws designed to undermine and appropriate Cherokee Nation's sovereign right to exercise exclusive jurisdiction on Cherokee Nation lands.¹⁶⁰

In 1827, Cherokee Nation ratified a written constitution.¹⁶¹ In response, Georgia's legislature passed a law declaring Cherokee Nation's title to its lands as "temporary," stipulating that Cherokee Nation citizens were tenants at will, and that the state of Georgia had the legal authority to take Cherokee Nation's lands by whatever means necessary.¹⁶² The then Governor of Georgia, John Forsyth, notified the War Department that if Cherokee Nation had not been removed by the end of 1828, the state of Georgia would ignore the borders delineated in treaties signed by the United States and Cherokee Nation, and begin exercising jurisdiction on Cherokee Nation lands.¹⁶³

Furthermore, in response to the discovery of gold, Georgia passed laws forbidding Indians from "digging for gold" in Cherokee Nation, declaring any gold discovered on Cherokee Nation lands to "belong to every other citizen of the state" of Georgia.¹⁶⁴ Next, Georgia passed a law criminalizing

¹⁵⁷ JOHN EHLE, *TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION* 225 (1988).

¹⁵⁸ *Id.*

¹⁵⁹ Matthew T. Gregg, *Shortchanged: Uncovering the Value of Pre-Removal Cherokee Property*, 3 *CHRON. OKLA.* 320, 330 (2009).

¹⁶⁰ EHLE, *supra* note 157, at 225.

¹⁶¹ See CONSTITUTION OF THE CHEROKEE NATION IN JULY 1827, in *LAWS OF THE CHEROKEE NATION* (1852), *supra* note 8, at 118.

¹⁶² See THURMAN WILKINS, *CHEROKEE TRAGEDY; THE STORY OF THE RIDGE FAMILY AND THE DECIMATION OF A PEOPLE 196-97* (1970).

¹⁶³ See *id.* at 197.

¹⁶⁴ EHLE, *supra* note 157, at 225.

any conduct that prevented—whether by force or threat—the Cherokees from moving west.¹⁶⁵ In the same provision, the state of Georgia purported to criminalize all meetings and/or assemblies of Cherokee Nation’s sovereign government—specifically its National Committee and Council—unless the purpose of the meeting was to sell land to Georgia or the United States (who in turn would give the land to Georgia).¹⁶⁶

If the laws outlawing the Cherokee Nation government were not enough, individual citizens of Georgia resorted to violence as a tactic to force the Cherokee to relocate.¹⁶⁷ Despite repeated pleas that the federal government increase the number of federal troops in Georgia to protect Cherokee Nation from the state’s continued encroachment, in the spring of 1831, President Andrew Jackson’s administration issued an order to *remove* the majority of federal troops stationed in Georgia.¹⁶⁸ This left the Cherokee Nation without any federal protection from the violence Georgia inflicted.¹⁶⁹

Again, violence against Native women was used in an attempt to destroy a Tribal Nation. In this instance, the newly-established Georgia Guard was assigned the task of harassing and assaulting Cherokee women as part of Georgia’s campaign of terror. The bilingual Cherokee newspaper, the *Cherokee Phoenix*, published this notice to warn Cherokee women in 1831:

It is said that the Georgia Guard have received orders, from the Governor we suppose, to inflict corporal punishment on such females as shall hereafter be guilty of insulting them. We presume they are to be the judge of what constitutes *insult*.¹⁷⁰

With the State’s troops actively participating in the assault, rape, battery, and robbery of Cherokee Nation life and property, the survival of Cherokee Nation in its ancestral homeland began to look incredibly slim.¹⁷¹ Historian Theda Perdue explains how gendered violence threatened the existence of the Cherokee Nation:

Killing of [Cherokee] women may have resulted from more than simply opportunity. Women perpetuated clans and lineages. If the women of a lineage died, the lineage died regardless of the number

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Theda Perdue, *Cherokee Women and the Trail of Tears*, 1 J. WOMEN’S HIST. 14, 22 (1989).

¹⁶⁸ *Id.*

¹⁶⁹ During this same time period, the Cherokee Nation tried to sue the state of Georgia in federal court, but Justice Marshall held that the Cherokee Nation was not a “foreign” government. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). However, Justice Marshall did use the word “nations” to refer to tribes. *See, e.g., id.*

¹⁷⁰ Perdue, *supra* note 167, at 22 (reprinting *Notice*, CHEROKEE PHOENIX (Mar. 26, 1831)).

¹⁷¹ EHLE, *supra* note 157, at 244.

of surviving males. Therefore, an attack on a woman was an attack on lineage, clan, and even tribe.¹⁷²

Georgia's intentions were clear. In an effort to remove the few white allies Cherokee Nation had maintained, Georgia passed a law outlawing any non-Indian from entering and living on Cherokee Nation lands without receiving the proper license from the state of Georgia.¹⁷³ The punishment for entering Cherokee Nations without the permission of Georgia was four years imprisonment with hard labor.¹⁷⁴ In response, most missionaries—who were the primary targets of Georgia's law—moved to the Tennessee side of Cherokee Nation's lands.¹⁷⁵ Samuel Worcester, a missionary from Vermont, did not.¹⁷⁶ Instead, he remained in New Echota, Cherokee Nation, where he preached the Gospel and assisted Elias Boudinot in the printing of the Cherokee Nation newspaper, the *Cherokee Phoenix*.¹⁷⁷

On March 12, 1831, Georgia officials entered Cherokee Nation lands and arrested Reverend Worcester.¹⁷⁸ Worcester's arrest put the jurisdictional battle in the forefront: Cherokee Nation maintained that Georgia had no right to define or prosecute criminal conduct on Cherokee Nation lands, and in return, the state of Georgia asserted that it could because Cherokee Nation had no inherent criminal jurisdiction over non-Indian American citizens residing on Cherokee Nation lands within Georgia's borders.¹⁷⁹ The dispute made it all the way to the U.S. Supreme Court.

B. *The Worcester Decision Post Johnson v. M'Intosh*

In 1832, Georgia had every reason to expect a victory in the Supreme Court.¹⁸⁰ Less than ten years before, in *Johnson v. M'Intosh*, the Supreme Court had declared that as a result of the United States' colonial conquest, Tribal Nations could not even claim legal title to their own lands as "their rights to complete sovereignty, as independent nations, were necessarily diminished."¹⁸¹ To reach the conclusion that Tribal Nations could not claim

¹⁷² THEDA PERDUE, *CHEROKEE WOMEN* 88 (1998).

¹⁷³ WILKINS, *supra* note 162, at 219.

¹⁷⁴ *Id.* at 221.

¹⁷⁵ *Id.* at 219–21.

¹⁷⁶ Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 519 (1969).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See, e.g., Letter from William Wirt to Cherokee Nation Principal Chief John Ross (Sept. 22, 1830), in GILCREASE MUSEUM: JOHN ROSS PAPERS, <https://collections.gilcrease.org/object/4026430-5> [<https://perma.cc/NL7U-BGH2>]. See also WILKINS, *supra* note 162, at 227–28.

¹⁸⁰ The state of Georgia refused to appear before the U.S. Supreme Court in both *Cherokee Nation v. Georgia* and *Worcester v. Georgia*. It did not submit a brief, nor participate in oral argument in either case. See Burke, *supra* note 176, at 521.

¹⁸¹ *Johnson v. M'Intosh*, 21 U.S. 43, 574, 586 (1823) ("The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United

legal title to their own lands, the *Johnson* Court reasoned that “[c]onquest gives a title [to the Conqueror] which the Courts of the conqueror cannot deny.”¹⁸² According to the Court in *Johnson*, Natives could not be left “in possession of their country” because they were “fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest.”¹⁸³ As a result, “[t]o leave them in possession of their country, was to leave the country a wilderness”¹⁸⁴—that is, land that is not commercially exploited or colonially conquered in the name of what was then viewed to be American progress. Based on this line of reasoning, the Court characterized Native as “heathens” who could no longer claim title after “Christian people . . . [had] made a . . . discovery” of their lands.¹⁸⁵

The *Johnson* Court, therefore, reached three foundational conclusions: (1) colonial conquest diminished and/or erased the sovereignty of Tribal Nations; (2) Tribal Nations, and their citizens, do not worship Christ nor do they commercially exploit land and they are therefore racially inferior “savages” and “heathens”; and finally (3) Tribal Nations therefore have no inherent authority over their own lands because, as a result of colonial conquest and their inferiority, they cannot claim legal title to them.

Cherokee Nation, *vis a vis* the case of Reverend Worcester, rejected these three foundational tenets in *Johnson v. M'Intosh* and challenged Georgia's attempt to exercise criminal jurisdiction on Cherokee Nation lands in a case that quickly made its way up to the Supreme Court.¹⁸⁶ The question before the Court was simple: which sovereign—State or Tribe—could exercise criminal jurisdiction over non-Indians living on tribal lands? A clear application of *Johnson*, of course, would have required the Court to conclude that Cherokee Nation could not exercise jurisdiction over an American citizen on lands for which the Nation could not even claim legal title. This did not deter Cherokee Nation, or Reverend Worcester, from advocating for the affirmation of Cherokee Nation's inherent sovereign authority to exercise criminal jurisdiction on its own lands.

For Cherokee women, *Worcester v. Georgia* concerned more than a white preacher's right to reside on Cherokee lands with Cherokee Nation consent; as the Georgia Guard continued its malicious attack against Cherokee women, Cherokee women knew the legal battle in *Worcester v. Georgia* would determine whether their Nation could continue to exercise its inherent right to protect them.

States to extinguish their title, and to grant the soil, has never, we believe, been doubted.”).

¹⁸² *Id.* at 588.

¹⁸³ *Id.* at 590.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 577.

¹⁸⁶ EHLE, *supra* note 157, at 253.

1. *Tribal Nations Have Not Been Stripped of Their Inherent Sovereignty*

In *Worcester*, the Supreme Court rejected the fundamental tenets of *Johnson* and upheld the inherent sovereign authority of Cherokee Nation to exercise jurisdiction on its own lands.¹⁸⁷ First, the *Worcester* Court outright rejected the *Johnson* Court's earlier holding, concluding that colonial conquest had *not* stripped Cherokee Nation of its sovereignty, but instead recognized Cherokee Nation as:

. . . a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.¹⁸⁸

The *Worcester* Court's central holding, therefore, rejects the notion that the United States, as a colonial power, has the constitutional power to diminish another nation's inherent sovereignty.

To reach this conclusion, the *Worcester* Court analyzed the relationship between the United States and Tribal Nations—noting first that “the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection.”¹⁸⁹ Thus, the fact that the United States held more “power”—whether military, economic, or relational—has no bearing on the sovereignty of a nation with less “power” when the two nations agree to recognize their mutual sovereignty and assured protection.

The *Worcester* Court continued, noting that the status of the United States as a colonial power could not strip Tribal Nations of their sovereignty, because although many Tribal Nations had signed treaties swearing their allegiance to the United States, they had done so as an ally, much in the same way they had with Great Britain prior to the Revolutionary War.¹⁹⁰ The Court explained that these previous analogous agreements “merely bound the [Tribal] nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that

¹⁸⁷ See *Worcester v. Georgia*, 31 U.S. 515, 562 (1832) (acknowledging “the pre-existing power of the [Cherokee Nation] to govern itself”).

¹⁸⁸ *Id.* at 561.

