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Formalism and Judicial Supremacy in Federal Indian Law

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I. Introduction

There is no question that in the last thirty years, the Supreme Court has presided over an unprecedented assault on the sovereignty of Indian tribes.[1] At the same time, the Court has allowed a substantial increase of state

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1. *See* Alex Tallchief Skibine, *Teaching Indian Law in an Anti-Tribal Era*, 82 N.D. L. REV. 777 (2006) [hereinafter Skibine, *Teaching Indian Law*].

jurisdiction inside Indian reservations.[2] Scholars have explained this result by pointing out that the Court has abandoned the foundational principles of Indian law as first laid down by Chief Justice Marshall, replacing it with a new subjectivism,[3] favoring states' rights,[4] thereby abandoning the "exceptionalism" that had been the hallmark of Federal Indian law.[5] I have argued elsewhere that the tribes' problem has been the Court's adoption of a *Dependency Paradigm* governing the incorporation of Indian tribes within the American political and legal system.[6] Adoption of this paradigm has not only allowed the Court to issue decisions mostly detrimental to Indian tribes, but has also allowed the Court to assume the lead in determining the terms of tribal incorporation within the United States political system, thus achieving judicial supremacy in an area constitutionally assigned to the Congress.

In this article, I focus on federal common law and the methodology the Court has used in order to achieve results mostly detrimental to tribal sovereign interests. I argue that the Court has used what can be termed a formalistic mode of analysis to achieve judicial supremacy and hide pragmatic but subjective choices that are not in accordance with current congressional policies.[7] Focusing on two federal Indian common law doctrines — the

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2. *See* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice, and Mainstream Values*, 86 MINN. L. REV. 267 (2001) [hereinafter Getches, *Beyond Indian Law*].

3. *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996); *see also* 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 (1999) (arguing that the Court has manufactured a new federal Indian common law by importing values from constitutional law and other areas of general public law).

4. *See* Getches, *Beyond Indian Law*, *supra* note 2.

5. *See* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005) [hereinafter Frickey, *(Native) American Exceptionalism*]. In a somewhat similar vein, see Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 Hastings L.J. 579 (2008) (arguing that the Court is deciding "Indian law" cases for reasons and on grounds not derived from federal Indian law principles but based on overarching constitutional issues and principles not related to Indian law or concerns.

6. *See* Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667 (2006) [hereinafter Skibine, *Redefining the Status*].

7. The Court's use of formal rules to assert its authority is not limited to achieving supremacy over Congress. It can also be used to impose its edict on state courts and lower federal courts. Arguing that the Court is very much a political Court that acts as a legislature when it decides issues based on federal common law, Judge Posner has observed that "[t]he Court tries to use the few cases that it agrees to hear as occasions for laying down rules or

implicit divestiture doctrine and the Indian preemption inquiry — I show how these two doctrines, originally fashioned by justices with *functionalism* in mind, have been transformed or discarded using a formalist approach. I argue that instead of restraining its judicial activism,[8] the Court has promoted its own notions of what the place of Indian tribes should be within our federal system by adopting formalism as its theory of adjudication.

Before proceeding further, a few definitions of the terms formalism and functionalism are in order. As stated by professor Frederick Schauer, "[a]t the heart of the word 'formalism,' in many of its numerous uses, lies the concept of decisionmaking according to *rule*."[9] Functionalism on the other hand, prefers the application of "standards" to resolve a given dispute. These standards generally should allow courts more flexibility in weighing the importance of various contexts in applying the law to the facts of each case. As stated by Professor William Eskridge:

> Another way of contracting formalism and functionalism focuses on the reasoning process by which we reach rules or standards. Formalism might be understood as deduction from authoritative constitutional text, structure, original intent, or all three working together. Functionalism might be understood as induction from constitutional theory or practice, with practice typically being examined over time. Formalist reasoning promises stability and continuity of analysis over time; functionalist reasoning promises adaptability and evolution."[10]

In this article, I do not join the greater debate about whether, normatively speaking, functionalism is always better than formalism.[11] I only argue here that in the field of federal Indian common law, a functional approach is superior in resolving conflicts between the federal, state, and tribal

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standards that will control a large number of future cases." Richard A Posner, *The Supreme Court 2004 Term, Foreword: A Political Court,* 119 HARV. L. REV. 31, 37 (2004).

8. On defining judicial activism, see Keenan D. Kmiec, Comment, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441 (2004).

9. Frederick Schauer, *Formalism,* 97 YALE L.J. 509, 510 (1988).

10. William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases,* 22 HARV. J. L. & PUB. POL'Y 21 (1998).

11. Although my functionalist tendencies incline me to think that the answer may vary depending on the field, i.e., constitutional law, statutory interpretation, or federal common law, I do agree with Professor Eskridge that in some areas, such as separation of powers, the better approach may be to mix the two together. *See id.*

governments. While some scholars have been critical of formalism,[12] not all scholars have rejected formalism, at least not completely.[13] There is, in effect, a vibrant debate about what is formalism and whether it is a good or bad thing. Some scholars have taken the position that formalism is a much more nuanced concept than advocated by others, and as such formalism should have a legitimate role in American jurisprudence.[14] Others have been more sanguine in criticizing formalism. For instance, speaking about Supreme Court cases dealing with federalism, Professor Erwin Chemerinsky stated that the reason the federalism cases are formalistic was that "they reasoned deductively from minimally justified premises and expressly eschewed consideration of what would be best from a policy perspective."[15] Professor Chemerinsky also argued that although legal theory has evolved from formalism to legal realism, the justices of the current Supreme Court have reverted to formalism in deciding issues of federalism. This, according to Chemerinsky, has allowed the justices to hide their policy choices behind arcane rules.

I think the exact same thing has happened in federal Indian law. One of the hallmarks of formalism in federal Indian law cases has been the methodical use of much older cases as precedents supporting a general rule. The mechanical use of such older cases has allowed the Court to avoid stating any current moral or policy reasons for the rule being adopted or claimed. As one scholar observed:

> One view of the vice of Formalism takes that vice to be one of deception, either of oneself or of others. To disguise a choice in the language of definitional inexorability obscures that choice and thus obscures questions of how it was made and whether it could have been made differently.[16]

One reason why functionalism is superior to formalism in the field of federal Indian common law is that although Congress is said to have the

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12. *See, e.g.*, Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 9-25 (1984) (discussing problems with traditional legal theory such as formalism and its focus on "rules").

13. *See, e.g.*, Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1 (2007); *see also* Eskridge, *supra* note 10 (arguing that mixing formalism and functionalism in separation of powers cases may be a good thing).

14. *See* Schauer, *supra* note 9; *see also* Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191, 1208-11 (2003).

15. *See* Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959 (1997).

16. Schauer, *supra* note 9, at 513-14.

exclusive power to regulate the field of Indian affairs, the political reality is that while Congress has adopted broad policies favoring tribal self-government, it has very seldomly addressed precise issues involving conflicting tribal and state claims to powers over nonmembers within Indian reservations. A functional approach in federal Indian law would force the Court to explain why its holdings are congruent with *current* congressional policies, and if not, why not. Hopefully, this would restrict judicial activism and curb judicial supremacy by forcing the Court to tie its reasoning to congressional legislation, thus creating a better balance between congressional and judicial power. Another reason to prefer functionalism is that the absence of formalistic rules would leave more leeway for the states, the tribes and the federal government to negotiate such jurisdictional disputes.[17]

Before the ascendancy of the Rehnquist Court, the modern foundations of federal Indian law had been established by one of legal realism's most influential scholars, Felix Cohen.[18] In a recent article, Professor Philip Frickey made the insightful observation that the very idea of Felix Cohen writing a black letter law treatise in Indian law was contrary to his position as a legal realist.[19] That is because legal treaties, by their very nature, are undertakings reflecting a formalistic view of the law, while Cohen was a legal realist who believed in a functional approach to the law.[20] In this article, I do not deny that some of Cohen's foundations relied on formalistic principles. But what I argue is that the Court in the years following Felix Cohen, was influenced by legal realism and did adopt functional principles in federal Indian Law. In his article, Professor Frickey briefly touched on the fact that some of the cases decided by the Supreme Court since the late 1970's have a formalistic nature.[21] Inspired by Professor Frickey's suggestion, in this article

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17. *See* Lorie Graham, *Securing Economic Sovereignty Through Agreements*, 37 NEW ENG. L. REV. 523 (2003); *see also* Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922 (1999).

18. *See Foreword* to COHEN'S HANDBOOK OF FEDERAL INDIAN LAW ix-xv (Nell Jessup Newton et al. eds., 2005). On Cohen's realism, see Jeremy Paul, *Felix Cohen's Brand of Legal Realism*, 38 CONN. L. REV. 593 (2006).

19. *See* Philip P. Frickey, *Transcending Transcendental Nonsense: Towards a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649 (2006) [hereinafter Frickey, *Towards a New Realism*].

20. *See* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

21. *See* Frickey, *Towards a New Realism*, *supra* note 19, at 657-60 (mentioning Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), and Duro v. Reina, 495 U.S. 676 (1990), as prime examples).

I show how the Rehnquist Court's basic enterprise in federal Indian law has been not only to replace the modern foundations of Indian law as established by Felix Cohen,[22] but also to replace functional standards influenced by a legal realism that favored pluralist values, with formalistic rules influenced, if anything, by an outdated version of legal positivism.[23]

In an earlier article, Professor Frickey had argued that practical reasoning, and/or pragmatism, rather than more "foundationalist" theory such as formalism, intentionalism, or textualism, could better explain the Court's thinking in Indian cases.[24] While there is no doubt that pragmatic considerations continue to affect the Court's decisions,[25] I believe that since 1988, the Court's decisions have been increasingly shaped and influenced by the use of both *formalism* as a theory of adjudication, and its progeny in the field of statutory interpretation, textualism.[26] I realize that mixing formalism and pragmatism[27] can be seen as counter-intuitive, because pragmatism has frequently been identified as the opposite of formalism.[28] Similar to a claim made by one scholar evaluating changing approaches in the development of state common law in the field of torts,[29] my position is that the Court's jurisprudence in federal Indian common law reflects a hybrid use of formalism

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22. As pointed out in Frickey, *Towards a New Realism*, *supra* note 19, I do not deny here that there is a paradox between Cohen the legal realist and Cohen the treatise writer and these foundationalist principles may have been formalistic in nature. For a comprehensive analysis of Felix Cohen's legal philosophy, see Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FLA. ST. U. L. REV. 189 (2001).

23. For an argument accusing some members of the Court of doing just that in other areas than federal Indian law, see Ofer Raban, *The Supreme Court's Endorsement of Politicized Judiciary: A Philosophical Critique*, 8 J.L. SOC'Y 114 (2007).

24. *See* Philip Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990).

25. As Professor Frickey recently stated, the Court's federal Indian law is "jerry-rigging a ruthlessly pragmatic blend of federal Indian Law with general American law." Frickey, *(Native) American Exceptionalism*, *supra* note 5, at 460.

26. It has to be noted that Frickey's article was published in 1990 and probably written in 1989. In previous writings, I have identified 1988 as a turning point for the Court in Indian cases. *See* Skibine, *Teaching Indian Law*, *supra* note 1.

27. For a concise definition of Pragmatism, see Richard A. Posner, *Legal Pragmatism Defended*, 71 U. CHI. L. REV. 683 (2004).

28. For an analysis describing the evolution of pragmatism, as well as its split between classical pragmatism and neo-pragmatism, see Susan Haack, *On Legal Pragmatism: Where Does "The Path of The Law" Lead Us?*, 50 AM J. JURIS. 71 (2005).

29. *See* Marin Roger Scordato, *Post-Realist Blues: Formalism, Instrumentalism, and the Hybrid Nature of Common Law Jurisprudence*, 7 NEV. L.J. 263 (2007).

and practical reasoning or instrumentalism.[30] My argument is that the Court has used formalism to come up with rules justifying decisions fitting the Justice's own pragmatic views without having to tie these decisions to congressional policies, or any kind of historical context.

In Part II of this article, I discuss the evolution of the implicit divestiture doctrine, determining the amount of inherent sovereignty retained by Indian tribes over their people and territory. I show how the Court has progressively transformed the doctrine to discount functional factors. In Part III, I describe how the Court has moved away from functionalism and towards formalism in determining the amount of state jurisdiction within Indian country.

II. Inherent Tribal Sovereignty and the Implicit Divestiture Doctrine

A. The Functional Formalist Beginnings: Oliphant and Montana

The Court started its attack on inherent tribal sovereignty in 1978 when it decided *Oliphant v. Suquamish Indian Tribe*[31] and held that Indian tribes had been *implicitly divested* of the inherent power to criminally prosecute non-Indians for crimes perpetrated against tribal members within Indian reservations. Although Justice Rehnquist spent much of his opinion attempting to show that the three branches of the United States government shared a presumption that tribes did not have criminal jurisdiction over non-Indians, he was in fact adopting a very different principle to determine the extent of tribal sovereignty that had prevailed in the past. Until then, the generally accepted and rather formalistic rule put forth by Felix Cohen had been that Indian tribes had retained all of their inherent sovereign powers unless such powers had been taken away by an Act of Congress or given up in a treaty.[32] After first declaring that Indian tribes could not exercise any inherent sovereign power *inconsistent with their status*,[33] Justice Rehnquist at first seemed to inject a functional aspect to his analysis when he stated, without any elaboration, that "[u]pon incorporation into the territory of the United States, the Indian tribes thereby came under the territorial sovereignty of the United States and their exercise of separate power is constrained so as

30. Certainly the Court's formalist tendencies can co-exist with other approaches. *See, e.g.*, Joshua A. Klein, Note, *Commerce Clause Questions After Morrison: Some Observations on the New Formalism, and the New Realism*, 53 STAN. L. REV. 571 (2002).

