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Alex Tallchief Skibine

THE COURT'S USE OF THE IMPLICIT DIVESTITURE DOCTRINE TO IMPLEMENT ITS IMPERFECT NOTION OF FEDERALISM IN INDIAN COUNTRY

Alex Tallchief Skibine*

INTRODUCTION

With two hundred years worth of un-discarded baggage, and antiquated and often contradictory theories, the Supreme Court's current jurisprudence in the field of federal Indian law has mystified both academics and practitioners. None of the Supreme Court's theories within the field of Federal Indian law have been more puzzling than the implicit divestiture doctrine, and its use in determining whether Indian tribes have inherent sovereign powers to regulate individuals who are not members of the tribe. However, in its last decision on the subject, *Strate v. A-1 Contractors*,[1] the Court held that a tribal court did not have judicial jurisdiction to hear a tort case involving a traffic accident between two non-Indians on a highway running through the reservation but maintained by the state pursuant to a right of way received from the federal government.[2] After observing that a tribe's inherent power does not reach beyond what is necessary to protect tribal self-government, the Court ended its analysis by stating in a rather conclusory fashion, "neither regulatory nor adjudicatory authority over the state highway at issue is needed to preserve the right of reservation Indians to make their own laws and be ruled by them."[3]

The purpose of this article is threefold. First, tracing the evolution of the implicit divestiture doctrine, it shows that the doctrine has been transformed from one putting the burden on the tribes to show why having jurisdiction over nonmembers is essential to tribal self-government to one adding on the tribes the burden of also demonstrating why state jurisdiction over such nonmembers

* Professor of Law, University of Utah. J.D. 1976, Northwestern University. I would like to thank professors Philip Frickey and Michael McConnell for agreeing to read previous drafts of this article and making insightful comments. I am also grateful for the financial assistance provided by the University of Utah College of Law 's Faculty Development Fund.

1. 520 U.S. 438 (1997).

2. The State received the right of way in 1970 pursuant to federal legislation enacted in 1948, ch. 45, 62 Stat. 17 (1970) (current version at 25 U.S.C. §§ 323-28 (1994)).

3. *Strate*, 520 U.S. at 459 (quoting from Williams v. Lee, 358 U.S. 217, 220 (1959)).

infringes on the right of reservation Indians to make their own laws and be ruled by them. Secondly, this article shows that the purpose of this newly constructed doctrine is to privilege the assertion of state jurisdiction at the expense of tribal jurisdiction. Finally, the article criticizes the theoretical basis of the doctrine and suggests that it is one born out of a judicial view which only sees the states as the beneficiaries of federalism and refuses to include tribes in the federalism calculus.

While some scholars are offering ideas on how to go about "de-colonizing" federal Indian law,[4] or are blaming the Court's new direction on its abandonment of "foundational principles,"[5] others believe that the Court is implementing the past congressional policy of colonialism by ignoring current congressional policies. These critics are accusing the Court of assuming a legislative function without legislative guidance.[6] Other scholars attempt to justify the Court's decisions by reference to overarching democratic principles.[7] This article takes the position that the Court's jurisprudence towards tribal power over non-members is mostly driven by its desire to implement its own notion of federalism while being consistent with its jurisprudence concerning the power of the judiciary to create rules of federal common law.[8] Federalism here is used in the Jeffersonian sense. This means that governmental power should not be exclusively concentrated in a strong central (federal) government, but should be diffused to local governments, such as the states.[9] Traditionally "federalism" means a devolution of power from a central government. The Indian tribes as local governments, should be able to benefit from such philosophy.[10] While the Congress has cooperated to some extent with the notion of a tripartite federalism, and the corresponding devolution

4. *See* Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law,* 46 ARKANSAS L. REV. 77 (1993); Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law,* 31 U. OF MICH. J.L. REFORM. 899 (1998); Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence,* 1986 WIS. L. REV. 219; Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century,* 20 N.Y.U. REV. L. & SOC. CHANGE 217 (1993).

5. *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, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law,* 107 HARV. L. REV. 381 (1993).

6. *See* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Non-members,* 109 YALE L.J. 1 (1999)(hereinafter *Our Age of Colonialism).*

7. *See* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium,* 96 COLUM. L. REV. 809 (1996).

8. Other commentators have also recently argued that notions of federalism were behind resolutions of some of the issues being disputed within Indian reservations *See* Kevin Worthen & Wayne Farnsworth, *Who Will Control the Future of Indian Gaming? "A Few Pages of History are Worth a Volume of Logic,"* 1996 BYU. L. REV. 407; *see also* Steven Paul McSloy, *Border Wars: Haudenosaunee Lands and Federalism,* 46 BUFF. L. REV. 1041 (1998).

9. The term also comprises those who, out of a desire to control judicial activism, advocate the imposition of stricter limits on the power of courts to devise federal common law.

10. *See* Richard W. Garnett, *Into the Maze: United States v. Lopez, Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country,* 72 N.D. L. REV. 433 (1996) (discussing why the judicial philosophy behind cases such as *U.S. v. Lopez,* 514 U.S. 549 (1995), may be used to question the power of Congress to extend certain criminal laws in Indian Country).

of federal power to the tribes,[11] the Supreme Court has steadfastly refused to include tribes as beneficiaries of its federalist philosophy.[12] Instead, the Rhenquist Court, in the last twenty-five years or so, has been engaged in a concerted effort to divest tribes of their inherent sovereign powers and indirectly transfer this power to the states.

Perhaps the Court does not want to include devolution of power to the tribes as part of its federalist jurisprudence because tribes are not part of the Constitutional framework in that they are only mentioned in connection with the Commerce Clause.[13] Further, tribes are not protected by the Tenth Amendment.[14] While it is true that Indian Nations were never asked to agree to the Constitution as a prerequisite to joining the Union, they have been treated, as a result of treaties,[15] acts of Congress, and Supreme Court opinions, as coming under the jurisdiction of the United States political system.[16] This political incorporation was accomplished against their will and was used many times to their detriment. One could have hoped that in return, the Court would put an end to a jurisprudence which stubbornly denies tribes their political rights within the United States political system as if they still were alien nations.[17]

PART II of this article first explains how the methodology used in *Strate v. A-1 Contractors* will lead to a modification of the *Montana* approach in determining tribal jurisdiction, over non-member on non-member fee land, within Indian reservations. PART III analyzes the impact of *Strate* on tribal jurisdiction over non-members on "Indian" land. Finally, PART IV examines the theoretical

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11. *See e.g.*, the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, 88 Stat. 2203 (1975) (providing for tribal contracting of federal programs administered for the benefit of Indians), the Indian Child Welfare Act of 1978, Pub. L. 95-608 , 92 Stat. 3069 (1978), the Clean Water Act, Pub L. 100-4 (codified as amended at 35 U.S.C. 1377 (1988)) (providing for treatment of tribes as states under certain conditions), and the Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2467 (codified at CAA § 301(d), 42 U.S.C. 7601(d) (1994)) (delegating federal authority to tribes in order to administer certain provisions of the Act).

12. For an in depth analysis of why and how the tribes should be included in Our Federalism, *see* Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617 (1994) (arguing that treaties between the United States and the Tribes can serve as the foundation for the inclusion of tribes in our Federalism). A similar idea was more recently explored by professor Frank Pommersheim in *"Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. OF COLO. L. REV. 123 (2000).

13. U.S. CONST. art. II, § 8, reads: "The Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

14. The Tenth Amendment provides that: "The powers not delegated, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

15. For an insightful discussion of the Indians' perception of what the treaties represented *see*, Robert A. Williams, *"The People of the States Where They are Found are often their Deadliest Enemies": The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981 (1996).

16. For instance, Congress in 1871 enacted a law which proclaimed that Indian nations should no longer be considered independent sovereigns with whom we can sign treaties, Act of March 3, 1871, ch 120, 60 Stat. 544, 566 (1994)(codified as amended at 25 U.S.C. 71 (1994)). *But see*, Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 3, 51.

17. Indians generally became citizens of the United States under the Indian Citizenship Act of June 2, 1924, ch 233, 43 Stat. 253. For an analysis discussing what political philosophy can be used to explain and legitimize the position of Indian Nations within the U.S. political system, *see* Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at Its Development, and at How Its Analysis Under Social Contract Theory Might Expand Its Scope*, 18 N. ILL. U. L. REV. 115 (1997).

implications of the *Strate* doctrine from a federalist and a foundationalist perspective.[18] It also analyzes the impact of the *Strate* doctrine on certain aspects of Congressional power over Indian affairs.

PART II: THE IMPACT OF *STRATE V. A-1 CONTRACTORS* ON TRIBAL INHERENT POWER OVER NON-MEMBERS ON NON-MEMBER LAND WITHIN INDIAN RESERVATIONS.

A. Montana v. United States

Although located within the geographic territory of the United States, Indian nations have always been considered as having possession of a certain degree of inherent sovereignty.[19] This sovereignty, first acknowledged in treaties signed between the United States and the tribes, was recognized early on by the Supreme Court and described the tribes as domestic dependent nations possessing a certain degree of sovereignty over both their people and territory.[20] However, starting in 1978, the Court announced that Indian tribes had been implicitly divested of any inherent sovereign powers which were inconsistent with their status as domestic dependent nations.[21] Initially, the doctrine of implicit divestiture applied to cases where the exercise of inherent powers was in conflict with the overriding sovereignty of the United States.[22] The Court considerably expanded the scope of the doctrine in *Montana v. United States.*[23]

The Court in *Montana* had to decide whether the Crow tribe had the inherent sovereign power to exercise jurisdiction over non-Indians hunting and fishing on land owned by the State, but located within the Crow Indian reservation. The Court started its analysis by quoting the following language from *U.S. v. Wheeler*:

> The areas in which such implicit divestiture of sovereignty have been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe.... [T]hese limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the power of self-government... are of a different type. They involve only the relations among members of a tribe.[24]

The *Montana* Court then asserted that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is

18. This term is borrowed from professor David Getches' article, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law,* 84 CAL. L. REV. 1573 (1996).

19. *See* Allison Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court Changing Vision,* 55 U. PITT. L. REV. 1 (1993).

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

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

22. *Id. See also* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1979).

23. 450 U.S. 544 (1981).

24. *Id.* at 564 (citing United States v. Wheeler, 435 U.S. 313, 326 (1978)).

inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[25]

Having stated this general rule, the *Montana* Court somewhat backtracked and recognized two exceptions to its general rule:

> 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 non members who enter consensual relationship with the tribe or its members, though commercial dealing, contracts, lease, 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 reservation when that conduct threatens or has some direct effect on the political integrity, the economic security or the health and welfare of the tribe.[26]

The Court did not elaborate on the exact nature of its two exceptions beyond stating that they were not applicable in the case because "nothing in the case suggests that such non-Indian hunting and fishing so threatens the tribe's political or economic security."[27] In spite of the outcome in the *Montana* case, tribal advocates could take comfort that the language of the second exception could potentially be construed very broadly and give back the jurisdiction which had been taken under the general rule.

B. Narrowing the Montana exceptions.

Although the *Strate*[28] Court reaffirmed that *Montana v. United States*[29] was still the path-marking case controlling the decision in this area of the law, it was undoubtedly perturbed by the almost schizophrenic incongruity between *Montana's* general rule of no jurisdiction and the potentially broad phrasing of its second exception. The broad language of the exception posed a problem for the *Strate* Court because it could easily be used to confer jurisdiction over the traffic accident to the tribal court even if it involved two non-Indians. However, after dismissing the first *Montana* exception as not being applicable, the *Strate* Court focused its attention on the second exception and stated "undoubtedly, those who drive carelessly on a public highway running through the reservation endanger all in the vicinity, and surely jeopardized the safety of tribal members. But if Montana's second exception requires no more, the exception would severely shrink the rule."[30]

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25. *Id.*
26. *Id.* at 565-66.
27. *Id.* at 566.
28. For an in-depth legal history of the case and its background, *see* Wambdi Awanwicake Wastewin, *Strate v. A-1 Contractors: Intrusion Into the Sovereign Domain of Native Nations,* 74 N.D. L. Rev. 711 (1998).
29. *Montana,* 450 U.S. 544 (1981).
30. *Strate,* 520 U.S. at 457-58. The Court in *Strate* recognized that although the general rule is that "the inherent sovereign powers of an Indian tribe"— those powers a tribe enjoys apart from express provision by treaty or statute— "do not extend to the activities of non-members of the tribe," this rule is subject to the two Montana exceptions under which a tribe

After making a thorough analysis of all the precedents cited by the *Montana* Court to justify the second exception, and remarking that "each of those cases raised the question whether a State's (or territory) exercise of authority would trench unduly on tribal self-government,"[31] the Court stated that "read in isolation, the Montana rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface, [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations."[32]

The *Strate* Court, therefore, moved away from inquiring as to whether the non-member activity had a direct impact on the health and welfare of the tribe, and refocused the inquiry on whether tribal jurisdiction over the accident was really necessary to tribal self-government.[33] The Court then concluded that it was not.