¹⁸⁹ *Id.* at 560–61. The Court amplified this sentiment: “Protection does not imply the destruction of the protected. The manner in which this stipulation was understood by the American government, is explained by the language and acts of our first president.” *Id.* at 552. In *Cherokee Nation v. Georgia*, Justice Marshall used the phrase “domestic dependent nations” to describe Indian Tribes. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

¹⁹⁰ See *Worcester*, 31 U.S. at 552 (describing general character of relationships between Tribal Nations and Great Britain).

protection, *without involving a surrender of their national character.*"¹⁹¹ After "the extinguishment of the British power in their neighbourhood, and the establishment of that of the United States in its place," the treaties signed between the United States and Cherokee Nation put Cherokee Nation "under the protection of the United States" instead of another power such as Great Britain, France, or Spain.¹⁹² As Justice Marshall opined, the relationship between the United States and Cherokee Nation is best characterized as "that of a nation claiming and receiving the protection of one more powerful: NOT that of individuals abandoning their national character, and submitting as subjects to the laws of a master."¹⁹³

The United States had not interpreted treaties with such language between Great Britain and Tribal Nations as surrendering the sovereignty of Tribal Nations, and accordingly, Georgia's attempt to offer an alternative interpretation of the same language in United States treaties with Tribes failed. Instead of eliminating sovereignty, the Supreme Court held that treaties signed by the United States "treat the Cherokees as a nation capable of maintaining the relations of peace and war; and ascertain the boundaries between them and the United States."¹⁹⁴

This conclusion was further supported by the *Worcester* Court's observation that the United States had consistently signed treaties defining Cherokee Nation as a "nation." Simply put, the Supreme Court would not permit the United States (or Georgia) to escape the language the United States had elected to use, concluding that:

The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.¹⁹⁵

Furthermore, once declared in a treaty, the declaration that Tribal Nations constitute "nations" became the "supreme law of the land" under the United States Constitution.¹⁹⁶ Consequently, the *Worcester* Court reasoned, "[t]he only inference to be drawn from [the treaties the United States signed] is, that the United States considered the Cherokees as a nation."¹⁹⁷

¹⁹¹ *Id.* (emphasis added).

¹⁹² *Id.* at 555. Justice Marshall furthermore characterized these treaties as demonstrating a continuous relationship of protection, with only the role of the protector and not the relationship itself changing with the new treaty. *Id.*

¹⁹³ *Id.* (emphasis added).

¹⁹⁴ *Id.* at 519.

¹⁹⁵ *Id.* at 550–60.

¹⁹⁶ *Id.* at 559.

¹⁹⁷ *Id.* at 553.

2. *American Indians Are Not Racially Inferior*

The second remarkable departure from *Johnson*'s past precedent in *Worcester* is the simple fact that the *Worcester* Court never once described Tribal Nations, or their citizens, in racist terms, such as "heathens" or "fierce savages."¹⁹⁸ Instead of affirming *Johnson*'s framework and diminishing Cherokee Nation's sovereignty on account of Cherokee Nation's reliance on war as a means of defense, or hunting as a means of sustenance, the *Worcester* Court concluded that Cherokee Nation held "a right to all the lands within [Cherokee Nation's] boundaries," a right that "is not only acknowledged, but guaranteed [sic] by the United States."¹⁹⁹

Notably, Chief Justice John Marshall authored both majority opinions in *Johnson* and *Worcester*,²⁰⁰ yet the principles proffered in both cases are dramatically inconsistent with one another. Professor Lindsay Robertson argues that Chief Justice Marshall intended for his decision in *Worcester* to reverse *Johnson* altogether.²⁰¹ Dewi Ioan Ball points out that "the very basis of his ruling in *Johnson v. M'Intosh* (1823) was ridiculed by Chief Justice Marshall himself in the *Worcester* opinion."²⁰²

In departing from his own prior precedent, Chief Justice Marshall crafted *Worcester* to discard *Johnson*'s holdings that relied on racially inferior classifications to justify diminishing Tribal Nations' inherent sovereignty. Instead of perpetuating *Johnson*'s colonial narrative regarding the inferiority of Tribal Nations and their citizens and their failure to commercially exploit their lands the Court had previously deemed a "wilderness," Chief Justice Marshall's opinion in *Worcester* offered an honest account of Tribal Nations' sovereign-to-sovereign relationship with the United States, one completely void of any racially derogatory language.

3. *Indian Nations Constitute the Exclusive Sovereign with Authority Over Their Lands*

Finally, *Worcester* directly refuted the *Johnson* Court's conclusion that Tribal Nations cannot exercise comprehensive governmental power over their lands. Not only did Tribal Nations constitute "distinct political communities" with distinct "territorial boundaries," the *Worcester* Court also found that within those boundaries, "their authority is *exclusive*."²⁰³ Accordingly,

¹⁹⁸ See generally *id.* Furthermore, in contrast to *Johnson*, "Marshall suggested that the doctrine of discovery did *not* grant the European nations or the United States automatic claims to Native American land or limit the rights of Native America." BALL, *supra* note 28, at 16.

¹⁹⁹ *Worcester*, 31 U.S. at 557.

²⁰⁰ *Id.* at 557; see also *Johnson v. M'Intosh*, 21 U.S. 543, 571 (1823).

²⁰¹ See ROBERTSON, *supra* note 19, at 133. Robertson notes, however, that *Johnson* was never explicitly overturned and would eventually be revived. See *id.* at 142.

²⁰² BALL, *supra* note 28, at 17.

²⁰³ *Worcester*, 31 U.S. at 557 (emphasis added).

the Supreme Court recognized the authority of Cherokee Nation to exercise jurisdiction over Cherokee Nation lands to the exclusion of *any other* sovereign, and in particular, the state of Georgia.

IV. OLIPHANT ATTEMPTS TO ERASE WORCESTER

For 146 years, this affirmation of tribal sovereignty in *Worcester* remained good law, although its use by the contemporary Court has been sparse.²⁰⁴ Importantly, prior to the advent of the Rehnquist Court, the Supreme Court had not directly repudiated the central holdings in *Worcester*. Accordingly, Tribal Nations continued to exercise jurisdiction over non-Indians with little interference. In 1978, however, the Supreme Court re-visited this question and, ultimately, reached a different answer.

For the Native women whose Nations continued to exercise jurisdiction and protect them after *Worcester*, the Court's decision in *Oliphant* resulted in nothing less than total devastation.

While the *Worcester* Court declared that an Indian Nation's authority to exercise criminal jurisdiction over non-Indians on tribal lands was "exclusive,"²⁰⁵ the Supreme Court, in 1978, declared that this power simply did not exist.²⁰⁶ Jurisdiction over non-Indians—once framed as inherent—was unilaterally abolished.²⁰⁷

In *Oliphant v. Suquamish Indian Tribe*, the Court granted certiorari "to decide whether Indian tribal courts have criminal jurisdiction over non-Indians."²⁰⁸ The Court "decide[d] that they do not."²⁰⁹

A. *The Factual and Historical Context for Oliphant*

Like *Worcester* and *Dollar General*, the facts of *Oliphant* involve significant, serious acts of violence that threaten the health and welfare of the Tribe exercising jurisdiction over a non-Indian.²¹⁰ In *Oliphant*, the Supreme

²⁰⁴ See, e.g., Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 647–48 (2006) (noting that "the Marshall Trilogy no longer drives the constitutional common law of the Supreme Court").

²⁰⁵ *Worcester*, 31 U.S. at 557.

²⁰⁶ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196–97 (1978).

²⁰⁷ Some may point to *Ex Parte Kenyon* as the departing point from *Worcester*'s inherent sovereignty framework, but *Ex Parte Kenyon* is easily distinguished. One hundred years before *Oliphant*, a lower federal court decided the case of *Ex Parte Kenyon*, 14 F. Cas. 353 (C.C.W.D. Ark. 1878), wherein the court concluded that the Cherokee Nation could not exercise criminal jurisdiction over a non-Indian who married a Cherokee Nation citizen. 14 F. Cas. at 355. In *Ex Parte Kenyon*, however, the alleged crime took place off Cherokee Nation lands (in Kansas), and consequently, the court's decision is based on the location of the crime, not the inability of a Tribal Nation to exercise criminal jurisdiction over anyone who enters and commits a crime on tribal lands. See *id.*

²⁰⁸ *Oliphant*, 435 U.S. at 195.

²⁰⁹ *Id.*

²¹⁰ Although the defendant in *Worcester*, Samuel Worcester, had committed no violent act himself, the fight for jurisdiction—within which his arrest was placed—involved

Court reversed a 1976 Ninth Circuit Court of Appeals decision upholding the sovereign authority of the Suquamish Indian Tribe to arrest and try two non-Indians for the crimes of assault, resisting arrest, and reckless driving—all committed on tribal lands during the Tribe’s annual Chief Seattle Days Celebration.²¹¹

When the Tribe had planned its annual Chief Seattle Days Celebration, the Tribal Government expected thousands of people to enter the Port Madison Reservation and congregate in a small area on the Tribal Encampment Grounds.²¹² Accordingly, the Tribe requested law enforcement assistance from state, county, and federal law enforcement officials.²¹³ However, federal and state police refused to assist the Tribal Nation, instead stating that the Tribe would have to provide its own law enforcement, using tribal funds and tribal personnel.²¹⁴

During the celebration, Defendant Mark Oliphant was arrested at approximately 4:30 a.m., when—in a drunken state—he physically assaulted a tribal police officer and attempted to resist arrest. Defendant Daniel Belgarde was also arrested in the night, “after an alleged high-speed race along the Reservation highways that only ended when Belgarde collided with a tribal police vehicle.”²¹⁵ At the time of their arrests, Oliphant and Belgarde (both white) were living on the Tribe’s Port Madison Reservation.²¹⁶

Both of the accused sought writs of *habeas corpus*, asserting “that the Suquamish Indian Provisional Court does not have criminal jurisdiction over non-Indians.”²¹⁷ The District Court, however, affirmed the Tribe’s exercise of its inherent criminal jurisdiction over crimes committed on tribal lands and denied their petitions.²¹⁸ On August 24, 1976, the Court of Appeals for the Ninth Circuit affirmed the denial of *habeas corpus* in the case of Defendant Oliphant.²¹⁹ Judge Kennedy—who later became Justice Kennedy of the Supreme Court—filed a dissent, disagreeing with Judges Duniway and Burns with regard to whether Oliphant could be brought to answer in Tribal Court for the crimes he committed on tribal lands.²²⁰

Legal analysis aside, the facts of *Oliphant* demonstrate once again that without the preservation of a Tribe’s inherent authority to exercise criminal jurisdiction on tribal lands, tribal citizens—as well as non-Indians residing on the reservation—will be placed in serious jeopardy. For Native people,

a significant amount of violence perpetrated by the Georgia militia, as well as Georgia’s citizens. See *infra* Section ERROR! REFERENCE SOURCE NOT FOUND..

²¹¹ *Oliphant*, 435 U.S. at 193–95.

²¹² *Oliphant v. Schlie*, 544 F.2d 1007, 1013 (9th Cir. 1976).

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Oliphant*, 435 U.S. at 194.

²¹⁶ *Id.* In 1978, “there were many more nonmembers (63 percent) living on the reservation than tribal members.” BALL, *supra* note 28, at 76.

²¹⁷ *Oliphant*, 435 U.S. at 194.

²¹⁸ *Schlie*, 544 F.2d at 1009.

²¹⁹ *Oliphant*, 435 U.S. at 195.

²²⁰ *Schlie*, 544 F.2d at 1015 (Kennedy, Circuit J., dissenting).

who face the highest rates of violence in the United States,²²¹ the elimination of tribal criminal jurisdiction over non-Indians has come with dire consequences. As in *Worcester*, *Oliphant*, and *Dollar General*, often times the fight against tribal jurisdiction accompanies an attempt to walk away from—or ultimately support the commission of—some of the most heinous, violent crimes committed against Tribal Nations and their citizens.

B. *Oliphant's Attempt to Erase Worcester*

To reach the conclusion that Tribal Nations have no criminal jurisdiction over non-Indians who commit crimes on their lands, the *Oliphant* Court had to alter the original meaning of *Worcester* or reject it altogether. The parties in *Oliphant* understood this, as their opposing positions on *Worcester* were featured prominently in the briefing. According to Petitioner Oliphant, the Tribe's "reading of Marshall's opinion [in *Worcester*] is the necessary underpinning for the *whole argument* of the Tribe and the United States."²²² As a result, Oliphant did not hesitate to attack it.