31. 435 U.S. 191 (1978).

32. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 122 (Univ. Of N.M. photo. reprint 1971) (1942).

33. *Oliphant*, 435 U.S. at 208.

not to conflict with the interest of this overriding sovereignty."[34] This principle could have left some room for a functional analysis if the Court had proceeded to balance the tribe's interest in asserting criminal jurisdiction over non-Indians with the interest of the United States in not exposing non-Indians to tribal prosecution. Instead, however, the Court's formalistic analysis limited itself to the two following sentences

> [F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty . . . . By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.[35]

The Court substantially modified its *Oliphant* analysis in *Montana v. United States*.[36] The crucial issue in *Montana* was whether *Oliphant's* implicit divestiture doctrine could be extended beyond criminal jurisdiction to cases asking the Court to decide whether Indian tribes could regulate hunting and fishing by nonmembers on lands owned by non-tribal members within the boundaries of the tribe's reservation.[37] The Court extended *Oliphant* and held that the tribe had been implicitly divested of such civil regulatory jurisdiction.[38]

This decision is a mix of functional and formalist principles, perhaps because it was written by Justice Stewart, a moderate Republican. This is not an unusual move and at least one prominent scholar has taken the position that, at least in constitutional separation of powers cases, this might be the correct approach.[39] On one hand *Montana* is a formalist decision since the Court there announced a formal general rule of no tribal jurisdiction over nonmembers on nonmember fee land within Indian reservation. Furthermore, the Court based this general rule on another formal rule adopted in dicta found

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34. *Id.* at 209. The Court did rely on two very old precedents, *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846) and *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), to legitimize the principle but did not explain why any statements made in 1823 and 1846 were so relevant to deciding a case in 1978.

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

36. 450 U.S. 544 (1981).

37. *Id.* at 547.

38. *Id.* at 656-67.

39. *See* Eskridge, *supra* note 10.

in a previous case, *United States v. Wheeler*,[40] which stated that Indian tribes have been implicitly divested of all *external* sovereignty.[41] Moreover, the Court in *Montana* asserted without any explanation that by "external" sovereignty, it meant any tribal relations having to do with nonmembers.[42] However, having set out its formal rule, Justice Stewart inserted functional elements in the analysis. First, he asserted that it is only the exercise of tribal powers beyond what is necessary to protect tribal self-government that is inconsistent with the tribes' dependent status, and therefore implicitly divested.[43] Secondly, he came up with two exceptions to his "general proposition that the inherent powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[44] Thus, the Court stated

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservations when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[45]

At least the *Montana* second exception seemed to call for an essentially functional analysis, because in order to determine whether tribal control over nonmembers was necessary to tribal self-government, the Court has to evaluate whether the activity of such non-Indians has a direct impact on the health and welfare of the tribe, its economic security, or its political integrity. However, having announced its seemingly functional second exception, the Court abruptly limited its analysis to basically these two sentences:

> [N]othing in this case suggests that such non-Indian hunting and fishing so threaten the Tribe's political or economic security so as to justify tribal regulation. The complaint in the District Court did

40. 435 U.S. 313 (1978).
41. *Montana*, 450 U.S. at 564 (quoting *Wheeler*, 435 U.S. at 326).
42. *Id.* (citation omitted).
43. *Id.*
44. *Id.* at 565.
45. *Id.* at 565-66 (citation omitted).

> not allege that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe.[46]

Of course, there was no reason for the tribe to allege such a threat by non-Indians in the lower courts since the Court had not yet come down with a general rule of non-jurisdiction and an exception asking the tribe to prove that such nonmember activity posed such threat to tribal communities.

The Court initially seemed to define the *Montana* second exception broadly, calling for a functional analysis. Thus, in *National Farmers Union Insurance Cos. v. Crow Tribe*,[47] the Court held that before tribal jurisdiction could be challenged by nonmembers in federal court, the plaintiff had to exhaust their tribal remedies because "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, [and] the extent to which that sovereignty has been altered, divested, or diminished."[48] A couple of years later, the Court confirmed the "exhaustion" requirement, stating

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts . . . . "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact."[49]

B. Form over Function: From Brendale to Hicks

The Court's outlook began to change the next time it addressed inherent tribal sovereignty, when it issued a series of concurring and dissenting opinions in a 1989 case, *Brendale v. Confederated Tribes & Bands of the*

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46. *Id.* at 566. The Court also further remarked that "the District Court made express findings, left unaltered by the Court of Appeals, that the Crow Tribe has traditionally accommodated itself to the State's 'near exclusive' regulation of hunting and fishing on fee lands within the reservation." *Id.*

47. 471 U.S. 845 (1985).

48. *Id.* at 855-56.

49. Iowa Mut. Ins. Co. v. Laplante, 480 U.S. 9, 18 (1987) (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n.14 (1982)) (citations omitted). On the exhaustion of tribal remedies doctrine, see generally Alex Tallchief Skibine, *Deference Owed Tribal Courts' Jurisdictional Determination: Towards Co-Existence, Understanding, and Respect Between Different Cultural and Judicial Norms*, 24 N.M. L. REV. 191 (1994) [hereinafter Skibine, *Towards Co-Existence*].

Yakima Indian Nation.[50] The issue in *Brendale* was whether the Yakima Indian Nation could zone nonmember fee lands within its reservation. Even though all the Justices admitted that the *Montana* case controlled the outcome, the Court was badly fractured on *Montana's* implications. Justice White, joined by Justices Rehnquist, Scalia, and Kennedy, held that the Tribe could never have any inherent power to zone non-Indian fee land.[51] Justices Marshall, Brennan and Blackman believed that a tribe always has the authority to zone all lands within its reservation.[52] Finally, Justices Stevens and O'Connor held that the Tribe could zone nonmember fee land in the "closed" part of the reservation where the tribe or its members owned the substantial majority of the total acreage but could not regulate such nonmember land in the "open" part of the reservation where nonmembers owned a substantial amount of land.[53]

According to Justice White's more formalistic approach, the governing principle was that tribes never have authority to actually zone nonmember fee land.[54] The only thing that tribes have is a "protectible interest" to intervene in a county zoning proceeding and argue that the zoning at issue will have a "demonstrably serious" impact that "must imperil the political integrity, the economic security or the health and welfare of the tribe."[55] The tribe could then challenge the county's ultimate zoning decision in federal court. These four Justices (White, Rehnquist, Scalia, and Kennedy) also thought that practically speaking, a functional approach to *Montana's* second exception "would make little sense in the circumstances of these cases,"[56] because tribal and county zoning authority over such nonmember fee land could then keep switching back and forth, depending on whether the nonmember activity on such land threatened the tribe at any given time.

In determining that a tribe could still zone nonmember fee land in parts of the reservation where the tribe or its members still owned a substantial amount of land, Justices Stevens and O'Connor took a more political (or perhaps pragmatic) approach, albeit one partly justified on rather formal property concepts. They held that the original right to exclude nonmembers from the reservation continued to vest the tribe with zoning authority as long a the tribe

50. 492 U.S. 408 (1989).

51. *Id.* at 414-33.

52. *Id.* at 448-68

53. *Id.* at 433-49. For criticism and a comprehensive analysis of *Brendale*, see Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991).

54. *Brendale*, 492 U.S. at 430.

55. *Id.* at 431.

56. *Id.* at 429.

"has preserved the power to define the essential character of that area."[57] Although Stevens asserted that the tribe had preserved that power by maintaining the power to exclude nonmembers from all but a small area of that part of the reservation, he backed that statement by relying substantially on assumptions of what Congress must have intended when it allowed non-Indians to acquire lands within Indian reservations.[58]

Finally Justices Blackmun, Marshall, and Brennan took the position that zoning was an essential aspect of tribal self-government and therefore fit right into the second *Montana* exception. In his dissenting opinion, Justice Blackmun gave one of the most eloquent — and perhaps one of the last — defenses of tribal sovereignty and the functional approach. He first argued that *Montana* could not be considered to be the first and only case defining the extent of tribal sovereignty, but should be understood in its historical context. He concluded that *Montana* cannot be understood to prevent tribes from exercising jurisdiction when important tribal interests are at stake.

In previous writings, I have identified 1988 as the year the Court started a definite anti-tribal period.[59] The three *Brendale* opinions represent good examples of the three distinct approaches to Indian cases: formalist, political/pragmatic, and functionalist. The case itself can be viewed as somewhat of a turning point in Indian law. Sadly for tribal interests, Blackmun's functional analysis and understanding of *Montana* did not prevail. Furthermore, Blackmun and the two Justices who joined his *Brendale* opinion — Marshall and Brennan — would soon retire from the Court. The next case involving tribal sovereignty over nonmembers definitely reflected both a change in the Court's personnel and a new formalistic bias.

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57. *Id.* at 441.

58. For instance Justice Stevens stated,

> Although it is inconceivable that Congress would have intended that the sale of a few lots would divest the Tribe of the power to determine the character of the tribal community, it is equally improbable that Congress envisioned that the Tribe would retain its interest in regulating the use of vast ranges of land sold in fee to nonmembers who lack any voice in setting tribal policy.

Id. at 437. Justice Stevens came back to this line of reasoning a few page later, stating:

> In my opinion, just as Congress could not possibly have intended in enacting the Dawes Act that tribes would maintain the power to exclude bona fide purchasers of reservation land from that property, it could not have intended that tribes would lose control over the character of their reservations upon the sale of a few, relatively small parcels of land.

Id. at 441.

59. *See also* Skibine, *Teaching Indian Law, supra* note1.

Although the 1993 decision in *South Dakota v. Bourland*,[60] can be viewed as an inherent tribal sovereignty case and was surely viewed as such by the dissent, this does not seem to be the way Justice Thomas saw it. Writing for the majority in his first federal Indian law opinion, Justice Thomas, stated the issue in *Bourland* to be whether the Cheyenne River Sioux Tribe still had a treaty right to regulate hunting and fishing by nonmembers in an area of the reservation which had been taken by the United States for a dam and reservoir project under two Acts of Congress: the Flood Control Act of 1944,[61] and the Cheyenne River Act.[62] The Court held that the acquisition of such lands by the United States pursuant to these two acts abrogated the tribe's treaty right to exclude nonmembers in those areas, and thus took away the lesser tribal right to regulate such nonmembers. Although Justice Thomas acknowledged that the tribe could technically claim jurisdiction under the second *Montana* exception, he stated that the district court had already held against the tribe as to all the areas except for 18,000 acres. He left the district court's finding undisturbed and left a decision on the 18,000 acres to be dealt with on remand. However, footnote 15 of his opinion was much more telling about his position relative to the second *Montana* exception. There he stated:

> The dissent's complaint that we give "barely a nod" to the Tribe's inherent sovereignty argument is simply another manifestation of its disagreement with *Montana* . . . . While the dissent refers to our "myopic focus" on the Tribe's prior treaty right . . . . it shuts both eyes to the reality that after *Montana*, tribal sovereignty over nonmembers "cannot survive without express congressional delegation," and is therefore *not* inherent.'[63]

In other words, for Justice Thomas, the case should have been governed by one formal rule: there is no inherent tribal authority over nonmembers, period, unless such authority has been delegated to the tribe by the Congress.

