Articles

The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration

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Although Congress is said to have "plenary power" in Indian Affairs,[1] much of federal Indian law is still dictated from the judicial bench through federal common law. While Congress asserted its plenary power in a rather heavy handed manner between the early1880s and the late 1920s,[2] the New Deal era of the 1930s announced a new federal policy towards Indians, one based on respect for tribal self-government instead of assimilation and termination.[3] After a brief bout with the "termination" policy of the 1950s,[4] Congress once again has, since the late 1960s, embarked on a policy of tribal self-determination.[5] Thus, except for a brief period in the 1950s, Congress has not used its plenary power to the detriment of Indian tribes in the last seventy years. Until the late 1970s, the Court cooperated with the policies of Congress and even assumed the lead in implementing the pro-tribal policies initiated during the New Deal era and continued in the self-determination era. Accordingly, the Court abided by some presumptions favoring tribal power over state power within Indian country[6] and assumed that tribes

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1. *See* Nell J. Newton, *Federal Power over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195 (1984).

2. This period is generally known as the Allotment era. *See* Judith W. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

3. *See* Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FLA. ST. U. L. REV. 189 (2001).

4. *See* Charles Wilkinson & Eric Biggs, *The Evolution of the Termination Policy*, 5 AM. IND. L. REV. 139 (1977).

5. The policy probably began with President Nixon's message to Congress on July 8, 1970 (*see* H.R. DOC No. 91-963.), which eventually led to the enactment of the Indian Self Determination and Education Assistance Act of 1975, Pub. L. No. 93-638. *See e.g.*, Tadd M. Johnson & James Hamilton, *Self-Governance for Indians Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251 (1995).

6. *See* Williams v. Lee, 358 U.S. 217 (1959) *and* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973); *see also* Deborah A. Geir, *Power and Presumptions; Rules and Rhetoric;*

retained all of their inherent sovereign powers not surrendered in treaties or expressly taken away by congressional statutes.[7] Then in the late 1970s, under the increasing influence of soon to be Chief Justice Rehnquist, the Court began to change course and started issuing rulings against tribal interests.[8] As a result, the consensus among scholars and tribal advocates is that the Rehnquist Court should be viewed as "anti-Indian," and tribal lawyers are actively discouraged from petitioning for certiorari from the Supreme Court. In a recent noted article, Professor David Getches noticed that the Rehnquist Court had granted certiorari to an unusual amount of cases concerning Native American issues.[9] He also confirmed that, in these cases, the tribal interests were on the losing side nearly eighty percent of the time.[10] Hoping to counter such decisions, Indian tribal leaders are gearing up for a major legislative effort in 2003 to have Congress overturn some of the most controversial decisions of the Rehnquist Court that have resulted in a substantial loss of tribal political power within Indian reservations.[11]

Attempting to determine why the Court is taking so many Indian cases and why the tribes are losing so many of them, Getches concluded that the Court's federal Indian law decisions are influenced by its general agenda disfavoring racial preference, while favoring majoritarian values and states' rights.[12] Another noted scholar, Phillip Frickey, has argued that the problem with the current Court is that it has forgotten the foundationalist principles established by John Marshall in the Cherokee cases,[13] and is now in the process of "flattening federal Indian law into the broader American public law by importing general constitutional and sub-constitutional value into the field."[14] Other scholars believe,

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Institutions and Indian Law, 1994 BYU L. REV. 451 (1994).

7. *See* FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942).

8. The first of these anti tribal decisions was probably Oliphant v. Suquamish Tribes, 435 U.S. 191 (1978), and the most recent was Nevada v. Hicks, 533 U.S. 353 (2001). *See generally* Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993).

9. David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001) (hereinafter *Beyond Indian Law*). The Court has decided some eighty cases involving Indian issues in the last twenty years.

10. Even convicted criminals win more cases than Indian tribes at the Supreme Court, at least percentage-wise. Sam Deloria, Director of the American Indian Law Center at the University of New Mexico, Remarks at the Federal Bar Association conference on Federal Indian Law held (April 2002)

11. *See* Resolution #SPO-01-141, adopted during the 58th Annual Session of the National Congress of American Indians, held from November 25-30 in Spokane, Washington.

12. *Id.* Getches theorizes that, because so many Indian cases deal with these three themes, this also explains why so many of these cases are taken by the Court.

13. *See* Phillip Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) (hereinafter *Marshalling Past and Present*).

14. *See* Phillip Frickey, *A Common Law for Our Age of Colonialism, The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1 (1999) (hereinafter, *Our Age of Colonialism*).

however, that perhaps the Court's motivation is a concern with the rights of non-Indians living within reservations and being controlled by what the Court views, in spite of some continuing judicial assertions to the contrary,[15] as essentially racially based organizations.[16] Echoing such sentiment, Sam Deloria recently expressed the view that tribes were losing many cases affecting tribal jurisdiction over non-members because the Court was uncomfortable with the fact that non-Indian residents of the reservations could not vote in tribal elections and would never be eligible for tribal membership.[17] Explaining why the Court has not returned to Chief Justice Marshall's view, T. Alexander Aleinikoff stated: "The answer, I believe is grounded on three concerns of the Court. The first, I label the democratic deficit. The second is based on the ethno-racial basis of tribal membership. The third turns on the importance the Court attaches to citizenship in an increasingly multicultural United States."[18]

This article argues that the reason for the Court's anti-tribal decisions comes from its failure to integrate its general jurisprudence on federalism and associational rights, as well as its preference for formalism,[19] into federal Indian law. In a recent article, attempting to decipher an internal doctrinal coherence for the Rehnquist Court, Professor John McGinnis argued that the Court's jurisprudence "is one of decentralization and private ordering of social norms."[20] McGinnis argues that the Court has favored federalism and freedom of association because it is "rediscovering the provisions of the Constitution that create alternative forums for norm creation by empowering institutions such as local governments and civil associations that engage the citizenry and restrain special interests."[21] Although the Court's recent federalism jurisprudence has led many scholars to question the legitimate role of the Court in enforcing the norms of federalism,[22] this article suggests that the

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15. *See* Morton v. Mancari, 417 U.S. 535 (1974) *and* Rice v. Cayetano 528 U.S. 495 (2000).

16. *See* L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702 (2001).

17. Sam Deloria, Director of the American Indian Law Center at the University of New Mexico, Remarks at the Federal Bar Association conference on Federal Indian Law (April 2002).

18. T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY 115 (2002).

19. On the Rehnquist Court's preference for formalism, see Joshua A. Klein, *Commerce Clause Questions After Morrison: Some Observations on the New Formalism and the New Realism*, 55 STAN. L. REV. 571 (2002).

20. *See* John O. McGinnis, *Reviving Tocqueville America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 487, 489 (2002).

21. *Id.* at 490.

22. *See,e.g.*, William Eskridge & John Freejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND L. REV. 1355 (1994). While some scholars justify a role for the judicial branch, *see* Vicki Jackson, *Federalism, and the Uses and Limits of Law: Printz and Principles*, 111 HARV. L. REV. 2181 (1998), *and* Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996), many others insist that the norms of federalism are better enforced through the political process, *see* Edward Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994) (arguing that federalism should never be invoked by the Court as a reason for striking down an act of Congress) *and* Frank Cross, *Realism*

Court's general jurisprudence in other areas such as federalism and associational rights, as well as its endorsement of formalism, should have led to positive results for Indian tribes.[23] The interests of Indian tribes in autonomy and self-government are in fact congruent with the positions adopted by the Rehnquist Court elsewhere. The body of anti-tribal decisions analyzed in this article represents a lost opportunity, a failure to correctly integrate federal Indian law with the rest of the Court's jurisprudence. Hopefully, the Court's recent treatment of federal Indian law is a temporary aberration that can be rectified to fit into what McGinnis otherwise describes as sound, internally coherent jurisprudence.