Petitioner Oliphant argued that any assertion that Tribal Nations may exercise criminal jurisdiction over non-Indians "flows only from a 'platonic notion,' based upon a misreading and misapplication of *Worcester v. Georgia*."²²³ Petitioner Oliphant further urged that "*Worcester v. The State of Georgia* is not support for the tribal sovereignty concept,"²²⁴ because "Chief Justice Marshall's opinion says no such thing [about inherent jurisdiction over non-Indians] and to suggest that it does is legal nonsense."²²⁵ Ultimately, Oliphant posited that his interpretation of *Worcester* was the correct interpretation because "[t]he reading of *Worcester* urged by the Tribe and the United States would automatically endow every Indian tribe with all the attributes of sovereignty,"²²⁶ something that Petitioner Oliphant could not stomach.

The Suquamish Indian Tribe countered, urging the Supreme Court to follow *Worcester's* original meaning, wherein Chief Justice Marshall "held that Indian nations: had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial."²²⁷ According to the Tribe, the *Worcester* Court determined that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their terri-

²²¹ AMERICAN INDIANS AND CRIME, *supra* note 6, at 7.

²²² Reply Brief for Petitioners at 7, *Oliphant*, 435 U.S. 191 (No. 76-5729) (emphasis added).

²²³ *Id.* at 26.

²²⁴ Brief for Petitioners at 46, *Oliphant*, 435 U.S. 191 (No. 76-5729).

²²⁵ Reply Brief for Petitioners, *supra* note 222, at 7.

²²⁶ *Id.* at 31.

²²⁷ Brief for Respondents at 12, *Oliphant*, 435 U.S. 191 (No. 76-5729) (citations omitted).

tory,” and there was no reason to depart from the *Worcester* Court’s sound reasoning.²²⁸

In issuing its decision, however, the Supreme Court did not directly address the parties’ differing positions on how *Worcester* should shape or control the outcome and instead diminished *Worcester*’s holding to a mere description of what the *Oliphant* Court mischaracterized as the “dependent” relationship Chief Justice Marshall described between Indian Tribes and the United States:

As Mr. Chief Justice Marshall explained in *Worcester v. Georgia*, such an acknowledgment is not a mere abstract recognition of the United States’ sovereignty. “The Indian nations were, from their situation, necessarily dependent on [the United States] . . . for their protection from lawless and injurious intrusions into their country.”²²⁹

In diminishing *Worcester* to nothing more than a declaration that Tribes are dependent upon the United States for protection, the *Oliphant* Court did not explain how the Court’s reading of *Worcester* would align with the actual words in Chief Justice Marshall’s opinion. That is, although the Court in *Oliphant* relied on *Worcester* to declare Tribal Nations “dependent” on the United States, the *Oliphant* Court did not adopt—or even attempt to explain away—the *Worcester* Court’s holding that this “dependence” has no effect on Tribal Nations’ right to self-government, as “the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection.”²³⁰

It is impossible to square the Court’s decision in *Oliphant* with the precedent articulated in *Worcester*. Whereas *Worcester* held that the United States’ colonial conquest of Indian Nations did *not* strip the Nations of their inherent sovereignty, the Court in *Oliphant* held that colonial conquest did.²³¹ Whereas *Worcester* confirmed that Indian Nations constitute the sov-

²²⁸ *Id.* at 14.

²²⁹ *Oliphant*, 435 U.S. at 207 (citation omitted) (quoting *Worcester v. Georgia*, 31 U.S. at 555).

²³⁰ *Worcester*, 31 U.S. at 560–61. Further, the *Worcester* Court also stated: “Protection does not imply the destruction of the protected. The manner in which this stipulation was understood by the American government, is explained by the language and acts of our first president.” *Id.* at 552.

²³¹ *Oliphant*, 435 U.S. at 209. Dakota legal scholar John P. LaVelle explains that the *Oliphant* Court “relied on selected treaty language, opinions of attorneys general issued in 1834 and 1855, defeated congressional bills and accompanying legislative reports, dictum from an 1878 opinion by a district court judge and a withdrawn 1970 opinion of the Solicitor of the Department of Interior.” John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the Cohen’s Handbook Cutting-Room Floor*, 38 CONN. L. REV. 731, 735 (2006). Thus, there is nothing to suggest that the Court considered the plethora of nineteenth century tribal laws whereby Tribal Nations historically asserted jurisdiction over non-Indians who committed crimes on tribal lands.

ereign with “exclusive” authority to exercise jurisdiction over non-Indians on tribal lands,²³² the *Oliphant* Court held that tribal jurisdiction over non-Indians “is a relatively new phenomenon,”²³³ and as a result, “Indians do not have criminal jurisdiction over non-Indians *absent affirmative delegation of such power by Congress.*”²³⁴

Eliminating tribal jurisdiction required the Supreme Court to erase *Worcester*. To conclude that Tribal Nations were stripped of their inherent authority, however, the *Oliphant* Court had to cite to something, a decision or source of law—anything—that supported the taking away of what the *Worcester* Court had promised to preserve. This necessity led the Court to rely on its 1823 decision in *Johnson v. M’Intosh*—a decision renounced by its own author, Chief Justice Marshall, in *Worcester*.

C. *The Oliphant Court’s Reliance on Johnson v. M’Intosh*

By dismissing *Worcester* and adopting the *Johnson* framework, the *Oliphant* Court substituted *Worcester’s* affirmation of sovereignty for *Johnson’s* colonial notion that “[c]onquest gives a title which the Courts of the conqueror cannot deny.”²³⁵ In concluding that Tribal Nations could no longer exercise criminal jurisdiction over non-Indians, the Supreme Court reaffirmed its role as the “Court[] of the conqueror.”²³⁶

To be sure, Petitioner *Oliphant* himself advocated stringently for the replacement of *Worcester* with *Johnson*. *Oliphant’s* opening brief quoted significant portions of *Johnson*—a case *Oliphant* described as “[t]he great case of *Johnson v. McIntosh*”²³⁷—asserting that after *Johnson*, the doctrine of discovery had been squarely affirmed as controlling law, and as “the law of the land . . . cannot be questioned.”²³⁸ According to Petitioner *Oliphant*, the exercise of tribal jurisdiction over non-Indians “was repudiated more than 150 years ago in *Johnson v. McIntosh.*”²³⁹ That is, according to *Oliphant’s* reading of *Johnson*, “tribal sovereignty . . . *simply does not exist.*”²⁴⁰

The Court followed Petitioner *Oliphant’s* suggestion and fully replaced *Worcester* with the framework embedded in *Johnson*. First, the *Oliphant*

²³² *Worcester*, 31 U.S. at 557.

²³³ *Oliphant*, 435 U.S. at 197.

²³⁴ *Id.* at 208 (emphasis added).

²³⁵ See *Johnson v. M’Intosh*, 21 U.S. 543, 588 (1823).

²³⁶ See *id.* at 588.

²³⁷ Reply Brief for Petitioners, *supra* note 222, at 15 (quoting *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279–80 (1955)).

²³⁸ Brief for Petitioners, *supra* note 224, at 40 (quoting *Johnson*, 21 U.S. at 591). See also *id.* (“However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained, if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.”).

²³⁹ Reply Brief for Petitioners, *supra* note 222, at 6.

²⁴⁰ See *id.* at 17–18 (emphasis added).

Court rejected *Worcester*'s holding that colonial conquest did not strip Indian Nations of their inherent sovereignty and instead adopted *Johnson*'s holding that the rights of Indian Nations "to complete sovereignty, as independent nations, [are] necessarily diminished."²⁴¹ This doctrine, known as the "discovery doctrine," is so titled as the *Johnson* Court based its conclusion on the rationale that colonial "discovery gave exclusive title to those who made it."²⁴² According to the Court in *Oliphant*, Tribal Nations could not exercise criminal jurisdiction over land to which the *Johnson* Court claimed they could not even claim legal title.²⁴³

Second, whereas *Worcester* rejected any and all past precedent that justified the stripping of tribal jurisdiction on the alleged racial inferiority of a Tribal Nation's citizens, the *Oliphant* Court fully endorsed *Johnson* without questioning the *Johnson* Court's conclusion that Indian Nations cannot exercise authority over their lands because their citizens are uncivilized "savages" and "heathens."²⁴⁴ Accordingly, the *Oliphant* Court's endorsement of *Johnson* renders its conclusion that Tribal Nations cannot exercise jurisdiction over non-Indians predicated on a distinction drawn on race, as well as religion. Not only were Indians "fierce savages," the *Johnson* Court also classified them as "heathens" whose governments lose their authority to govern when their lands are discovered by "Christian people."²⁴⁵

Finally, the *Oliphant* Court relied on *Johnson* to circumvent the *Worcester* Court's central holding that Indian Nations constitute the exclusive sovereign with authority over their lands.²⁴⁶ In *Johnson*, the Court reasoned that because the "territory [of Tribal Nations] was occupied by numerous and warlike tribes of Indians[,] the exclusive right of the United States to extinguish their title . . . has never . . . been doubted."²⁴⁷ Thus, through the substitution of *Johnson* for *Worcester*, the *Oliphant* Court transformed the "exclusive authority"²⁴⁸ of Tribal Nations to exercise jurisdiction

²⁴¹ *Oliphant*, 435 U.S. at 209 (quoting *Johnson*, 21 U.S. at 574).

²⁴² *Johnson*, 21 U.S. at 574.

²⁴³ See *Oliphant*, 435 U.S. at 209 (quoting *Johnson*, 21 U.S. at 574).

²⁴⁴ See Oliviero & Skibine, *supra* note 115, at 6 (noting that the Supreme Court's decision in *Johnson* "is a political finding rooted in racist assumptions about Indian nations"); see also *Johnson*, 21 U.S. at 576–77 (concluding that Tribal Nations cannot claim legal title to their lands because their citizens constitute racially inferior "heathens" and "savages").

²⁴⁵ *Johnson*, 21 U.S. at 576–77. While the racist language of *Johnson* was not directly endorsed by the decision in *Oliphant*, Justice Rehnquist did rely, in part, on another nineteenth century case that also contained racist statements about Native people. See *Oliphant*, 435 U.S. at 210–211 (discussing *Ex Parte Crow Dog*, 109 U.S. 556, 571 (1883)). In *Crow Dog*, the Court ruled that tribal citizens could not be tried in federal court—owing, in part, to their "savage nature." *Ex Parte Crow Dog*, 109 U.S. at 571. When Justice Rehnquist invoked this part of the decision to argue that white men should not be held accountable in tribal courts, he conveniently used ellipses to eliminate the racist language. See *Oliphant*, 435 U.S. at 210–11.

²⁴⁶ Compare *Worcester v. Georgia*, 31 U.S. 515, 557 (1832) with *Oliphant*, 435 U.S. at 209 (quoting *Johnson*, 21 U.S. at 574).

²⁴⁷ *Johnson*, 21 U.S. at 586 (emphasis added).

²⁴⁸ *Worcester*, 31 U.S. at 557.

on tribal lands to an “exclusive right”²⁴⁹ of the United States to extinguish any and all authority Tribal Nations exercise. The Court crafted a curious doctrine called “implicit divestiture”—namely, that lack of jurisdiction can be inferred.²⁵⁰

D. Oliphant Characterizes Tribal Jurisdiction as a “New Phenomenon”

Aside from replacing *Worcester* with *Johnson*, the Supreme Court’s decision in *Oliphant* drew further support for its conclusion based on an incorrect assumption—or perhaps intentional revision of history—that, as of 1978, the exercise of tribal jurisdiction over non-Indians constituted “a relatively new phenomenon.”²⁵¹ Of course, as discussed above, at the time the Supreme Court decided *Worcester*, several Tribal Nations had codified laws criminalizing non-Indian conduct on tribal lands, including non-Indian rape of women. As described above, these laws were borne out of various Tribal Nations’ traditional values that recognize women as foundational to tribal self-governance and sovereignty—values that encompass an understanding that non-Indian attacks on Native women must be prevented precisely because they have been historically used to accomplish colonial conquest. Indeed, by the time Mark Oliphant’s attack on tribal jurisdiction reached the U.S. Supreme Court, Tribal Nations had been exercising jurisdiction over non-Indians for hundreds of years.²⁵²

Understanding precisely how the *Oliphant* Court attempted to replace *Worcester* with *Johnson* provides significant insight into why, and how, the levels of non-Indian perpetrated violence against Native women remains a serious crisis that—despite recent advancements in other areas of American democracy—has yet to dissipate. Just as the continued survival of Tribal Nations depends on the women who give birth to future generations, the safety of Native women depends on their Nations’ ability to exercise jurisdiction to protect them.