The Court revisited the issue of inherent tribal powers over nonmembers four years later in its 1997 decision, *Strate v. A-1 Contractors*.[64] The issue in *Strate* was whether the tribal court had jurisdiction over a civil law suit involving one nonmember who sued another nonmember over a minor traffic

60. 508 U.S. 679 (1993).
61. Pub. L. No. 78-534, 58 Stat. 887.
62. Pub. L. No. 83-776, 68 Stat. 1191 (1954).
63. *Bourland*, 508 U.S. at 695 n.15 (citation omitted)
64. 520 U.S. 438 (1997).

accident on a highway running through the reservation.[65] The Court initially took the position that since the state had obtained a right of way over the highway, the land where the accident occurred could be treated as non-Indian fee land for jurisdictional purposes. Thus, the Court seemed poised to determine whether controlling non-Indian conduct on the highway was necessary to tribal self-government in that such activities could have a direct impact or imperil the health and welfare of the tribe or its members. However, after first remarking that a broad construction of *Montana*'s second exception could swallow the *Montana* rule, Justice Ginsburg, writing for the Court, undertook a typical formalistic and mechanical analysis of all the cases initially listed as supporting the second *Montana* exception, noting that each case "raised the question whether a State's (or Territory's) exercise of authority would trench unduly on tribal self-government."[66] Having stated that, the Court abruptly concluded that because the non-Indian plaintiff here could pursue her case in a state forum, "[o]pening the Tribal Court for her optional use is not necessary to protect tribal self-government; and . . . is not crucial to 'the political integrity, the economic security, or the health and welfare of the [Three Affiliate Tribes]."[67]

Although some have cited *Strate* as an example of the Court's minimalist philosophy,[68] the looming impact of the decision becomes more obvious when one recalls that earlier in the opinion, Justice Ginsburg had stated that the adjudicatory jurisdiction of a tribal court could never be larger than the regulatory jurisdiction of the tribal council. In other words, the Court had just laid down a rule that an Indian tribe never has regulatory authority over any nonmember driving on a reservation road, at least not when the state owns the title or a right of way to such road. More importantly, the Court in *Strate* implied that the functionalist analysis called for under the second *Montana* exception is just not applicable whenever a party could have filed the same case in state court. Thus, the Court in *Strate* seemed to have transformed the second *Montana* exception from a test asking the tribe to show why tribal jurisdiction was necessary to tribal self-government by reference to the impact

65. *Id.* at 442.

66. *Id.* at 458. I have argued elsewhere that the cases listed in *Montana* could not possibly support the second exception to the general rule since there was no general rule to start with before the *Montana* Court invented one. *See* Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267, 271-75 (2000)[hereinafter Skibine, *Imperfect Notion]*.

67. *Strate*, 520 U.S. at 459 (citation omitted).

68. *See* Sarah Krakoff, *Undoing Indian Law Once Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001).

the non-Indian activities had on tribal members to one asking the tribe to also show why state jurisdiction over the same activity would unduly trench on tribal self-government. In other words, the Court began the process of imposing on tribes the burden of not only showing that their sovereignty had not been implicitly divested but also that state jurisdiction in this area had been otherwise preempted.[69] This trend would become even more obvious in Justice Scalia's opinion for the Court in *Nevada v. Hicks*.[70]

The issue in *Hicks* was whether a tribal member could sue a state game warden in tribal court for torts committed while the state warden was investigating crimes related to violations of state hunting laws the tribal member was alleged to have committed while *off* the reservation.[71] The distinguishing factor with previous implicit divestiture cases was that the alleged torts committed by the state official in *Hicks* occurred on land owned by tribal members. In other words, the lands did not qualify as nonmember fee land.

After holding that the *Montana* general rule barring tribal jurisdiction over nonmembers extended to all lands within the reservation, Justice Scalia, writing for the Court, seemed to first indicate that he was going to undertake a comprehensive functional balancing analysis to determine if the tribe had jurisdiction under the second *Montana* exception. However, after stating that "State sovereignty does not end at a reservation border," Scalia limited his analysis to just asserting that determining whether a tribe has inherent sovereign jurisdiction over nonmembers required "an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State on the other."[72] In the past, applying such a test had generated some lengthy analysis.[73] However, after observing that some much older cases had mentioned that service of process from state courts could reach parties inside Indian reservations,[74] Scalia abruptly concluded that the tribal court did not have jurisdiction in this case. The totality of his analysis is contained in the following two sentences

69. For an analysis predicting this trend, see Skibine, *supra* note 66.

70. 533 U.S. 353 (2001).

71. *Id.* at 355.

72. *Id.* at 362.

73. *See, e.g.*, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

74. Justice Scalia mentioned *Utah & Northern Railway Co. v. Fisher*, 116 U.S. 28 (1885), and *United States v. Kagama*, 118 U.S. 375 (1886).

> We conclude today, in accordance with these prior statements, that tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations — to "the right to make their own laws and be ruled by them." The State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of law impairs state government."[75]

I have argued elsewhere that Scalia's *Hicks* opinion could be understood as the federal Indian law equivalent to the Court's federalism decision of *Gregory v. Ashcroft*.[76] In that case, the Court required a clear statement from Congress of its intent to interfere with a core state function — such as the appointment and length of tenure of state judges — before it would interpret a federal statute to overturn a conflicting state law.[77] Similarly, *Hicks* could be understood as requiring a clear statement from Congress before a core state function — such as a criminal investigation — could be interfered with even when performed inside an Indian reservation. Certainly, this understanding would conform with the Court's formalist and textualist trends since it would not demand any balancing analysis, or any determination of congressional intent before determining whether tribal jurisdiction was allowed.

Justice Scalia waited until Part V of his opinion to give some pragmatic or practical reasons for his decision.[78] Thus, after mentioning that the actions of the state officers could not possibly threaten tribal interests because these officers were fully subject to "the limitations of federal constitutional and statutory law,"[79] Scalia observed that the tribe and its members could always "invoke the authority of the Federal Government and federal courts (or the state government and state courts) to vindicate constitutional or other federal-

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75. *Hicks*, 533 U.S. at 364.

76. 501 U.S. 452 (1991); *see* Alex Tallchief Skibine, *Making Sense Out of Nevada v. Hicks: A Reinterpretation*, 14 ST. THOMAS L. REV. 347 (2001).

77. On clear statement rules and federalism, see generally William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

78. Part V seems to have been an afterthought generated by the need to defend himself from some of the criticisms leveled by Justice O'Connor in her concurrent opinion. *Hicks*, 533 U.S. at 370-75.

79. *Id.* at 371.

and state-law rights"[80] in cases where the state officers had not acted lawfully in the performance of their duties. In other words, according to Scalia, tribal courts should be denied jurisdiction in this case because the tribe or its members can always file a law suit in federal or state courts.[81]

Justice Souter filed a concurring opinion which was joined by Justices Kennedy and Thomas.[82] The opinion is interesting because it reveals Justice Souter's own "pragmatic" reasons behind his rather formalistic approach.[83] The "sound policy" reasons given by Justice Souter are striking for their subjectivism and total detachment from congressional policy. First, he mentioned that tying tribal authority to land status would create "an unstable crazy jurisdictional quilt."[84] He then mentioned that because tribal courts differ from other American courts in their structure and in the substantive law they are applying,[85] the result is a "complex mix . . . which would be unusually difficult for an outsider to sort out."[86] Finally after mentioning that tribal courts' decisions on matters of non-tribal law cannot be appealed to state or federal courts, he concluded that this would result in "a risk of substantial disuniformity in the interpretation of state and federal law, a risk underscored by the fact that tribal courts are often subordinate to the political branches of tribal governments."[87]

Part III of Souter's opinion is striking for its brevity. Instead of undertaking a comprehensive functional analysis to determine if the second *Montana*

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80. *Id.* at 373.

81. This argument is reminiscent of Justice White's opinion in *Brendale*. *See supra* notes 50-51 and accompanying text (arguing that tribes' only right is to intervene in a county zoning proceeding and appeal to a federal court if the County's zoning decision goes against them).

82. *Hicks*, 533 U.S. at 375.

83. Apparently, Souter wrote his concurring opinion because he disagreed with Scalia's approach in that he saw no reasons to look at the state interest before undertaking the *Montana* analysis. Souter also disagreed with Scalia on the importance that should be given to the status of the land in such inquiry. Souter did not think the status of the land where the nonmember conduct occurred was important at all while Scalia thought it could sometime be a determinative factor. *See* Recent Case, Ford Motor Co. v. Todecheene, *394 F.3d 1170 (9th Cir. 2005)*, 118 HARV. L. REV. 2469, 2473-74 (2005).

84. *Hicks*, 533 U.S. at 383. Souter conveniently forgot to mention that the very existence of such a crazy jurisdictional quilt is due to the Court's previous cases restricting tribal jurisdiction while allowing state jurisdiction within Indian country.

85. *But see* Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701 (2006) (arguing that in fact, in cases involving nonmembers, tribal courts have been applying western concepts of law, reserving application of traditional tribal law to cases involving only tribal members).

86. *Hicks*, 533 U.S. at 384-85.

87. *Id.* at 385.

exception validates tribal jurisdiction, he only stated the following:"[a]s Judge Rymer indicated in her dissent, the uncontested fact that the tribal court itself authorized service of the state warrant here bars any serious contention that the execution of the warrant adversely affected the Tribes' political integrity."[88] But the fact that the tribal court authorized service cannot possibly mean that it understood thereby that it was giving up all jurisdiction over any subsequent law suits filed by tribal members alleging that the state official committed tortious actions against them and, therefore, acted beyond the authority allowed under the warrant.

Earlier in the same year that *Hicks* was decided, the Court had the opportunity to decide a case involving the controversial issue of tribal taxation of nonmember businesses located on Indian reservations. In its 2001 decision, *Atkinson Trading Co v. Shirley*,[89] the Court had to decide whether the Navajo Nation could tax a non-Indian trading post located on fee land within the Navajo reservation. The court of appeals had upheld the tribal tax by complementing the *Montana* framework "with a case by case approach that balanced the non Indian fee status of the land with the nature of the inherent sovereign powers the tribe was attempting to exercise, its interests, and the impact that the exercise of the tribe's powers has upon the nonmember interests involved."[90] In other words, the court of appeals used a typical functional analysis.

While the Supreme Court claimed to consider whether the second *Montana* exception would allow the tribe to tax such non-Indian businesses, the Court just bluntly asserted "we fail to see how petitioner's operation of a hotel on non-Indian fee land threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."[91] Conveniently omitted from the Court's discussion is any reference to how a lack of power to tax non-Indian businesses located on non-Indian fee land within the reservation might impact or imperil the Navajo Nation's economic

88. *Id.* at 386.

89. 532 U.S. 645 (2001).

90. *Id.* at 649 (quoting Atkinson Trading Co. v. Shirley, 210 F.3d 1247, 1255, 1257, 1261 (10th Cir. 2000)).

91. *Id.* at 657. The Court also added a meaningful footnote to this sentence remarking that the *Montana* case had only talked in terms of *nonmember conduct* threatening Indian tribes, and stating that "unless the drain of the nonmember conduct upon tribal services and resources is so severe that it actually imperils the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands. Petitioner's hotel has no such adverse effect upon the Navajo Nation." *Id.* at 657 n.12.

security. Also absent are any references to any congressional policy encouraging tribal economic development or self-sufficiency.

C. The Implicit Divestiture Doctrine in the Lower Courts After Hicks

1. Montana's Second Exception After Hicks.

A surprising number of lower court cases have allowed tribal jurisdiction over nonmembers in spite of Supreme Court precedents such as *Strate* and *Hicks*. For instance, in *McDonald v. Means*,[92] a horse owned by a nonmember rancher wandered onto a Bureau of Indian Affairs (BIA) road and caused an accident involving a tribal member. Because it was a BIA road, the road could not be considered nonmember fee land so the question was whether *Hicks* could be extended so as to deny the tribal court jurisdiction over this law suit. Allowing the tribal court to have jurisdiction, the Ninth Circuit seemed to be limiting *Hicks* to its facts or at least to cases arising on Indian lands but involving law suits against state officials.[93]

In *South Dakota v. Cummings*,[94] the South Dakota Supreme Court found that a state patrolman, in fresh pursuit of another vehicle driven by a tribal member stemming from a traffic violation committed outside the Indian reservation, did not have jurisdiction to gather evidence once the tribal member crossed into the reservation. Although *Hicks* would seem to indicate state jurisdiction, the court was able to distinguish *Hicks* on the basis that it involved a tribal member trying to sue state officials in tribal court while this

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92. 309 F.3d 530 (9th Cir. 2002); *see also* Elliott v. White Mountain Tribal Court, No. CIV 05-4240-PCT-MHM, 2006 WL 3533147 (D. Ariz. Dec. 6, 2006) (holding tribal court to have jurisdiction over a law suit by the tribe against a non-member who damaged tribal property when she started a fire within the reservation).

93. Thus the court remarked that "Even if *Hicks* could be interpreted as suggesting that the *Montana* rule is more generally applicable than either *Montana* or *Strate* have allowed, *Hicks* makes no claim that it modifies or overrules Montana." *Id.* at 540 n.9. The Ninth Circuit also made the interesting observation that since the defendant in this case was a member of *another* tribe, disallowing tribal court jurisdiction here would be paradoxical inasmuch as the tribe would still have criminal jurisdiction over the nonmember, since such tribal criminal jurisdiction had been recognized and reaffirmed by Act of Congress at 25 U.S.C. 1301(2) (2000). *Id.* at 540 n.10. This observation leads to the following question: To what extent is the congressional recognition of tribal criminal jurisdiction over nonmember Indians incongruent with the Court's continued position that tribes generally have been implicitly divested of civil jurisdiction over the same nonmember Indians? How could it be inconsistent with tribal status to have jurisdiction over non-member Indians in most civil matters while not inconsistent to have criminal jurisdiction over such non-member Indians?