To reach this conclusion, however, the Court borrowed language used in *Williams v. Lee*,[34] a case which defined what was necessary to tribal self-government for the purpose of limited state judicial jurisdiction over reservation Indians. In doing so, the Court was able to considerably narrow *Montana's* second exception.

Although *Worcester v. Georgia*[35] held that the state of Georgia could not have any jurisdiction whatsoever inside Cherokee territory, 127 years after that decision the Supreme Court in *Williams v. Lee* was able to declare that:

> Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained.... [E]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.[36]

The Court in *Williams* was in the end solicitous of tribal self-government in holding that a state court could not have jurisdiction over a law suit based on a transaction between the non-Indian plaintiff and the Indian defendant because "there can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of tribal courts over reservation affairs and hence would infringe on the right of reservation Indians to govern themselves."[37]

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can still retain jurisdiction; first, when non-members have entered into consensual relations with the tribe or its members, and second, when the activities of the non-members have a direct impact on the health, welfare, economic security or political integrity of the tribe.

31. *Id.* at 458.

32. *Id.* at 459.

33. Of course, this does not make the nature of the test any more specific since *Montana's* second exception itself may be viewed as a further delineation of what is necessary to tribal self-government.

34. The *Williams* Court stated, "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be governed by them." Williams v. Lee, 358 U.S. 217, 218-220 (1958).

35. 31 U.S. 515 (1832).

36. *Williams,* 358 U.S. at 219-20.

37. *Williams,* 358 U.S. at 223. In other words, the right of reservation Indians to self-government was equated with the right to exercise jurisdiction over reservation affairs. If this phraseology is kept,

It is important to note, however, although *Williams* was about state courts acquiring jurisdiction over Indian defendants, none of the authorities cited by the Court dealt with that situation. The *Williams* Court cited five cases as authorities for its principle. Three of these cases allowed suits by Indians against non-Indians in state courts.[38] These cases can be distinguished on the ground that allowing Indians the option to sue in state courts is different from forcing them to defend themselves in state courts. The fourth case was *New York ex rel. Ray v. Martin,*[39] a case which upheld state criminal jurisdiction over a non-Indian who had murdered another non-Indian on an Indian reservation.[40]

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absent governing acts of Congress, tribal jurisdiction would pre-empt state jurisdiction only in cases involving "reservation affairs." Asking whether a lawsuit involves a reservation affair seems different than asking whether the activity of non-members have a direct impact on the tribal health, welfare, economic security or political integrity. Some courts have attempted without much success to further define what constitutes a "reservation affair." *See e.g.*, Crawford v. Genuine Parts Co., 947 F.2d 1405, 1407 (9th Cir. 1991); Stock West Corp. v. Taylor 942 F.2d 655, 660 (9th Cir. 1991), and also a discussion by Alex Tallchief Skibine, "*Deference Owed Tribal Courts' Jurisdictional Determination: Towards Co-Existence, Understanding, and Respect Between Different Judicial Norms,* 24 N.M. L. REV. 191, 198-01 (1994).

38. Felix v. Patrick, 145 U.S. 317 (1892); United States v. Candelaria, 271 U.S. 432 (1926); Harisson v. Laveen, 196 P.2d 456 (1948).

39. 326 U.S. 496 (1946).

40. *Martin* was solely grounded on an earlier Supreme Court case, *United States v. McBratney*, 194 U.S. 621 (1881), which held that Colorado had jurisdiction over such crimes involving only non-Indians because Colorado entered the Union on an equal footing with the original states, exclusive federal jurisdiction over the reservation had to be expressly reserved by the United States. The problem with this theory is that it is the Federal government and not the original states which had exclusive jurisdiction over Indian reservations to begin with. While it is true that under the equal footing doctrine, Congress had to expressly indicate its intent not to have a particular reservation be part of a new state or territory, there is no reason why it should have had to explicitly reserve exclusive federal jurisdiction. This misunderstanding perhaps has its origin in *Langford v. Monteith,* 102 U.S. 145 (1880), and its reformulation of another previous case, *Harkness v. Hyde,* 98 U.S. 476 (1878). A couple of years before *Langford*, the Court in *Harkness* held that the territory of Idaho had no jurisdiction over non-Indians within an Indian reservation because the Act of Congress organizing the Territory provided that the lands of any Indian tribe shall not constitute part of the Territory of Idaho until the tribe consent to such inclusion. Since the treaty between the United States and the Shoshone Indians did not contain such tribal consent the Court found that "The [tribal] territory reserved, therefore, was as much beyond the jurisdiction, legislative or judicial, of the government of Idaho, as if it had been set apart within the limits of another country, or a foreign State." *Harkness,* 98 U.S. at 478. In *Langford* however, the Court held that although Congress could except tribal lands when organizing a new state or territory so that "they constitute no part of such territory, although they are included within its boundaries,"(102 U.S. at 146) in order to benefit from this exception, the tribes had to have a treaty with a specific clause requesting such an exemption. Otherwise, "Where no such clause or language equivalent to it is found . . . the lands held by them [the Indians] are a part of the territory and subject to its jurisdiction, so that process may run there, however the Indians themselves may be exempt from that jurisdiction." *Id.* at 147. Not only did tribes need a specific treaty clause signifying their intent to be exempted from inclusion but in the absence of such a clause, the Court took the position that the State had jurisdiction over non-members within Indian reservations. Not surprisingly, not many tribes had such specific treaty clauses. For instance, in *Thomas v. Gay*, 169 U.S. 264 (1898), the Court found that because the Osage Indian tribe did not to have such a clause in its treaty, the reservation was within the territory of Oklahoma and such territory could tax cattle belonging to non-Indians and grazing within the reservation under leases authorized by Congress unless the plaintiffs could show that such taxation would be a "violation of the rights of Indians and an invasion of the jurisdiction and control of the United States over them and their lands." After concluding that a tax upon the cattle of non-Indians could not be deemed to be a tax upon the lands or privileges of the Indians, the Court relied on Utah and N. Railway Co v. Fisher, 116 U.S. 28 (1885) and Maricopa & P. R. Co. v. Territory of Arizona, 156 U.S. 347, and found that such local taxation could not be perceived to be in conflict with congressional power over Indian commerce.

The fifth and last authority cited in *Williams v. Lee*, to support its formulation of the infringement test, was *Utah and N. Railway Co. v. Fisher.*[41] The issue in *Fisher* was whether the territory of Idaho had jurisdiction to tax a road and property owned by a railroad but apparently located on an Indian reservation. The Court allowed the tax because it would not have impaired any rights reserved by the Indians in any treaty. Although the *Fisher* Court acknowledged that to uphold state jurisdiction in all cases would interfere with the protection afforded to the Indians in their treaty, it stated without providing any precedent for it, "the authority of the territory may rightfully extend to all matters not interfering with that protection."[42] Having stated the rule, the Court took the position that the right of the Indians could not be impaired by the taxing of the road because the Indians had ceded the lands on which the road was built to the United States, and "by force of the cession thus made, the land upon which the railroad and other property of the plaintiff are situated was . . . withdrawn from the reservation."[43]

The use of *Williams v. Lee,* coupled with its earlier remark, that all cases cited in *Montana* to support its second exception asked whether state jurisdiction would not unduly trench on tribal self-government, indicate that the Court was deciding whether tribal jurisdiction over non-Indian activities was necessary to tribal self-government. It did so by determining whether state jurisdiction over the same activity would "trench unduly" on tribal self-government.[44] But, deciding whether a state can assert jurisdiction because such jurisdiction does not interfere with tribal self-government should be different than asking if the tribe has any jurisdiction in the first place. For one thing, unless tribal and state

41. 116 U.S. 28 (1885).

42. *Id.* at 31.

43. Id. at 31-32. That same point was also made in Maricopa & P.R. Co. v. Territory of Arizona, 156 U.S. 347 (1895). In that case, the Court held that the territory could tax the property of a railroad located within the Gila River Indian reservation. However, the railroad's property was obtained pursuant to an Act of Congress and the Court, citing Fisher, took the position that the necessary effect of the Congressional grant was to "withdraw the land from the operation of the prior act of reservation. And the immediate consequence of such withdrawal, was to re-establish the full sway and dominion of the territorial authority." *Id.* at 351. Fisher is somewhat ambiguous on this point, however, because in answering the plaintiff's contention that by stipulation of the parties the lands had to be considered as still being within the reservation, the Court took the position that because this stipulated finding had to be read by reference to the legislation under which the lands were ceded, the result would not change because the stipulation and finding "will not be so construed as to allow the company to escape taxation by the force of a stipulation as to an alleged fact which that legislation show does not exist." *Id.* at 33. The Fisher Court's analysis is revealing in that it never considered whether the state taxation could interfere with tribal sovereignty or self-government. It only looked at whether it would interfere with any specific right reserved to the tribe in any of the treaties it signed with the United States. If that is the analysis that the *Strate* Court is seeking to adopt in determining if a tribe has a right to regulate non-members, the answer will always be "no" unless such jurisdiction was specifically reserved by the tribe in a treaty or specifically conferred on the tribe by an Act of Congress.

44. Since the 1832 decision in *Worcester v. Georgia*, 31 U.S. 315 (1932), the Court recognized that under the commerce power, the exclusive right to regulate relations with the tribes was vested in the Congress. From this time on, power within Indian reservations became to be shared between the Federal government and the Indian tribes. At the onset, States had no power inside Indian reservations, as put by the Supreme Court in 1959, "over the years this Court has modified these principles in cases where essential tribal relations were not involved." Williams v. Lee, 358 U.S. 217, 219-20 (1959).

jurisdiction are mutually exclusive, they could both assert jurisdiction concurrently.[45]

The Court therefore seemed to have reformulated the test deciding what was necessary to tribal self-government for the purpose of determining if a tribe had retained inherent sovereignty over nonmembers under the *Montana* test by adding the requirement that such inherent jurisdiction could only exist if it did not conflict with state jurisdiction. Furthermore, as discussed in the next section, determining whether a tribe's assertion of jurisdiction over non-member activities on non-member fee land is necessary to self-government, by asking whether a state assumption of jurisdiction over the same activity will unduly infringe on tribal self-government, will almost always result in a finding that the tribal power is not necessary to self-government. In order to establish jurisdiction, this methodology will more likely require tribes to persuade a court that state jurisdiction has been pre-empted by the operation of federal law. In other words, although *Strate* purported to follow *Montana,* its holding may lead to a requirement that in order to exist, tribal jurisdiction over non-members will have to be backed by some kind of positive federal law.[46]

C.A problematic deconstruction of Strate: Determining tribal jurisdiction by reference to state jurisdiction within Indian reservations.

Under evolving Supreme Court jurisprudence concerning the permissibility of state jurisdiction within Indian reservations, a tribe's interest in self-government alone has never been enough to pre-empt state jurisdiction over non-members.[47] The only Supreme Court case dealing squarely with tribal and state jurisdiction over non-members while on non-member fee lands is not promising. In *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation,*[48] the Court could not achieve more than a plurality in any of the three opinions. Although the initial issue was whether the counties had zoning authority over non-member fee land located within the Yakima Indian reservation, the case turned on a determination of whether the tribes had zoning authority.

After stating that this was a case where the tribe and the county could not have concurrent jurisdiction, four justices relied on the *Montana* test to hold that

45. *See e.g.,* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989), and Washington v. Confederated Tribes of the Colville Indian Reserv., 447 U.S. 134 (1979).

46. This does not mean that there has to be an express delegation or confirmation of tribal authority by the United States Congress. In most cases, such as cases where tribal and state jurisdiction are mutually exclusive, this requirement will amount to having to show that Congress has pre-empted state jurisdiction.

47. *See* McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).

> The extent of federal pre-emption and residual sovereignty in the total absence of federal treaty obligations or legislation is therefore something of a moot point. The question is generally of little more that theoretical importance, however, since in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction.

Id.

48. 492 U.S. 408 (1989).

the tribes never could zone non-member fee lands.[49] At the most, the tribe could appeal the county zoning decision to a federal court arguing that the zoning ordinance at issue had both a direct and a severe impact on tribal health, welfare, economy, and political integrity. Three justices, using the same *Montana* test, found that counties can never exercise zoning authority over any lands within a reservation.[50] Relying on the tribe's power to "determine the essential character of a given area" derived from the tribal treaty right to exclude non-members, two justices held that the tribe could zone non-member fee lands if these lands were located within an area where most of the land belonged to the tribe or tribal members.[51] Assuming the intent of Congress when it enacted legislation allowing non-members to acquire lands within an Indian reservation, these two justices held that the county, and not the tribe, had zoning authority over that part of the reservation where the majority of the land was held by non-members.