²⁴⁹ *Johnson*, 21 U.S. at 587.

²⁵⁰ See generally LaVelle, *supra* note 231 (explaining the doctrine of implicit divestiture).

²⁵¹ See *Oliphant*, 435 U.S. at 197. The Court also searched congressional history, treaties, and statutes to try to find “evidence” that tribes were authorized to prosecute non-Indians. See Sarah Krakoff, *Mark the Plumber v. Tribal Empire, or non-Indian Anxiety v. Tribal Sovereignty: The Story of Oliphant v. Suquamish Indian Tribe*, in *INDIAN LAW STORIES* 280 (Carole E. Goldberg et al. eds., 2011). There is nothing to indicate that the Court considered or thought to search for *tribal* laws or statutes. If they had, presumably they may have discovered the many tribal criminal laws that are discussed earlier in the paper.

²⁵² See Oliviero & Skibine, *supra* note 115, at 7 (“Prior to *Oliphant*, a number of tribes exercised criminal jurisdiction over non-Indian offenses.”).

E. *Oliphant in a Civil Context*

Although *Oliphant* dealt with criminal—and not civil—jurisdiction, the Supreme Court subsequently relied on *Oliphant* to further depart from *Worcester* and diminish—but not altogether eliminate—tribal *civil* jurisdiction over non-Indians.²⁵³ For example, twenty-three years after *Oliphant*, the Court decided *Nevada v. Hicks*, a case concerning the exercise of tribal civil jurisdiction over non-Indians.²⁵⁴ Specifically, the Court considered whether the Tribal Court for the Fallon Paiute-Shoshone Tribes could exercise civil jurisdiction to adjudicate the alleged tortious conduct of state wardens executing a search warrant for evidence of an off-reservation crime.²⁵⁵ Based on *Oliphant*'s departure from *Worcester*, the Supreme Court concluded that the Fallon Paiute-Shoshone Tribes could not.²⁵⁶

The *Hicks* Court predicated its conclusion on the *Oliphant* Court's departure from *Worcester*, noting that, although the question in *Hicks* dealt with civil and not criminal jurisdiction, the *Hicks* Court could look to the *Oliphant* Court's conclusion that "tribes lack criminal jurisdiction over non-members."²⁵⁷ The *Hicks* Court further noted that "[t]hough tribes are often referred to as 'sovereign' entities, it was 'long ago' that 'the Court departed from Chief Justice Marshall's view that 'the laws of a State can have no force' within reservation boundaries.'"²⁵⁸ The Court's decision in *Hicks*, however, did not fully and completely eliminate tribal *civil* jurisdiction over non-Indians and instead recognized that Tribes maintain civil jurisdiction over non-Indians in relation to issues that affect "tribal self-government" and "internal relations."²⁵⁹

The Supreme Court's partial—but not full—endorsement of *Oliphant* in the civil jurisdiction context, however, set the stage for *Dollar General*. Although *Hicks* did not completely eliminate tribal civil jurisdiction over non-Indians, it left the door open for the Court to put the final nail in *Worcester*'s coffin and—after 180 years—come close to fully eliminating all forms of tribal jurisdiction over non-Indians. The four votes in favor of allowing tribes to retain civil jurisdiction over non-Indians in *Dollar General* are par-

²⁵³ The initial case concerning civil jurisdiction over non-Indians came in 1981, just three years after *Oliphant*. In *Montana v. United States*, the Court held that the Crow Nation could not regulate the activities of white hunters and fishers on non-Indian owned fee land, even though the land at issue was within the reservation boundaries. *Montana v. United States*, 450 U.S. 544, 564–65 (1981). Despite numerous decisions limiting the scope of tribal civil jurisdiction, the Court has not, however, completely eliminated the civil jurisdiction of Tribal Nations over non-Indians.

²⁵⁴ *Nevada v. Hicks*, 533 U.S. 353, 355 (2001).

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 374.

²⁵⁷ *Id.* at 358 (following the *Montana* decision, which the Court considered to be the "path-marking case" on the subject of tribal civil jurisdiction).

²⁵⁸ *Id.* at 361 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980) (quoting *Worcester v. Georgia*, 31 U.S. 515, 561 (1832)) (brackets omitted)).

²⁵⁹ *Hicks*, 533 U.S. at 364.

ticularly significant given that Tribal Nations have consistently and continually lost civil jurisdiction cases in the Supreme Court by unanimous or nearly-unanimous votes since the 1980s.²⁶⁰

V. THE AFTERMATH OF *OLIPHANT*

For Native women—and their Tribal Governments that seek to protect them—the loss of criminal jurisdiction over non-Indians in *Oliphant* has been devastating. The *Oliphant* Court gave passing notice to the high rates of non-Indian perpetrated violence on tribal lands, noting that the Court was “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.”²⁶¹ The Court, however, deemed these high-rates of non-Indian perpetrated violence as having “little relevance to the principles” that formed the foundation for the Court’s conclusion that Tribal Nations could no longer have the authority to criminally prosecute non-Indians who commit crimes on tribal lands.²⁶²

Tribal Governments reported negative consequences of *Oliphant* almost immediately.²⁶³ Tribal law enforcement agencies suddenly found themselves without jurisdiction to arrest—and prosecute—non-Indian individuals committing violent crimes on tribal lands.²⁶⁴ While some tribal law enforcement agencies ultimately developed cross-deputization or mutual aid agreements with neighboring jurisdictions to allow for arrests of non-Indians committing crimes on tribal lands, the initial aftermath of the decision left Tribal Governments with absolutely no authority over non-Indians when they committed *any* crime on the reservation—including homicide, domestic violence, sexual assault, and child abuse.²⁶⁵ A logical consequence was that crime in Indian country increased. As described by then-Assistant Secretary for Indian Affairs, Forrest Gerard, *Oliphant* created a “void in law enforcement on Indian reservation[s].”²⁶⁶

In 1980, two years after *Oliphant*, the Institute for the Development of Indian Law published the results of a study documenting the problems *Oli-*

²⁶⁰ See *supra* note 41 (collecting cases).

²⁶¹ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

²⁶² *Id.*

²⁶³ See Oliviero & Skibine, *supra* note 115, at 11. See also Stephen M. Johnson, Note, *Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of Oliphant*, 7 AM. INDIAN L. REV. 291, 293 (1979) (“In a newspaper interview published immediately after the Supreme Court handed down the *Oliphant* decision, a candidate for the position of Crow tribal chairman stated that Crow tribal members were ‘really disturbed’ about the Court’s holding and predicted some tribal members might ‘take the law into their own hands.’”).

²⁶⁴ Oliviero & Skibine, *supra* note 115, at 7.

²⁶⁵ *Id.* at 7–8.

²⁶⁶ Krakoff, *supra* note 251, at 284 (citing *White Oliphant Case Causes Police “Void,”* INDIAN VOICE (Apr. 1978)).

phant left in its wake.²⁶⁷ The findings were intuitive: “*Oliphant* has created a serious gap in the enforcement and prosecution of non-Indian crime on the reservation.”²⁶⁸ At that time, tribes reported that non-Indian crime was increasing—in fact, “[forty] percent of the respondents answered that non-Indian crime has gone increasingly unenforced since *Oliphant*.”²⁶⁹ The study also spoke of the harm to the morale of tribal police officers, noting that they “felt stymied in the performance of their duty.”²⁷⁰

The initial problems reported in the early 1980s have not subsided—and will not until tribal criminal jurisdiction is fully restored.²⁷¹ At a Senate Committee on Indian Affairs field hearing in 2008, Salt River Pima-Maricopa Indian Community President Diane Enos testified that “[t]he viciousness and frequency of crimes committed today by both non-Indians and Indians has increased greatly since the [Court’s decision in] *Oliphant*”²⁷² In a related 2011 hearing, Jacqueline Johnson-Pata, executive director of the National Congress of American Indians, submitted written testimony, explaining that “non-Indian perpetrators are well aware of the lack of Tribal jurisdiction over them, the vulnerability of Native women and the unlikelihood of being prosecuted by the Federal Government . . . for their actions.”²⁷³ As North Dakota Senator Heidi Heitkamp noted, the lack of tribal jurisdiction over non-Indian perpetrated crimes in Indian Country “leave[s] no cop on the beat to stop them. . . . [C]riminals seeking refuge on [tribal] land ha[ve] been ravaging Native communities.”²⁷⁴

The next section focuses on social sciences to establish that *Oliphant* has resulted in inhumane conditions for Native people, both under domestic and international law. When these contemporary harms are considered alongside the affirmations of tribal sovereignty and jurisdiction that Justice Marshall articulated in *Worcester*, it becomes clear that the use of a colonial framework in *Oliphant* to overrule *Worcester* threatens not only the lives of Native women; ultimately, *Oliphant* threatens the continued survival of sovereign Indian Nations.

²⁶⁷ Oliviero & Skibine, *supra* note 115, at 2.

²⁶⁸ *Id.* at 7.

²⁶⁹ *Id.* at 11.

²⁷⁰ *Id.* at 7.

²⁷¹ See BALL, *supra* note 28, at 193–201.

²⁷² *Law and Order in Indian Country: Field Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 8 (2008) (statement of Diane Enos, President, Salt River Pima-Maricopa Indian Community), <https://www.indian.senate.gov/sites/default/files/upload/files/March172008.pdf> [<https://perma.cc/V4B6-XT25>]. President Enos also provided statistics for arrests in her nation’s territory—establishing that arrests of non-Natives are much more common than arrests of Native people. See *id.* at 9.

²⁷³ *Tribal Law and Order Act One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country?: Hearing Before the S. Comm. on Indian Affairs*, 112th Congress 63 (2011) (statement of Jacqueline Johnson-Pata, Exec. Dir., National Congress of American Indians), <https://www.indian.senate.gov/sites/default/files/upload/files/092211trans-112shrg73817.pdf> [<https://perma.cc/9RJ2-Z3WC>].

²⁷⁴ Heitkamp, *supra* note 29 (outlining how jurisdictional issues interfere with criminal prosecutions).

A. *Statistics Reveal that Post-Oliphant, Violence Against Native Women Constitutes a Crisis*

The abuse and violence perpetrated against Native women and children threatens the continued existence of Tribal Nations; indeed, the very high rate of victimization constitutes one of the primary barriers to the self-determination of Tribal Nations. Criminologist Ronet Bachman has noted that, in some areas of the country, murder against American Indian and Alaska Native women is “over ten times the national average.”²⁷⁵ The most recent data analysis from the National Institute of Justice reveals that more than four in five Native people have been victims of violence.²⁷⁶ Over half (56.1 percent) of Native women report being victims of sexual violence.²⁷⁷ Over thirty-nine percent of respondents reported that they had experienced violence within the year of being interviewed.²⁷⁸ People who are suffering from the after-effects of trauma often suffer from maladies (such as depression and anxiety) that can make it difficult to contribute effectively to self-determination (such as voting, running for office, or participating in the political process). Since most Native people are victims, violence presents a direct threat to tribal sovereignty.

Perhaps most important, over ninety-five percent of Native women reported that they had been victimized by a perpetrator of another race—making the overturning of *Oliphant* a crucial linchpin for ending violence against Native women and ensuring the continued existence of Tribal Nations.²⁷⁹ Repeating these numbers *ad nauseam*, however, is entirely insufficient and provides no workable solution. These and countless similar reports repeatedly come to a common conclusion: Native people are the most victimized people in the United States.²⁸⁰ We ask the next obvious question—what *harm* do these victimizations do to tribal sovereignty? It is critical to understand the interplay between the Court’s poorly reasoned decision to strip Tribal Nations of criminal jurisdiction in *Oliphant* (and its progeny) to explain the widespread crime and trauma experienced by Native people today.