94. 679 N.W.2d 484 (S.D. 2004).

case involved the state official trying to prosecute a tribal member in state court. As the court put it:"[i]n other words, in *Hicks*, tribal sovereignty was being used as a sword against state officers. Here, tribal sovereignty is being used as a shield to protect the tribe's sovereignty from incursion by the State."[95]

In *Ford Motor Co. v. Todecheene*,[96] the Ninth Circuit upheld tribal court exhaustion requirement. After first holding that the tribal court did not have jurisdiction over a law suit filed by a tribal member against Ford Motor Co. arising out of a Ford Explorer flipping over on a reservation road, and killing a tribal policewoman, the court vacated its previous order on the grounds that it was not obvious that the tribe did not have jurisdiction. Therefore, tribal court remedies should first be exhausted by the nonmember defendant before an action challenging the tribal court jurisdiction can be filed in federal court.[97] Similarly, in *Elliott v. White Mountain Apache Tribal Court*,[98] a non-Indian who was lost on the reservation and had started a fire to signal her position to potential rescuers was sued by the tribe after the fire she had started ended up burning thousands of acres of reservation land.[99] The federal district court held that because tribal jurisdiction was not plainly lacking, the nonmember defendant had to first exhaust her tribal court remedies before filing an action in federal court to challenge the tribal court's jurisdiction.[100]

The only federal circuit case that has taken a broad view of *Hicks* and ruled against tribal jurisdiction seems to be *MacArthur v. San Juan County*.[101] In

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95. *Id.* at 487.

96. 394 F.3d 1170 (9th Cir. 2005).

97. Ford Motor Co. v. Todecheene, 488 F.3d 1215 (9th Cir. 2007). This requirement was first mandated by the Supreme Court in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).

98. No. CIV-05-4240-PCT-MHM, 2006 WL 3533147 (D. Ariz. Dec. 6, 2006).

99. Eventually this signal fire combined with another fire to burn over 400,000 acres of land on and off the reservation.

100. On the exhaustion of tribal court remedies requirement, *see* Skibine, *Towards Co-Existence*, *supra* note 49.

101. 497 F.3d 1057 (10th Cir. 2007). There may be a number cases decided by state courts that may have gone against tribal interests. *See, e.g.*, Zempel v. Liberty, 143 P. 3d 123 (2006) (finding no tribal jurisdiction because the defendant was registered with the state even though the sole shareholder was a tribal member); *see also* Confederated Salish & Kootenai Tribes v. Clinch, 158 P.3d 377 (2007). Interestingly, these cases use an implicit divestiture analysis to divest the tribes of jurisdiction at the same time that they vest jurisdiction with the states, thereby following the lead indicated in Justice Scalia's *Hicks* opinion. Other federal circuit cases that have ruled against tribal jurisdiction did not rely on *Hicks* as precedent since the cause of action arose on non-Indian fee land. Such cases relied mostly on *Strate*. See for

this case, Navajo tribal members who had been employed by a health clinic owned and managed by a state county, but had been fired, sued the county in Navajo tribal court, alleging wrongful termination, among other things. The clinic was located on the Navajo reservation but on land owned by the County. Having won in tribal court, the plaintiffs sought to have the tribal order enforced by the federal court. The Tenth Circuit held that the tribal court did not have jurisdiction over the County, a nonmember defendant. After needlessly taking the position that *Hicks* applied to all cases involving tribal jurisdiction over non-members,[102] the court stated

> [T]his case essentially boils down to an employment dispute between SJHSD and three of its former employees. . . . While the Navajo Nation undoubtedly has an interest in regulating employment relationships between its members and non-Indian employers on the reservation, that interest is not so substantial in this case as to affect the Nation's right to make its own laws and be ruled by them.[103]

2. Montana's First Exception After Hicks

Another issue in *MacArthur* was whether the tribal court had jurisdiction based on *Montana*'s consensual exception.[104] Relying on statements made by Justice Scalia in *Hicks*, the Tenth Circuit held that the consensual exception was not applicable to consensual relations involving county or state agencies.[105] Besides relying on Justice Scalia's words, the reasons given by

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instance, Nord v. Kelly, 2008 WL 900138 (8th Cir, 2008).

102. *MacArthur*, 497 F.3d at 1069-70. The land on which the clinic was located was owned by the County in fee and therefore was non-Indian fee land within the reservation. The court's use of *Hicks* as controlling all cases involving assertion of tribal jurisdiction over non-members on Indian owned lands within the reservation was therefore dicta. For a different take, see for instance, the discussion of *McDonald v. Means* at *supra* notes 92-93.

103. *MacArthur*, 497 F.3d at 1075.

104. After stating that as a general rule, Indian tribes do not have any inherent sovereign authority over nonmembers, the Court in *Montana* had stated that "[a] tribe may regulate through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe, or its members, through commercial dealings, leases, or other arrangements." *Montana*, 450 U.S. at 565-66.

105. *MacArthur*, 497 F.3d at 1073 (quoting *Hicks*, 533 U.S. at 372 (Scalia, J.) ("The [Montana] Court . . . obviously did not have in mind states or state officers acting in their governmental capacity; it was referring to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into.")).

the court are somewhat elusive. In effect, the court seemed to have taken the position that states and counties could not submit to tribal jurisdiction even when they wanted to. The Tenth Circuit could have taken the position that under the Commerce Clause, Congress has the exclusive power to regulate commerce with Indian tribes and, therefore, that "plenary" authority over such Indian affairs preempts the states or counties from entering into such agreements with the tribes, at least not without federal approval. The Tenth Circuit, however, never addressed the argument preferring instead to take the position that it was the tribes that could not enter into such consensual agreements because that would "closely resemble the 'freedom independently to determine their external relations,' and therefore was necessarily relinquished as a result of the tribes' dependent status."[106] But surely, this argument is a complete misreading of the precedents. It sadly forgets the holding of the *Montana* Court stating that consensual relations is an *"exception"* to the general proposition that tribes had otherwise lost the power to independently determine their external relations.[107]

Montana's consensual exception was given a much broader reading in *Smith v. Salish & Kootenai College*.[108] The court in *Smith* found that the nonmember defendant involved in an auto accident had consented to tribal jurisdiction under the first *Montana* exception when he cross appealed against another named defendant. The problem was that Smith had initially been a defendant in that law suit; he had been sued in tribal court by injured tribal members who had been passengers in the truck Smith was driving when it overturned. However, these passengers had also sued another defendant — the college that owned the truck Smith had been driving. Eventually, the passengers and the college settled. However, because Smith, who had filed a cross claim against that college, refused to withdraw his cross claim, the Ninth Circuit found that Smith "elected to litigate the claim fully in tribal court," thereby allowing the tribal court to keep jurisdiction under *Montana*'s first exception.[109] Rather than doing a simple and short formalistic analysis declaring that the nonmember plaintiff had consented to jurisdiction by electing not to dismiss his cross claim, the Ninth Circuit backed its holding

106. *Id.* (citation omitted).

107. For a forceful argument criticizing the Scalia approach on this issue, see Justice O'Connor's concurring opinion in *Hicks*, 533 U.S. at 392-94.

108. 434 F.3d 1127 (9th Cir. 2006).

109. *Id.* at 1129. For a similar argument concerning enforcement of a consent agreement between a member and a nonmember by a tribal court, see *Fry v. Colville Tribal Court*, No. CV-07-0178-EFS, 2007 WL 2405002 (E. D. Wash. Aug. 17, 2007).

with a lengthy functional analysis weighing different factors such as the connection of the law suit to tribal lands, the Indian status of the defendant college, and the general interest of the tribal court is exercising subject matter jurisdiction in this case.[110]

Another case that relied on the consensual exception to the *Montana* rule was *Plains Commerce Bank v. Long Family Land & Cattle Co.*[111] The Eighth Circuit in that case held that the Cheyenne River Sioux tribal court had jurisdiction over a law suit involving a contractual dispute between a tribal member plaintiff and a non-Indian bank extending loans to reservation businesses. After a jury trial in tribal court, the Bank was found liable for discriminatory lending practices in its dealing with tribal members. One of the Bank's arguments was that the consensual relation had only been with the Long Company. Because Long Company was a race-neutral corporation registered under the laws of South Dakota, it should not be considered as having membership in the tribe for the purpose of determining tribal court jurisdiction. The Eighth Circuit stated that because the Bank "formed concrete commercial relationships with the Indian owners of that corporation, we conclude that it engaged on the kind of consensual relationship contemplated by *Montana.*"[112] The Eighth Circuit also found that unlike the situation in *Strate v. A-1 Contractors*,[113] where the highway traffic accident between a nonmember and the nonmember defendant had nothing to do with the contract the defendant had signed with the tribe,[114] in this case "the Longs' discrimination claim arose directly from their preexisting relationship with the bank."[115] Therefore, *Montana's* consensual relation was applicable and the tribal court had jurisdiction.[116]

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110. For an in depth analysis of the case, see Nicole E. Ducheneaux, *Smith v. Salish Kootenai College: Self-Determination as Governing Principle or Afterthought in Tribal Civil Jurisdiction Jurisprudence*, 68 MONT. L. REV. 211 (2007).

111. 491 F.3d 878 (8th Cir. 2007), *cert. granted*, 128 S.Ct. 829 (2008).

112. *Id.* at 886. In doing so, the Eighth Circuit took a different position than the one reached by the Montana Supreme Court in *Zempel v. Liberty*, 143 P.3d 123 (Mont. 2006).

113. 520 U.S. 438 (1997).

114. The Court in *Strate* stated that although A-1 was engaged in subcontract work for the Fort Berthold Reservation, and therefore had a "consensual relationship" with the Tribes, Gisela Fredericks was not a party to the subcontract, and the Tribes were strangers to the accident. *Id.* at 457.

115. *Plains Commerce Bank*, 491 F.3d at 887.

116. Besides the statements in *Hicks* and *Strate*, the Supreme Court addressed the consensual relations exception to the *Montana* rule in only one other case, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001). In that case, the Court held that a nonmember's "receipt of tribal police, fire, and medical services does not create the requisite connection" allowing tribal taxation of

At the time of this writing, the Court had granted the petition of *Cert* in this case but had not yet issued a decision. While the Court of Appeals' decision relying on the consensual exception to the *Montana* rule in favor of tribal jurisdiction seems to be on imminently sound legal grounds, it would not be surprising if the Court once again used a formalist mode of analysis to overturn the decision. As this article was going to the printer, the Supreme Court issued its decision in *Plains Commerce Bank.* As predicted, the Court reversed the Eighth Circuit's decision. The Court held that the tribal court did not have jurisdiction over the case because it found that, at its core, the Longs claim of discrimination was really a challenge to the power of the Bank to sell its non-Indian fee land to another party and under *Montana,* a tribe lacks the civil authority to regulate the sale of non-Indian fee land. Although the decision could and should be limited to instances where a tribe is attempting to regulate the sale of non-Indian fee land through its tort law, some language used in the opinion seems to tie the consensual exception to instances where tribal jurisdiction is needed for tribal self-government Thus the Court stated: "*Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests. *Montana* expressly limits its first exception to the activities of nonmembers, allowing these to be regulated to the extent necessary to protect tribal self-government [and] to control internal relations."[117]

D. Summary of the Supreme Court's Implicit Divestiture Jurisprudence

The Supreme Court in *Oliphant* came up with a new rule which stated that upon incorporation into the United States, Indian tribes became implicitly divested of any inherent sovereign power "inconsistent with their status."[118] The question remaining was not only how to determine what was inconsistent with tribal status, but more importantly, who was going to make that decision. The *Oliphant* Court first came up with what could have been a functional standard when it took the position that the powers that were inconsistent with

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such nonmember. *Id.* at 655. The Court also stated, "Montana's consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself. . . . A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another." *Id.* at 656.

117. Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2721 (2008) (citations omitted).

118. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09 (1978).

tribal status were those that were in conflict with an overriding federal interest.[119]

In *Montana*, however, the Court replaced this standard with a formal rule: Indian tribes have been divested of any jurisdiction over nonmembers, at least while on nonmember fee lands. This general rule was based on two related formalistic concepts: First, it is inconsistent with tribal status for tribes to independently determine their external relations, and second, by "external relations," the Court meant any tribal relations dealing with nonmembers. The *Montana* Court initially inserted a functional component to its analysis coming up with an exception to its general *Montana* rule and stating that while it was inconsistent with tribal status to exercise any power not necessary to tribal self-government, tribal control of nonmembers may be necessary to tribal self-government when the conduct of such nonmembers had a direct impact on the economic security, political integrity or health and welfare of the tribe. The Court's decisions in *Strate* and *Hicks* showed, however, that the Court has all but nixed this *Montana* exception. Although I have argued elsewhere that language in a later decision, *United States v. Lara*,[120] does not seem consistent with prior cases and may indicate a revision in the Court's implicit divestiture jurisprudence,[121] the following statement by Justice

Rehnquist in a 2001 case adequately summarized the Court's position in implicit divestiture cases:

> "[T]hrough their original incorporation into the United States as well as through specific treaties and statues, Indian tribes have lost many of the attribute of sovereignty." We concluded that the inherent sovereignty of Indian tribes was limited to "their members and their territory": "[e]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal

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119. As explained earlier, the Court in *Oliphant* determined that there was such a conflict by analyzing the historical assumptions of the three branches of the federal government as well as federal interests derived from the constitutional structure such as the interest in making sure that United States citizens not be subject to unwarranted intrusion into their personal liberty.