The failure to properly integrate federal Indian law can be traced to the failure to properly conceptualize tribes as the third sovereigns within the American political system. Tied to the Court's conceptual failure is its refusal to include Indian tribes in what some scholars have termed the "dialogic of federalism."[24] Scholars have perceptively observed that essential to our democracy is the existence of a dialogue, a democratic conversation, between the various branches of our government and the plurality of interest groups making up our political system.[25] Justice Ginsburg, for instance, once stated that "judges . . . participate in a dialogue with other organs of government."[26] The Court's new preoccupation with federalism has only been about the relationship between the states and the federal government. As a result, Indian tribes are being squeezed out of the political equation within the federalism calculus. Part I of this article examines possible reasons why the Court has refused to properly include tribes in the dialogic of federalism.

Part II of this article assesses the impact of the Court's failure to properly conceptualize tribes in its new federalism jurisprudence. This article analyzes that impact through three types of Indian law cases: state

about Federalism, 74 N.Y.U. L. REV. 1304 (1999). Others believe that federalism is just providing the theoretical veneer for the protection of other interests. Anthony D'Amato, for instance, has argued that such language in judicial decisions "is a mode of couching the personal legislative preference of unelected judges in the publicly venerated language of a judicial decree." *Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought*, 85 NW. U. L. REV. 113 (1990).

23. For instance, the Court's use of formalism to limit congressional Commerce Clause power should have resulted in similar findings concerning interference with the internal affairs of the tribes.

24. *See* Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001) *and* Michael C. Dorf. & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 289 (1998).

25. *See* Robert Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845 (2001)(arguing that American democracy is "conversational" rather than "majoritarian."); *see also* Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93 (2000), *and* Maimon Schwarzchild, *Pluralism, Conversation and Judicial Restraint*, 95 NW. U. L. REV. 961 (2001) (discussing when judicial decisions encourage democratic "conversations" and when they do not).

26. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992). *See also* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575 (2001).

jurisdiction in Indian country, tribal jurisdiction over nonmembers, and statutory construction. The article concludes that the Court's decisions are driven by a skepticism about Congress's interest in considering the rights of states and non-Indians living on Indian reservations, as well as a deep suspicion of the tribes' willingness to protect the rights of non-Indians. This has led the Court to abandon the Indian canon in statutory construction, reverse its traditional presumptions about tribal and state authority in Indian country, and ask for clearer indication of congressional intent before the rights of states and individuals are impacted.

Part III examines the extent of the Court's willingness to allow Congress to represent the tribes' interests in the dialogic of federalism. Through an examination of recent decisions, this article reveals that the Court has expressed a desire to engage Congress more actively in a dialogue about the place and powers of Indian tribes within the American political system. New notions of federalism, however, have been a key component, if not a catalyst, in this dialogue. Examining how the new federalism may limit such a dialogue, this article concludes that, while the Court may not be legally foreclosing the dialogue between mainstream and Native American values, it may be in the process of controlling, structuring, and influencing it by imposing restrictions and conditions on the subject matter of the debate. Thus, the Court has narrowed the scope of Congress's "plenary" power over Indian affairs. This is consistent with the idea that the Court's new federalism is primarily driven by a distrust of Congress born out of a judicial belief that Congress, as an institution, is no longer capable or willing to protect the rights of states. This narrowing of congressional power also indicates that the Court has re-conceptualized its role vis-à-vis Congress in a manner that has led to the assertion of judicial supremacy at the expense of Congress, at least in the field of federal Indian law.

This article concludes with an analysis of why this narrowing of congressional power has not yet been extended to limiting the power of Congress over the affairs of the Indians.[27] This is not surprising because the Court seems to be treating the tribes not as semi-independent sovereigns but as part of the federal government. Under this view, there would be no reason to impose restrictions on the power of Congress to govern entities which are essentially viewed as being an intrinsic part of the federal government. The article concludes, however, that limitations on congressional power over the affairs of Indian tribes can be extrapolated from the place of tribes within the structure of the Constitution or by including the tribal right of self-government under the umbrella of First Amendment associational rights.

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27. Thus, in spite of its apparent mistrust of Congress, it has refused to retreat from its doctrine giving Congress plenary power over Indian affairs. *See* Robert N. Clinton, *Redressing the Legacy of Conquest*, 46 ARK. L. REV. 77, 120 (1993). *See* discussion *infra* notes 242 *et. seq.*

According to Felix Cohen, Indian law should be important to non-federal Indian law scholars because Indians fulfill within the United States system the same role that Jews played in Germany and Europe before the Second World War. As Cohen once observed, "Like the Miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere."[28] I believe it imperative for the Court to rectify some of its Indian law doctrines and uphold the tribes' right to self-government and their legitimate role in "our federalism." Not only would such a move be in conformity with the Court's political and philosophical conceptions behind the new federalism, but it would also bring coherence to a field that desperately needs it, harmonizing it with the Rehnquist Court's legacy in other fields. Such a move would relieve the Court of accusations of being anti-tribal or anti-Indian without any apparent legitimate purpose, except for the dubious one of asserting judicial supremacy at the expense of Congress.

I. Reasons For the Court's Failure to Properly Integrate Federal Indian Law and Tribes in the Dialogic of Federalism

The new federalism cases have restricted the power of Congress to interfere with the rights of states.[29] Some of these cases have focused on restricting federal power derived from the Commerce Clause[30] and Section V of the Fourteenth Amendment,[31] while others have used state sovereign immunity derived from the Eleventh Amendment to check federal power.[32] Still others have focused on the Tenth Amendment.[33] Many of these Indian law cases are about "who will control who and what" within Indian reservations, and tribal losses usually result in an equivalent jurisdictional gain by states. While Part II of this article will show how, instead of being a positive force for Indian tribes, the Court's new federalism has been detrimental to tribal interests, this part suggests some reasons for this result.

28. Felix S Cohen, *The Erosion of Indian Rights, 1950-53: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

29. The most important recent federalism decisions are New York v. United States, 505 U.S. 144 (1992); United States v. Lopez, 514 U.S. 540 (1995); Seminole Tribe v. Florida, 517 U.S. 44 (1996); City of Boerne v. Flores, 521 U.S. 507 (1997); Printz v. United States, 521 U.S. 898 (1997); Alden v. Maine, 527 U.S. 706 (1999); Florida Prepaid v. College Sav. Bank, 527 U.S. 627 (1999); United States v. Morrison, 529 U.S 598 (2000); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

30. *See* United States v. Lopez, 514 U.S. 540 (1995); United States v. Morrison 529 U.S 598 (2000).

31. *See* City of Boerne v. Flores, 521 U.S. 507 (1997); Fla. Prepaid v. College Sav. Bank, 527 U.S. 627 (1999); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

32. *See* Alden v. Maine, 527 U.S.706 (1999) *and* Seminole Tribe v. Florida 517 U.S. 44 (1996).

33. *See* New York v. United States, 505 U.S. 144 (1992) *and* Printz v. United States, 521 U.S. 898 (1997).