²⁷⁵ RONET BACHMAN ET AL., DEP’T OF JUSTICE, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 5 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf> [<https://perma.cc/6NU2-FATB>].

²⁷⁶ ROSAY, *supra* note 32, at 2.

²⁷⁷ *Id.* This new data shows one in two Native women has experienced sexual violence – up from older estimates which said one in three Native women had been raped. See NAT’L INST. JUSTICE, U.S. DEP’T JUSTICE, FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 22 (2000), <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf> [<https://perma.cc/4KNB-QEZ4>].

²⁷⁸ ROSAY, *supra* note 32, at 2.

²⁷⁹ ROSAY, *supra* note 32, at 11.

²⁸⁰ See, e.g., AMERICAN INDIANS AND CRIME, *supra* note 6, at 7; ENDING VIOLENCE, *supra* note 31, at 36.

B. *Oliphant Perpetuates Colonial Violence Against Native Women*

As history has shown, the colonial conquest of Native lands and Native women's bodies go hand in hand. By replacing the tribal sovereignty-affirming foundation of *Worcester* with the colonial framework found in *Johnson*, *Oliphant* reinstated a legal framework that supports the perpetuation of violence against Native women. Recent history is rife with examples of non-Indian perpetrated criminal violent conduct against Native women and children that, if not for *Oliphant*, Tribal Governments would have been able to prohibit and prosecute.

Tribal sovereignty and jurisdiction form the foundation of a Tribal Nation's ability to support and perpetuate its own culture and identity; thus, *Oliphant's* elimination of tribal sovereignty and jurisdiction has also served to undermine the ability of tribal citizens to turn to their own cultural identity for support when faced with violence their Nation no longer has the authority to prohibit and prosecute.

After *Oliphant* was decided, it became easier for non-Native people to commit crimes with impunity.²⁸¹ Some of the most well-known perpetrators have been non-Native men who served as teachers or federal employees on tribal lands and/or reservations. Several child sexual abuse scandals rocked the Bureau of Indian Affairs during the 1980s, when hundreds of children were victimized by non-Indian federal employees.²⁸² The Senate Select Indian Affairs Committee documented several egregious examples of this dynamic.²⁸³ For example, a white teacher named Paul Price abused at least twenty-five Cherokee boys on the Eastern Band of Cherokee reservation for over fourteen years.²⁸⁴ John Boone, another white teacher, sexually abused and photographed at least 142 young boys on the Hopi reservation over an eight-year time period (1979–1987).²⁸⁵ There have been numerous occasions in which the federal government either failed to do background checks on the employees working on Indian reservations, or did perform background checks and made a hire regardless of the results.²⁸⁶ The federal government, for example, hired Terry Hester to teach on the Navajo reservation, despite

²⁸¹ In testimony before the Indian Law and Order Commission in 2012, Humboldt County District Attorney Paul Gallegos said: “[There are] people that move into those areas for that reason: they want to engage in unlawful activity. They do so because they know that there is an absence of law enforcement.” INDIAN LAW AND ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT AND & CONGRESS OF THE UNITED STATES 14 (2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf [<https://perma.cc/3L82-D5SP>].

²⁸² EchoHawk, *supra* note 53, at 103–04.

²⁸³ See, e.g., SPECIAL COMM. OF INVESTIGATIONS OF THE SELECT COMM. ON INDIAN AFFAIRS, 101ST CONG., FINAL REPORT AND LEGISLATIVE FINDINGS, S. PRT. NO. 101–60, at 89–104 (Comm. Print 1989).

²⁸⁴ See *id.* at 94–95.

²⁸⁵ EchoHawk, *supra* note 53, at 103.

²⁸⁶ See *id.* at 104–05.

the fact that he had indicated on his employment application that he had previously been arrested for child sexual abuse.²⁸⁷

This disregard for tribal sovereignty and safety for Native women and children perpetuates the dire consequences that colonial violence originally created in the form of mental and physical diseases and which plague contemporary tribal communities. Today, Native people occupy most of the bottom rungs in terms of socioeconomic status in the United States. Native people are typically at the highest risk for poverty, unemployment, and a variety of psychological and physical illnesses. The variety of maladies suffered disproportionately by Native people are strongly correlated to unresolved trauma.²⁸⁸ In this section, we consider both physical and psychological maladies that occur in high rates among Native people, including suicide, mental illness, addiction, and poor physical health. We consider how each of these maladies can be triggered in victims of rape and abuse and rely on contemporary brain science to illustrate how trauma affects the brain and sets the foundation for additional negative outcomes.²⁸⁹

Native people generally suffer from high rates of mental health disorders that are also extremely common in people who have been victimized.²⁹⁰ This is not to say that all people with these disorders have been victims of abuse—rather we seek to examine a strong correlation between mental illness and abuse. In general, people who experience child or adolescent sexual

²⁸⁷ *Id.* at 103–04.

²⁸⁸ *See id.* at 87 (“A victim of this terrible crime [child sexual abuse] may thereafter never live a normal, happy, healthy, and secure life because they face an increased risk of suffering an array of devastating short and long-term consequences.”).

²⁸⁹ Of course, none of these types of injuries are necessarily exclusive of others. In a 2015 study, researchers found that Native adolescents with a history of victimization had a higher likelihood of experiencing “depression symptoms, poly-drug use, PTSD [Post Traumatic Stress Disorder] symptoms, and suicide attempt[s].” Teresa N. Brockie et al., *The Relationship of Adverse Childhood Experiences to PTSD, Depression, Poly-Drug Use and Suicide Attempt in Reservation-Based Native American Adolescents and Young Adults*, 55 AM. J. COMMUNITY PSYCHOL. 411, 418 (2015).

²⁹⁰ We should note that the entire construct of Western contemporary mental health is objectionable to many Native people. While beyond the scope of this paper, we encourage readers to consider how colonial power and control often forcefully introduced western medicine ideals that do not respect the entire range of Native psyche expectations and the various obligations within tribal communities. As the American Psychiatric Association indicated, “Among AIAN [American Indian/Alaska Native] people, there is a wide range of beliefs about illness, healing, and health. The concept of mental illness and beliefs about why and how it develops have many different meanings and interpretations among AIAN people. Often physical complaints and psychological concerns are not distinguished and AI/ANs may express emotional distress in ways that are not consistent with standard diagnostic categories.” AM. PSYCHIATRIC ASS’N OFFICE OF MINORITY AND NAT’L AFFAIRS, MENTAL HEALTH DISPARITIES: AMERICAN INDIANS AND ALASKA NATIVES (2010), http://www.integration.samhsa.gov/workforce/mental_health_disparities_american_indian_and_alaskan_natives.pdf [<https://perma.cc/H4A7-KJP7>] [hereinafter MENTAL HEALTH DISPARITIES]. For further information on how Western medicine often clashed with traditional Native values, see generally ROBERT A. TRENNERT, *WHITE MAN’S MEDICINE: THE NAVAJO AND GOVERNMENT DOCTORS, 1863–1955* (1998) (exploring how the United States sought to impose Western health care to the Indians in order to speed their assimilation into white society).

abuse have a seventy percent likelihood of suffering from some form of psychological injury, including mood disorders and anxiety disorders.²⁹¹ Given the high rates of sexual violence in tribal communities, it is not particularly surprising that the rates of mental health disorders (including Post Traumatic Stress Disorder (“PTSD”)) are also disproportionately high in most studies that consider this question.²⁹² There are several mental diagnoses that are common among abuse survivors.²⁹³ This can range from relatively mild forms of impairments like dysthymia, depression, and anxiety to longer-term impairments such as dissociative disorder and PTSD.²⁹⁴ Native people suffer from PTSD at rates 4.4 times higher than the United States population as a whole. Moreover, PTSD is “associated with long-term changes in neurobiology.”²⁹⁵

In addition, American Indian and Alaska Native Tribes suffer from high rates of addiction and mortality related to drugs and alcohol—another malady strongly linked with having experienced abuse and violence. In the mid-1990s, the rate of death associated with alcoholism for American Indians was over seven times the rate for the American population as a whole.²⁹⁶ Substance abuse is common in survivors of physical and sexual abuse; some theorize that victims of abuse attempt to “self-medicate” by using central nervous system stimulants or depressants to block flashbacks and other painful memories and feelings tied to the abuse. For example, one study of Native women found that a history of substance abuse was “significantly more common” amongst Native women who had been abused as children.²⁹⁷ Another study reported that ninety percent of Alaska Native women entering residential treatment program in Alaska had been physically abused, and of those women, sixty-four percent reported that the abuse happened before the age of thirteen. A study of seven Indian Nations concluded that past sexual and physical abuse significantly increased the likelihood of substance abuse dependency.²⁹⁸

Mental health and addiction are also closely interwoven as risk factors for suicide in Native communities. One of the saddest realities of tribal life today is that Native people commit suicide on average about twice as often

²⁹¹ See Bárbara G. Amado, Ramón Arce & Andrés Herraiz, *Psychological Injury in Victims of Child Sexual Abuse: A Meta-Analytic Review*, 24 PSYCHOSOCIAL INTERVENTION 49, 51 (2015).

²⁹² See MENTAL HEALTH DISPARITIES, *supra* note 290.

²⁹³ See Amado, Arce & Herraiz, *supra* note 291, at 53.

²⁹⁴ See Amado, Arce & Herraiz, *supra* note 291, at 50.

²⁹⁵ J. Douglas Bremner et al., *Structural and Functional Plasticity of the Human Brain in Posttraumatic Stress Disorder*, 167 PROGRESS BRAIN RES. 171, 171 (2008).

²⁹⁶ Mary P. Koss et al., *Adverse Childhood Exposures and Alcohol Dependence Among Seven Native American Tribes*, 25 AM. J. PREVENTIVE MED. 3, 238 (2003).

²⁹⁷ Diane K. Bohn, *Lifetime Physical and Sexual Abuse, Substance Abuse, Depression, and Suicide Attempts among Native American Women*, 24 ISSUES MENTAL HEALTH NURSING 333, 344 (2003).

²⁹⁸ Koss et al., *supra* note 296, at 248.

as the non-Native American population.²⁹⁹ In some regions, the disparity is even more pronounced.³⁰⁰ It is likely that this suicide rate is fueled, in part, by high rates of unresolved trauma.³⁰¹ The basic concept of a link between abuse and suicide is fairly straightforward. Physical and sexual abuse are common antecedents of suicide across races,³⁰² largely because abuse is likely to cause depression and self-esteem issues in the lives of victims who may feel hopeless and unsafe in the aftermath of trauma.³⁰³ Some studies have found that experiencing childhood abuse is one of the most common predictors of an adolescent suicide attempt.³⁰⁴ In the context of American Indian and Alaska Native people in particular, PTSD and history of physical and sexual abuse have been associated with suicide and suicide attempts.³⁰⁵ Studies have identified that a risk factor for suicide is a history of intimate partner violence and interpersonal conflict.³⁰⁶

Because abuse is directly linked to suicide, it follows that a society that is able to prevent such abuse will be successful in lowering the suicide rates. Other risk factors for suicide in tribal communities include a disconnection with one's history or culture.³⁰⁷ Scientists who have considered the question find that tribal communities that continue to practice and cultivate traditions have found that these communities also suffer lower rates of suicide.³⁰⁸

Native people also suffer from disproportionate rates of certain physical diseases and conditions—and many of these conditions have also been

²⁹⁹ Carmela Alcántara & Joseph P. Gone, *Reviewing Suicide in Native American Communities: Situating Risk and Protective Factors within a Transactional-Ecological Framework*, 31 DEATH STUD. 457, 461 (2007). See also Lenora M Olson & Stéphanie Wahab, *American Indians and Suicide: A Neglected Area of Research*, 7 TRAUMA. VIOLENCE ABUSE 19, 20 (2006).