120. 541 U.S. 193 (2004).

121. *See* Skibine, *Redefining the Status*, *supra* note 6, at 677-82 (arguing that Justice Breyers' statement in *Lara* that Indian tribes' loss of inherent tribal powers in *Oliphant* and *Duro* were the result of "restrictions . . . that the political branches of the government had imposed on the tribes," *Lara*, 541 U.S. at 200, seems inconsistent with the Court's implicit divestiture jurisprudence according to which many inherent tribal powers were lost upon the Indian tribes' incorporation within the United States); *see also* Alex Tallchief Skibine, *Dualism and the Dialogic of Incorporation in Federal Indian Law*, 119 HARV. L. REV. F. 28 (2005), http://www.harvardlawreview.org/forum/issues/119/dec05/skibine.pdf.

> relations is inconsistent with the dependent status of the tribes.'" ("The dependent status of Indian tribes . . . is necessarily inconsistent with the freedom to determine their external relations").[122]

As explained earlier, Scalia's opinion in *Hicks* indicated that in order to acquire jurisdiction over nonmembers, the tribes may have to show that their interest in self-government is "superior" to the states' interest in having exclusive jurisdiction over these nonmembers. Because the Constitution's Commerce Clause assigned to Congress the exclusive role of regulating relations with Indian tribes, it would seem Congress should have the primary role in indicating how these interests should be balanced. Yet the Court, through the adoption of formalistic rules, has now assumed judicial supremacy and is making such decisions not with congressional policies in mind, but instead, with state policies and state interests in mind. In the next part, I turn to these state interests and show how in determining the extent of state jurisdiction inside Indian country, the Court has moved away from a functional analysis — based on the balancing of tribal, federal, and state interests — to an approach based on formalism favoring states' rights

III. Formalism in State Jurisdiction Cases

A: The Functionalist Years: From Infringement to Indian Preemption

States used to have no jurisdiction whatsoever within Indian reservations.[123] In its 1959 landmark decision in *Williams v. Lee*,[124] after examining some precedents which had allowed a measure of state jurisdiction inside Indian Country,[125] the Court formulated a new test, which became known as the "infringement test," stating "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state actions infringed on the right of reservation Indians to make their own laws and be ruled by them."[126] In 1973, *McClanahan v. State Tax Commission of Arizona*, appeared to have replaced this test. The Court gave the first definition of the Indian preemption test, stating

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122. *Atkinson Trading Co.*, 532 U.S. at 650-51 (citation omitted).

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

124. 358 U.S. 217 (1959).

125. The cases cited were *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948), *New York* ex rel. *Ray v. Martin*, 326 U.S. 496 (1946), *United States v. Candelaria*, 271 U.S. 432 (1926), *Felix v. Patrick*, 145 U.S. 317 (1892), and *Utah & Northern Railway v. Fisher*, 116 U.S. 28 (1885).

126. *Williams*, 358 U.S. at 220.

> The trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction, and toward the reliance on federal preemption. The modern cases thus tend to avoid reliance on platonic notion of Indian sovereignty and to look instead at the applicable treaties and statutes which defines the limits of state power.[127]

The Court further elaborated on the nature of Indian preemption inquiry in *White Mountain Apache Tribe v. Bracker*,[128] stating

> This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.[129]

Although some later cases seemed to have acknowledged that the infringement and preemption tests could co-exist, forming two distinct barriers to the exercise of state jurisdiction inside Indian reservations,[130] the two tests seemed to have been eventually merged into one flexible balancing inquiry. This balancing approach represents a quintessential functional philosophy. Thus in *New Mexico v. Mescalero Apache Tribe*, the Court declared "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority."[131]

The initial conception of the Indian preemption inquiry was largely influenced by Justice Thurgood Marshall. His preemption analysis can be divided into five factors or components. The first factor is whether the state regulations will unduly interfere, or not be compatible with, an existing federal regulatory scheme.[132] An equally important factor, however, is the

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127. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 (1973) (citation omitted).

128. 448 U.S. 136 (1980).

129. *Id.* at 145.

130. In *Bracker*, the Court stated, "The two barriers are independent because either standing alone, can be a sufficient basis for holding state law inapplicable." *Bracker*, 448 U.S. at 142-43 (1980).

131. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1980).

132. Such an incompatibility was found in *Bracker*, 448 U.S. 136, where the State was trying

"backdrop" of Indian sovereignty.[133] A third factor is whether there is a nexus between the state tax and state services. The fourth factor is whether the "value" the state is trying to regulate or tax is generated on the reservation. This factor seemed to have made a crucial difference between the Court's refusal to allow state regulation of reservation casinos,[134] as well as regulations of hunting and fishing activities,[135] and its allowance of state taxation of cigarette sales made to nonmembers.[136] A fifth factor is whether the activity the state is attempting to regulate has a spillover effect outside of the reservation. For instance, such a spillover effect played a factor in the Court's willingness to allow some state regulation of liquor sales on Indian reservations in *Rehner*.[137] Finally, the Court has also considered whether tribal and state regulations could coexist or whether allowing state regulation would in fact preempt tribal regulation. For instance, in *Mescalero Apache Tribe*, the Court refused to allow state regulation of hunting and fishing, stating "[i]t is important to emphasize that concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation."[138]

Although the ultimate preemption inquiry looks at whether state jurisdiction has been preempted by the operation of federal law, one must not confuse a finding of congressional *intent* to preempt with Indian preemption. Justice Marshall had stated for the Court that the preemption inquiry did not focus solely on a congressional "intent" to preempt. His version of the preemption inquiry was a flexible approach allowing preemption of state jurisdiction even in the absence of a specific intent to preempt.[139] Justice

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to tax nonmember loggers transporting forest product on reservation roads.

133. As the Court stated in *Mescalero Apache Tribe*, "The traditional notions of Indian sovereignty provide a crucial 'backdrop' against which assertion of State authority must be assessed." *Mescalero Apache Tribe*, 462 U.S. at 334 (citation omitted). The lack of such sovereignty backdrop was an important factor in allowing state jurisdiction in *Mescalero Apache Tribe* and *Rice v. Rehner*, 463 U.S. 713 (1983).

134. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

135. *See Mescalero Apache Tribe*, 462 U.S. 324.

136. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).

137. *Rehner*, 463 U.S. at 724.

138. *Mescalero Apache Tribe*, 462 U.S. at 338.

139. Writing for the Court in *Mescalero Apache Tribe*, he stated,

> By resting pre-emption analysis principally on a consideration of the nature of the competing interests at stake, our cases have rejected a narrow focus on congressional intent to pre-empt State law as the sole touchstone. They have also rejected the proposition that preemption requires "an express congressional

Rehnquist, however, always had a very different understanding of the Indian preemption test. In a separate opinion written in *Washington v. Confederated Tribes of the Colville Reservation*,[140] he objected to any balancing because "[b]alancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we have reserved for Congress."[141] Justice Rehnquist firmly believed that a specific congressional intent to preempt was necessary. Thus he wrote,

> I see no need for this Court to balance the state and tribal interests in enacting particular forms of taxation in order to determine their validity. Absent discrimination, the question is only one of congressional intent. Either Congress intended to pre-empt the state taxing authority or it did not.[142]

When it comes to the preemption inquiry, the ultimate difference between Marshall and Rehnquist can be seen as the contrast between a functional approach — where various factors and congressional policies will be balanced to figure out if state interests are sufficient to overcome a presumption against state jurisdiction created by an historical context containing a backdrop of tribal sovereignty — and a more formalistic approach, which creates a presumption in favor of state jurisdiction and places the burden on the tribes to show a congressional intent to preempt. However, since almost all of the justices in the Rehnquist camp consider themselves textualists, shunning any kind of quest for congressional intent,[143] that approach seems to require the tribe to find specific statutory language preempting state jurisdiction. Unfortunately for the tribe, although Justice Marshall's understanding of Indian preemption initially carried the day,[144] as the next section will show,

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statement to that effect."

Id. at 334.

140. 447 U.S. 134 (1979).

141. *Id.* at 177.

142. *Id.* at 161. Rehnquist never gave up on his version of preemption. In a later case he stated in a dissent, "[e]ven under the modified form of preemption doctrine applicable to state regulation of reservation activities, there must be some affirmative indication that Congress did not intend the State to exercise the sovereign power challenged in this suit." Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 854-55 (1982).

143. On textualism as a theory of statutory interpretation, see generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

144. In addition to the earlier *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), using Marshall's version of Indian preemption, the Court found state jurisdiction preempted in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), *Central Machinery v. Arizona Tax Commission*, 448 U.S. 160 (1980), *Ramah Navajo School Board*,

Rehnquist's version of preemption seemed to have prevailed in the long run, or at least, for the time being.

B. Mismanaging Preemption: Cotton Petroleum and Milhelm

In *Cotton Petroleum Corp. v. New Mexico*,[145] the issue was whether the state could impose a severance tax on oil and gas produced by a non-Indian whose income was generated from land he was leasing from the tribe within the Mescalero Apache Indian reservation. The Court held that the state tax was not preempted. The Court found no backdrop of tribal sovereignty or immunity from such state taxes in this case, because even though the 1938 Indian Mineral Leasing Act did not permit nor preclude such states taxation, an older Act of Congress had at one time removed the tax immunity previously enjoyed by such non-Indian oil and gas producers on Indian reservations.[146] Without such a backdrop of sovereignty creating a presumption of preemption, the Court asked whether subsequent legislation could be construed either explicitly or implicitly as preempting such state taxation. Finding none, the Court held that the state tax had not been preempted. Contrary to what it claimed,[147] the Court did not do any comprehensive balancing of the interests, preferring instead to distinguish previous cases on the ground that here, the state was providing some services to the reservation. Perhaps the absence of a tribal sovereignty backdrop can distinguish this case from others. However, Justice Blackmun, in dissent, thought that the majority had given up on a true balancing of the interests, stating

> Instead of engaging in a careful examination of state, tribal and federal interests . . . the majority has adopted the principle of "the inexorable zero". . . [u]nder the majority's approach, there is no pre-emption unless the States are *entirely* excluded from a sphere of activity and provide *no* services to the Indians or to the lessees they seek to tax.[148]

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458 U.S. 832, *Mescalero Apache Tribe*, 462 U.S. 324, and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

145. 490 U.S. 163 (1988).

146. *Id.* at 182-83.

147. *Id.* at 176 (stating that questions of preemption "are not 'controlled by mechanical and absolute conceptions of state and tribal sovereignty,'" and have instead been resolved by the application of "a flexible preemption analysis sensitive to the particular facts and legislation involved").

148. *Id.* at 204 (citations omitted). Justice Blackmun went on to state, "Pre-emption analysis

Furthermore, the dissenting opinion also noted that in finding that state taxation here would not impose any economic burden on the tribe, the Court blinded itself to the economics of oil and gas production.[149]

The next preemption case on the Court's agenda, *Department of Taxation & Finance of New York v. Milhelm Attea & Bros. Inc.*,[150] essentially overturned two rather recent precedents, *Warren Trading Post Co. v. Arizona State Tax Commission*,[151] and *Central Machinery Co. v. Arizona State Tax Commission*.[152] In *Milhelm Attea*, the issue was whether the Indian Trader statute[153] preempted state regulations which not only imposed a quota on the amount of untaxed cigarettes registered wholesale traders could sell to reservation Indian retailers but also imposed some substantial record keeping requirements on such wholesalers.[154] In addition, these wholesalers had to make sure that their buyers had a valid state tax exemption certificate, had to make monthly statements reports to state agencies, and had to pre-collect taxes on non-exempt sales.[155] While under Justice Thurgood Marshall's flexible Indian preemption analysis, state jurisdiction was able to be preempted in the absence of specific congressional intent to preempt, *Milhelm* can be understood as standing for the proposition that state jurisdiction is not preempted even when there seems to be clear indication of congressional intent to preempt. Certainly, the Indian Trader statutes seemed rather clear. They stated in part:

> The Commissioner of Indian Affairs shall have the *sole* power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper, specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.[156]

In allowing the state quota, licensing, and record keeping regulations to stand, the Court seemed to have been motivated by essentially pragmatic

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calls for a close consideration of conflicting interests and of their potential impact on one another. . . . The [majority's] exclusion of all sense of proportion has led to a result that is antithetical to the concerns that animate our Indian preemption jurisprudence." *Id.* at 208.

149. *Id.* at 208-09.

150. 512 U.S. 61 (1994).

151. 380 U.S. 685 (1965)

152. 448 U.S. 160 (1980).

153. Act of Aug. 18, 1876, ch. 289, 19 Stat. 200 (codified at 25 U.S.C. § 261 (2000)).

154. *Milhelm Attea*, 512 U.S. at 64.

155. *Id.* at 67.