Although blaming the Court's anti-tribal decisions on the rise of the new federalism seems similar to Professor Getches' argument that the Court's Indian law decisions are influenced by its policy of promoting the rights of states,[34] this article does not equate the rise of the new federalism with the Court's special affinity for state power. Rather, this article agrees with those who have argued that the Court's decision to take the lead in enforcing norms of federalism is not so much about promoting states' rights as it is about the Court's loss of confidence in Congress's institutional ability to protect the place of states within the constitutional framework.[35] Although states have been the primary beneficiaries of this judicial ill will toward Congress, and under federal Indian law, the states' gains have come at the expense of the tribes, it did not have to be that way. As stated by President Reagan "[t]his Administration believes that responsibilities and resources should be restored to the governments which are the closest to the people. This philosophy applies [not only] to state and local government but also to federally recognized American Indian tribes."[36] The new federalism, therefore, is not *per se* inapposite to tribal interests. Yet, tribes have not benefited from the Court's federalism inclinations.[37] The important question is why not?

One reason for the Court's failure to adequately integrate federal Indian law with other doctrines of constitutional law is the perception that federal Indian law should, in some respect, remain *sui generis*. Although scholars have noted that attempts at integrating federal Indian law into the broader framework of constitutional doctrines have been sorely lacking among academics,[38] an underlying premise of scholars like Getches and Frickey is that federal Indian law should remain *sui generis*, just like Indian tribes.[39] Others have argued, however, that trends in constitutional law have always had an influence on the Court's Indian decisions, and yet Indian law and the tribes have managed to survive the vagaries of the different constitutional winds influencing the Court's jurisprudence.[40] Thus, Yuanchung Lee convincingly argued that for all practical purposes, the Court had abandoned Marshall's vision of

34. *See Beyond Indian Law*, *supra* note 9.

35. *See* Ruth Colker & James Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133 (2000); Philip Frickey & Steven Smith, *Judicial Review, The Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002).

36. Ronald Reagan, Statement by the President: Indian Policy, *in* FRANCIS PAUL PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY, 302-04 (3d ed., U. Neb. Press 2000).

37. *See* Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267 (2000).

38. *See* T. Alexander Aleinikoff, *Sovereignty Studies in Constitutional Law: A Comment*, 17 CONST. COMMENT 197 (2000).

39. *See* Getches, *supra* note 9; Frickey, *supra* note 14.

40. *See* Yuanchung Lee, *Rediscovering the Constitutional Lineage of Federal Indian Law*, 27 N.M. L. REV. 273 (1997).

tribal sovereignty during the *Lochner* era but the current concept of tribal sovereignty was reborn with the advent of the New Deal.[41] Lending support to this thesis is a recent article by Dalia Tsuk which persuasively argued that it is the New Deal pluralist theories of Felix Cohen in the 1930's that were at the root of the more recent political re-conceptualization of Indian tribes as governments.[42] In this article, I suggest that attempting to preserve federal Indian law as "*sui generis*" is a mistake because Indian law has not been completely *sui generis* for quite some time. In fact, the Rehnquist Court's anti-tribal decisions are better explained as a failure to properly integrate federal Indian law into the rest of the Court's jurisprudence.

Another, and perhaps more important, reason for the tribes' lack of success in benefiting from the new federalism is the Court's failure to properly conceptualize the place of tribes as political institutions operating within the American political system. At a recent Federal Bar Association conference on federal Indian law, many speakers noted that one of the crucial issues facing tribes is determining where they fit within the American political system.[43] Tribes are not states or foreign nations, and as such, their rights and obligations are not defined either in the Constitution or in international law. Although tribal rights were defined in treaties, the United States stopped making treaties with Indian tribes in 1871. Furthermore, although the Supreme Court has, since 1831, described tribes as domestic dependent nations with whom the United States has a trust relationship, what this status entails is a product of subsequent statutes, as well as evolving concepts of federal common law.

Some scholars have attributed the Court's failure to properly conceptualize tribes to its detachment from the foundational moorings laid down by Justice Marshall in the famous Cherokee Cases.[44] Other scholarship, however, raises the possibility that the Court is not abandoning Marshall's foundationalist principles, because the principles were abandoned long ago;[45] rather, it is reappraising its commitment to some of the political and cultural pluralism of the New Deal era.[46] The Court's reservations about pluralist theories in the sphere of Indian affairs seems consistent with its general suspicion of pluralism as a positive political norm demanding deference to the legislative branch.[47]

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41. *Id.*

42. *See* Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FLA. ST. U. L. REV. 189 (2001).

43. *See, e.g.*, Susan Williams at the Federal Bar Association Convention on Federal Indian Law (April, 2002).

44. *See* David Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996)[hereinafter, *The New Subjectivism*]; Philip Frickey, *Marshalling Past and Present*, 107 HARV. L. REV. 381 (1993).

45. *See* Lee, *supra* note 40.

46. *See* Tsuk, *supra* note 42.

47. *See* Jane S. Schacter, *Metademocracy: The Changing Structure in Statutory Interpretation*, 108 HARV. L. REV. 593, 603-06 (1995).

Although the issue of whether the Court is rejecting Marshall's foundational cases or reappraising the Indian New Deal seems, at first, to be just an academic exercise, it is not. For one thing, the rejection of New Deal pluralism altogether could have more nefarious consequences for Indian tribes. New Deal pluralism brought about a renewed respect for tribal self-government and the abandonment of the assimilationist policies of the allotment era.[48] In rejecting these New Deal ideals, there is a danger that the Court could inadvertently revert back to the policies which preceded the New Deal: those in fashion during the *Lochner* era and its corresponding assimilationist policies focusing on the perceived needs and rights of individual Indians over tribal interests.[49]

I believe, however, that the Rehnquist Court's general jurisprudence is, in fact, consistent with at least some of Cohen's pluralist theories.[50] The rejection of some of Cohen's New Deal theories, therefore, should not lead to the rejection of all of the Indian New Deal era decisions. In other words, to use Tsuk's terminology, the Court should not have had to throw the tribal baby of comparative and cultural pluralism out with the bath water of socialist pluralism.[51]

Contributing to the failure to adequately conceptualize tribes as distinct sovereigns that should benefit from the new federalism is the persistence of an outdated notion of the "trust" relationship existing between Indian tribes and the federal government.[52] Scholars like Mary Christina Wood have identified two strands in the trust doctrine: a positive "sovereign trust" model and a more problematic guardian-ward model.[53] Although some scholars have convincingly attempted to stress

48. *See* Tsuk, *supra* note 42.

49. *See* Lee, *supra*, note 40 (arguing that cases such as *Hodel v. Irving*, 481 U.S. 704 (1987), and *Babbitt v. Youpee*, 519 U.S. 234 (1997), that favored individual rights at the expense of tribal rights, may be indicative of such a trend. This could also explain why the Court has allowed congressional policies devised during the allotment era to influence some of today's decisions. This is especially true for cases turning on interpretations of statutes enacted before the New Deal such as in the so-called reservation disestablishment cases, the latest of which is *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998)). *See also* County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) (holding that Indian owned land which had been patented in fee pursuant to the General Allotment Act could be taxed by the county). *See generally* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. L.J. 1 (1995). *See also* discussion *infra* note 139.

50. *See* McGinnis, *supra* note 20 at 526-43 (explaining how and why the Court has favored associational rights).

51. According to Tsuk, Felix Cohen's conceptions of pluralism evolved from socialist pluralism, to systematic pluralism, and finally to comparative pluralism. The Court seems to have rejected socialist pluralism, forgotten about comparative pluralism, and kept the systematic pluralism aspect of Cohen's overall pluralist theories. This explains the Court's reluctance to view Indian tribes as distinct sovereigns, separate from the federal government, but still part of our federalism. As a result, in many of these Indian cases the Court has improperly equated tribal interests with federal interests and then proceeded on to rule in favor of the states.