Cases such as Williams are different from the norm in that they involve involve jurisdiction over both members and non-members.[52] Justice Rhenquist's statement in *Ramah Navajo School Board v. Bureau of Revenue* illustrates this point:

> The Court also recognized that in some instances a state law may be invalid because it infringes on the right of reservation Indians to make their own laws and be ruled by them (citing *Williams v. Lee*). But apart from those rare instances in which a state attempts to interfere with the residual sovereignty of a tribe to govern its own members, the tradition of sovereignty merely provides a backdrop against which the pre-emptive effect of federal law or treaties must be assessed.[53]

The Court has stated that the tribes' interest in self-government is "grounded in notions of inherent sovereignty and in congressional policies seek an accommodation between the interests of the tribes and the federal government, on one hand, and those of the States on the other."[54] However, in the absence of strong congressional policies militating against state jurisdiction, the judicial "accommodation" has always favored the states' interest in regulating non-Indians doing business within Indian reservations.[55] In most cases, a congressional

49. Justice White wrote that plurality opinion joined by Justices Rhenquist, Scalia, and Kennedy.

50. That opinion was authored by Justice Blackmun joined by Justices Brennan and Marshall.

51. Justice Stevens authored that opinion joined by Justice O'Connor. Justice Stevens never stated exactly how much land must be out of Indian ownership before the tribe can lose its zoning jurisdiction. He did mention that about half of the lands in the so-called open area had been alienated to non-members. Justice Stevens' task was made easier in this case due to the fact that the tribe itself had divided the reservation into an open and a closed part.

52. The fact that the case involved a non-Indian attempting to sue a tribal member in a state court over a debt incurred on the reservation was crucial to the *Williams* court's determination that the tribal court and not the state court had jurisdiction over the disputes. *Id.* Thus the Court stated that "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams*, 358 U.S. at 220.

53. 458 U.S. 832, 849 (1982)(dissenting opinion).

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

55. *E.g.*, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (allowing state taxation of non-Indians buying cigarettes from Indians on the reservation); *See also* Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107 (9th Cir.1997) (allowing state assessment of Business transaction privilege tax on room rentals and food and beverage sales); Gila River Indian

legislation or treaty will be necessary in order to pre-empt state jurisdiction over non-members.[56]

While the debate among the Marshall-Brennan faction and the Rhenquist-Stevens position on these issues used to be about the kind of congressional legislation which would be sufficient to pre-empt or overcome a state's interest,[57] more recently the Court seems to have adopted Justice Rhenquist's view which focuses on finding a congressional intent to pre-empt state jurisdiction.[58] In the past, the Court has refused to focus solely on a congressional intent to pre-empt state law and has taken the position that a specific congressional intent to pre-empt was not necessary.[59] Recently, the Court has adopted the view that "whether such immunity [from state jurisdiction] shall be granted is thus a question that is "essentially legislative in character".... The question for us to decide is whether Congress has acted to grant the Tribe such immunity, either expressly or by plain implication."[60] Although this statement opens the door for deriving congressional

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Community v. Waddell, 91 F.3d 1232 (9th Cir. 1996) (allowing state transaction privilege tax on sale of tickets and concessionary items in connection with sporting and cultural events on reservation); Salt River Pima-Maricopa Indian Community v. Arizona, 50 F.3d 734 (9th Cir. 1995) (allowing state sales taxes on non-Indian goods sold on reservation by non-Indian sellers to non-Indian buyers); *but cf.*, Crow Tribe v. Montana, 819 F.2d 895 (9th Cir. 1987).

56. *See e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (state taxation of non-Indian logging operations); Ramah Navajo School v. Bureau of Revenue, 458 U.S. 832 (1982) (taxation of non-member contractor building schools on reservation), Mescalero Tribe v. New Mexico, 462 U.S. 324 (1983) (regulation of non-member hunters), Hoopa Valley Tribe v. Nevins, 881 F.2d 657 (9th Cir. 1989) (pre-empting state timber yield tax and timber reserve fund tax on non-Indian companies purchasing tribal timber).

57. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, "State jurisdiction is pre-empted 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 stakes are sufficient to justify the assertion of state authority." *Id.* at 334. *Compare* Getches & Wilkinson, Cases and Materials on FEDERAL INDIAN LAW, 4th Ed., 437 (arguing that the pre-emption analysis should not involve a balancing of the interests). Although it is true that the first cases invoking federal pre-emption did not contemplate such balancing, *see* McClanahan v. Arizona, 411 U.S. 164 (1973), Washington v. Confederated Tribes, 447 U.S. 134 (1980) (where the balancing was not done in the pre-emption analysis but in that part of the opinion determining whether state taxation interfered with tribal self-government), later cases have muddled the analysis. The preemption and infringement tests were at one time two distinct tests, *see* White Mountain Apache Tribe v. Bracker 448 U.S. 136, 142-43 (1980), and some courts still make this distinction, *see* Crow Tribe v. Montana, 819 F.2d 895 (9th Cir. 1987). When the issue involves state jurisdiction over non-members, the Court has merged the two tests into a flexible pre-emption analysis sensitive to the particular facts and legislation involved. In tax cases, courts have looked at several factors including: the amount of tribal involvement with the taxed activity, whether the value of the activity being taxed was generated on the reservation, whether the state was already regulating any part of the activity being taxed, and whether there is any type of nexus between the tax and the amount of services delivered by the state. *See generally* Richard J. Ansson, Jr., *State Taxation of Non-Indians Who 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 States,* 78 OR. L. REV. 501 (1999).

58. Rhenquist had taken the view that "Absent discrimination, the question is only one of congressional intent. Either Congress intended to pre-empt the state taxing authority or it did not." Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 177 (1980).

59. Justice Marshall 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 pre-emption requires "an express congressional statement to that effect." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983).

60. Cotton Petroleum v. New Mexico, 490 U.S. 163, 175 (1988). In the process of deciding whether

intent by implication, the current Court's textualist philosophy, its reluctance to use legislative history, and its focus on plain meaning will make it increasingly difficult for it to find a congressional intent to pre-empt state jurisdiction absent some plain legislative language to that effect.

The problem with deciding the extent of tribal authority by focusing only on cases where state jurisdiction was challenged becomes evident when considering the approach adopted in *Washington v. Confederated Tribes of the Colville Indian Reservation*;[61] a 1979 case decided between the Court's decisions in *Oliphant* and *Montana*. The *Colville* case is interesting because it decided whether both the tribe and the state had jurisdiction to tax non-Indians buying cigarettes on the reservation. The Court's contrasting approaches to the resolution of these two issues is revealing and underscores the conceptual fallacy in the *Montana/Strate* type of reasoning.

Concerning state jurisdiction over the activity the *Colville* Court relied on *Williams v. Lee* and *McClanahan v. Arizona*[62] and held that the state of Washington was able to tax for the following reasons:

> Washington does not infringe on the right of reservation Indians "to make their own laws and be ruled by them" ... merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they are currently receiving. The principle of tribal self-government, grounded in notions of inherent sovereignty and congressional policies, seeks an accommodation between the interest of the Tribes and the Federal Government, on the one hand, and those of the State on the other.[63]

Concerning the power of the tribe to assume jurisdiction, after observing that the power to tax transactions occurring on trust lands and significantly involving a tribe or its members was a fundamental attribute of sovereignty, and that the tribes retained this right unless divested of it by federal law or by necessary implication of their dependent status, the Court stated the following:

> [S]uch divestiture [has been found] in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do

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a non-member producing coal on the reservation was immune from state taxation, the *Cotton Petroleum* Court added the following:

> Although determining whether federal legislation has pre-empted state taxation of lessees of Indian land is primarily an exercise in examining congressional intent, the history of tribal sovereignty serves as a necessary "backdrop" to that process.... [E]ach case "requires a particularized examination of the relevant state, federal and tribal interests".... Moreover in examining the pre-emptive force of the relevant federal legislation, we are cognizant of both the broad policies that underlie the legislation and the history of tribal independence in the field at issue.... [I]t bears emphasis that although congressional silence no longer entails a broad-based immunity from taxation for private parties doing business with Indian tribes, federal pre-emption is not limited to cases in which Congress has expressly- as compared to impliedly- pre-empted the state activity."

Id. at 176-77.

61. 447 U.S. 134 (1979).
62. 411 U.S. 164 (1973).
63. *Washington*, 447 U.S. at 156.

not accord the full protection of the Bill of Rights.[64]

The Court concluded that an overriding federal interest did not exist which was frustrated by tribal taxation of non-Indians. The *Colville* Court would only deny a tribal power if it was inconsistent with an overriding national interest.

If the *Colville* Court had applied the approach it used in deciding whether the state had jurisdiction to a determination of whether the tribe had jurisdiction, tribal jurisdiction could only have been allowed if there could be an "accommodation" between the federal and tribal interests on one hand and the state interest on the other. As stated previously, tribal interests in self-government will generally not be able to pre-empt state jurisdiction over non-members unless they are supported by federal legislation or a treaty.

Unlike *Colville,* the *Strate* Court's focus on cases measuring whether the tribe's interest in self-government is sufficient to bar state jurisdiction implies that tribal authority will be stricken down as long as it is inconsistent or incompatible with the interests the states may have in regulating the activity. This stands the *Colville* Court's application of the original *Oliphant* doctrine to civil jurisdiction cases on its head since the approach there was whether the tribal power was inconsistent with an overriding *federal* interest.[65] The *Colville* Court seemed to have almost anticipated such problems when it stated that "even if the state's interests were implicated by the tribal taxes, a question we need not decide, it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the states."[66]

The *Strate* Court's reference to state jurisdiction cases, therefore, leads to the following conclusions: First, in those rare cases where a tribe could exercise concurrent jurisdictions with the states,[67] such jurisdiction may still be allowed as long as the non-member activity has a serious and direct impact on the tribe's health, welfare, economic security, or political integrity. Second, in cases where the exercise of tribal authority would conflict with state jurisdiction over the same activity, the tribe will have to also show that state jurisdiction over the same activity would be an interference with tribal self-government.[68] However, when it comes to non-members on non-member land, it seems that the only way for the tribe to do this successfully is to show that state jurisdiction has been pre-empted by an Act of Congress which also reaffirms the need for tribal jurisdiction in this

64. *Id.* at 153-54.

65. *Oliphant,* 435 U.S. 191.

66. *Colville,* 447 U.S. at 154.

67. While two political units can have concurrent jurisdiction over taxation, it seems that most regulatory activities such as zoning and traffic control call for mutually exclusive jurisdictions, *see* Brendale v. Confederated Tribes of the Yakima Indian Nation, 492 U.S. 408 (1989); Mescalero Apache Tribe v. New Mexico, 462 U.S. 324 (1983).

68. The exact meaning of what is meant by "tribal self-government" is not clear. For a comprehensive treatment of recent efforts by native people to achieve self-government *see* Alex Tallchief Skibine, *Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination,* 1995 UTAH L. REV. 1105 (1995); Jeffrey Wutzke, *Dependent Independence: Application of the Nunavut Model to Native Hawaiian Sovereignty and Self-Determination Claims,* 22 A. INDIAN L. REV. 509 (1998).

area.

The lack of elaboration given in *Strate* regarding the reasons for the Court's conclusion has resulted in lower courts adopting an ad hoc approach in deciding whether tribes have jurisdiction over non-members while on non-member fee lands.[69] The next section demonstrates, some of the key issues involving cases arising on non-member lands have focused on the breath of *Montana's* second exception after *Strate*, and whether exhaustion of tribal remedies[70] was still required.

D. Implementation of Strate in the lower courts.

1. The breath of *Montana's* second exception after *Strate.*

One of the first cases decided in the aftermath of *Strate* was *Wilson v. Marchington.*[71] The case involved a traffic accident on a state highway running through the Blackfeet Indian Reservation between a tribal member plaintiff and a non-member defendant. The court held that the tribal judgment in favor of the plaintiff could not be enforced in federal court because under *Strate*, the tribal court did not have subject matter jurisdiction. The fact that Wilson was a tribal member, while *Strate* involved two non-members, did not impress the Ninth Circuit which treated it as a distinction without a difference and stated that "if the possibility of injuring multiple tribal members does not satisfy the second Montana exception under Strate, then, perforce, Wilson's status as a tribal member alone cannot."[72] Although the court acknowledged that the "parameters of the Strate holding are not fully defined,"[73] it could not see how tribal interests would be diminished or jeopardized by requiring the tribal member to present her case in state or federal court rather than tribal courts.