³⁰⁰ See Alcántara & Gone, *supra* note 299, at 461 (discussing Native suicide rates that are five to seven times the non-Native suicide rate in some geographic regions, for example).

³⁰¹ See *id.* at 469 (discussing historical trauma and colonization as a paradigm for understanding prevalence of suicide in Native communities).

³⁰² *Id.* at 467.

³⁰³ See generally Eve K. Mościcki, *Epidemiology of Completed and Attempted Suicide: Toward a Framework for Prevention*, 1 CLINICAL NEUROSCIENCE RES. 310 (2001) (explaining that mood disorders and hopelessness are primary risk factors for suicide).

³⁰⁴ See Thomas E. Joiner et al., *Childhood Physical and Sexual Abuse and Lifetime Number of Suicide Attempts: A Persistent and Theoretically Important Relationship*, 45 BEHAV. RES. & THERAPY 539, 545 (2007).

³⁰⁵ Alcántara & Gone, *supra* note 299, at 467.

³⁰⁶ See Lenora Olson et al., *Guns, Alcohol, and Intimate Partner Violence: The Epidemiology of Female Suicide in New Mexico*, 20 CRISIS 121, 124 (1999) (finding interpersonal violence and interpersonal conflict as risk factors for suicide in women living in New Mexico, across all races).

³⁰⁷ Olson & Wahab, *supra* note 299, at 21. See also MENTAL HEALTH DISPARITIES, *supra* note 290 (identifying connection with one's culture and one's past as "protective factors" against suicide).

³⁰⁸ See Michael J. Chandler & Christopher Lalonde, *Cultural Continuity as a Hedge Against Suicide in Canada's First Nations*, 35 TRANSCULTURAL PSYCHIATRY 191, 215 (1998) (stating "communities that have taken active steps to preserve and rehabilitate their own cultures are shown to be those in which youth suicide rates are dramatically lower.").

linked to adverse childhood experiences and abuse. The Western medical world now understands and explains this phenomenon using a long-range study called Adverse Childhood Experiences, which has opened up a new avenue for understanding how psychological trauma affects long-term physical health.³⁰⁹ For example, PTSD has been linked to lung disorders and general bodily pain.³¹⁰ Therefore, we might expect to see higher rates of lung disorders and general bodily pain in the lives of Native people. It is now clear that experiencing abuse or other adverse effects as a child can be correlated to short-term and long-term physical medical conditions.

Over the past thirty-eight years, the harms brought on by the Court's decision in *Oliphant* have never subsided. Non-Indian perpetrated crime and trauma in tribal communities have become commonplace, and Native women and children continue to suffer violence and sexual assault at rates higher than any other population in the United States—more often than not in the hands of a non-Indian perpetrator who—because of *Oliphant*—will never be prosecuted. *Oliphant*'s dire consequences warrant a reconsideration of the entire decision itself.

The inability of Tribal Nations to protect their women and children from the majority of violent assaults committed against them has added another layer of trauma and terror to communities still recovering from centuries of historical violence. It is within this larger, post-*Oliphant* context that *Dollar General* came before the Court in 2015.

VI. *DOLLAR GENERAL* AND THE SUPREME COURT'S RETURN TO *WORCESTER*

In 2015, the question of whether a Tribal Nation could exercise jurisdiction over a non-Indian on tribal lands once again returned to the Supreme Court. Like *Oliphant*, *Dollar General* involved non-Indian perpetrated violence against a tribal citizen on tribal lands.³¹¹ Specifically, the case involved allegations that a non-Indian store manager at a Dollar General store, located

³⁰⁹ See Valerie J. Edwards et al., *Adverse Childhood Experiences and Health-Related Quality of Life as an Adult*, in HEALTH CONSEQUENCES OF ABUSE IN THE FAMILY: A CLINICAL GUIDE FOR EVIDENCE-BASED PRACTICE 81, 83 (Kathleen A. Kendall-Tackett ed., 2004) (discussing the role of trauma as a cumulative stressor and its association with other undesirable health outcomes).

³¹⁰ Deborah Bassett et al., *Posttraumatic Stress Disorder and Symptoms among American Indians and Alaska Natives: A Review of the Literature*, 49 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 417, 429 (2014).

³¹¹ See *Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 169–170 (5th Cir. 2014). *Worcester* is also indirectly relevant for this question of violent crime. Although the defendant in *Worcester*, Samuel Worcester, had committed no violent act himself, the fight for jurisdiction—within which his arrest was placed—involved a significant amount of violence perpetrated by the Georgia militia, as well as Georgia's citizens, against the citizens of Cherokee Nation. See *Worcester v. Georgia*, 31 U.S. 515, 515–16 (1832).

on Mississippi Band of Choctaw Indians' ("MBCI") tribal lands, sexually assaulted a thirteen-year-old citizen of the Tribe.³¹²

By the time the case reached the Court, the question had evolved—and narrowed—to whether the Tribe could exercise its inherent civil jurisdiction over a non-Indian defendant for torts committed on the Tribe's lands.³¹³ Dollar General asked for nothing less than an extension of *Oliphant* to completely eliminate tribal *civil* jurisdiction over non-Indians.³¹⁴ In a 4-4 tie, however, the Supreme Court let stand the Fifth Circuit Court of Appeals' decision that the Tribe could exercise this jurisdiction.³¹⁵

While a 4-4 tie may seem insignificant, when considered in the context of *Oliphant* and the arguments Dollar General made in reliance on that particular precedent, the decision of four Justices to depart from *Oliphant's* reasoning and uphold the jurisdiction of a Tribal Nation over a non-Indian is noteworthy. As discussed in further detail below, this tie indicates that the Court is headed away from the *Oliphant/Johnson* framework, and ultimately, back to *Worcester*.

A. *Factual and Procedural Background of Dollar General*

In 2000, Dollar General opened a store on the MBCI reservation.³¹⁶ To rent the storefront where Dollar General opened its store, Dollar General executed a long-term commercial lease agreement with the Choctaw Shopping Center Enterprise, a company wholly owned by the MBCI.³¹⁷ The lease Dollar General signed contained a clause in which the parties agreed that "[e]xclusive jurisdiction and venue" laid with the Tribal Court of the MBCI.³¹⁸ To continue operating its business on tribal lands, Dollar General also maintained a valid tribal business license, as required by the MBCI Tribal Code.³¹⁹

In 2003, Dollar General agreed to participate in MBCI's Youth Opportunity Program ("YOP"), a program designed to place tribal youth in short-term positions with local businesses to help the youth develop job and life skills.³²⁰ That summer, MBCI's YOP placed a thirteen-year-old member of the Tribe, and several other Choctaw students, as interns in the Dollar Gen-

³¹² *Doe v. Dollar Gen. Corp.*, No. CV-02-05, SC 2005-6, slip op. at 1–2 (Miss. Choctaw Sup. Ct. Feb. 8, 2008) (per curiam), http://sct.narf.org/documents/dollar_general_v_choctaw/miss_choctaw_supreme/mississippi-choctaw-supreme-court-opinion.pdf [<https://perma.cc/3U8D-T8UQ>].

³¹³ See Brief for Petitioners, *supra* note 224, at i.

³¹⁴ Brief for Petitioners, *supra* note 224, at 16.

³¹⁵ *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159, 2159 (2016).

³¹⁶ Brief for Respondents, *supra* note 227, at 8–9.

³¹⁷ *Id.* at 9.

³¹⁸ *Id.*

³¹⁹ *Id.* See also Choctaw Tribal Code § 14-1-4(1) (detailing the tribal business permit requirement).

³²⁰ Brief for Respondents, *supra* note 227, at 9.

eral store.³²¹ It was during that summer that Dollar General’s non-Indian store manager allegedly sexually molested the thirteen-year-old MBCI citizen.³²² The federal government did not initiate any prosecution,³²³ and *Oliphant* prohibited the Tribe from taking criminal action since the perpetrator was non-Indian.

In 2005, the child survivor’s parents filed a civil lawsuit against the store manager, as well as Dollar General, in the MBCI Tribal Court.³²⁴ The child’s parents alleged that the store manager had, on two occasions subjected the child to unwanted sexual advances and offensive touching.³²⁵ The complaint specifically stated that the store manager followed the child into the store’s stockroom and made sexual advances, which the child resisted.³²⁶ On another occasion, the Dollar General manager allegedly “grabbed [the Choctaw child] in his crotch area and stopped only when [the child] escaped from his grasp.”³²⁷ The child’s parents alleged that, after this encounter, the Dollar General manager “continued to make sexually offensive remarks and advances.”³²⁸

Asserting a common theory of tort law (available in the majority of jurisdictions found within the United States), the child survivor’s parents brought claims against Dollar General, alleging that Dollar General was vicariously liable for its store manager’s conduct.³²⁹ The parents alleged that Dollar General negligently hired, trained, and/or supervised its store manager.³³⁰ Furthermore, the parents asserted that their child had suffered severe mental trauma and sought medical treatment as a result of the actions of Dollar General’s manager.³³¹ As the complaint states—and Dollar General did not dispute—the assaults took place on tribal trust lands within the Tribe’s reservation.³³²

After the parents filed their suit, Dollar General immediately moved to dismiss, on the grounds that because Dollar General was a non-Indian entity, the Choctaw Civil Court was without jurisdiction.³³³ The Choctaw Civil Court considered the company’s arguments and concluded the Court had ju-

³²¹ *Id.* at 10.

³²² *Id.*

³²³ Andrew Bard Epstein, *Dollar General Takes Its Case Against Indigenous Sovereignty to the Supreme Court*, THE NATION (Dec. 7, 2015), <https://www.thenation.com/article/dollar-general-takes-its-case-against-indigenous-sovereignty-to-the-supreme-court/> [<https://perma.cc/K9ZU-YEJE>] (noting that “federal prosecutors refused to bring charges”).

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.* at 10–11.

³³⁰ *Id.*

³³¹ *Id.* at 11.

³³² *Id.*

³³³ *Doe v. Dollar Gen. Corp.*, No. CV-02-05, SC 2005-6, slip op. at 3 (Miss. Choctaw Sup. Ct. Feb. 8, 2008) (per curiam).

risdiction over the claims, and consequently, the Court denied the company's motion to dismiss.³³⁴ Dollar General exercised its right to request interlocutory appeal, and in February 2008, with the issues fully briefed and argued, the MBCI Supreme Court granted Dollar General's motion for permission to appeal the jurisdictional challenge.³³⁵

Focusing on the consensual relationship that arose from Dollar General's lease and business license with the Tribe, as well as Dollar General's agreement to participate in the Tribe's YOP, the MBCI Supreme Court concluded the Choctaw District Court had jurisdiction over the claims brought against the company.³³⁶ The Supreme Court sent the case back down to the Civil Court for further proceedings.³³⁷

Undeterred, Dollar General circumvented the MBCI Tribal Court system altogether, filing a separate complaint in the U.S. District Court for the Southern District of Mississippi. The complaint claimed that the Choctaw Civil Court lacked jurisdiction to adjudicate the parents' claims against a non-Indian corporation and requested a temporary restraining order and preliminary injunction.³³⁸ In December of 2008, the District Court denied Dollar General's motion for preliminary injunction.³³⁹ After the parties filed cross-motions for summary judgment, the District Court rendered its decision in December 2011, concluding that based on the business relationship between the company and the Tribe, Dollar General had "implicitly consented to the jurisdiction of the Tribe with respect to matters connected to this relationship."³⁴⁰ The District Court determined that because the parents' tort claims of sexual molestation arose "directly from this consensual relationship," the complaint satisfied "the requirement of a sufficient nexus between the consensual relationship and exertion of tribal authority."³⁴¹ Thus, the District Court refused to enjoin the Choctaw Civil Court from exercising its own jurisdiction.

Dollar General immediately appealed. In March 2014, a divided panel of the U.S. Court of Appeals for the Fifth Circuit affirmed the lower court's decision.³⁴² As the panel majority explained, Dollar General had willingly entered into a consensual relationship, both through signing the commercial lease and renting space to operate a business on tribal lands, as well as agreeing to participate in the YOP program, through which the Choctaw

³³⁴ See *DolgenCorp, Inc. v. Miss. Band of Choctaw Indians*, 2008 WL 5381906, at *1 (S.D. Miss. Dec. 19, 2008).