52. *See generally* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

53. Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471 (1994).

the positive aspects of the trust relationship,[54] the Rehnquist Court seems to be stuck on the paternalistic guardian ward model.[55] Under this aspect of the trust relationship, the federal government is the guardian and the tribes are its wards. Evidently, the Court seems to believe that under this type of relationship the ward cannot have a distinct political existence from the guardian. Thus, while there are positive aspects to the trust relationship, the concept of a trust with Indian tribes originated in colonial times and is overall a paternalistic doctrine with racist overtones.[56] It was initially needed to bring Indian tribes within the political jurisdiction of the United States and to protect tribes from the political ambitions of the states.[57] The persistence of the trust doctrine with all its historical and colonial baggage, however, is no longer helpful in finding productive solutions to how to best integrate Indian tribes as distinct third sovereigns within the United States political system. The time to re-think or re-invent the trust doctrine has passed.[58] The doctrine should be discarded so that a new relationship can begin.[59]

II. The Impact of the Court's New Federalism on Federal Indian Law

A. The State Jurisdiction Cases: Over-Emphasizing the States' Interests in the Preemption Inquiry

One aspect of the new federalism has resulted in an increased judicial focus on the interests of states before their interests are determined to have been impacted by federal legislation.[60] This section traces the evolution of the tests used by the Court to determine if a state has regulatory and civil jurisdiction in Indian country and shows how these tests have evolved into a doctrine which privileges the interests of the states at the expense of the tribes' right to self-government.

Initially, there were two barriers to state jurisdiction in Indian

54. Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251 (1995).

55. *Id. See also* Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Paradigm for Federal Actions Affecting Tribal Land and Resources*, 1995 UTAH L. REV. 109 (1995); Ray Torgerson, *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 (1996); Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at its Development and at How its Analysis Under Contract Theory Might Expand its Scope*, 18 N. ILL. U. L. REV. 115 (1997).

56. *See* Robert Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107 (1999).

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

58. Scholarly efforts in this area have not been lacking. *See* Robert Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77 (1993) *and Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV.422 (1984).

59. What this new relationship should look like is beyond the scope of this article.

60. *See* Phillip Frickey & Steven Smith, *Judicial Review, The Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002).

country. First, state jurisdiction did not extend to Indian reservations if it infringed on the right of reservation Indians "to make their own law and be governed by them."[61] In *Williams v. Lee*, the landmark decision that first used the test, a non-Indian was attempting to sue a Navajo tribal member in a state court for a debt contracted on the Navajo reservation. The Court stated "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state actions infringed on the right of reservation Indians to make their own laws and be ruled by them."[62] Secondly, state jurisdiction may also have been preempted by operation of federal law. Thus, in its landmark decision *McClanahan v. Arizona*, the Court stated:

> The trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward the reliance on federal preemption. The modern cases thus tend to avoid reliance on platonic notion of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.[63]

While the Indian preemption test is, at its root, a test for determining whether Congress has, by implication, preempted state jurisdiction, the infringement test is a balancing test. Thus, in *Washington v. Confederated Tribes of the Colville Reservation*, after finding that federal law did not preempt state cigarette taxes imposed on non-members, the Court moved to the infringement test and stated that "*Washington* does not infringe the right of reservation Indians to 'make their own law and be ruled by them' . . . . The principle of self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the tribes and the Federal government, on the one hand, and those of the State on the other."[64]

Rehnquist wrote a separate opinion in *Colville* objecting to the "balancing" part of the infringement test because "[b]alancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress."[65] As he made clear in a later opinion, Rehnquist believed the "infringement test" was only applicable in "those rare instances in which the State attempted to interfere with the residual sovereignty of a tribe to govern its own members."[66] For Rehnquist, there was never an "infringement" test when states were attempting to regulate non-Indians; then there was only

61. 358 U.S. 217, 219-20 (1959).
62. *Id.* at 220.
63. 411 U.S. 164, 172 (1973).
64. 447 U.S. 134, 156 (1979).
65. *Id.* at 177.
66. Ramah Navajo Sch. Bd. v. New Mexico, 458 U.S. 832, 848 (1982).

a preemption test, which did not involve any balancing of the interests.[67] In Rehnquist's view, "[e]ven under the modified form of preemption doctrine applicable to state regulation of reservation activities, there must be some *affirmative indication* that Congress did not intend the State to exercise the sovereign power challenged in the suit."[68]

At the time he wrote these views, Rehnquist's position was diametrically opposed to the one held by the majority of the Court. The preemption test did not require any affirmative indication of congressional intent to preempt. The infringement test, initially at least, was meant to apply to disputes involving at least some non-members. Thus in *McClanahan v. Arizona*, a case dealing with a state's attempt to impose a state income tax on a Navajo Indian living and working on the Navajo reservation, the Court refused to apply the infringement test because "[i]t must be remembered that cases applying the *Williams* test have dealt principally with situation involving non-Indians. In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions."[69]

In the early cases, the Court was able to find state jurisdiction preempted based on ambiguous and vague federal legislation by invoking a "backdrop of tribal sovereignty" to inform the preemption inquiry.[70] Things have changed since the early 1980s, and in one of the latest cases examining whether a state had jurisdiction to tax the activities of a non-Indian performing work in Indian country, the Court described the Indian preemption inquiry as a "balancing test" between the federal and tribal interests on one side and the state's interest on the other.[71]

How the balancing of state interests first entered into the preemption analysis is revealing. Notions of balancing first surfaced in *White Mountain Apache Tribe v. Bracker*,[72] where Justice Marshall, writing for the majority, stated that the Indian preemption test consisted of "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether in the

67. Thus he wrote: "[t]hat doctrine, I had thought, was at bottom a preemption analysis based on the principle that Indian immunities are dependent upon congressional intent . . . I see no need to balance the state and tribal interests." 447 U.S. at 177.

68. 458 U.S. 832, at 854-55. I have a hard time distinguishing Rehnquist's version of the Indian preemption test from regular federal preemption not involving Indian tribes. I believe that in Rehnquist's mind at the time, these two tests involved essentially the same inquiry. Rehnquist made clear in his *Ramah* dissent that in order to be preempted, state regulations had to be incompatible with existing federal regulation, which, in effect, amounts to a regular non-Indian preemption analysis. When the regulations are compatible with the federal scheme, Rehnquist would have demanded "affirmative indication" of an intent to preempt.

69. 411 U.S. 164, 179.

70. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980); Ramah Navajo Sch. v. Bureau of Revenue, 458 U.S. 832 (1982); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

71. Ariz. Dept. of Revenue v. Blaze Constr., 526 U.S. 32 (1999).

72. 448 U.S. at 136, 145 (1980).

specific context, the exercise of state authority would violate federal law."[73] Up to that point, the interests of states were considered only as part of the infringement test. Although Justice Marshall seemed to have been under the impression that *McClanahan v. Arizona*[74] called for the consideration of state interests in the preemption inquiry,[75] an analysis of that decision clearly shows that the *McClanahan* Court was referring to the state interest in determining whether state jurisdiction was forbidden under the infringement test, not the preemption test. Furthermore, although Marshall insisted that there were two independent barriers to assertion of state jurisdiction, the infringement test and the preemption inquiry, his analysis seems to merge the two tests into one.[76]

This merging of the two tests was firmed up in another Justice Marshall opinion, *New Mexico v. Mescalero Apache Tribe.*[77] In *Mescalero*, the Court stated "[s]tate jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stakes are sufficient to justify assertion of state authority."[78] In summary, besides merging the two tests into one, the Court seemed to have transformed the original preemption inquiry devised in *McClanahan* into a flexible, subjective, and value-laden balancing inquiry. According to some scholars, balancing the interests is legitimate because "Congress typically engages in balancing in its legislative role."[79] These scholars warned however that this balancing should be done only in order to determine how Congress, not the Court, intended to accommodate these interests.[80] Since *Mescalero,* however, the Court seemed to be balancing in a vacuum. To be sure, the balancing of the interest method was to play a major and decisive role in future decisions favoring state jurisdiction. Thus in *Cotton Petroleum v. New Mexico,* Justice Blackmun, dissenting, rightly asserted:

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73. *Id.* at 145.