Wilson was followed without much discussion in *Burlington Northern Railroad v. Red Wolf,*[74] a case involving a collision between a train and a car at a railroad crossing which killed two tribal members. The accident took place on a right of way owned by the non-Indian defendant but within the exterior boundaries of the Crow Indian reservation. The trial in tribal court resulted in a $250,000,000 verdict against the railroad. The case was appealed to the Supreme Court which granted cert, vacated the judgment and remanded in light of *Strate.* Relying on *Wilson*, the *Red Wolf* court brushed aside the fact that the plaintiffs here were tribal members and found that the tribal court did not have any jurisdiction over the matter.

69. *See infra* Part V. (The cases involving disputes which occurred on tribal lands will be treated separately).

70. *See* National Farmers Union v. Crow Tribe, 417 U.S. 845 (1985), (holding that, as a matter of comity, before litigants can challenge the jurisdiction of a tribe in a federal forum, they have to first exhaust their tribal court remedies).

71. 127 F.3d 805 (9th Cir. 1997).

72. *Id.* at 815.

73. *Id.*

74. 196 F.3d 1059 (9th Cir. 1999).

The problem with the Ninth Circuit's approach is that, while it continues to claim that *Montana*'s second exception will still be applied whenever the tribe can show that a non-member's impact is "demonstrably serious" or when it is necessary to "protect tribal integrity against serious encroachments by non-members", it does not provide examples of situations which would trigger the exception. Thus, the *Red Wolf* court continues to say that "we do not reduce tribal sovereignty to mere landownership, or equate a servient land estate with political subordination,"[75] but concludes nevertheless that "we recognize that when Congress provides for the conveyance of certain property rights from tribes to non-member parties, it acts within its unique authority to defease tribal jurisdiction to the extent its purposes require."[76]

Before the Ninth Circuit issued its opinion in *Marchington,* one federal district court has reached the opposite conclusion, holding the following:

> injury to a single tribal member is sufficient to implicate the interests protected by the second Montana exception. That exception protects not only a tribe's interest in its health and welfare, but its interests in self-government and political integrity as well. The right on a political community to govern disputes which involve its members is an important part of self-governance.[77]

A more expansive view of the second exception was also taken by another federal district court in *Cheromiah v. United States.*[78] The court considered whether tribal members could sue the United States for medical malpractice which occurred at a federally run hospital located on the reservation. Although the hospital may have been located on tribal lands, the court assumed, for less than obvious reasons, that the hospital was located on lands "some how subject to less tribal authority —as in *Strate* and *Montana*—,"[79] and held that the two *Montana* exceptions applied. Therefore, even though the suit was filed in federal court, tribal tort law controlled and was applicable to determine liability.[80] The court explained:

> [T]his is one of the unique situations in which the conduct of non-members so impacts the "health or welfare of the tribe" that the second *Montana* exception applies as well. Unlike *Strate*, this case does not present a routine auto accident between two non-Indians, nor even a routine tort between an Indian and a non-Indian. Rather, the United States government has undertaken the responsibility of providing the primary emergency medical care to the members of the Acoma Tribe.[81]

It is unclear if this case will be upheld on appeal. *Strate* held that the judicial

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75. *Id.* at 5.
76. *Id.*
77. Montana v. Bremner, 971 F. Supp. 436, 438 (1997).
78. 55 F. Supp. 2d 1295 (1999).
79. *Id.* at 1304.
80. *See* Louis v. United States, 54 F. Supp. 2d 1207 (D.N.M. 1999); Chips v. United States, No. 92-5025, slip op. at 3 (W.D.S.D. April 28, 1993); Azure v. United States, No. 90-68-GF-PGH, slip op. at 9-10 (D. Mont. May 9, 1991).
81. *Cheromiah,* 55 F. Supp. 2d at 1305.

power of the tribe can never extend beyond the tribe's power to regulate and found that the tribe did not have the power to regulate the conduct of non-members on the highway. Therefore, the fact that a plaintiff is a tribal member should be irrelevant. If the issue in *Cheromiah* was whether the tribe could regulate medical procedures in a hospital run by the federal government, tribal jurisdiction would have been doubtful.

The impact of *Strate* on the *Montana* exceptions was also the focus of the Ninth Circuit's decision in *Montana v. E.P.A.*[82] In that case, the state of Montana was challenging the validity of a EPA rule issued pursuant to the Clean Water Act. The rule allowed the agency to treat a tribe as a state if under principles of federal common law, the tribe had jurisdiction to manage all water resources, including water belonging to non-member, within its reservation. *Montana* argued that the EPA's continuing recognition of *Montana* as the leading authority was invalid in light of more recent cases such as *Strate* and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Reservation.*[83] According to the state of Montana, EPA should have used a different methodology in determining whether the Salish and Kootenai tribes had enough jurisdiction to be treated as states under the CWA.

After holding that the EPA was correct in determining that *Montana* was still the controlling precedent, the Ninth Circuit upheld the EPA's determination that the Salish and Kootenai tribes had jurisdiction over all reservation water resources within the reservation because water pollution on the reservation has a direct and serious effect on the health and welfare of the tribe. There are two factors that made this case unique. First, the EPA issued an administrative rule which had interpreted section 518 (e) of the Clean Water Act[84] as favoring tribal jurisdiction because the Act created a presumption that water pollution does have a serious and direct impact on health and welfare.[85] Generally, agency findings are not reviewed *de novo* but under an arbitrary and capricious standard which calls for a certain amount of judicial deference towards the agency's action.[86] The actual finding that the Salish and Kootenai tribes had jurisdiction in this case can be considered an application of the law to the facts which also generate a deferential standard of review. Under such standard, agency findings will be upheld if reasonable.[87]

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82. 137 F.3d 1135 (9th Cir. 1998).

83. 492 U.S. 408 (1989).

84. Pub. L. No. 100-4, codified at 33 U.S.C. section 1377 (1988).

85. 56 Fed. Reg. 64878-80 (1991) (codified at 40 C.F.R. pt. 131).

86. *See* 5 U.S.C. section 706(2)(A). Under this section of the Administrative Procedure Act, judicial review is limited to ascertaining whether the agency has looked at the relevant factors and has not made any clear error of judgement. *See also* AMAN & MAYTON, ADMINISTRATIVE LAW 452-53, describing arbitrary and capricious standard of review.

87. Although the district court treated this finding as an issue of fact due to a substantial amount of deference, 941 F. Supp at 957, the Ninth Circuit upheld the district court ruling on this issue without mentioning the level of deference it was using, 131 F.3d at 1141. The problem with the EPA's position was that it interpreted the CWA as allowing it to treat tribes as states only if tribes had jurisdiction over all water resources within the reservation *under evolving principles of federal common law.* Perhaps the EPA would have been better off had it interpreted section 518(e) of the CWA as an

The Ninth Circuit in *Montana Dept. of Transportation v. King* took a narrower approach to the second *Montana* exception.[88] The issue was whether the tribe had jurisdiction to impose its tribal employment laws on the state of Montana while the state was performing construction work on a state highway running through the reservation of the Fort Belknap Indian Community. After observing that *Strate* cautioned that the second *Montana* exception was to be narrowly applied, the Ninth Circuit summarily concluded that 'the Community's assertion of authority over the State's own employees goes beyond the "internal functioning of the tribe and its sovereignty."'[89]

Most importantly, the court remarked that tribal jurisdiction "instead impinges on one of the State of Montana's sovereign responsibilities—maintaining Highway 66 and the right of way at its own expense."[90] This statement provides a reason not to uphold tribal jurisdiction besides the rather subjective, and the erroneous conclusion that enforcing tribal employment laws on its reservation is not necessary to tribal self-government. Grounding the decision on the impact tribal jurisdiction would have on the state's own responsibilities in this area also attempts to inject into the analysis reference made in *Strate* that all the cases cited to support the second exception had asked whether state jurisdiction would not unduly trench on tribal self-government.

A similar approach was taken by a federal district court in *Glacier County School District No 50 v. Galbreath.*[91] The issue was whether the tribal court had jurisdiction over an order directing the school district to readmit a student which had been expelled for disciplinary reasons. The expelled student was a tribal member, the school district is a political subdivision of the state, and the elementary school the student attended was located on land owned in fee by the school district. Although the court phrased the issue in terms of whether the conduct the tribe seek to regulate, the administration and operation of a school district, was demonstrably serious and imperiled the economic security, political integrity, or the health and welfare of the Tribe, the decision was founded on different grounds. Thus the Court stated that:

> The state of Montana, through its administrative agencies and courts, is the authority responsible for safeguarding the inalienable right of children to a public education. Accordingly, the public interest lies in ensuring the responsible state agencies are free to apply their expertise in resolving the various issues associated with providing and education to the children of the State.... [O]pening the tribal court for the optional use of tribal member unhappy with the substance or pace of the proceedings mandated by Montana law is not... necessary to tribal self-

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outright congressional recognition that tribes do have jurisdiction over all water resources within their reservations. For a comprehensive look at the decision see, Alex Tallchief Skibine, *The Chevron Doctrine in federal Indian Law and the Agencies Duty to interpret legislation in favor of Indians: Did the EPA reconcile the Two in interpreting the "Tribes as States" section of the Clean Water Act,* 11 St. Thomas L. Rev. 15 (1998).

88. Montana Dept. of Transp. v. King, 191 F.3d 1108 (9th Cir. 1999).

89. *Id.* at 1114.

90. *Id.*

91. 26 Indian Law Reporter 3221 (1999).

government.[92]

Some courts in further elaborating on the ramification of *Strate* are slowly developing an understanding that the test deciding whether a tribe has jurisdiction should not be based on a subjective conclusion about what is necessary to self-government or has a serious impact on tribal health and welfare, but on whether tribal jurisdiction would be incompatible with state jurisdiction over the same activity.

The court in *Glacier County* also thought that requiring the school district to exhaust tribal court remedies would be superfluous. Next, the article will examine other cases which have dealt with the exhaustion of tribal remedies requirement in the aftermath of *Strate.*

2. The exhaustion of tribal remedies doctrine after *Strate.*

The *Strate* Court concluded its analysis by adding the following footnote which states in part:

> When, as in this case, it is plain that no federal grant provides for tribal governance of non-members conduct on land covered by Montana's main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct.... [T]herefore, when tribal court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement... must give way, for it would serve no purpose other than delay.[93]

The exhaustion of tribal court remedies was first mandated in *National farmers Union v. Crow Tribe*[94] where the Court found that although federal courts had federal question jurisdiction to determine the extent of a tribe's jurisdiction, the congressional policies favoring self-government and self-determination "favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge."[95] The question after *Strate* was whether exhaustion is ever required in cases involving activities of non-members on non-member fee land.