³³⁵ *Dollar Gen. Corp.*, slip op. at 4.

³³⁶ See *id.* at 6–11.

³³⁷ *Id.* at 12.

³³⁸ See *DolgenCorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 169–70 (5th Cir. 2014).

³³⁹ *Id.* at 170.

³⁴⁰ *DolgenCorp Inc. v. Miss. Band of Choctaw Indians*, 846 F. Supp. 2d 646, 650 (S.D. Miss. 2011).

³⁴¹ *Id.* (citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) and *Montana v. United States*, 450 U.S. 544, 566 (1981)).

³⁴² *DolgenCorp*, 746 F.3d at 169.

child was “essentially an unpaid intern, performing limited work in exchange for job training and experience.”³⁴³ There was, as a result, an “obvious nexus” between the conduct regulated through the parents’ suit and the consensual relationship Dollar General formed with the Tribe.³⁴⁴ Ultimately, the Fifth Circuit affirmed MBCI’s inherent sovereignty, as a Tribal Nation, “to regulate the safety of the child’s workplace” and “protect[] its own children on its own land.”³⁴⁵

Having lost its jurisdictional challenge in four separate courts, Dollar General filed a petition for writ of certiorari with the U.S. Supreme Court.³⁴⁶ In 2015, the Supreme Court agreed to hear the case.³⁴⁷

Oral argument was heard on December 7, 2015, and on June 23, 2016, the Supreme Court issued a 4-4 tied decision, stating that “[t]he judgment is affirmed by an equally divided Court.”³⁴⁸ As a result, the Fifth Circuit’s decision upholding tribal jurisdiction stands. After ten years of fighting the Tribe’s civil jurisdiction to simply hear the case, Dollar General must now litigate (or settle) the case and respond to the claims that the company failed to supervise its store manager who sexually assaulted a Choctaw child. This child, of course, is now a young adult who has lived over thirteen years without any semblance of justice.

B. Dollar General in the Context of a Post-*Worcester* *Oliphant*

The 4-4 tie in *Dollar General* is remarkable because Dollar General based its entire argument before the Supreme Court on *Oliphant*. Dollar General boldly asserted that tribal civil jurisdiction over non-Indians should be eliminated entirely because the Court’s consideration of “civil jurisdiction leads to the same conclusion this Court reached regarding criminal jurisdiction in *Oliphant*.”³⁴⁹

A review of Dollar General’s opening brief before the Supreme Court reveals that hardly a page goes by without a citation, quotation, or reference to *Oliphant* as the doctrinal foundation for eliminating tribal civil jurisdiction over non-Indians.³⁵⁰ In 1978, Petitioner *Oliphant* had asked the Supreme

³⁴³ *Id.* at 173.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ Petition for Writ of Certiorari, *supra* note 39, at ii.

³⁴⁷ *Dolgenercorp Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2833 (2015) (No. 13-1496) (Mem.).

³⁴⁸ *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159, 2160 (2016).

³⁴⁹ Brief for Petitioners, *supra* note 35, at 24.

³⁵⁰ *Id.* The following excerpts from Petitioners’ brief, all of which rely on *Oliphant*, are also pertinent to this discussion: “This Court has repeatedly held that tribes generally lack regulatory authority over nonmembers . . . even the limited laws that may be applied to outsiders cannot be enforced through criminal prosecutions in tribal court. Accordingly, there is no question that the Tribe in this case lacked jurisdiction to impose even a dollar in criminal fines on the nonmember” *Id.* at 19 (citations omitted). “This Court

Court to replace the authority in *Worcester* with the racist doctrine articulated in its predecessor, *Johnson*, and in 2015, Dollar General simply asked the Court to apply its prior holding in *Oliphant*. In this regard, the Supreme Court's denial of Dollar General's argument equates to a denial of *Oliphant* and its doctrinal underpinnings—specifically *Johnson*.

Dollar General relied on *Oliphant*'s denouncement of each of *Worcester*'s principles to argue that tribal jurisdiction over non-Indians should be eliminated altogether. First, Dollar General's opening brief repeatedly cited *Oliphant* as the basis for asserting that the United States' colonial conquest of Indian Nations did in fact strip Indian Nations of their inherent sovereignty. In its opening brief, Dollar General asserted that Indian Nations lost their authority as a result of "incorporation"—i.e., colonial conquest by and into—the United States, quoting portions of *Oliphant* to state that:

Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. . . . Indian tribes therefore necessarily *gave up their power* to try non-Indian citizens of the United States except in a manner acceptable to Congress.³⁵¹

Similarly, in *Oliphant*, the Supreme Court quoted *Johnson* to conclude that as a result of colonial conquest, the rights of Indian Nations "to complete sovereignty, as independent nations, [are] necessarily diminished."³⁵² Like the Supreme Court and Petitioner in *Oliphant*, the Dollar General corporation attempted to build upon the Court's decision in *Johnson* to conclude that this diminishment of sovereignty was, at least in part, due to the fact that Tribes "gave up their power to try non-Indian[s]."³⁵³

Dollar General offered numerous variations of this *Johnson/Oliphant* argument in its opening brief as well as at oral argument. At oral argument, Dollar General's attorney asserted that Indian Nations did not retain adjudicatory authority as a result of the United States' colonization:

[MBCI's] theory is that, when the Tribes entered the United States and were incorporated into this country, their power to adjudicate

thus has held that tribal courts cannot hear criminal cases against nonmembers absent specific authorization from Congress." *Id.* at 2 (citation omitted). "[T]he Court has held that tribes lack any inherent authority to enforce their laws through criminal prosecution of nonmembers in tribal court." *Id.* at 22 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978)).

³⁵¹ *Id.* at 37 (emphasis added) (citations omitted) (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209–10 (1978)).

³⁵² See *Oliphant*, 435 U.S. at 209 (quoting *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823)).

³⁵³ Brief for Petitioners, *supra* note 35, at 37 (quoting *Oliphant*, 435 U.S. at 210).

cases in this fashion was understood to be an element of their sovereignty. *That is not correct.*³⁵⁴

To be sure, Petitioner Dollar General also laced this argument throughout its entire opening brief. For example, the corporation noted that, “In *Oliphant*, the Court thus began by asking whether at the time of incorporation, tribes and the federal government would have understood tribes to retain the right to subject nonmember American citizens to tribal justice. The answer, the Court held, ‘would have been obvious.’”³⁵⁵ Later, the company claimed that “the breadth of tribal regulation is comparable to the criminal jurisdiction this Court has held tribes necessarily surrendered upon incorporation into the United States.”³⁵⁶ Repeatedly, Dollar General asked the Supreme Court to conclude that, under the same principles applied in *Oliphant*, Tribal Nations “gave up” all jurisdiction over non-Indians when they were conquered by and “incorporated” into the United States.

Second, Dollar General’s opening brief repeatedly cited *Oliphant* as the basis for asserting Indian Nations can exercise *no* authority over non-Indians on their lands. Thus, almost forty years after the *Oliphant* Court replaced *Worcester* with *Johnson*, Dollar General asked the Supreme Court to extend *Oliphant*’s reliance on *Johnson* to its ultimate end and conclude that Tribes are left with no authority to regulate the harmful conduct of non-Indians on tribal lands. For example, the company argued that:

First, the same treaties, history, and considerations of the United States’ overriding sovereignty that led this Court to conclude that tribal courts lack criminal jurisdiction over nonmembers in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), make clear that tribes likewise have been divested of the inherent authority to subject nonmembers to civil suit in tribal court.³⁵⁷

On the following page, Dollar General made an even bolder argument: “Even setting this history aside, tribal court jurisdiction over nonmembers is fundamentally incompatible with the United States’ ‘overriding sover-

³⁵⁴ Transcript of Oral Argument at 3, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496) (emphasis added). A recording of the oral argument is also available from Oyez. *Dollar General Corporation v. Mississippi Band of Choctaw Indians*, OYEZ, <https://www.oyez.org/cases/2015/13-1496> [https://perma.cc/T3DV-NA5X].

³⁵⁵ Brief for Petitioners, *supra* note 35, at 24 (quoting *Oliphant*, 435 U.S. at 210).

³⁵⁶ *Id.* at 55 (citing *Oliphant*, 435 U.S. at 195). Other pertinent sections of the brief include: “In *Oliphant*, this Court held that tribal court criminal jurisdiction over nonmembers is inconsistent with the ‘commonly shared presumption of Congress, the Executive Branch, and lower federal courts’ at the time tribes were incorporated into the United States, as well as the ‘overriding sovereignty’ of the United States.” *Id.* at 23 (citations omitted) (quoting *Oliphant*, 435 U.S. at 206, 209). “In *Oliphant*, this Court also looked to legislation and judicial decisions for further evidence of the contemporary understandings of the authority retained by the tribes after their incorporation into the United States.” *Id.* at 30 (citing *Oliphant*, 435 U.S. at 201–02).

³⁵⁷ Brief for Petitioners, *supra* note 35, at 16.

eignty.”³⁵⁸ The corporation extended the argument to claim that recognition of the inherent sovereignty of Indian Nations to exercise jurisdiction over non-Indians would jeopardize the Supreme Court’s position as the “Supreme Court of the United States.”³⁵⁹

Third, and finally, Dollar General’s opening brief repeatedly cited the arguments and doctrine in *Oliphant* that trace their origins to the *Johnson* Court’s conclusion that the citizens of Tribal Nations are “savages” and “heathens.”³⁶⁰ Although the corporation did not use the same racially-prejudiced “savage” and “heathen” epithets the Court used in *Johnson*, the company repeated the *Johnson* and *Oliphant* Courts’ characterization of Indian Nations—and their Tribal Court systems—as uncivilized, inferior, and incompetent—concepts that echo *Johnson*’s conclusion that American Indians constitute uncivilized “fierce savages.”³⁶¹ In its brief, and at oral argument, Dollar General repeatedly questioned the competency and legitimacy of Tribal Court systems, for instance, stating that although “Petitioners do not deny the conscientious effort of many tribes to improve the quality, objectivity, and professionalism of their courts,” the current status of Tribal Courts was such that non-Indians could not be required to litigate in them.³⁶²

Oliphant effectively erased the historic exercise of tribal law over non-Indians to suddenly render it nonexistent. Forty years later, Dollar General relied on *Oliphant*’s erasure of tribal jurisdiction to assert that Tribal Court systems are likewise not evolved, developed, and/or legitimate. Specifically, Dollar General relied on *Oliphant*’s conclusion that the exercise of tribal jurisdiction over non-Indians is “a relatively new phenomenon”³⁶³ to assert that as a result of “the special nature and history of tribal justice systems. . . . [it was not] until very recently [that] most tribes” developed actual legal systems.³⁶⁴ According to the corporation, “most tribes relied on traditional methods of dispute resolution that . . . differed substantially from state and federal legal systems,” and as a result, tribal courts could not be considered constitutionally suitable for non-Indian corporations.³⁶⁵ At oral argument, the

³⁵⁸ *Id.* at 17 (quoting *Oliphant*, 435 U.S. at 209). Other relevant portions of the brief include: “No doubt, for example, tribes may forbid nonmembers from assaulting tribal police officers, as occurred in *Oliphant*. But as this Court’s decision in that case demonstrates, it does not follow that tribes have free rein to enforce even entirely legitimate rules against nonmembers through litigation in tribal courts.” *Id.* at 42. “[T]his Court concluded in *Oliphant* that tribes lack inherent authority to enforce their laws against nonmembers through their criminal courts for the independent reason that such jurisdiction is ‘inconsistent with [tribes’] status’ and with the ‘overriding sovereignty’ of the United States.” *Id.* at 37 (quoting *Oliphant*, 435 U.S. at 208–09).

³⁵⁹ Transcript of Oral Argument, *supra* note 354, at 60.