74. 411 U.S. 164 (1973).

75. *White Mountain*, 448 U.S. at 144.

76. 448 U.S. at 142-43. The confusion surrounding these two tests was perhaps due to Marshall's understanding that "[t]here is no rigid rule by which to resolve the question whether a particular state may be applied to an Indian reservation or to tribal members." *Id.* at 142. In *White Mountain*, 448 U.S. 136 (1980), having disallowed state jurisdiction under a preemption analysis, the Court did not feel bound to comment on whether state jurisdiction would also have been lacking under the infringement test.

77. 462 U.S. 324 (1983).

78. *Id.* at 334.

79. *See* GETCHES AND WILKINSON & FEDERAL INDIAN LAW 437.

80. *Id.* (According to the authors, "[t]here is no 'balancing' for a court to do in a preemption analysis.") While I agree that balancing the interests in order to determine congressional intent is more legitimate than engaging in an independent judicial balancing of these interests, I also believe that balancing is not always appropriate. Perhaps the major problem with balancing, even when tied to a determination of congressional intent, is that it allows the Court to ask itself what Congress would have done had it considered the States' interests, even if Congress either did not consider these interests or discarded them without comment.

> Instead of engaging in a careful examination of state, tribal, and federal interests . . . the majority's has adopted the principle of "the inexorable zero" . . . under the majority's approach, there is no preemption unless the States are *entirely* excluded from a sphere of activity and provide *no* services to the Indians or to the lessees they seek to tax.[81]

Thus, balancing the tribal and state interests has led to an under-emphasis of the tribal interests and an over-representation of state interests. Furthermore, the later cases do not explain why and how the balancing is done and seem to indicate that the Court is no longer doing the balancing to determine any implied congressional intent but is engaging in an independent balancing of the interests to determine if state regulations should be allowed.[82]

Finally, this new flexible balancing preemption inquiry was eventually extended to determine the validity of a state attempt to establish jurisdiction over tribal members, a position diametrically opposed to the original position of the Court. Thus, as demonstrated by Professor Getches, although previous cases made it clear that consideration of the states' interests should be limited to cases involving non-Indians,[83] the balancing test is now being applied to cases where the state attempts to regulate Indians within Indian reservations.[84]

In conclusion, the Court has moved from a position where vague and ambiguous acts of Congress could preempt state law upon the backdrop of sovereignty, to a preemption inquiry which balances the governmental interests involved. This "balancing," however, has allowed the Court to neutralize Thurgood Marshall's insistence that the preemption inquiry be conducted against a backdrop of tribal sovereignty. Although the Court still begins its inquiry here, by the time the state interests are considered at the other end of the inquiry, the tribal sovereignty backdrop seemed to have been forgotten. At best, this approach ignores the backdrop of tribal sovereignty; at worst, the Court has replaced it with a backdrop of state sovereignty. In this fashion, consideration of the state interests seems to now be performing essentially the same role for the states as the "affirmative indication of congressional intent" test previously advocated by Justice Rehnquist.

Ultimately, the lack of adequate consideration given to tribal interests in balancing tests can be traced to the Court's failure to

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81. 490 U.S. 163, 204 (1988) (citations omitted).

82. The later cases are *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993), *Dep't of Taxation v. Milhelm*, 512 U.S. 61 (1994), *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995), and *Arizona Dep't of Revenue v. Blaze*, 526 U.S. 32 (1999).

83. *See* Getches, *supra*, note 9, at 1627.

84. *Id.* at 1630 (citing Oklahoma. Tax. Comm'n v. Chackasaw Nation, 515 U.S. 450 (1995)). *See also* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

correctly conceptualize and integrate Indian tribes as the third sovereigns within the American political system. In effect, under the current tests, tribal interests are not considered independently from federal interests. This has proven fatal to such tribal interests in an era when, under the new federalism, the Court has privileged the interests of the states over federal interests. Unfortunately, as the next section shows, the balancing test is no longer confined to state jurisdiction cases and has recently made inroads in cases attempting to decide if tribes have inherent jurisdiction over non-members.

B. Inherent tribal sovereignty over non-members: Towards requiring indication of congressional intent before the rights of the states or non-members can be impacted.

Another aspect of federalism has been the imposition of clear statement rules in cases where federal law impacts essential aspects of state sovereignty.[85] In federal Indian law, this has translated into a more active search for clear indication of congressional intent before tribal action can impact the interests of states or non-Indians. Indian tribes used to possess inherent sovereign powers unless relinquished in treaties or specifically taken away by Congress.[86] This situation changed in 1978 with the Court's decision in *Oliphant v. Suquamish Indian Tribe,*[87] where the Court held that tribes had lost all those inherent powers that were inconsistent with their status as domestic dependent nations.[88] Since 1978, the Court has decided at least ten more cases asking whether Indian tribes possess inherent authority to assume jurisdiction over non-members within Indian reservations.[89] Except for three cases involving the tribal power to tax non-members while on Indian lands,[90] tribal interests have lost out every single time. Taken together, these inherent sovereignty cases indicate that the Court is no longer an impartial arbiter

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85. *See* Gregory v. Ashcroft, 501 U.S. 452 (1991) *and* Smith & Frickey, *supra* note 35.

86. *See* FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1945).

87. 435 U.S. 191, 208 (1978)(holding that Indian tribes did not have criminal jurisdiction to prosecute non-Indians).

88. *Id.* at 208. In Oliphant, the Court held that Indian tribes did not have criminal jurisdiction to prosecute non-Indians.

89. *See* Montana v. United States, 450 U.S. 544 (1980); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Kerr McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985); Brendale v. Confederated Tribes, 492 U.S. 408 (1989); Duro v. Reina, 495 U.S. 676 (1990); South Dakota v. Bourland, 508 U.S. 679 (1993); Strate v. A-1 Contractors, 520 U.S. 438 (1997); Atkinson Trading Co. v. Shirley, 532 U.S. 353 (2001); and Nevada v. Hicks, 533 U.S. 353 (2001).

90. Washington v. Confederated Tribes, 447 U.S. 134 (1980); Kerr McGee v. Navajo Tribe, 471 U.S. 195 (1985); and Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). The tribes also won half of *Brendale v. Confederated Tribes*, 492 U.S. 408 (1989), because the Court allowed tribes to zone non-Indian fee lands located in a part of the reservation where land was predominantly owned by the tribe or tribal members, while denying tribal zoning power over the part of the reservation where a majority of the land was owned by non-members.

in such cases and is instead more concerned about protecting the property or civil rights of non-members from what it perceives to be potentially arbitrary tribal action.