156. *Id.* at 70 (citing 25 U.S.C. § 261) (emphasis added).

reasons, albeit very subjective ones. Thus, the Court had already held in previous cases that states could tax cigarette sales made on Indian reservations to nonmembers.[157] It also had held, however, that a state could not sue a tribe to collect such taxes because Indian tribes have sovereign immunity from suit.[158] So the dilemma was: how can the state collect their lawful tax? The obvious answer should have been: let the Congress amend the Indian Trader statutes or abrogate the tribe's immunity from suit in such instances.[159] But that would mean deferring to Congress on issues dealing with federalism, Indian tribes, and states' rights. The Court would have none of that, preferring instead to assume judicial supremacy and allow the state's regulations even if this meant overturning two recent precedents, *sub silentio.*

C. Preempting Preemption in State Regulation of Nonmembers

As shown in Part II, the Court in cases such as *Brendale, Strate,* and *Hicks,* has used the implicit divestiture doctrine as an alternative test to both preempt tribal jurisdiction over nonmembers while at the same time implicitly affirming the existence of state jurisdiction in those cases. In this section, I focus on another method used by the Court to privilege state over tribal regulations: declaring that the event the state is trying to regulate never occurred on the reservation.

1. The Indian Country Cases

Although this article is about how federal Indian common law has been recently reshaped by formalism, it should be noted that the Court has also allowed state jurisdiction or prevented tribal jurisdiction by holding, as a matter of statutory construction, that land previously considered "Indian country,"[160] was no longer so.[161] In the area of statutory construction, the

157. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).

158. *See* Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505 (1991).

159. For sure, this is the remedy the Court has suggested in many cases to tribes that have been on the losing end of cases. For instance, in *Oliphant,* after holding that tribes had no criminal jurisdiction over non-Indians, the Court took the position that whether Indian tribes need criminal jurisdiction over non-Indians in order to effectively fight crimes on reservations are "considerations for Congress to weigh." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

160. The term "Indian Country" is a term of art. It is defined by federal statute as: "(a) all lands within the limit of any Indian reservations under the jurisdiction of the United States Government . . . , (b) all dependent Indian Communities within the borders of the United

proxy for formalism has been the use of "textualism" as a method or theory of statutory interpretation.[162] In a 1990 article, Professor Philip Frickey had put forth the argument that instead of more foundationalist theories such as intentionalism or textualism, the Court's analysis in statutory construction cases in federal Indian law reflected what he termed "practical reasoning."[163] Concerning cases involving the existence of Indian country, Frickey argued that although these decisions purport to rely solely on "clear evidence of congressional intent" to end reservation status, these decisions cannot be explained solely in those terms. Frickey showed how these cases were actually decided on practical reasoning reflecting the dynamic nature of the Court's interpretation.[164]

The most recent cases in this area of the law, all decided after Frickey published his landmark article, are *Hagen v. Utah*,[165] *South Dakota v. Yankton Sioux Tribe*,[166] and *Alaska v. Native Village of Venetie Tribal Government*.[167] All three cases involved assertion of jurisdiction over nonmembers. In *Hagen*, the State of Utah was trying to prosecute a nonmember for distributing a controlled substance.[168] In *Yankton*, the Yankton Tribe was trying to regulate a nonmember's solid waste disposal facility located on nonmember fee land.[169] Finally in *Venetie*, the tribe attempted to tax a nonmember entity building a school on land owned by the tribe.[170] In *Hagen* and *Yankton*, the Court held that the part of the reservation where the nonmember or his property was had been disestablished by acts of Congress. In *Venetie*, the Court held that as a result of the Alaska Native Claims Settlement Act (ANCSA),[171] the land owned by the Native Village of Venetie could not qualify as a dependent Indian community and therefore was no longer Indian country.

States . . . , and (c) all Indian allotments, the Indian title to which have not been extinguished . . . ." 18 U.S.C. § 1151 (2000).

161. For an analysis on how the Court has accomplished this, see Robert Laurence, *The Unseemly Nature of Reservation Diminishment by Judicial, as Opposed to Legislative Fiat and the Ironic Role of the Indian Civil Right Act in Limiting Both* 71 N.D. L. REV. 393 (1995).

162. *See* Molot, *supra* note 13.

163. Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990).

164. *Id.* at 1148-50.

165. 510 U.S. 399 (1994).

166. 522 U.S. 329 (1998).

167. 522 U.S. 520 (1998).

168. *Hagen*, 510 U.S. 399.

169. *Yankton*, 522 U.S. at 329.

170. *Venetie*, 522 U.S. at 520.

171. 43 U.S.C. §§ 1601-1628 (2000).

Continuing the trend identified by Professor Frickey, the *Hagen* decision's analysis concerning congressional intent to disestablish the Ute reservation is unconvincing, to say the least. The Court's growing formalism can be seen in its increasing use of textualism and its reliance on statutory words purporting to convey clear indications of congressional intent. In *Hagen*, the Court relied heavily on the fact that under a 1902 Act of Congress, "all the unallotted land lands within said reservation shall be restored to the public domain."[172] Although the Court gave talismanic importance to the words "restored to the public domain" to find clear evidence of congressional intent, these words do not actually say the reservation status of these lands had been terminated. As argued by the dissent, the legislative record was ambiguous at best, and therefore the case should have been decided based on the canon of statutory interpretation which requires ambiguous expressions to be resolved in the tribe's favor.[173] The *Yankton* case, even more clearly, reflects increased reliance on textualism. The Court in *Yankton* thought that the statute's plain term evidenced a clear congressional intent to disestablish the reservation. As the Court stated, "we perceive congressional intent to diminish the reservation in the plain statutory language."[174]

The issue in *Venetie* was whether land owned by the tribe constituted a dependent Indian community.[175] Justice Thomas's opinion represents a classical use of form over substance. Reversing the court of appeals that had used a six factor functional balancing test to determine the lands to be part of a dependent Indian community,[176] the Supreme Court held that the lands could not be part of a dependent Indian community because they were set aside under ANCSA,[177] an Act of Congress that had the purpose of terminating the dependency of the Native Communities on the federal government. The Court

172. *Hagen*, 510 U.S. at 404.

173. *See id.* at 422-27 (Blackmun, J., dissenting). In addition, it has to be noted that although these key words were contained in the 1902 Act, they were omitted from the 1905 Act that finally allotted the reservation. However, this fact was judged not to be particularly meaningful to the Court.

174. *Yankton*, 522 U.S. at 344-45, 351. The court stated "Article I of the 1894 Act provides that the Tribe will "cede, sell, and relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation"; pursuant to Article II, the United States pledges a fixed payment of $600,000 in return. This "cession" and "sum certain" language is "precisely suited" to terminating reservation status."

175. *Venetie*, 522 U.S. at 523.

176. Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Vill. Of Venetie Tribal Gov't, 101 F.3d 1286, 1292-94 (9th Cir. 1996), *rev'd*, 522 U.S. 520 (1998).

177. 43 U.S.C. §§ 1601-1628 (2000).

justified this finding by adopting a rather formalistic definition of the term "dependent Indian community," stating,

> We now hold that [dependent Indian community] refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements — first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence.[178]

Using this kind of formal definition, the Court was able to ignore the realities on the ground — the fact that these lands were located in isolated Native communities with whom the United States maintained a trust relationship. It also allowed the Court to ignore the fact that ANCSA was amended in 1987,[179] to provide for the continuance of the trust relationship between the Native Alaskan Tribes and the United States.[180] Even more disturbing from a normative viewpoint is Justice Thomas's insistence on the "dependent" nature of the Indian community. Thus, after stating that "the federal superintendence requirement guarantees that the Indian community is sufficiently "dependent" on the Federal Government,"[181] he concluded that there was not enough "indicia of active federal control over the Tribe's land sufficient to support a finding of federal superintendence."[182] In other words, what is important to Thomas is not the federal policy of tribal self-government or the fact that this was a very native and isolated community, but the degree of power and control the federal government exercised in the management of these lands. The normative implications of this holding seems to be that according to the Court, the primary factor in determining the existence of Indian country should be the degree of federal control exercised and not the

178. *Venetie*, 522 U.S. at 527. At least one state supreme court has since adopted a slightly different position, holding that at least in the case of the Pueblos in New Mexico, a reservation could also qualify as a dependent Indian community. *See* New Mexico v. Romero, 142 P.3d 887, 891 (N.M. 2006) (citing Alaska v. Native Village of Venetie, 522 U.S. 520, 527 (1998)).

179. *See* Alaska Native Claims Settlement Act Amendments of 1987, Pub. L. No. 100-241, 101 Stat. 1788.

180. For a critical evaluation of the Court's reasoning in *Venetie*, see David M. Burton, *Canons of Construction, Stare Decisis, and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37 (1998); *see also* Kristen Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 TULSA L.J. 73 (1999).

181. *Venetie*, 522 U.S. at 531.

182. *Id.* at 534.

fact that these lands have been under the control of sovereign tribes since time immemorial.

2. Wagnon v. Prairie Band of Potawatomi Nation[183]

The issue in *Wagnon* was whether the State of Kansas could impose an excise tax on fuel sold by a non-Indian distributor to the Prairie Band of Potawatomi Nation.[184] The Court of Appeals for the Tenth Circuit had ruled against the state tax using a traditional balancing preemption test.[185] Using a formalistic approach, the Supreme Court in *Wagnon* written by Justice Thomas, reversed. Looking only at the words of the tax statute to find that it was meant to tax the receipt of the fuel by the distributor and not its subsequent sale to the tribe, the Court took the position that the functional balancing test was not applicable because the tax incurred by the non-Indian distributor occurred off the reservation. Thomas's penchant for formalism was clearly reflected in the last part of his opinion, where he stated, "The application of the interest-balancing test to the Kansas motor fuel tax is not only inconsistent with the special geographic sovereignty concerns that gave rise to that test, but also with our efforts to establish a 'bright line standard[s]' in the context of tax administration."[186]

This formalistic approach allowed the Court to ignore the reality of the situation and congressional policies.[187] In her dissent, Justice Ginsburg noted that although the tax was formally imposed on the non-Indian distributor, in reality, the tax burdened reservation activities. According to her, the tax should have been considered as having taken place on the Indian reservation because under the applicable statute, "[t]o whom and where the distributor sells are the criteria that determine the 'transactions' on which '[n]o tax is . . . imposed, and correspondingly the transaction on which the tax is imposed'"[188]

183. 546 U.S. 95 (2005).

184. *Id.* at 101-02.

185. Prairie Bank of Potawatomi Nation v. Richards, 379 F.3d 979, 983 (10th Cir. 2004), *rev'd*, 546 U.S. 95 (2005).

186. *Wagnon*, 546 U.S. at 113.

187. For an analysis of the case making a similar point, see Timothy R. Hurley, Comment, *Elevating Form over Substance at the Expense of Indian Sovereignty [Wagnon v. Prairie Band Potawatomi Nation, 126 S.Ct. 676 (2005)]*, 46 WASHBURN L.J. 453 (2007).

188. *Wagnon*, 546 U.S. at 123-124. Justice Ginsburg also disagreed with the Court's position that the State could avoid the balancing test by just legislatively switching the legal incidence of the tax to the non-Indian.

Another instance where the Court showed its blindness of the economic realities on the ground occurred when Justice Thomas asserted that the tribe's "[d]ecision to impose a tax should have no effect on its net revenues from the operation of the station."[189] As Justice Ginsburg noted in dissent:"[a]s a practical matter, however, the two tolls cannot coexist."[190] Justice Ginsburg also provided a persuasive explanation as to why a functional balancing test is more appropriate in these circumstances:

> Balancing tests have been criticized as rudderless, affording insufficient guidance to decisionmakers. Pointed as the criticism may be, one must ask, as in life's choices generally, what is the alternative. The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes, and the Federal Government, on the one hand, and those of the State, on the other. No "bright line" test is capable of achieving such an accommodation with respect to state taxes formally imposed on non-Indians, but impacting on-reservation ventures.[191]

One of the most problematic aspects of the Court's formalistic approach is that it may put an end to the proliferation of recently enacted tribal-state agreements.[192] As stated by Justice Ginsburg:"[b]y truncating the balancing-of-interests approach, the Court has diminished prospects for cooperative efforts to achieve resolution of taxation issues through constructive intergovernmental agreements."[193] While these tribal-state agreements have proliferated, it is true that they are not standardized. As a result, it is very possible that some agreements may be beneficial to tribes,[194] while others may not.[195] Nevertheless, these compacts are useful.[196] Their very existence,

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189. *Id.* at 114.

190. *Id.* at 116 (citing *Prairie Band*, 379 F.3d at 986).

191. *Id.* at 124-25 (Ginsburg, J., dissenting) (citations and quotation marks omitted).

192. *See* JEFFREY D. ASHLEY & SECODY J. HUBBARD, NEGOTIATED SOVEREIGNTY: WORKING TO IMPROVE TRIBAL-STATE RELATIONS (2004).

193. *Wagnon*, 546 U.S. at 131 (Ginsburg, J., dissenting)

194. *See* Richard J. Annson, Jr., *State Taxation of Non-Indians Whom Do Business with Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize the Need for Indian Tribes to Enter into Taxation Compacts with Their Respective State*, 78 OR. L. REV. 501 (1999).