The Strate footnote is hard to reconcile with the Court's statement in *National Farmers Union* that "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of the relevant statutes...."[96] The Strate footnote also seems to reverse the presumption of tribal jurisdiction over such matters established by the Court in *Iowa Mutual Ins. Co. v. Laplante*[97] when it stated: "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal

92. *Id.*
93. *Strate,* 520 U.S. at 459.
94. 471 U.S. 845 (1985).
95. *Id.* at 856.
96. *Id.* at 855-56.
97. 480 U.S. 9 (1986). The case extended the tribal exhaustion of remedies requirement to cases where federal jurisdiction was grounded on diversity of citizenship, 28 U.S.C. 1332.

sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."[98] Comparing the phrasing of *Iowa Mutual* with the wording of the *Strate* footnote shows that while under *Iowa Mutual* the burden is on the non-Indian to show that tribal jurisdiction has been taken by a federal enactment, the Strate footnote puts the burden on the tribe to show the existence of a "federal grant provid[ing] for tribal governance of non-member's conduct."[99]

While some cases still require exhaustion because the underlying events occurred on Indian lands,[100] or a dispute concerning whether the law suit arose on Indian lands within a reservation,[101] most courts are in agreement with *Glacier County School District No. 50 v. Gallbreath*[102] and have not required exhaustion. For instance the Ninth Circuit did not require exhaustion in either *Red Wolf*[103] or *Montana Dept. of Transportation v. King.*[104] Interpreting *Strate* as adding a fourth exception to the exhaustion requirement when "it is plain that no federal grant provides for tribal governance of non-members conduct on land covered by *Montana's* main rule,"[105] the Ninth Circuit in both *Red Wolf* and *King* concluded that exhaustion was not required when tribal court jurisdiction does not exist under *Montana* and *Strate*. This argument, however, is tautological. It amounts to stating that exhaustion of tribal remedies for the purpose of deciding whether the tribal court has jurisdiction should not be mandated when the tribal court does not have jurisdiction.[106] Under such an approach, the federal court will only require exhaustion once it has decided that the tribe has jurisdiction. But allowing the tribal courts to first decide this issue was the very purpose why exhaustion of tribal court remedies were mandated in *National Farmers Union Ins. v. Crow Tribe of Indians.*[107]

Other courts have been more partial to the exhaustion doctrine. For instance, in *Glendale Colony v. Connell,*[108] the district court attempted to distinguish *Strate* by stating the non-member defendant was not "simply traveling

98. *Id.* at 18.
99. *Strate*, 520 U.S. at 459.
100. *See* Navajo Nation v. Intermountain Steel Buildings Inc. 42 F. Supp. 2d 1222 (1999).
101. *See, e.g.,* Allstate Indemnity Co. v. Stump, 191 F.3d 1071 (9th Cir. 1999).
102. 26 Indian Law Reporter 3221 (1999). *See* discussion at notes 91-92.
103. 196 F.3d 1059 (9th Cir. 1999), *see* discussion at notes 74-76.
104. *King*, 191 F.3d at 1114. The case is discussed at notes 88-90.
105. *Id.* at 1115. As stated by the Supreme Court in *National Farmers Union v. Crow Tribe,* exhaustion is not required "where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action taken is patently violative of express jurisdictional prohibitions or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." 471 U.S. at 856 n.21 (citations omitted).
106. After *National Farmers*, some courts seemed to impose a requirement that exhaustion could only be mandated after the federal court made the initial decision that the case involved a "reservation affair." I have previously argued that such a requirement did not make sense because it amounted to a determination of whether the tribal court had jurisdiction. *See* 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, 198-01 (1994).
107. 471 U.S. 845 (1985).
108. 46 F. Supp. 2d 1061 (1997).

through the reservation en route to a off reservation destination" but was a resident of the Glendale Colony which had a permit to conduct business on the reservation and had a continuous and ongoing presence on the reservation. In mandating exhaustion, the Court took into account the fact that unlike the plaintiff in *Strate*, this plaintiff was a tribal member. The Court concluded that given the uncertainty, "it would be illogical not to apply the exhaustion requirement which is designed to allow tribal courts to address, in the first instance, the extent of their jurisdiction."[109] Whether the court was able to draw a meaningful distinction or one which will eventually be held on appeal to be just another distinction without a difference remains to be seen.

If the test was truly whether jurisdiction over a certain activity was necessary to tribal self-government due to a direct impact on tribal health, welfare, political integrity or economic security, it would be beneficial for the federal courts to first hear what the tribal courts thought about the matter. However, the language of the *Strate* footnote seems to leave no room for any exhaustion requirement. The *Strate* footnote, therefore, provides the clearest indicia that the *Strate* Court has in fact moved away from the previous understanding of the *Montana* test and has refocused the inquiry on whether exercise of tribal authority is authorized by Congress or compatible with state jurisdiction over the same activity. If the inquiry is now whether Congress has preempted state jurisdiction in favor of tribal authority or whether tribal authority over some activities would be incompatible with state jurisdiction over the same activities, it becomes obvious that federal judges can decide such issues without the benefit or input of tribal judges.

The lower courts are struggling with applying *Strate* because the *Strate* Court itself was less than explicit about what it was doing. Although the conventional wisdom is to restrict the application of the *Montana-Strate* line of reasoning to activities of nonmembers on nonmember lands, the next Part of this article will examine whether there are some repercussions for tribal jurisdiction over nonmembers on lands owned by the tribe or its members.

PART III: THE POTENTIAL IMPACT OF *STRATE* ON TRIBAL JURISDICTION OVER NON-MEMBERS ON LANDS OWNED BY THE TRIBE OR ITS MEMBERS.

A. The right to exclude v. inherent sovereignty.

After *Montana* came down with its general rule and its two exceptions, many wondered if the rule and its exceptions were applicable to other types of lands within Indian reservations such as tribal lands or lands held in trust for individual tribal members. The *Montana* Court stated, "The Court of Appeals held that the Tribe may prohibit non-members from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, and with this holding we

109. *Id.* at 1065.

can readily agree."[110] The question left unanswered was why the Court was so willing to agree? Was it because *Montana's* general rule was just not applicable to such lands, or because one of the two *Montana* exceptions applied to preserve tribal power over non-Indians? *Montana* itself seems to indicate that its general rule was applicable regardless of who owned the land since it was based on the notion that upon incorporation into the United States, Indian tribes lost all powers over non-members because it became inconsistent with their tribal status to be able to independently determine their external relations.

The Court in *Strate* was careful to state that it expressed no opinion on whether the same result would obtain if the incident arose on a tribal road within the reservation.[111] However, in *El Paso Natural Gas Company v. Neztsosie*,[112] in addressing the petitioners' argument that *Strate* prevented tribal jurisdiction over a tort case involving radioactive contamination, the Court summarily distinguished *Strate* stating "But *Strate* dealt with claims against non-members arising on state highways.... [B]y contrast the events in question here occurred on tribal lands."[113]

This article takes the position that although the tribe would have had jurisdiction if the events in *Strate* had occurred on a tribal road, the important issue here is that some courts have drawn a distinction between tribal jurisdiction based on inherent sovereignty and jurisdiction based on the "right to exclude," and have emphasized that tribal jurisdiction over non-members is solely derived from the "right to exclude." This is an important distinction because if jurisdiction is only based on the right to exclude, then the *Montana* rule applies to such lands once the tribe has lost such right, and the tribe has to rely on one of the two exceptions in order to have jurisdiction.

Grounding the tribal power over non-members as being derived from the right to exclude instead of inherent sovereignty allows those Justices who may believe that tribes have in fact lost all "inherent" sovereign powers over non-members upon incorporation into the United States to be doctrinally consistent with their understanding of *Montana* while still upholding tribal power over non-members while on tribal land. On the other hand, it allows those Justices to expand the application of the Montana principle to all lands except those where the tribes have retained the right to exclude.

This article concludes that drawing such a dichotomy between the right to exclude and inherent tribal sovereignty is disingenuous because the right to exclude is itself derived from inherent sovereignty.[114] As early as the *Chinese Exclusion* case,[115] the Court recognized this self-evident principle.[116] Yet, this

110. *Montana*, 450 U.S. at 556.
111. *Strate*, 520 U.S. at 442.
112. 526 U.S. 473 (1999).
113. *Id.* at 483 n.4. The Court concluded, however, that the tribal court had no jurisdiction but that it was solely because tribal regulatory authority had been pre-empted by federal law.
114. *See e.g.* United States v. Curtiss-Wright, 299 U.S. 304 (1936).
115. Chae Chan Ping v. United States, 130 U.S. 581 (1889).
116. In the Chinese Exclusion case, the Court stated: "that the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition

distinction played a crucial role in extending the *Montana* rule to the federally owned lands in *South Dakota v. Bourland*[117] and the state's right of way in *Strate*. The following discussion focusing on *Merrion v. Jicarilla Tribe*[118] and *Bourland*, explains the nature of the distinction and why it matters.

B. Merrion v. Jicarilla Tribe.

The issue in *Merrion* was whether the Jicarilla Apache Tribe could impose an oil and gas severance tax on non-Indian lessees who produced oil and gas within the reservation pursuant to a lease they had signed with the tribe. Justice Marshall delivered the opinion of the Court and held that the tribe had the inherent sovereign power to impose such a tax. Therefore, the tribe had not lost this right even though it had failed to reserve it in its lease with the non-Indian oil producers. Relying on *Washington v. Confederated Tribes of the Colville Indian reservations*,[119] the *Merrion* Court stated:

> The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction . . . .[120]

Justice Stevens, whose dissent was joined by Justice Rhenquist and the Chief Justice, wrote an unusually long dissenting opinion. His main point was that the tribe's authority over non-Indians only emanated from its power to exclude them from the lands. Since the tribe did not reserve the power to impose new taxes on the non-Indian lessees when it agreed to the lease, the tribe had lost the power to impose new taxes on the non-Indian lessees. According to Justice Stevens, when the tribes were incorporated in the United States, they lost their status as independent nations and "were afforded no general powers over citizens of the United States."[121] Although Justice Stevens recognized that tribes do have sovereign powers, the tribes can only exercise such powers over their own members. After referring to language in *Montana* and *United States v. Wheeler*,[122] indicating that tribes have no inherent powers over non-members, Stevens concluded:

> The tribe's authority to enact legislation affecting non-members is therefore of a different character than their broader power to control internal affairs. This difference is consistent with the fundamental principle that "in this nation each sovereign governs only with the consent of the governed." . . . [A]n examination of

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which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation." *Id.* at 603.

117. 508 U.S. 679 (1990).

118. 455 U.S. 130 (1982).

119. 447 U.S. 134 (1979).

120. *Merrion*, 455 U.S. at 137 (the Court also cited Gibbons v. Ogden, 9 Wheat. 1 (1824), as precedent).

121. *Id.* at 160.

122. 435 U.S. 313 (1978).

> cases that have upheld this [taxing] power, however, demonstrate that the power to impose such a tax derives solely from the tribe's power to exclude non-members from territory that has been reserved for the tribe.[123]

Observing that "the dissent confuses the Tribe's role as commercial partner with its role as sovereign,"[124] the majority rejected Justice Stevens' analysis and found that Steven's view denigrated Indian sovereignty by relegating it to a power which is possessed by any individual landowner. Concerning the dissent's implication that the power to tax depends on the consent of the taxed as well as on the Tribe's power to exclude non-Indians, the majority stated:

> Whatever place consent may have in contractual matters and in the creation of democratic governments, it has little if any role in measuring the validity of an exercise of legitimate sovereign authority.... [O]nly the federal government may limit a tribe's exercise of its sovereign authority. Indian sovereignty is not conditioned on the assent of a non-member.[125]

Although Justice Stevens lost this particular battle, his words might not have been written in vain and he might be on the verge of winning the war. Thus the views expressed in his dissent were later adopted in three important cases: *Duro v. Reina*,[126] *South Dakota v. Bourland*,[127] and of course, *Strate*.[128]

C. *South Dakota v. Bourland:* Overturning *Merrion* sub silentio?

The issue in *Bourland* was whether the Cheyenne River Sioux Tribe could assert jurisdiction over non-members hunting and fishing on lands located within the reservation but which had been acquired from the tribe by the United States for a Dam and Reservoir project. Writing for the majority, Justice Thomas stated that in enacting the 1944 Flood Control Act[129] and the 1954 Cheyenne River Act,[130] Congress had abrogated the Tribe's right under the 1868 Fort Laramie Treaty[131] to regulate non-member hunting and fishing on lands acquired by the United States pursuant to these two Acts.

The Court focused on the fact that the "right" the tribe had possessed to control non-Indian hunting and fishing within the reservation came from the treaty giving the tribe "absolute and undisturbed use and occupation" of the reservation. According to the Court, these words gave the tribe the power to exclude others and arguably conferred upon the Tribe the lesser included,

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123. *Merrion*, 455 U.S. at 172-173 (Justice Stevens cited *Nevada v. Hall*, 440 U.S. 410, for the proposition that the power to govern derives from the consent of the governed).
124. *Id.* at 146-47.
125. *Id.* at 147.
126. 495 U.S. 676 (1990).
127. 508 U.S. 679 (1993).
128. 520 U.S. 438 (1997). Justice Stevens' opinion in *Brendale v. Confederated Tribes*, 492 U.S. 408 (1989), also reflected this view in that it only relied on the right to exclude. Because there was no majority but only a plurality, Stevens' opinion, joined only by Justice O'Connor, dictated the result for the two pieces of land involved in that litigation. *See supra* text accompanying notes 60-63.
129. 1944 Flood Control Act, ch. 6645, 58 Stat. 887 (1944).
130. 1954 Cheyenne River Act, 68 Stat. 1191 (1954).
131. 1968 Fort Laramie Treaty, April 29, 1868, 15 Stat. 635, 1868 WL 5271.

incidental power, to regulate non-Indian hunting and fishing on these lands.[132] Since the tribe lost its right to exclude when the United States acquired these lands from the tribe pursuant to the Flood Control and Cheyenne River Acts, the Court held that Congress also eliminated the incidental regulatory jurisdiction formerly enjoyed by the Tribe because these two acts did not expressly provide for the continuance of tribal jurisdiction over non-members.