From its 1978 opinion in *Oliphant* to its 2001 decision in *Nevada v. Hicks*,[91] the Court has consistently narrowed tribal power. In *Oliphant*, the Court held that tribes could not assume criminal jurisdiction over non-Indians. In *Duro v Reina*, the Court extended the *Oliphant ruling to criminal jurisdiction over non-member Indians.*[92] In *Montana v. United States*,[93] the Court extended this line of reasoning to civil jurisdiction over the activity of non-members on non-Indian fee lands, but allowed for two potentially meaningful exceptions: when non-members have consented to tribal jurisdiction, and when the activities of non-members have a serious and direct impact on the health and welfare of the tribe, its political integrity, or its economic security.[94] In *Strate v. A-1 Contractors*, however, the Court severely limited, if not eliminated, the second *Montana* exception.[95] The Court found that the exception did not allow the tribe to control the conduct of non-Indians driving on a state highway running through the reservation.[96] Finally, in *Nevada v. Hicks*, the Court extended the *Montana/Strate* reasoning to cover non-member activities occurring on Indian owned land. The Court held that the tribal court had no jurisdiction to hear a tort case brought by a tribal member against state game wardens for wrongful acts which took place on Indian land while these state officials were investigating a crime allegedly committed by the plaintiff while he was off the reservation.[97]

Hicks will generate a lot of uncertainty because there were various concurring opinions, at least three of which disagreed with each other about the level of importance to be given the fact that the activities forming the basis of the lawsuit occurred on Indian land. Scalia, Rehnquist, and Ginsburg took the position that, for the purpose of determining whether the tribe had jurisdiction under *Montana*'s second exception,[98] the fact that the activity took place on Indian owned land was "one factor to consider in determining whether regulations of the activities is necessary to protect tribal self-government."[99] Countering the criticism of Justice O'Connor, Justice Scalia acknowledged that this

91. 533 U.S. 353 (2001).
92. 495 U.S. 676 (1990).
93. 450 U.S. 544 (1981).
94. *Id.* at 565-66.
95. 520 U.S. 439 (1997).
96. *Id.*
97. 530 U.S. 438 (1997) (for an in-depth analysis see Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement its Imperfect Notion of Federalism in Indian Country*, 36 TULS. L.J. 267 (2000)).
98. Under *Montana*, a tribe may still have jurisdiction even if the non-members were on non-Indian land, if the non-members' activities can have a direct and serious impact on the health and welfare of the tribe, its economic security, or its political integrity. 450 U.S. 544 (1980).
99. 533 U.S. at 360.

factor may at times be significant enough so as to be "dispositive."[100] Souter, Thomas and Kennedy took the position that "land status within a reservation is not a primary jurisdictional fact, but is relevant only insofar as it bears on the application of *Montana*'s exceptions."[101] Finally, O'Connor, Stevens, and Breyer thought that the status of the land where the activity took place should be a "prominent" factor in the *Montana* analysis.[102]

I have argued elsewhere that the extension of the *Montana* rule to activities occurring on Indian land came from a lack of understanding, or perhaps an unwillingness to acknowledge, why the Court in previous decisions had made a distinction between Indian and non-Indian lands when it came to recognize tribal power over non-members.[103] Justice Scalia, for instance, explained that the *Montana* rule should be extended to Indian owned lands because "*Oliphant* itself drew no distinctions based on the status of the land."[104] Land status was irrelevant in *Oliphant* because the case dealt with criminal jurisdiction and tribes were held not to have criminal jurisdiction over non-Indians as the exercise of criminal jurisdiction would have been inconsistent with the general overriding federal interest to protect American citizens from unwarranted intrusion into their personal liberty.[105] Thus tribal criminal jurisdiction could only come from an "affirmative delegation of such power by Congress."[106] Whether the act occurred on Indian or non-Indian land is thus irrelevant to such concerns. Assertion of tribal civil power is a different matter. While it is true that, as claimed by Justice Scalia,[107] the *Montana* Court held that because tribal assumption of jurisdiction over non-member was an exercise of external relations, it was inconsistent with the status of tribes as domestic nations to allow them to "independently determine their external relations."[108] The Court also believed that tribal jurisdiction over non-members on *Indian*-owned land was not such an *independent* exercise of tribal authority.

Thus, the *Montana* Court took the position that the 1868 Treaty at Fort Laramie "obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied

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100. *Id.*

101. *Id.* at 375.

102. *Id.* at 395.

103. *See* Alex Tallchief Skibine, *Making Sense Out of Hicks: A Reinterpretation*, 14 ST. THOMAS L. REV. 347 (2001) (hereinafter, *Making Sense out of Hicks)*.

104. 533 U.S. at 360. The *Hicks* Court remarked that the *Montana* Court had also stated that the *Oliphant* rule supports a more general proposition, namely that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565 (quoting Montana).

105. 435 U.S. at 210. Because under *Talton v. Mayes*, 163 U.S. 376 (1896), the Bill of Rights is not applicable to the exercise of tribal inherent authority, tribal prosecution could conceivably result in such unwarranted intrusion into personal liberty.

106. 435 U.S. at 208.

107. 533 U.S. at 378, (citing United States v. Wheeler, 435 U.S. 313 (1978)).

108. 450 U.S. at 565, (quoting from United States v. Wheeler, 435 U.S. at 326.)

by the Tribe and, thereby, arguably conferred upon the Tribe the authority to control hunting and fishing on those lands."[109] In other words, congressional consent to tribal jurisdiction could be implied from the various treaties and statutes setting up Indian reservations for the "exclusive" use of the tribes, and giving the tribes the "right to exclude."[110] It is because assertion of tribal civil jurisdiction does not generate the same concerns as assertion of tribal criminal jurisdiction that the *Montana* Court believed that congressional consent to tribal authority could be implied from the right to exclude.[111] It is also because the *Montana* Court concluded that when Congress allowed non-Indians to acquire land inside Indian reservations, it implicitly negated its previous implied consent to the continued exercise of tribal jurisdiction over those lands, that it treated non-Indian fee land differently.[112]

Hicks can be conceived as a case where the Court held that, for the purpose of tribal civil jurisdiction over non-members, creation of the reservation for the exclusive use of Indians with its implied right to exclude was no longer enough of an indication of congressional consent. The difference of opinions among the Justices, however, have led me to argue elsewhere that *Hicks* could be better conceptualized as a case demanding clear indication of congressional intent when core state functions are affected.[113] When core state functions are not involved and the non-member activities took place on Indian land, however, it seems that a majority of the Justices would still not require indications of congressional consent as a prerequisite to finding tribal jurisdiction. Instead, most of the justices would consider the status of the land in applying the second prong of the *Montana* test. Whether this will ever result in a finding of tribal jurisdiction is unclear and will require courts to engage in fact intensive analysis.

In conclusion, the Court evidently is less and less willing to recognize tribal sovereignty over non-members based on historic notions of inherent tribal sovereignty derived from federal common law. Although the Court is willing to recognize tribal civil authority over non-

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109. *Id.* at 558-59.

110. Similarly, in *South Dakota v. Bourland*, the Court stated that "pursuant to its original treaty with the United States, the Cheyenne River Tribe possessed both the greater power to exclude non-Indians from, and arguably the lesser included, incidental power to regulate non-Indian use of the lands." 508 U.S. 679 at 688 (1993).

111. The *Montana* Court statement that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation," is not inconsistent with this position and can be explained in either of two ways. First, the Court may have believed that granting the tribes the right to exclude was such an express congressional delegation. Secondly, it may have thought that the tribal exercise of the power to exclude was obviously necessary to tribal self-government.

112. Thus, because the tribes no longer had the right to exclude the non-Indians from these non-Indian owned fee lands, they would have to rely on their inherent sovereignty which the Court in *Montana* had said did not exist except if one of the two *Montana* exceptions was applicable.