³⁶⁰ *See, e.g.*, Brief for Petitioners, *supra* note 35, at 3–4, 24 (describing the tribal court systems as generally under-resourced, unsophisticated, and under-developed); *id.* at 40–41 (questioning the objectivity and fairness of tribal courts).

³⁶¹ *Id.*

³⁶² Brief for Petitioners, *supra* note 224, at 58.

³⁶³ *Id.* at 29 (quoting *Oliphant*, 435 U.S. at 197).

³⁶⁴ *Id.* at 3 (citing *Oliphant*, 435 U.S. at 196).

³⁶⁵ *Id.*

corporation's attorney emphasized that as of 1880, "tribes had much less developed legal systems."³⁶⁶ As Dollar General put it, "[t]he recent and varied development of tribal justice systems is one of the reasons this Court has repeatedly held that tribes lack the power to subject nonmembers to trial in tribal court for criminal offenses."³⁶⁷

At oral argument, Justice Breyer asked the company's attorney, "What's wrong with the tribal courts?" and the company's attorney answered, "What's wrong with the tribal courts? *It depends.*"³⁶⁸ In articulating what he meant by "it depends," the company's attorney asserted that "everyone agrees [there are] . . . modern tribal judiciaries [that have not] developed real principles in attempt to identify law"; Dollar General's attorney, however, did not provide the Supreme Court with a single example when a non-Indian had been subjected to a tribal court that failed to apply what he described as "real principles" of law.³⁶⁹

Dollar General hoped that the Supreme Court would once again adopt a myopic view of tribal law and court systems and strip Tribal Nations of their inherent jurisdiction over non-Indians, just as it had done in *Oliphant*.³⁷⁰ The *Dollar General* Court, however, did not.

The departure of four justices from the *Oliphant Johnson* framework in *Dollar General* is made even more evident by a comparison of the arguments presented by state governments in *Oliphant* with the arguments presented by the state of Oklahoma (and several others) forty years later in *Dollar General*. In 1978, the state of Washington focused on attacking *Worcester*.³⁷¹ In 2015, the states that elected to fight tribal jurisdiction by filing an *amicus* brief in the Supreme Court to support Dollar General (Oklahoma, Arizona, Utah, Michigan, Wyoming, and Alabama) focused exclusively on *Oliphant*.³⁷² In 2015, neither Dollar General—nor the states who filed a brief in support—even mentioned the Court's decision in *Worcester*.³⁷³ They omitted reference to the case altogether.

In 1978, however, states could not advocate for the erasure of tribal jurisdiction without addressing *Worcester* since—at that time—the precedents established in *Worcester* were still considered good law. The state of Washington attacked *Worcester* vigorously, but not without first paying tribute to Chief Justice Marshall's decision, noting that "[t]he leading case

³⁶⁶ Transcript of Oral Argument, *supra* note 354, at 61.

³⁶⁷ Brief for Petitioners, *supra* note 35, at 10 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196–97 (1978)).

³⁶⁸ Transcript of Oral Argument, *supra* note 354, at 11 (emphasis added).

³⁶⁹ *Id.*

³⁷⁰ *Oliphant*, 435 U.S. at 197.

³⁷¹ See generally Brief for Attorney General of the State of Washington as Amicus Curiae in Support of Jurisdictional Statement, *Oliphant*, 435 U.S. 191 (No. 76-5729).

³⁷² See generally Brief Amicus Curiae of Oklahoma, Wyoming, Utah, Michigan, Arizona, and Alabama in Support of Petitioners, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496).

³⁷³ See generally Brief for Petitioners, *supra* note 35; Brief Amicus Curiae of Oklahoma et al., *supra* note 372.

often cited for the proposition that an Indian tribe possesses the attributes of a sovereign power is *Worcester*.³⁷⁴ Instead of acknowledging Georgia's unlawful attempt in the 1830s to exercise jurisdiction on Cherokee Nation lands, the state of Washington described the dispute as "a jurisdictional dispute between the federal government and the State of Georgia. . . ."—and not as a dispute between Georgia and the Cherokee Nation.³⁷⁵

In contrast to the state of Washington's characterization, the *Worcester* Court had considered the question of state versus tribal jurisdiction and held that Cherokee Nation maintained "a right to all the lands within [Cherokee Nation's] boundaries," a right that "is not only acknowledged, but guaranteed [sic] by the United States."³⁷⁶ The state of Washington, however, substituted "conferred" for *Worcester's* use of the terms "acknowledged" and "guaranteed," stating that a Tribal Nation's right to exercise jurisdiction over its own lands is a right that is "specifically conferred by an action of the United States government, and [i]s not some form of inherent sovereignty that can be relied upon by the tribe as authority to exercise all the powers of a sovereign."³⁷⁷

According to the state of Washington in *Oliphant*, "*Worcester* does not judicially recognize full blown tribal sovereignty to support the exercise of tribal powers. . . ."³⁷⁸ The state continued with its attacks on tribal sovereignty and the exercise of tribal jurisdiction over non-Indians, asserting that: "As a description of the present legal status of Indian tribes, the term 'tribal sovereignty' is a legal misnomer."³⁷⁹ The brief also argued that "the 'sovereignty' which the tribes historically have exercised was purely personal rather than territorial in scope. . . ."³⁸⁰

Forty years later, state opposition to tribal jurisdiction transformed from an attack on *Worcester* to an affirmation of *Oliphant*. In *Dollar General*, the states' brief—authored by Oklahoma's Attorney General—repeatedly referred to *Oliphant*, urging that because the *Oliphant* Court held "that tribes lack 'inherent sovereign authority to exercise criminal jurisdiction over non-Indians,'" it would "make [] no sense if . . . tribes [could] impose sweeping conditions on admittance to tribal lands."³⁸¹ According to Oklahoma Attorney General Scott Pruitt and the five other states who joined his brief:

³⁷⁴ Brief for the Attorney General, *supra* note 371, at 24 (citation omitted).

³⁷⁵ *Id.* at 25.

³⁷⁶ See *Worcester v. Georgia*, 31 U.S. 515, 557 (1832).

³⁷⁷ Brief for the Attorney General, *supra* note 371, at 25 (emphasis added).

³⁷⁸ *Id.* at 26.

³⁷⁹ *Id.* at 6.

³⁸⁰ *Id.* The brief also argued that "[i]n the absence of Congressional authorization the concept of 'tribal sovereignty,' as developed and applied by this court, does not provide any basis for the assumption of criminal jurisdiction by an Indian tribe over non-Indians" and that "[e]ven as a shield to be used against the state, 'platonic notions' of 'tribal sovereignty' retain little, if any, vitality." *Id.* at 8, 11.

³⁸¹ Brief Amicus Curiae of Oklahoma et al., *supra* note 372, at 13 (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981) (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978))).

“Indian tribes have lost any ‘right of governing every person within their limits except themselves.’”³⁸²

To be sure, nothing in *Oliphant*’s rationale provides for a disparate outcome based on a distinction between the tribal exercise of criminal versus civil jurisdiction. As Dollar General keenly—and repeatedly—pointed out, if *Oliphant*’s departure from *Worcester* remains good law and controlling precedent, then the Court’s decision must logically preclude the exercise of any tribal jurisdiction over non-Indians.

Four Justices, however, did not agree with Dollar General. Despite innumerable assertions that the Court’s prior decision in *Oliphant* should control, four Justices voted to affirm the inherent sovereignty of Tribal Nations to exercise civil jurisdiction over non-Indians. For the first time since the Court decided *Oliphant* almost forty years ago, a non-Indian challenging a Tribe’s exercise of jurisdiction now has to return to Tribal Court and adjudicate the claims brought against him (or here, the company).

Because *Dollar General* did not garner enough votes to render a binding decision, it is highly likely that the Court will soon have another opportunity to consider how to navigate the jurisdictional question. An interesting case developing in the Navajo court system raises many of the same issues in *Dollar General*. In *Church of Latter Day Saints v. RJ*, a non-Indian entity (in this case, the Church of Latter-Day Saints) sought to circumvent tribal civil jurisdiction over a tort claim brought against the Church for sexual abuse.³⁸³ In November 2016, two federal judges in the District of Utah denied the Church’s motion for declaratory and injunctive relief based on their argument that the tribe lacks jurisdiction over them.³⁸⁴ In so doing, they cited the *Dollar General* decision from the Fifth Circuit.³⁸⁵ This decision—or one very similar—will likely be appealed and may make its way to the Supreme Court.

The votes of four justices in favor of tribal jurisdiction in *Dollar General* constitute four votes against *Oliphant*. And votes against *Oliphant* constitute votes for the case *Oliphant* purported to overturn: *Worcester*. The Court’s decision in *Dollar General*, therefore, signals a departure from *Oliphant* and a return to *Worcester*.

CONCLUSION

To be sure, the arguments against tribal jurisdiction have not changed. The Supreme Court’s stance on them, however, has. One hundred and eighty years ago in *Worcester*, the Supreme Court proclaimed Tribal Nations to be

³⁸² *Id.* at 14 (quoting *Oliphant*, 435 U.S. at 209).

³⁸³ See Corp. of the President of the Church of Jesus Christ of Latter-Day Saints v. RJ, 221 F. Supp. 3d 1317, 1319–22 (D. Utah 2016).

³⁸⁴ *Id.* at 1328.

³⁸⁵ *Id.* at 1324.

the “exclusive authority” exercising jurisdiction over anyone who came onto their lands.³⁸⁶ One hundred and forty-five years later, in *Oliphant*, the Supreme Court relied on the colonialist doctrine announced in *Johnson* to circumvent *Worcester* and conclude that Tribal Nations cannot today—and never could before—exercise jurisdiction over non-Indians.³⁸⁷ For Native women and children—and the Tribal Nations that seek to exercise their inherent right to protect them—*Oliphant* and its racist reasoning is our *Plessy v. Ferguson*. It just happened to come one hundred and forty years after our *Brown v. Board of Education: Worcester v. Georgia*.

Dollar General's departure from *Oliphant*, therefore, should give us hope. After forty years of living under a framework that prohibits Tribes from exercising their inherent jurisdiction to protect their women and children from the majority of the individuals who assault, rape, murder, and/or abuse them, restoration lies on the horizon. As the inevitable constitutional challenge against the partial restoration of tribal jurisdiction in the 2013 reauthorization of VAWA makes its way up to the Supreme Court, the recent doubt cast on *Oliphant*'s standing as legitimate precedent signals the restoration of Chief Justice Marshall's judicial understanding that tribal jurisdiction over non-Indians is not *given* by Congress or even the United States—but rather, tribal jurisdiction constitutes an inherent attribute of sovereignty that the Supreme Court never had the constitutional power to *take*.

For Native women and children—and their Tribal Nations that seek to protect them—the Court's decision in *Dollar General* signals a restoration of sovereignty—and ultimately, safety. According to four Justices sitting on the Court in 2016, *Oliphant* no longer commands their unwavering respect and obedience.³⁸⁸ While this is not yet a full restoration of *Worcester*, it is a start. It is the beginning of a return. A return to *Worcester*.

³⁸⁶ *Worcester v. Georgia*, 31 U.S. 515, 553–7, 559–61 (1832).

³⁸⁷ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) (quoting *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823)).

³⁸⁸ The Supreme Court may construe *Oliphant* and its problematic progeny as exempt from *stare decisis* through the doctrine of *per incuriam*—a doctrine that permits the Court to declare that cases were “wrongly decided, usu. because the judge or judges were ill-informed about the applicable law.” *Per Incuriam*, BLACK'S LAW DICTIONARY 1159 (7th ed. 1999). “A judgment *per incuriam* is one which has been rendered inadvertently . . . rendered in ignorance of legislation of which they should have taken account.” LOUIS-PHILIPPE PIGEON, DRAFTING AND INTERPRETING LEGISLATION 59–60 (1988). Because *Oliphant* and its progeny ignored the various laws of Tribal Nations that have historically affirmed the exercise of tribal jurisdiction over non-Indians, they were rendered “in ignorance” of legislation and should be wholly re-examined.