Focusing on whether Congress intended the tribe to lose jurisdiction over non-Indians in the Flood Control and the Cheyenne River Acts, and concluding that unlike the legislation at issue in *Montana*, neither of the two Acts reflected any congressional intent to diminish the tribe's powers of self-government, the dissent stated:

> the majority's myopic focus on the treaty ignores the fact that this treaty merely confirmed the Tribe's pre-existing sovereignty over the reservation land. Even on the assumption that the Tribe's treaty-based right to regulate hunting and fishing by non-Indians was lost with the Tribe's power to exclude non-Indians, its inherent authority to regulate such hunting and fishing continued.[133]

Unimpressed by this argument, Justice Thomas for the majority asserted that the purpose of the legislation allowing for the transfer of lands out of tribal ownership was irrelevant and was not the determinative factor in *Montana*. As long as the tribe had lost the power to exclude, it had lost jurisdiction. This is why Justice Thomas answered the dissent in footnote 15 of the opinion by stating:

> While the dissent refers to our "myopic focus" on the Tribe's prior treaty right to "absolute and undisturbed use and occupation" of the taken area, it shuts both eyes to the reality that after *Montana*, tribal sovereignty over non-members "cannot survive without express congressional delegation" and is therefore not inherent."[134]

Underlying the Court's position is the same view which was first expressed by Justice Stevens in his *Merrion* dissent: once the specific treaty right to exclude is waived or taken away, tribes seem to lose all powers over non-members unless one of the two *Montana* exceptions apply.[135]

Although, at first, *Bourland* seems to be only applicable to prevent inherent tribal jurisdiction over non-member while on non-members owned land, the

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132. *Bourland*, 508 U.S. at 687-88.

133. *Id.* at 701.

134. *Id.* at 695, n.15 (citing *Montana*, 450 U.S. at 564). It seems counterintuitive, and perhaps even a contradiction in terms to say that in order to "survive", tribal sovereignty has to be "delegated" through express congressional legislation.

135. Justice Thomas did mention the two *Montana* exceptions but took the position that the Court could not decide this issue because the Court of appeals had not addressed them in remanding them for consideration to the district court which had held that they were not applicable. *Bourland*, 508 U.S. at 695. The mention of the exceptions is puzzling, however, since their existence is hard to reconcile with the court's prior statement concerning the total lack of inherent sovereignty absent congressional delegation. Thus after stating that "general principles of "inherent sovereignty" also do not enable the Tribe to regulate non-Indian hunting and fishing in the taken area," *Id.* at 694, and following those words with a statement in footnote 15 that "after *Montana*, tribal sovereignty over non-members "cannot survive without express congressional delegation" *Id.* at 695. Justice Thomas nevertheless asserted that "the question remains, however, whether the Tribe may invoke other potential sources of tribal jurisdiction over non-Indians on these lands. Montana discussed two exceptions...." *Id.*

decision may not be so limited. If the only reason *Montana's* general rule is not applicable on Indian land is that the tribes there have retained the right to exclude, absent the application of one of the *Montana* exceptions, the tribes may have lost jurisdiction over non-members who are conducting activities on trust lands owned by individual members of the tribe when these non-members are on such lands with the consent of the tribal owners. Although many scholars have taken the position that tribes would retain full jurisdiction over such lands,[136] the issue is not free from doubts.

Perhaps the *Strate* Court really wanted to build on Justice Thomas' inference in *Bourland* and hold that a congressional intent to divest tribes of not only the right to exclude, but also all inherent sovereignty can be implied whenever land is transferred to non-members.[137] This position would not only be inconsistent with every rule of statutory construction developed by the courts over the years, but it also cannot be reconciled with many other cases recognizing tribal jurisdiction over non-members in other contexts.[138] However, in some respect, the *Strate* Court took Justice Thomas' *Bourland* opinion one step further. In spite of its contradictory and sometimes confusing language, Justice Thomas' opinion in *Bourland* at least went through the pain of analyzing, in detail, the congressional acts which took the land out of tribal ownership, before holding that they evidenced a clear congressional intent to abrogate the tribe's pre-existing right to control non-Indian hunting and fishing. The *Strate* court on the other hand, dispensed with the analysis all together. After bluntly asserting that "the right of way is open to the public and traffic on it is subject to the State's control,"[139] the Court relied on *Bourland* and held that because the tribes have consented to the state's use of the highway "They have retained no gatekeeping right."[140] Therefore because they have lost the right to exclude, the right of way should be treated the same as the fee lands in *Montana* for the purpose of determining tribal jurisdiction.

D. Recent lower court cases.

The lower court decisions which have followed in the wake of *Strate* have, with an occasional exception,[141] generally taken the position that the reason tribes

136. *See e.g.* Allison Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty The Supreme Court's Changing Vision,* 55 PITT. L. REV. 1, 61 n.259 (1993), and Judith Royster, *Mineral Development in Indian Country The Evolution of Tribal Control Over Mineral Resources,* 29 TULSA L.J. 541, 609 (1994).

137. *Bourland,* 508 U.S. at 692.

138. *See* Frickey, *supra* note 6, at 45-48.

139. *Strate,* 520 U.S. at 455-56.

140. *Id.* at 456.

141. *See e.g.,* Halwood v. Cowboy Auto Sales, 946 P.2d 1088 (1997), where the New Mexico Court of Appeals upheld tribal jurisdiction over tribal members' claim against a non-member car dealer who improperly repossessed plaintiffs' car while on tribal lands. The court did not find tribal jurisdiction because of the right to exclude but under *Montana*'s first exception, stating that "tribes possess such authority over the activities of non-members who enter consensual relationships with the tribes' members through commercial dealings and contracts." *Id.* at 1092.

retain jurisdiction over non-members on lands owned by the tribe or its members, is that the tribes have the right to exclude. This refocuses the judicial inquiry away from whether tribes have inherent sovereignty to regulate, to whether they actually have preserved the right to exclude. The Ninth Circuit decision in *State v. Hicks*[142] is indicative of what the debate is all about.

The issue in *Hicks* was whether the tribal court had jurisdiction to hear a case filed by a tribal member against a state game warden for a variety of torts alleged to have taken place in connection with the search of the plaintiff's car while on tribal lands. The majority held that the tribal court had jurisdiction because unlike *Strate* and *Montana*, "the incidents underlying the instant case occurred on Indian-owned, Indian-controlled land, over which the tribe retained its right to exclude non-members."[143] Crucial to the court's holding was the fact that the tribe had not consented to allow state officials to conduct search and seizure operations on the reservation to investigate state crimes, without a tribal search warrant. Therefore, in the instant case, when the tribal court agreed to grant the state warden's request for a warrant, it was exercising its "gatekeeping right" and "The tribe's unfettered power to exclude state officers from its land implies its authority to regulate the behavior of non-members on that land."[144]

The Dissent argued that in fact the state game wardens had been given permission by the tribal court to execute a warrant. Therefore, their right to be on the reservation was no less absolute than the non-members in *Strate* and another recent case, *County of Lewis v. Allen.*[145] In *County of Lewis,* the court held that the Nez Perce Tribe lacked jurisdiction over a member's action against the County. This was because in entering into an agreement with the County giving County officers the authority to enter the reservation to investigate minor crimes and make arrests, the tribe had ceded the right "to exclude state officials engaged in law enforcement activities on the reservation."[146]

The *Hicks* majority answered this argument by taking the position that unlike the situation in *County of Lewis*, "There was no general cession of jurisdiction by the tribe; instead there was a controlled, limited permission for state officials to come onto tribal land and comport themselves to the parameters of that permission."[147] Whether the case can be distinguished from *County of Lewis* that easily is questionable. Is there really a material difference between granting warrants to state officers on a case by case basis and allowing state officers to investigate crimes on the reservation on a more general basis? If there is a difference, it seems to be one of degree and not of substance.[148] Yet, these cases are typical of the kind of issues that are likely to be debated once it is agreed

142. 196 F.3d 1020 (9th Cir. 1999).
143. *Id.* at 1027.
144. *Id.* at 1028.
145. County of Lewis v. Allen, 163 F.3d 509 (9th Cir. 1998) (en banc).
146. *Id.* at 514.
147. *Hicks*, 196 F.3d at 1029.
148. As of this writing, the United States Supreme Court had granted the petition for *certiorari* but had not yet decided the case.

that the tribes' authority to regulate non-members on tribal lands is derived from the power to exclude instead of the general inherent powers of a sovereign.

As previously stated, the courts' struggle with this issue comes from a misconception about the "right to exclude" as being derived solely from the creation of the reservation either by treaty, act of Congress, or Executive Order.[149] This misconception misleads some jurists into treating the power to exclude as if it was just another power possessed by all landowners. In fact, the power to exclude is derived from the tribe's inherent sovereignty.[150] Its existence does not depend on having been expressly retained in a document. As stated by the Court long ago, "[t]he treaty was not a grant of rights to the Indians, but a grant of rights from them— a reservation of those rights not granted."[151]

Although *Strate* may have reformulated the second *Montana* exception, the next Part discusses whether it may have been influenced by its own federalist jurisprudence concerning the proper role of the judiciary in creating rules of federal common law.

PART IV. THEORETICAL IMPLICATIONS OF THE *STRATE* DOCTRINE.

A. A Justification for Strate from a Federalist Perspective.

Having announced a "general rule" that any jurisdiction over non-Indians had been lost upon incorporation into the United States, the *Montana* Court resurrected inherent tribal sovereignty from the ashes of its general rule. The *Montana* Court advanced two exceptions to its rule of no tribal jurisdiction over non-members. The problem from a federalist perspective is that *Montana's* second exception can potentially recognize the existence of tribal powers over non-members in a vast number of situations without any justification other than that such non-member activity has a direct impact on tribal health and welfare. A federalist Court may find it hard to be faithful to both *Montana's* general principle that upon incorporation in the United States, tribes lost all inherent powers over non-members, and the phrasing of its second exception which seems to allow courts to recognize additional tribal powers based upon a seemingly independent judicial judgment that such powers are "necessary to tribal self-government."

Implicit divestiture is a federal common law doctrine.[152] The requirement that tribal power over non-members has to be authorized by Congress is consistent with federalist jurisprudence concerning the power of the judiciary to create rules pursuant to federal common law. Perhaps the *Strate* Court did not perceive any justification emanating from the Constitution, treaties, or federal

149. *See supra* text accompanying notes 110-18.
150. *See* Nishimura Ekiu v. United States, 142 U.S. 651 (1892).
151. United States v. Winans, 198 U.S. 371 (1905).
152. Federal common law has been described as judge made law. In other words, rules of decision adopted by federal courts that have the force of law and effect of positive federal law but "whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional command." *Id.*

legislation, and therefore was reluctant to use federal common law to expand tribal powers beyond the general rule without explaining why these exceptions were necessary to protect a federal interest. However, determining the existence of tribal power by reference to whether state jurisdiction has been pre-empted does conform with a federalist approach to the Judiciary's power to create rules. Under the Indian pre-emption doctrine, tribal power will only prevail over a state's own assertion of power if it has some backing or support in positive federal law.[153]

Some scholars have argued that the creation of rules through federal common law raises serious separation of power concerns. As stated by one scholar, "there can be no such thing as federal common law at least to the extent it is used to provide a rule of decision and to the extent that the phrase common law is construed as a category of lawmaking distinct from constitutional or statutory interpretation."[154] To alleviate these concerns, one scholar has put forth the axiom that the Court can make federal common law only if the rule is in furtherance of a basic feature of the constitutional scheme.[155] Others believe that federal common law is allowable as long as the court can point to some "authority" such as a treaty, a statute, or the Constitution.[156] In her landmark work on federal common law, professor Martha Field explained that she favors a requirement that courts specify the authority to sustain its federal rule because:

> a requirement that a federal court locate the power under which it acts seems to fit better with the notion of the federal government as one of limited powers. Most important, perhaps, the recitation of an authority interpreted to sustain the federal common lawmaking power takes more seriously the conception that Congress has the last word both on whether the area should be federalized and on what rule should be selected to govern.[157]

Some of the problems relating to the creation of rules through the federal common law were raised in *Kiowa Tribe v. Manufacturing Technologies.*[158] After observing that even though the doctrine of tribal sovereign immunity was not relevant or mandated by any federal interest supporting tribal self-government,

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153. *See* discussion *infra* Part II.B.

154. Martin Reddish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: an Institutionalist Perspective,* 83 NW. U. L. REV. 761, 792 (1989).

155. *See* Bradford R. Clark, *Federal Common law, a Structural Reinterpretation,* 144 U. PA. L. REV, 1245 (1996). As stated by professor Clark, "This criterion asks whether judicial application of the rule in question constitutes either the application of rules implied directly from the constitutional structure, or adherence to customary rules of decision necessary to implement a basic feature of the constitutional scheme." *Id.* at 1275.