195. For a scholarly debate on the merits of such agreements, see Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, FEDERAL LAWYER, Mar./Apr. 2006, at 38, and Ezra Rosser, *Caution, Cooperative Agreements, and the Actual State of Things: A Reply to Professor Fletcher*, 42 TULSA L. REV. 57 (2006)

196. *See* Frank Pommersheim, *Tribal State Relations: Hope for the Future?*, 36 S.D. L. REV.

however, is due to the fact that Congress has not acted specifically in this area and that, until recently, the Court had used a functional test which gave some leeway for the states and the tribes to negotiate mutually agreeable solutions.

One of the trends that can be identified as a result of the Court's formalism, is the reliance on non federal Indian law principles by some lower courts. In other words, faced with an incoherent federal Indian law jurisprudence resulting from the Court's switch from functional standards to more formalistic rules, some lower courts have opted to use legal analysis derived from other areas of the law. A case illustrating this trend is another *Wagnon* case, *Prairie Band of Potawatomi Nation v. Wagnon.*[197] In that case, a tribe was seeking to have the State of Kansas recognize the validity of its license plates so that tribal members would not have to purchase additional plates issued by the state. Although when initially deciding the case the Tenth Circuit had relied on a preemption balancing test, ultimately ruling in the tribe's favor,[198] upon remand from the Supreme Court, it again ruled in the tribe's favor but abandoned Indian preemption and relied on equal protection jurisprudence.[199] Thus, after finding that "with the exception of Iran and possibly Cuba . . . the State recognizes and is willing to accept registration and titling by practically every jurisdiction except in the case of Kansas-based Indian tribes,"[200] the Tenth Circuit found that the sole reason given by Kansas for such different treatment, public safety, was unconvincing. This was especially true in light of the fact that Kansas was recognizing license plates issued by non Kansas-based tribes, thus boosting the court's conclusion that Kansas "impermissibly discriminates against similarly situated sovereigns."[201]

D. State Regulation of Tribes and Tribal Members

When it comes to state tax authority over tribal members or tribes, the Court stated, in *Oklahoma Tax Commission v. Chickasaw Nation*,

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239 (1991).

197. 476 F.3d 818 (10th Cir. 2007).

198. *See* Prairie Bank of Potawatomi Nation v. Wagnon, 402 F.3d 1015, 1028 (10th Cir. 2005), *vacated*, 546 U.S. 1072 (2005).

199. This mode of analysis had been initially suggested before the Supreme Court remand in the concurring opinion. *See id.* at 1028-31 (McConnell, J., concurring).

200. *Prairie Bank*, 476 F.3d at 825 (citations omitted).

201. *Id.* at 827. The same argument had been made earlier by the Ninth Circuit in *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004), where the court used an equal protection argument to prevent the state from ticketing tribal police cars with light bars. These tribal police cars had to travel on off-reservation state highways to go from one portion of the reservation to another.

> [W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, "a more categorical approach: 'Absent cession of jurisdiction or other federal statutes permitting it,'. . . a State is without power to tax reservation lands and reservation Indians."[202]

Therefore, in such cases, a formalistic rule has been adopted for the benefit of tribal members. In this section, I show how the Court has managed to avoid giving tribes and their members the benefit of such formal rule by superimposing other formalistic approaches in order to rule in favor of state jurisdiction.

1. The "Legal Incidence of the Tax" Cases

The Court in *Chickasaw* also held that a crucial issue in such cases was determining upon whom the "legal incidence" of the tax fell: the members or the nonmembers.[203] If the legal incidence fell on the tribal members, the categorical approach should be used, while if it fell on the nonmembers, the functional balancing preemption inquiry should be used. Although the Court in *Chickasaw* found that the legal incidence of the tax fell on the tribe in that particular case, it unfortunately seems to have adopted a highly formalistic approach, leaving to state legislatures almost full discretion to determine that the nonmember entity bears the legal incidence of the tax when in fact, the real economic burden falls on the tribe or tribal members.

Fortunately for the tribes, it seems that at least some lower federal courts have re-injected functionalism within the formalist framework adopted by the Supreme Court in such cases. For instance, in *Coeur d'Alene Tribe of Idaho v. Hammond*,[204] the Ninth Circuit undertook a comprehensive multi-factored analysis before determining that the legal incidence of the tax fell on the tribal members. Starting its analysis by stating that "[t]he incidence of a state tax on a sovereign Indian nation inescapably is a question of federal law that cannot be conclusively resolved in and of itself by the state legislature's mere statement,"[205] the *Hammond* court took the position that a state's legislature "intent" could not be ultimately dispositive because "[i]f the legislature could

202. 515 U.S. 450, 458 (1995) (quoting County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 258 (1992)).

203. *Id.* at 457-61.

204. 384 F.3d 674 (9th Cir. 2004).

205. *Id.* at 682-83.

indirectly tax Indian nations merely by reciting *ipso facto* that the incidence of the tax was on another party, it would wholly undermine the Supreme Court's precedent that taxing Indians is impermissible absent clear *congressional* authorization."[206] Ultimately, basing its holding on a multi-factored analysis,[207] the *Hammond* court concluded that the state statute in question retained "the 'pass through' quality of the prior statute" and that, therefore, it retained its character as a "'collect and remit' scheme which places the incidence of the tax on the Indian retailers."[208]

2. State Taxation of Indian Owned Fee Land

Another controversial issue has been the states' attempts to tax Indian owned fee lands within Indian reservations. For instance, in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*[209] the Court used a textualist approach to hold that the language of the General Allotment Act of 1887 (GAA)[210] explicitly authorized state taxation of Indian owned land after the expiration of the trust period. As amended by the Burke Act of

206. *Id.* at 683. Later in its opinion the court also remarked that allowing the states to arbitrarily designate who bore the legal incidence of the tax "would permit states indirectly to threaten the very existence of the Tribes." *Id.* at 684.

207. *Id.* at 688. The court found first that the Kansas law required the non-tribal distributor "to pass on and collect the tax from the [tribal] retailer," *id.* at 685; second, that the state statute provided the non-tribal distributor with tax credits for collecting and remitting the tax to the states, *id.* at 686; third, that the state gave tax credits to the non-tribal distributor for fuel taxes that the distributor paid but could not collect from the tribal retailer, *id.* at 687; fourth, that while the tribal retailers had a right to a refund for fuel taxes sought by distributors and paid by the retailers, the retailers could neither set off their liability when consumers failed to pay the tax, nor could they be paid by the state for collecting the tax for the state, *id.*

208. *Id.* at 688 (citation omitted). While other courts have followed the *Hammond* court's approach in ruling in the tribes' favor, *see* Squaxin Island Tribe v. Stephens, No. C03-3951Z, 2006 WL 278559 (W.D. Wash 2006) (reconsidered in light of *Wagnon* but still reaching the same result), this does not mean that the legislative intentions to place the legal incidence of a tax on nonmember consumers is not important. Thus, in *Keewanaw Bay Indian Community v. Rising*, 477 F.3d 881 (6th Cir. 2007), after stating that "[i]t is worth noting at the outset that the Supreme Court has put great weight on expressions of legislative intent in determining where the legal incidence of a tax falls," *id.* at 888, the court found that the legal incidence of the tax fell on the nonmember consumers. In *Keewanaw Bay*, however, the Sixth Circuit did not limit itself to the legislature's intent but also cited *Hammond* in stating that "[e]ven so, if the actual operation of the tax contravenes the expressed legislative purpose, it would make little sense to rely entirely on a statement of legislative intent . . . ." *Id.*

209. 502 U.S. 251 (1992).

210. Ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 26 U.S.C.).

1906,[211] section 6 of the General Allotment Act provided that "[a]t the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside . . . ." Further language also provided that as soon as a fee patent was issued to an Indian allottee by the Secretary of the Interior: "[T]hereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed."[212] In this case, however, it was the Tribe that had reacquired the lands that had been previously allotted to individual Indians. Since the language of the statute did not specifically address that situation, the tribe argued that it was exempt from state taxation, especially since the GAA should be interpreted in light of the subsequent repudiation of the policies underlying it.[213]

The other landmark Supreme Court decision in this area of the law is *Cass County v. Leech Lake Band of Chippewa Indians*.[214] The issue in *Cass County* was whether the county could tax fee land owned by tribal members within the Leech Lake Band's reservation.[215] Unlike the *Yakima* case, however, the Leech Lake Band's reservation was not allotted pursuant to the GAA as amended by the Burke Act but by the Nelson Act of 1889.[216] Unlike the Burke Act, the Nelson Act did not contain any language that could even remotely be interpreted as an express congressional authorization to tax such lands. Nevertheless, Justice Thomas, writing for a unanimous Court, held that the County could proceed with the tax because Congress had made its intent to allow such tax "unmistakably clear."[217]

What is interesting about this opinion is how Thomas, an avowed textualist, came to his conclusion. He first managed to convince himself that the *Yakima* court did not rely on the express reference to taxability contained in the Burke Act. His only evidence for that interpretation seems to be a statement in *Yakima* to the effect that the Court in *Goudy v. Meath*,[218] had found such Indian fee land taxable "without even mentioning the Burke Act."[219]

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211. 25 U.S.C. § 349 (2000).

212. *Id.*

213. These policies were repudiated by Congress in the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 (2000)).

214. 524 U.S. 103 (1998).

215. *Id.* at 106.

216. Ch. 24, 25 Stat. 642.

217. *Cass County*, 524 U.S. at 106.

218. 203 U.S. 146 (1906).

219. *Cass County*, 524 U.S. at 112-13 (quoting *Yakima*, 502 U.S. at 259).

Therefore, according to Justice Thomas, the *Yakima* Court must have understood that "it was the alienability of the allotted land that the [Goudy] Court found of central significance."[220] It seems that textualism would call for this "unmistakably clear" meaning to be derived from the words of the statute or at least, from its structure. Instead, Justice Thomas supported his conclusion by invoking a general "rule" that he derived from the *Goudy* case that dealt with another Act of Congress. That rule was that whenever Congress allows Indians to freely alienate their lands, it must intend the states to be able to tax such lands.[221]

The first problem with this reasoning is that it has to overcome some direct language in the *Yakima* opinion stating that it relied on specific language in the Burke Act concerning taxability of the land. For instance, the *Yakima* Court had stated, "We agree with the Court of Appeals that by specifically mentioning immunity from land taxation 'as one of the restrictions that would be removed upon conveyance in fee,' Congress in the Burke Act proviso 'manifested a clear intention to permit the state to tax' such Indian lands."[222] Secondly, the *Yakima* Court's position seems to have been that the law had evolved since *Goudy*. That is why Justice Scalia, when writing for the Court in *Yakima,* observed that although an older case, *Goudy,* had found that even section 5 of the GAA had allowed such state taxation;[223] he went on to state that more recent cases established "a consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear."[224] Therefore, it seems that Scalia's position was that although the Court now seemed to be requiring clearer indication of congressional intent than at the time of *Goudy*, the express reference to taxation in the Burke Act overcame this obstacle.

Thomas's reasoning boils down to this: First, other legislation, section 5 of the GAA, had been interpreted in 1906 as allowing state taxation of Indian fee land because of its alienability. Secondly, section 6 of the GAA was eventually amended (by the Burke Act) to specifically allow state taxation. Therefore, congressional intent to allow similar taxation in the 1889 Nelson Act could be inferred by importing a purpose borrowed from the 1906 Burke

220. *Id.* at 113 (quoting *Yakima*, 502 U.S. at 263).

221. *Id.* at 110-11.

222. *Yakima*, 502 U.S. at 259 (quoting Confederated Tribes & Bands of the Yakima Nation v. County of Yakima, 903 F.2d 1207, 1211 (9th Cir. 1990).

223. The issue in *Yakima* was whether section 6, as amended by the Burke Act, allowed state taxation. The issue in *Goudy* was whether section 5 authorized such taxation. This is why *Goudy* was not directly on point in *Yakima.*

224. *Yakima*, 502 U.S. at 258 (quoting Montana v. Blackfeet Tribe, 471 U.S. 759 (1985)).

Act. As one scholar noted, Thomas the textualist had become Thomas, the purposivist.[225] In fact, this appraisal of Thomas seems overly generous. Thomas in *Cass County* not only resurrected *Goudy*, a 1906 opinion about section 5 of the GAA, as the leading case in this area of the law, but also extended its reasoning to a new situation involving the Nelson Act. In effect, Thomas in *Cass County* reverted back to rules prevailing before the legal realism movement. His approach is nothing less than a throwback to an outdated version of legal positivism which prevailed during colonial times.[226]

Some lower courts seemed to have found ways to avoid the irrationality of the rules laid down by the Supreme Court in *Cass County.* For instance, in *Keewanaw Bay Indian Community v. Naftaly,*[227] the Sixth Circuit was able to distinguish *Cass County* by taking the position that land that had become alienable through a treaty could not be compared to Indian land that became alienable as a result of an Act of Congress.[228] In *Gobin v. Snohomish County,*[229] the issue was not state taxation but zoning regulation that the county was trying to impose on a tribal member's fee land within the reservation. The court held that zoning regulations could not be equated to taxing regulations and therefore *Yakima* and *Cass County* were not controlling.[230]

City of Sherrill v. Oneida Indian Nation[231] represents a case where the Court was able to avoid either the functional balancing preemption inquiry, or any approach mandating clear indication of congressional intent, in order to allow state taxation of reservation Indians. At issue in the case was whether the City of Sherill could impose a tax on properties the Oneida Indian Nation (OIN) had recently purchased on the open market.[232] Although the Oneida Nation held fee simple title to these lands, the Nation claimed that the lands were still within its ancestral reservation and therefore could not be taxed by the city.