113. See Alex Tallchief Skibine, *Making Sense out of Hicks*, 14 ST. THOMAS L. Rev. 347, 359-61.

members if it can be persuaded that Congress has implicitly consented to such exercise of tribal jurisdiction, the apparent refusal in *Hicks* to consider the right to exclude as such an implicit authorization indicates that the Court may be increasingly less willing to presume congressional consent to the exercise of such tribal jurisdiction. The Court appears to be looking for clearer indication of congressional intent because of its suspicion about the willingness of tribal institutions to adequately protect the interest of individuals who are not tribal members and, therefore, do not vote in tribal elections and are not represented in tribal institutions.[114] Justice Souter made such suspicions clear in his *Hicks* concurrence when he stated that he was uncomfortable with subjecting non-tribal members to the jurisdiction of tribal courts since they "differ from traditional American courts in a number of significant respects."[115] Especially troubling for Justice Souter was that tribal courts are not bound by the Fifth and Fourteenth Amendments to the United States Constitution, apply different substantive laws, and do not have the same degree of judicial independence as American courts relative to other branches of the government.[116]

Professor Frickey has suggested that underlying the Court's decisions in this area is a judicial assumption that the Court is following the unstated wishes of Congress.[117] In other words, the Court is doing what it thinks Congress would have done had Congress acted in the area. Frickey believes that the Court has assumed a legislative function and is in the process of implementing a policy of colonialism.[118] An analysis of federal legislation on this issue, however, suggests that the Court has no basis to believe that Congress would act to prohibit tribal jurisdiction over non-members. Congress enacted legislation overturning the Court's decision in *Duro v. Reina.*[119] Congress also enacted a series of "Indian" amendments to national environmental legislation such as the Clean Water Act,[120] the Clean Air Act,[121] and the Safe Drinking Water Act.[122] None of these amendments prevent the exercise of tribal authority of

114. *See* Deloria, *supra* note 17.

115. 533 U.S. at 386.

116. *Id.* Such sentiments were also evident in Justice Kennedy's opinion for the Court in *Duro v. Reina*, when he emphasized that the power of a government should come from the consent of the governed and that non-members had never consented to tribal jurisdiction, 495 U.S. 676, 693 (1990). This consent theory is especially ironic in light of the fact that Indian tribes never consented to federal or state jurisdiction, that Indians were made American citizens without their consent, and that the Court still recognizes Congress as having plenary power over Indian tribes. *See* Robert Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002).

117. *See* Frickey, *supra* note 14.

118. Such colonial policies were in vogue between the 1880s and the 1920s, a time when Congress had adopted the allotment policy to assimilate Indians into mainstream society.

119. 495 U.S. 676 (1990), overturned legislatively in 25 U.S.C. §1301. *See* discussion *infra* at notes 204 *et seq.*

120. Pub. L. No. 100-4, (codified at 33 U.S.C. §1377 (3) (1994)).

121. Pub. L. Nos. 101-549, 104 Stat. 2467, § 301 (d) (codified at 42 U.S.C. §7601(d) (1994)).

122. Pub. L. Nos. 93-523, 88 Stat. 1660, (codified at 42 U.S.C. §§300f-300j (1994)).

non-members. To the contrary, the Court of Appeals for the District of Columbia Circuit has held that the amendment to the Clean Air Act delegated congressional authority to the tribes over non-members.[123]

Also indicative is the fact that in the two statutes that have attempted to implement comprehensive national regulatory schemes, the Indian Child Welfare Act (ICWA)[124] and the Indian Gaming Regulatory Act (IGRA),[125] Congress has not acted to prevent tribal jurisdiction over non-members. While ICWA was outright pro-Indian legislation that actually conferred exclusive jurisdiction to tribal courts over certain type of child custody proceedings, the more recent gaming legislation attempted to reconcile tribal and state interests by devising a system allowing for tribal-state gaming compacts. Yet even IGRA did not attempt to deny tribal jurisdiction over non-members engaged in gaming on the reservations.[126] An analysis of tribal specific federal legislation is even more revealing. Congress has enacted at least thirteen Indian land claims settlement acts,[127] sixteen tribal restoration acts,[128] and six tribal recognition acts.[129] Almost all of these acts contain provisions for the transfer or acquisition of new lands by the tribes. Although many of these statutes do provide some jurisdiction to the states where such lands are located,[130] none of the acts prohibit the tribes from exercising civil jurisdiction over non-members.[131] Furthermore, as held in *Bryan v. Ithasca County*,[132] Public Law 280 does not extend state civil regulatory power in Indian country. Neither does Public Law 280 divest the tribes of concurrent jurisdiction in criminal matters.[133]

In conclusion, these inherent tribal jurisdiction cases seem to

123. *See* Ariz. Pub. Serv. Co. v. EPA, 211 F.3d 1280 (D.C. Cir. 2000).

124. 25 U.S.C. §§1901-1963.

125. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. 2701-2721 (1994).

126. *See generally*, Alex Tallchief Skibine, *Gaming on Indian Reservations: Defining the Trustee's Duty in the Wake of Seminole Tribe v. Florida*, 29 ARIZ. ST. L.J. 123 (1997).

127. Indian Land Settlements Act have been enacted for the Narranganसett tribe in Rhode Island, the Penobscott and Passamquoddy tribes of Maine, the Miccosukee tribe of Florida, the Wamponoag tribe of Massachusetts, the Seminole tribe of Florida, the Puyallup tribe, the Seneca Nation in New York, the Mohegan and Mahsantuckett Pequot tribes of Connecticut, the Crow tribe, the Santo Domingo Pueblo, and the Torres Martinez tribe.

128. Restoration Acts have been enacted for the following tribes and bands: Klamath, Siletz, Cow Creek Band of Lower Umqua, Coos, Coquille, Alabama Coushatta, Ysleta Del Sur Pueblo, Paiutes of Utah, Wyandotte-Peoria-Ottawa-Modoc, Menominee, Catawba, Ponca of Nebraska, Auburn Indians, Graton Rancheria, and the Paskenta Band of Pottowatomi Indians.

129. These tribes are the Shawnees, the Texas Band of Kickapoos, the Pascua Yaki, the Lac Vieux Desert section, the Pokagon Band of Potawatomi, and the Grand Traverse Band.

130. 25 U.S.C. 713f (c)(6) is typical of such sections. It says "the State of Oregon shall exercise criminal and civil jurisdiction over the reservation, and over the individuals on the reservation, in accordance with section 1162 of Title 18, and section 1360 of Title 28, respectively."

131. *See, e.g.*, Rhode Island v. Narragansett Tribe, 19 F.3d 685 (date), where 25 U.S.C. §1708, a provision very similar to Public Law 280, was held not to deny the Narrangansett tribe concurrent jurisdiction with the State of Rhode Island.

132. 426 U.S. 373 (1976).

133. *See* Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997), Vanessa J. Jimenez, & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under P.L. 280*, 47 AM. U. L. REV. 1627 (1998).

indicate that the Court's actions go beyond Professor Frickey's assertion that the Court is in the process of implementing a colonial agenda. These cases show that the Court is also in the process of asserting judicial supremacy at the expense of Congress.