156. *See* Martha Field, *Sources of Law, the Scope of Federal Common* Law, 99 HARV. L. REV. 881 (1986) (hereinafter Field). The Supreme Court's position is that federal common law is limited but only according to subject matter. According to the Court, the enclaves appropriate for federal common law include "such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of states or our relations with foreign nations, and admiralty cases." Texas Indus. v. Radcliff Materials, 451 U.S. 630, 641 (1981). Professor Field believes that this position "does not provide any underlying rationale other than grandfathering." Field, *supra* note, at 911-12.

157. Field, *supra* note 156, at 947.

158. 523 U.S. 751 (1998).

the Supreme Court held that the tribes had sovereign immunity even for a transaction involving commercial activities taking place outside the reservation. This moved Justice Stevens in dissent to state: "First the law-making power that the Court has assumed belongs in the first instance to Congress. The fact that Congress may nullify or modify the Court's grant of virtually unlimited immunity does not justify the Court's performance of a legislative function."[159] Justice Stevens concluded that although the creation of a federal common law "default" rule of immunity might in theory be justified by federal interests, the majority opinion had acknowledged that such interests were lacking. Use of the common law to recognize such immunity was, therefore, illegitimate.

Justice Stevens' point was that under the separation of power principle, each branch of the government is supposed to only conduct its assigned role and not aggrandize itself at the expense of another branch by exercising that branch's function.[160] Although the Constitution vests with Congress the sole role of initially determining the relations between the tribes and the United States, Stevens's argument was that in the absence of any treaty or statutes, the Court's extension of the immunity to cover commercial transactions occurring off the reservation without grounding this extension in a federal interest was an usurpation of Congressional power.

The difference between Stevens and the majority was that the majority believed that it was not extending the immunity. Unlike the tribal power to regulate non-members traveling on a state highway running through the reservation, the *Manufacturing Technologies* majority believed that complete tribal sovereign immunity from suit survived incorporation. The Court was therefore not extending the immunity but just refusing to abrogate it, preferring instead to leave that task to the Congress.

The *Strate* Court, being a court with federalist tendencies, should agree with the position that federal courts have to identify the authority giving them the power to create rules of federal common law. Not wanting to go back and adopt the *Colville* line of reasoning[161] since it would not result in a divestiture of tribal powers over traffic accidents, the *Strate* Court may have attempted to reconcile its implicit divestiture jurisprudence with its conception of federal common law by reformulating *Montana*'s second exception. Requiring tribes to show that jurisdiction over non-members is necessary to tribal self-government, by asking whether state jurisdiction over such activity would unduly trench on tribal self-government, grounds the determination of what is or is not necessary to tribal self-government in federal statutory law, since state jurisdiction over non-members is not preempted unless the tribes interest in self-government is supported by

159. *Id.* at 764.

160. *See* Morrison v. Olson, 487 U.S. 654 (1998); Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadda, 462 U.S. 919 (1983).

161. Under Colville, a tribal power is divested only if it is in conflict with an overriding national interest. *See supra* text accompanying notes 61-64.

positive federal law.[162] As the next section demonstrates, however, the Court in *Strate* would have been better off following the *Manufacturing Technologies* majority's methodology and refuse to abrogate tribal civil authority over its reservation absent a congressional pronouncement to that effect.

B. The Flaw in Strate and Montana from a Foundationalist Perspective.[163]

Professor Field observed that in some areas of the law, such as federal Indian law for instance, courts sometimes fail to address the authority for federal common law simply because the existence of such authority is so well established. She cited to *Johnson v. M'intosh*[164] and mentioned *Worcester v. Georgia*[165] for the statement that the reason the pre-existing common law remained in effect was because it

> was adopted in treaties between the Indians and the United States, and between the United States and Britain, whose rights passed to the United States after the revolution; and the Constitution declares that treaties previously made as well as future treaties are to be the supreme law of the land.[166]

Justice Marshall was faithful to this view and in *Worcester v. Georgia*, he relied on the historical relationship the tribes had with England, as well as treaties, the constitution, acts of Congress, and principles of international law to state:

> From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, *within which their authority is exclusive.*[167]

Under the traditional view, treaties have always been considered not as a grant of sovereignty from the United States to the tribes, but a reservation by the tribes of all the powers not expressly given up in the treaty.[168] In other words, tribes did not have to expressly reserve a specific inherent power in a treaty in order for that inherent power to continue to exist. Contrary to Marshall's position, the *Montana* and *Strate* Courts did not seem to believe that under pre-existing common law, tribes had any authority over non-members. Therefore, for such jurisdiction to exist while remaining consistent with the *Strate* Court's jurisprudential philosophy concerning the courts' power to create rules of federal

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162. *See* discussion *infra* Part II.C. at notes 54-60.

163. As stated earlier, this term is borrowed from David Getches' article, *Conquering the Cultural Frontier, see* Getche *supra* note 17.

164. 21 U.S. 543 (1823).

165. 31 U.S. 515 (1832).

166. Field, *supra* note 156, at 948-49.

167. *Worcester,* 31 U.S. at 577. For a comprehensive overview of Justice Marshall's Indian jurisprudence, See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in federal Indian Law*, 107 HARV. L. REV. 381 (1993).

168. *See* United States v. Winans, 198 U.S. 371 (1905); Charles Wilkinson and John Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as the Water Flows and the Grass Grows Upon the Earth"— How Long a Time is That?* 63 CAL. L. REV. 601 (1975).

common law, it would have to have been specifically referred to in a Treaty or supported by congressional legislation.

Although Congress has the primary or even exclusive responsibility to determine the relations between the United States and the Indian tribes, the implicit divestiture doctrine seems, at first, necessary to implement a basic feature of the constitutional scheme if Congress has failed to address the issue of tribal authority. Under the separation of powers doctrine courts can only make federal common law if Congress has not spoken on the issue. However, in this case, it seems that Congress has in fact spoken on this issue. Although the Supreme Court seems to assume that tribes never had any jurisdiction over non-members, even before the first treaty was signed, no one can honestly read the early treaties and think that the Congress was under the impression that the tribes did not have power to regulate non-Indians living within their borders. In spite of contrary statements in *Oliphant v. Suquamish tribe*,[169] the tribes even had the power to criminally regulate non-Indians. A common clause in the early treaties was the following: "if any citizen of the US or other person not being an Indian shall settle on any of the Cherokees' lands, such person shall forfeit the protection of the US, and the Cherokees may punish him or not, as they please."[170]

The Court should, therefore, only be able to divest the tribes of jurisdiction over non-members if it can interpret treaties or acts of Congress as divesting tribes of that inherent power. The court in *Montana* by-passed this requirement by asserting as a general rule that tribes lost that jurisdiction upon incorporation and then carving out two exceptions. Once it is established that there never was such general rule until the Court made it up, it is the Court's own implicit divestiture doctrine which becomes suspect under separation of power principles since it divest the tribes of authority without invoking any federal interest justifying such divestiture.[171]

Crucial to the *Montana* Court's formulation of its general rule was the Supreme Court's statement in *United States v. Wheeler*[172] that Indian tribes had lost all jurisdiction over non-Indians upon incorporation into the United States because it was inconsistent with their status for the tribes to independently determined their external relations. However, a search for the basis of the *Wheeler* statement reveals that it was not supported by any legitimate authority. The only authority cited in *Wheeler* was Justice Johnson's concurrent opinion in *Fletcher v. Peck* where he stated: "the restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [of the United States] from

169. 435 U.S. 191 (1978).

170. *See* Article VIII of the treaty of 1791 with the Cherokees, 7 Stat. 39.

171. The difference between the *Oliphant* brand of the implicit divestiture doctrine and the *Montana* one is that the Court in *Oliphant* found that the inherent tribal power to criminally prosecute non-members had been divested because it was in conflict with the overriding sovereign interest of the United States, grounded in the United States Constitution, to protect its citizens from an unwarranted intrusion in their personal liberty. As developed in *Oliphant,* therefore, the implicit divestiture doctrine does not suffer from the problems plaguing the *Montana* brand of the doctrine.

172. 435 U.S. 313 (1978).

their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves."[173] However, whatever precedential value Justice Johnson's views on this issue may have had, they were clearly overruled in Worcester v. Georgia.[174]

What this shows is that *Montana*'s "general rule" was in fact not a general rule at all until the Court decided to make it so. The fact that there was no general rule to begin with makes the *Strate* Court's attempt to further determine the meaning of the second exception through a scrupulous reliance on the authorities cited to support it that much more suspect.[175] The general rule, not being a general rule, it is no wonder that the precedents cited to justify the exceptions were not appropriate. This explains the *Montana* Court's reliance on cases which dealt with assertion of state jurisdiction inside Indian Country. Most of the litigated cases involving the issue of tribal self-government had dealt with states' attempts to assert jurisdiction since the tribes' own power over civil matters had been firmly established since *Worcester* and had gone mostly unchallenged. The Court was able to cleverly avoid citing cases which had challenged and upheld tribal jurisdiction on broader grounds by listing these cases as justifying the first exception.

An analysis of the cases cited to support the first exception exemplifies the Court's strategy and reveals how the *Montana* court was able to seriously shrink the recognized sphere of tribal authority. The first exception phrased the existence of tribal jurisdiction as deriving from the fact that the tribes had entered into "consensual relations" with the non-Indians. An examination of the precedents cited reveals that this insistence on the "consensual" aspect of the relationship is something no other courts had highlighted in the past. For instance, in the most recent of the cited authorities, *Washington v. Confederated Tribes of the Colville Indian Reservation*,[176] the Court did not uphold the tribal taxing power over non-Indians because it involved consensual relations but because tribes had inherent authority over any non-Indian who entered the reservation for "commercial activities." The *Montana* Court's emphasis on the fact that the relationship has to be consensual, seems to indicate that the tribal authority is derived from the "consent" of the non-Indians and not from the tribe's inherent authority over any commercial activity.[177]

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173. 10 U.S. (6 Cranch) 87, 147 (1810).

174. 31 U.S. 515 (1832). Although Justice Johnson may have believed that the Tribes did not have jurisdiction over anyone else but their own members, he also believed that tribal members themselves were not under the control of anyone else but their tribes. His views on this issue are clearly summarized in his concurrent opinion in *Cherokee Nation v. Georgia* where he stated "I believe in one view and in one only, if at all, they are or may be deemed a state, though not a sovereign state.... [T]heir condition is something like that of the Israelites, when inhabiting the deserts. Though without land that they can call theirs in the sense of property, their right of personal self-government has never been taken from them.... And such they certainly possess; it has never been questioned, nor any attempt made at subjugating them as a people, or restraining their personal liberty except as their land and trade." 30 U.S. 1, 27 (1831).

175. See discussion *infra* Part II.B. at notes 30-32.

176. 447 U.S. 134 (1980).

177. *See* Duro v. Reina, 495 U.S. 676 (1990) (denied tribal criminal jurisdiction over non-member

The other cited cases never emphasized the "consensual" aspect of the relationship. For instance, in *Williams v. Lee*,[178] the Court emphasized that the crucial factor was that the transaction involved a "reservation affair." The Court stated:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of tribal courts over reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the reservation and the transaction with an Indian took place there.[179]

The *Williams* Court never described more specifically what constituted a "reservation affair." However, the fact that a non-Indian was involved in the law suit was not enough to make this transaction an "external" instead of a "reservation" affair. More importantly, the consent of the non-Indian was totally irrelevant, the Court made clear that to the extent that "consent" was needed, it was implied from the fact that the non-Indian was on the reservation. Neither of the other two cases cited by the *Montana* court to support its first exception, *Morris v. Hitchcock*[180] and *Buster v. Wright*,[181] restrict tribal authority to "consensual" relations.

Having stated at the outset that Indian tribes have been divested of any inherent power over non-Indians because this concerned external relations and the powers of self-government only involve relations among members, *Montana* attempted to reconcile some of the cases which had recognized the existence of tribal jurisdiction by arbitrarily fitting them as belonging to one or the other exception. Although the cases mentioned as supporting the second exception miss the mark altogether in that they are cases attempting to ascertain the limit of state and not tribal jurisdiction, the cases which are cited for the first exception do not fit the bill either since they do not rely on "consent" as the benchmark to recognize tribal power. *Strate* was able to exploit these faulty authorities used to justify an exception to a non-existent general rule in order to introduce its notion that what is necessary to tribal self-government should be determined by whether state jurisdiction over the same activity would unduly trench on the right of reservation Indians to make their own laws and be ruled by them.

In the future, it appears tribal jurisdiction over non-members on non-member lands will exist mostly in cases where Congress has enacted legislation. The next section will discuss the limits if any, on the power of Congress to

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Indians).