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225. *See* Michael Dorf, *Foreword: the Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 6 n.9 (1998).

226. *See* Raban, *supra* note 23.

227. 452 F.3d 514 (6th Cir. 2006).

228. The court also had to distinguish two lower court cases that did find taxability even though the land had become alienated initially through a treaty. *See* Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355 (9th Cir. 1993); Thompson v. County of Franklin, 314 F.3d 79 (2d Cir. 2002).

229. 304 F.3d 909 (9th Cir. 2002).

230. Id., at 916.

231. 544 U.S. 197 (2005).

232. *Id.*

The two pivotal issues argued at the court of appeals were first, whether the 1838 Treaty of Buffalo Creek,[233] signed between the OIN and the United States, had terminated the reservation guaranteed in an earlier treaty signed between the United States and the Six Nations Iroquois Confederacy in 1794.[234] Secondly, the State of New York was arguing that at some point late in the nineteenth century, the Oneida Nation of New York had ceased to exist as a federally recognized Indian tribe, thereby terminating any rights it may have had in previous treaties. The Second Circuit held that the original 1794 reservation was not abolished by the 1838 treaty and the Oneida Nation had never ceased to exist as an Indian tribe.[235] Therefore, the lands recently purchased by the Nation were still within an Indian reservation and not taxable by the City.

The Supreme Court reversed.[236] Ignoring the arguments made by the attorneys from both sides in their briefs, the grounds on which the court of appeals had made its decision, as well as the questions which had been formally presented for review,[237] the Court stated

> The wrongs of which OIN complains in this action occurred during the early years of the Republic. For the past two centuries, New York and its county and municipal units have continuously governed the territory. The Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970's. And not until the 1990's did OIN acquire the properties in question and assert its unification theory to ground its demand for exemption of the parcels from local taxation. This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude OIN from gaining the disruptive remedy it now seeks.[238]

In the end, the Court held that three equitable doctrines — laches, impossibility, and acquiescence — prevented the Oneidas from claiming that their property could not be taxed by the City.[239] *City of Sherrill* seems to be

233. Treaty with the New York Indians, Jan. 15, 1838, 7 Stat. 550.

234. Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 44.

235. *Sherrill*, 544 U.S. at 212.

236. *Id.* at 221.

237. *See* Curtis Berkey, *Recent Development, City of Sherrill v. Oneida Indian Nation*, 30 AM. INDIAN L. REV. 373 (2005-2006).

238. *Sherrill*, 544 U.S. at 216-17.

239. *Id.* at 197.

one of those cases law professors are not eager to talk about because it is so totally devoid of any doctrinal coherence, or easy classification.[240] One commentator concluded that the Court's opinion in *City of Sherrill* lacked both doctrinal coherence and pragmatism, and represented a case of "blaming the victim."[241] For certain there was no doctrinal coherence.[242] Whether the Court's action lacked pragmatism is a more difficult question, and I am not so sure I agree. It was authored by Justice Ginsburg, who, one year later, argued so persuasively and coherently in her *Wagnon* dissent why functional balancing tests should be used to measure the amount of state taxation inside Indian reservations.[243]

Although there are many grounds on which the decision has been criticized,[244] I will focus here on what could have been at least one important reason the Court refused to uphold the tribe's traditional immunity from state taxation.[245] Professor Sarah Krakoff observed that *City of Sherrill* represented the Court's effort to force the Indian tribes to remain dependent on the United States.[246] Thus she noted that the Court mentioned that OIN could have

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240. One scholar has remarked that it is hard for a law professor not to just say "Arrrgh!" when commenting about the decision. *See* Sarah Krakoff, *City of Sherrill v. Oneida Indian Nation of New York: A Regretful Postscript to the Taxation Chapter in Cohen's Handbook of Federal Indian Law*, 41 TULSA L. REV. 5, 10-11 (2005).

241. *See* Berkey, *supra* note 237, at 383.

242. I do not believe, as some have erroneously argued, that the tribal claim in *Sherrill* can be described as a claim of reparative justice for ancient wrongs and therefore, better suited for a legislative resolution. To start with, the claim was for an immunity from state taxation *today* for lands only recently reacquired by the tribe. Secondly, for any legislative solution to have had any chance of being enacted, it would have had to come before the Court's decision rather than after. Thus it seems somewhat disingenuous, or completely oblivious to current political realities, to argue for a solution that has no chance of coming about, precisely as a result of the Court's decision. *See The Supreme Court, 2004 Term: Leading Cases, Availability of Equitable Relief*, 119 HARV. L. REV. 347, 356-57 (2005).

243. Wagnon v. Prairie Band of Potawatomi Nation, 546 U.S. 95, 116-31 (2005).

244. For some insightful criticisms, see Joseph William Singer, *Nine-Tenths of the Law: Title, Possession, and Sacred Obligations* 38 CONN. L. REV. 605 (2006).

245. In doing so, I realize that assigning more complex reasons and motives to the Court may give too much credit to the Court and deflect the discussion away from what really is just ruthless pragmatism. Yet, I will, for the time being, resist, the strong temptation to simply argue that the Court seemed to have relied on what could be called the "whatever" principle, meaning whatever it takes to rule against the tribes and in favor of state interests.

246. *See* Krakoff, *supra* note 240, at 18. Noting the tribes' recent success in attaining self sufficiency through economic development, Krakoff also observed that "Tribal success on the ground is thus in direct disproportion to tribal success in the Highest Court. *Id.* at 19. Another commentator noted the same trend and, pointing to *City of Sherrill* as a case on point, argued that this change of attitude on behalf of the Court may be a result of the disproportionate success

avoided state taxation by simply asking the Bureau of Indian Affairs to place these lands in trust. Once lands are placed in trust, the United States, as the trustee for the tribes, is said to have legal title to the lands while the tribes have the beneficial title. As such the United States retains a certain amount of control over such lands. Similarly, I have argued elsewhere that an analysis of the Rehnquist Court in its last twenty five years or so showed that it has adopted a "dependency paradigm" governing the incorporation of tribes into the United States political system.[247] According to this paradigm of incorporation, the main reason Indian tribes are allowed to survive as quasi-sovereign entities within the United States political system is not that they have a right to self-determination and have always been recognized as quasi-sovereign entities, but that they are a weak and "dependent" people and cannot survive without being controlled by their "trustee," the United States.[248] Similarly, other scholars have pointed to the existence of two versions of the trust relationship, a "sovereign trust," advocated initially by Chief Justice Marshall in his two Cherokee cases, and a "guardian-ward trust," which was a product of the allotment/assimilation policies prevailing between the 1880's and the 1920's.[249] Sadly, it seems that most justices on the Court today have reverted back to a "guardian-ward" vision of the trust relationship.[250]

Conclusion

The title to this article contains a reference to judicial supremacy. Congress is said to have plenary power over Indian affairs; thus one would think that Congress would be the primary mover in determining the relationship between the tribes and the states when it comes to determining jurisdiction in Indian Country. In reality, this has not turned out to be the case. Using a formalistic

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of Indian gaming, see Joshua L. Sohn, *The Double-Edged Sword of Indian Gaming*, 42 TULSA L. REV. 139, 161-67 (2006).

247. *See* Skibine, *Redefining the Status, supra* note 6.

248. See, for instance, Justice Thomas' opinion in *Venetie*, 522 U.S. 520.

249. *See* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty, The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1476-1505.

250. For instance, Justice Thomas in his dissenting opinion in United States v. White Mountain Apache Tribe, 537 U.S. 465, 483 n..1 (2003), quoted with approval the following language from the Court of Claims :" "... the general relationship between Indian tribes and [the United States] traditionally has been understood to be one in the nature of a guardian-ward relationship. A Guardianship is not a trust."(quoting from Cherokee Nation of Oklahoma v. United States, 21 Ct. Cl. 565, 173 (1990). For a modern Indian vision of what the trust relationship should be, see Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 317 (2006).

framework, the Court has become the primary institution that determines jurisdictional relationships on Indian reservations. Of course, Congress could change that. In an important case, *United States v. Lara*,[251] the Court confirmed that its jurisdictional rulings in federal Indian law were based on federal common law and not the Constitution and therefore cold be altered by Congress. However, the lead opinion of Justice Breyer is full of caveats. Thus, Justice Breyer cautioned that the congressional reaffirmation of tribal authority at issue in the case was a "small" one concerning the tribe's authority over its "own lands" and not "dealing with potential constitutional limits on congressional efforts to legislate far more radical changes in tribal status," involving "interference with the power or authority of any State."[252]

Professor Perry Dane once stated that "[t]he great question in Indian law .. . is whether we can hope to regulate political whim without diluting that legal, existential recognition [of tribal sovereignty]."[253] He further explained that what he meant was that "despite the very different tones and political purposes" of the congressional plenary power and inherent tribal sovereignty doctrines, "there is in fact a deeper connection between them than we might like to admit."[254] In other words, judicial recognition of inherent tribal sovereignty may not have occurred if the Court had not first declared that Congress had plenary power to regulate such sovereignty. Yet, today, as the result of the decisions reviewed in this article, inherent tribal sovereignty has been drastically reduced not by the Congress but by the Supreme Court. Justice Breyer's caveats in *Lara* may even indicate that many on the Court may think that the "plenary" power of Congress is no longer what it used to be. There is a certain hydraulic quality to political power. If the tribes and Congress have lost some power, where did it go? The analysis presented in Part III of this article indicates that such power may have gone to a Supreme Court who seems more than willing to hand it over to the states.

Moreover, even if Congress still does have the power to reverse some of the Court's Indian decisions, I have a suspicion that unlike some other areas of the law, the Court knows that its federal common law rulings on Indian matters will seldomly, if ever, be contradicted or overturned by Congress. Of all the cases mentioned in this article that have gone against tribal interests, only one,

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251. 541 U.S. 193 (2004).

252. *Id.* at 205.

253. Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 973 (1991).

254. *Id.* at 973 n.43.

Duro v. Reina,[255] denying tribal criminal jurisdiction over nonmember Indians, was overturned by Congress.[256] On civil jurisdictional issues, only twice in the last thirty years, the Indian Child Welfare Act of 1978,[257] and the Indian Gaming Regulatory Act of 1988,[258] has Congress assumed the lead in comprehensively determining the jurisdictional framework in a given area.

I believe that it would be a mistake to think that this lack of congressional reaction implies congressional approval of what the Court has done. Yet the Court's formalism has meant the adoption of subjective and arbitrary rules, applicable to all tribes, and creating presumptions against tribal jurisdiction and in favor of state jurisdiction. The burden is now on the tribes to go to Congress to overcome these presumptions. Congress is, however, a political body and it has become increasingly hard to overturn broad general rules applicable across the board. The time for such national Indian legislation has perhaps passed.[259] Rather than looking for comprehensive national solutions, as was the case in ICWA and IGRA, perhaps we have entered a period where it would be more productive for each tribe to strike its own deal with individual states and local interest groups and then bring that compromise to Congress for approval or ratification. Certainly, this has already been done in many tribal land claims and water rights settlements. Some scholars have even suggested that, normatively speaking, each tribe should be considered separately for the purpose of federal Indian common law.[260] Although I am not sure that I agree with such scholars' normative arguments, perhaps it makes sense, at least politically, for each tribe to strike its own political deal. Tribal specific congressional legislation would at least force the Court to look

255. 495 U.S. 676 (1990).

256. 25 U.S.C. § 1301(2) (2000) (amending the Indian Civil Rights Act to provide that the definition of tribal powers of self-government include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians").

257. Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901-1923).

258. Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 25 U.S.C. §§ 2701-2721).

259. *But see* Kevin Washburn, *Tribal Self Determination at the Crossroads*, 38 CONN. L. REV. 777 (2006) (pointing out that the Indian Reorganization Act of 1934 was a product of the New Deal and the Indian Self Determination policy had its origins in the war on poverty and suggesting that national Indian legislation could still be possible if the tribes could tag such legislation to a broader social movement).

260. *See* Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004); *see also* Ezra Rosser, *Ambiguity and the Academic: The Dangerous Attraction of Pan-Indian Legal Analysis*, 119 HARV. L. REV. F. 141 (2005), http://www.harvardlawreview.org/forum/issues/119/dec05/rosser.pdf.

more at specific historical contexts and the realities "on the ground" as recently advocated by some.[261]

261. *See* Frickey, *Towards a New Realism*, *supra* note 19, at 660-66.