178. 358 U.S. 217 (1959).

179. *Id.* at 223.

180. 194 U.S. 384 (1904). This case is somewhat unusual because it involved non-Indians suing the Secretary of the Interior to enjoin him from enforcing the laws of Chickasaw Tribe which had enacted legislation directing the United States to impound cattle grazing on their reservation by belonging to non-Indians who had not paid a tribal tax. What makes this case unusual is that pursuant to treaties and Acts of congress all laws enacted by the Chickasaw legislature had to be approved by the president of the United States.

181. 135 F. 947, 950 (1905).

preempt state jurisdiction over non-members for activities occurring on lands not owned by the tribe, its members, or the federal government.

C. *Congressional power to pre-empt state jurisdiction over non-members located on non-member lands within Indian reservations.*

There are both some positive and negative aspect to the existence of Congressional power within Indian reservations. On the positive side, Congressional power has been used to pre-empt state jurisdiction within Indian reservations.[182] On the other hand, the Court has used the "plenary power" concept to justify congressional intervention in the internal affairs of the tribes.[183] The question asked in this section is whether there are any limits on Congressional power to pre-empt state authority within Indian reservations.

One line of argument is that the power of Congress over Indian affairs is not in fact plenary. Under the doctrine of enumerated power, Congress can only act pursuant to a power specifically delegated to it under the Constitution.[184] One of the first cases addressing the issue of whether Congress instead of the states had power over Indians within an Indian reservation was *United States v. Kagama.*[185] Although the *Kagama* Court refused to invoke the Commerce Clause as a source of congressional power over Indians, it used a mixture of inherent sovereignty derived from the ownership of the country along with the existence of a trust relationship between the tribes and the federal government not only to legitimize congressional power over Indians but also to pre-empt the exercise of state power within Indian reservations.[186] However, although the trust doctrine used to be invoked as a source of extra constitutional power for Congress, the Court over the years has backed away from using the trust as a source of "plenary" power whenever constitutional rights of Indians may have been affected.[187] More recently, the Court has not even mentioned the doctrine in cases such as *Hodel v. Irving,*[188] and *Seminole Tribe v. Florida.*[189]

Although Congressional authority over Indian affairs can be and has been

182. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), and discussion *infra* Part II.C. at notes 54-58.

183. *See* Kagama v. United States, 118 U.S. 375 (1886).

184. *See* United States v. Lopez, 514 U.S. 549 (1995). "We start with first principles. The Constitution creates a Federal government of enumerated powers . . . ." *Id.* at 552. As James Madison wrote "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The Federalist No. 45, pp 292-293." *Id.*

185. 118 U.S. 375 (1886).

186. *Id.* The Court in *Kagama* held that the Congress had the constitutional power to enact the Major Crimes Act which authorized the federal government to prosecute Indians who commit any of the listed crimes against other Indians while on Indian reservations.

187. *See* United States v. Sioux Nation, 448 U.S. 371 (1980); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977). For an interesting article on how the trust doctrine could be used to curb Congressional power over Indian tribes see Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at Its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope,* 18 N. ILL. U. L. REV. 115 (1997).

188. 481 U.S. 704 (1987).

189. 517 U.S. 44 (1996).

derived from various sources,[190] the judicial trend has been to rely exclusively on the Indian commerce power.[191] While it is true that a long line of Supreme Court precedents have asserted that this power gives Congress "plenary" authority over Indian affairs vis a vis the tribes,[192] the Court in cases such as *United States v. Lopez,*[193] and *United States v. Morrison,*[194] has recently narrowed the scope of the Commerce power and has indicated a new sensitivity to states' rights under the Constitution. Although it would be reasonable to think that such thinking would be extended to curb Congressional power over Indian tribes,[195] the more realistic probability is that the same reasoning may be applied to impose limits on Congressional power to pre-empt state authority within Indian reservations. In other words, is it possible that the same federalist sentiment which guided the Court in cases such as *Seminole Tribe v. Florida,*[196] *Lopez,* and *Morrison,* might lead the Court to closely question Congress' authority under its Indian Commerce power to pre-empt state jurisdiction? Professor Martha Field raised this possibility when she stated in a recent article that:

> A more ominous view is that the *Seminole* Court was building precedent for the future, eliminating solicitous treatment for native Americans faced with the prospect of increasing state regulations.... [U]nder this view, the *Seminole* decision cannot be regarded as lacking significance for the role of native Americans vis-a-vis federalism, for it is the first decision ever in which the Supreme Court has held unconstitutional a congressional enactment concerning structural federal-state-Indian relationships. Moreover, even if the holding goes no further, the limitation on congressional power that results directly from Seminole has potentially far-reaching effects on future congressional regulation of Indian affairs.[197]

It is true that previous cases challenging the power of Congress to regulate non-members while on non Indian fee land located within Indian reservations have upheld congressional power, but these cases involved liquor transactions within Indian reservations which either clearly involved commerce or Indians

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190. For a critical and comprehensive analysis as to the legitimacy of the plenary power, see Nell Newton, *Federal Power Over Indians; Its Sources, Scope, and Limitations,* 132 U. PA. L. REV. 195 (1984).

191. *See* Morton v. Mancari, 417 U.S. 535 (1974); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989). The treaty power has not been exercised with Indian nations since 1871 and Congress' power to govern and managed federal territories is not applicable to regulate non-members on non federal and non tribal land.

192. *See e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The Court stated, "As the Court in *Talton v. Mayes*, recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Id. See also* Cotton Petroleum Inc. v. New Mexico, 490 U.S. 163, 192 (1989).

193. U.S. v. Lopez, 514 U.S. 549 (1995) (limiting Congress' power to regulate handguns within local school zones where no impact on interstate commerce is demonstrated).

194. 529 U.S. 598 (2000).

195. *See* Richard Garnett, *Once More into the Maze, Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country*, 72 N. D. L. Rev. 433 (1996).

196. 517 U.S. 44 (1996).

197. *The Seminole Case, Federalism, and the Indian Commerce Clause*, 29 ARIZ. ST. L.J. 3, 19-20 (1997). *See also* Philip P. Frickey, *Domesticating Federal Indian Law,* 81 MINN. L. REV. 31, 49-51 (1996), and Ray Torgenson, *Sword Wielding and Shield Bearing: An Idealistic Assessment of the Federal Trust Doctrine in American Indian Law,* 2 Tex. F. on C.L. & C.R. 165, 189-190 (1996).

directly.[198] While it seems that traffic regulation of non-members on a state highway running through the reservation, which was at issue in *Strate*, would have a substantial impact on commerce with the Indian tribe, this is an area of the law which is still developing. Supporting congressional power, however, are statements like the following made by the Supreme Court in its recent decision in *Florida v. Seminole Tribe*:

> If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the federal government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.[199]

This article takes the position that the very power to create Indian reservations implies the right to pre-empt all state jurisdiction within them. Although a state may have obtained the authority to regulate certain activities of non-members within Indian reservations when Congress decided to allow lands to be transferred out of Federal or Indian ownership,[200] Congress still retained the power to regulate and impose conditions on any non-member activities within these reservations. Any possible misunderstandings about this comes from the Court's less than ingenious statements purporting to justify Congress' "plenary" power over Indian affairs and Indian tribes solely using the Commerce power. This dilemma could be obviated if the Court followed up on one scholar's observation and held that Congressional plenary power, vis-a-vis the states, does not only come from the Commerce power, but from the structure of the constitution. According to Professor Frickey, "If this argument is accepted, it leaves the states completely out of the picture of Indian affairs—the authority over Indian affairs is centralized and plenary, in the same sense that the power over interstate commerce is . . . ."[201]

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198. *See e.g.*, Perrin v. United States, 232 U.S. 478, 482 (1914), and United States v. Mazurie, 419 U.S. 544, 555 (1974). *See also* United States v. 43 Gallons of Whiskey, 93 U.S. 188, where the Court confirmed federal authority to regulate liquor traffic with Indians even on lands ceded by the tribe and now part of the state of Minnesota. *Id.* The Court took the position that it did not matter whether the interactions took place off the reservation because these interactions still constituted "commerce" with Indian tribes. *Id.*

199. *Seminole Tribe*, 517 U.S. at 62.

200. See Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) and *see supra* text accompanying notes 48-51.

201. Philip Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31, 68-69 (1996). Comparing the plenary power of Congress in Immigration and Indian Law, Professor Frickey observed that the source of the power invoked by the Court in its 1889 decision in the Chinese Exclusion Case, 130 U.S. 581 (1889), is in fact the same as the one invoked in its 1886 Kagama decision. Although it can be argued that this Congressional power is not as much delegated as it is "inherent" to an independent sovereign country under principles of international law, Professor Frickey observed that the plenary power of Congress in these two areas could be viewed as derived from the structure of the Constitution:

> This structural argument proposes that inherent in the Constitution, not outside the Constitution, are all those notions of inherent sovereignty under international law that are not inconsistent with constitutional text, structures, or institutional relationships. In this light, the abandonment of the ambiguous provision in the Articles of Confederation about power over Indian Affairs and the language in the Constitution about treaty power, war

In conclusion, even though the Indian Commerce power should not be interpreted as giving Congress "plenary" authority to intervene in the internal affairs of Indian tribes, it does give Congress the exclusive power to determine and conduct relations with the Indian tribes vis-a-vis the states.

CONCLUSION

Perhaps it would have been more doctrinally sound for the Court to adopt the position that whenever Congress allows non-members to buy land inside Indian reservations, it intends a divestiture of tribal powers over such non-members. The problem with this approach is that such Congressional intent is absent and inherent sovereignty cannot legitimately be narrowed down to the right to exclude.

There is nothing principled or doctrinally sound about the Court's jurisprudence in federal Indian law; it all seems based on political expediency. Tribal inherent sovereignty over tribal territory and the people who live there was first recognized in treaties and confirmed by Justice Marshall, just as was the concomitant principle that the states have no jurisdiction over tribal territory. Being uncomfortable with these ideas, the Rhenquist Court has struggled to find ways to divest tribes of such jurisdiction while at the same time increasing state jurisdiction within Indian reservations.

In a previous article I asserted that the Supreme Court's decision in *Strate v. A-1 Contractors* had not changed the rules of the game as established in the Court's 1981 decision in *Montana v. United States.*[202] I have now reconsidered my position. Although the Supreme Court has not yet held that tribes can never exercise any inherent sovereign powers over non-members, the Court no longer talks in terms of Indian sovereignty. Instead, the preferred terms are "right of Tribal self-government," and "right to exclude." This article has suggested that for at least some of the Justices, when it comes to tribal authority over non-members, self-government and the right to exclude are different than sovereignty in that unlike "sovereignty" which is inherent, "self-government" and the "right to exclude" seems to be rights which, in some fashion, have to be recognized, reaffirmed, or conferred by the greater sovereign. Thus, there is some indications that the Court will soon refuse to recognize inherent tribal sovereign powers over non-members while on non-member lands without any indication that Congress would somehow support such tribal authority.

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power, and power over commerce with Indian tribes provide strong reason to conclude that the colonial power resides in Congress not in the states . . . .

Id.

This "structural argument" theory has the benefit of allowing meaningful judicial review under the Constitution, a possibility which may not be available if the power is truly inherent and extra constitutional. On the topic of Congressional power as emanating from the structure of the Constitution, *see also* Charles Black, *Structure and Relationship in Constitutional Law* 7 (1969).

202. *See* Alex Tallchief Skibine, *The Chevron Doctrine in Federal Indian Law and the Agencies' Duty to Interpret Legislation in Favor of Indians: Did the EPA Reconcile the Two in Interpreting the "Tribes as States" Section of the Clean Water Act,"* 11 ST. THOMAS L. REV. 15 (1998).

Although the next round of legal battles will be about the kind of congressional nod that is required before tribal jurisdiction over non-members can be activated from its state of suspended animation, the tribes should not wait that long. There are no reasons why the tribes and the states could not sit down at the negotiating table, iron out their jurisdictional problems, and together approach Congress for ratification of such agreements. This has been done before in many water rights and land claims settlements.[203] Perhaps these settlements involved rare situations where both the tribes and the states had more to gain by sitting down at the negotiating table than staying away from it. Congress, the tribes, and the states should not give up, however, in attempting to formulate new and improved mechanisms facilitating such trilateral agreements.

203. *See., e.g.,* 25 U.S.C. 1701-1716 (1994) (codifying the Rhode Island Indian Claims Settlement Act); 25 U.S.C. 1721-1735 (1994) (codifying the Maine Indian Claims Settlement Act of 1980); Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No 100-512, 102 Stat. 2549 (1988).