Can tribes do anything to protect themselves from Supreme Court decisions which do not conform with current congressional policies and which deny tribes, in most situations, jurisdiction over non-members? Some scholars have suggested that tribes should rethink their membership policy.[134] T. Alexander Aleinikoff, for instance, argues that tribes could experiment with what he calls the concept of "denizenship," under which nonmember residents could have limited political rights by becoming non-voting tribal members, have the right to select nonvoting delegates to the tribal council, or have the right to vote but not be considered full tribal members.[135] Aleinikoff even suggested that, following the Nanuvut model, some tribes may want to open up voting to all residents, Indians and non-Indians. While I agree that Indian tribes should move from membership to citizenship, this move should not mean that all non-members currently residing on Indian reservations would automatically become tribal members. There are many long time residents within the United States who do not enjoy the right to vote in federal elections. Some of these nonvoters have the status of resident aliens under the American immigration laws. Perhaps Indian tribes should enact new immigration laws under which nonmember reservation residents could become resident aliens.[136] Such resident aliens could, upon meeting certain residency and other requirements such as pledging allegiance to the tribe, eventually become tribal citizens. Whether these new tribal citizens would have the same voting rights as the current tribal members would be a matter for each tribe to consider.[137] As a recent decision by the Navajo Supreme Court demonstrated, some tribes already have a traditional common law system under which non-members can be considered tribal members for certain purposes.[138]

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134. *See* L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 769 (2001); Mark Neath, *American Indian Gaming Enterprises and Tribal Membership: Race, Exclusivity, and a Perilous Future*, 2 U. CHI. L. SCH. ROUNDTABLE 689 (1995), Russell L. Barsh, *The Challenge of Indigenous Self-Determination*, 26 U. MICH. J.L. REFORM 277, 301-02 (1993).

135. T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY 148 (2002).

136. Indians used to joke that their problems at the time of Columbus was that they did not have an immigration policy. In effect, I am not so sure that they did not. The problem is that these tribal policies were ignored by the superior powers.

137. For suggestions outlining various models tribes may wish to pursue, see Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 467-71 (2002).

138. *See* Means v. The Dist. Court of the Chinle Judicial Dist., Supreme Court of the Navajo Nation, 1999 No. SC CV-61-98 (finding that Russell Means, a member of the Ogalala Sioux Nation, had through marriage to a tribal member and residency on the Navajo reservation, become associated with the Navajo tribe as a *Hadane*, thus allowing the Tribe to acquire criminal jurisdiction over him; the court also held that the Navajo Nation had jurisdiction over some nonmember Indians residing on the reservation through the treaty signed between the Nation and the United States in

C. Statutory Construction: Abandoning the Indian Liberal Construction Rule, and Protecting Property Rights

A consequence of the Court's expansion of federalism and its concomitant requirement for more specificity from Congress in revealing its intent has been the apparent abandonment of the Indian liberal construction rule except in treaty interpretation cases. Under this rule, sometimes referred as the "Indian canon," courts are to interpret statutes enacted for the benefit of Indians liberally with ambiguities resolved to the benefit of the Indians.[139] In *Chickasaw v. United States*, however, after taking the position that the Indian cannon is just another non-substantive cannon and is not a mandatory rule, the Court refused to apply the canon, observing that "nor can one say that the pro-Indian canon is inevitably stronger, particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue."[140] Although the Court also held that the Indian canon would produce an interpretation that would conflict with the intent of Congress, Justice O'Connor in dissent argued that such intent was far from clear. She further explained that the Indian canon should have been used because:

> [R]ooted in the unique trust relationship between the United States and the Indians, the Indian cannon presumes congressional intent to assist its wards to overcome the disadvantage our country has placed upon them. The Indian canon applies to statutes as well as treaties: The form of the enactment does not change the presumption that Congress generally intends to benefit the Nations.[141]

Thus stated, however, that justification only overcomes the argument that the canon is solely applicable to treaties. It does not answer the majority's argument that use of the canon is discretionary. The use of the canon should not be discretionary because the canon is a "substantive" rule of statutory construction.[142] Anchoring the use of the

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1868.)

139. *See* Montana v. Blackfeet Tribe, 471 U.S. 759, 766-67 (1985) *and* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985). In treaty cases, courts are supposed to interpret the terms of a treaty according to how Indians would have understood such terms at the time of the signing. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

140. 534 U.S. 84, 95 (2001).

141. *Id.* at 99.

142. I have argued elsewhere that, contrary to the argument made by Justice Scalia in *A Matter of Interpretation, Federal Courts and the Law* (1997), the Indian Canon is not just another grammatical Latin canon but is, just like the *Chevron* rule, a substantive rule. *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). Of course, describing

canon on Indians being "defenseless" or "weak" can be linked to the Court's disregard for the Indian policies of the New Deal and its reaching back to a vision of the trust relationship prevalent during the Allotment Era. This view held that the trust relationship was necessary not to protect tribal self-government but to prepare Indians to be assimilated into the mainstream of American society.[143] Accordingly, Indians were too "primitive" and "incompetent" to be released immediately into society's mainstream and needed a period of tutelage under the federal trusteeship before being ready for assimilation.[144]

Professor Phillip Frickey has argued that, according to Justice John Marshall's foundational cases, the Indian canon is not derived from the "defenseless and weak" status of the tribes, but from their status as domestic dependent nations under the Constitution.[145] In other words, according to Frickey, the canon is based on the internal structure of sovereignty in the American political system. To Marshall, the Indian canon was an integral part of the doctrine justifying the incorporation of tribes within the United States not as states or foreign nations, but as dependent domestic nations having a trust relationship with the United States. From such arguments, it seems logical to derive the existence of the canon from what came along with this dependent status: the right of Congress to take tribal land by treaty or conquest without such taking being subjected to either international law or the United States Constitution. In other words, it can be argued that the canon was devised by Marshall to counterbalance the harsh effects of the doctrine of discovery that incorporated Indian tribes within the geographical limits of the United States without their consent.[146] One of these harsh effects was being subjected to the authority of Congress which eventually would be recognized as "plenary." Discarding the Indian canon when interpreting statutes enacted pursuant to this plenary power, therefore, should logically imply that the Court should also abandon the notion that there is such a concept as an unbounded congressional plenary power

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the Indian canon as substantive does not answer the question of whether the canon should take precedent over another substantive canon like the *Chevron* rule. *See also* Williams v. Babbitt, 115 F.3d 657 (9th Cir. 1997) (refusing to allow the Indian Canon or the *Chevron* rule to trump the rule according to which courts are to interpret statutes so as to avoid raising serious constitutional questions).

143. Professor Mary Christina Wood has accurately observed that the trust relationship can be conceptually and historically divided into two strands: the sovereign-trust model, as originally proposed by Chief Justice John Marshall, and the guardian ward model which prevailed during the Allotment Era. While the sovereign-trust model's goal is to protect tribal self-government, the guardian ward model is a paternalistic concept which treats Indians as racially inferior and is aimed at protecting individual Indians from their own "incompetency." See Mary Christiana Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1495-1505 (1994).

144. *See, e.g.*, United States v. Sandoval, 231 U.S. 28 (1913).

145. *See* Frickey, *Marshalling Past and Present*, 107 HARV. L. REV. 381 (1993), *supra*, note 13.

146. *See* Johnson v. M'intosh, 21 U.S. 543 (1823).

over the internal affairs of the tribes.[147]

Scholars have also argued that the Court has been favoring a pragmatic type approach to statutory interpretation in Indian cases instead of the more traditional techniques such as textualism or intentionalism.[148] Although this is true for some types of cases such as the reservation disestablishment cases,[149] it is not true of others. Thus, in both *Minnesota v. Mille Lacs Band of Chippewa Indians*,[150] and *Idaho v. United States*,[151] the Court engaged in an exhaustive search about congressional intent through legislative history. In *Mille Lacs*, a majority of five Justices held that a subsequent treaty and Executive Order did not deprive the Chippewas of usufructuary rights guaranteed to them in an earlier 1837 treaty. One reason for the decision was that the Court required but could not find specific congressional authorization for the subsequent Executive Order purporting to terminate the previous treaty right. Also significant was the majority's refusal to go along with the four dissenters who took the position that the treaty rights could not have survived Minnesota statehood since these rights were inconsistent with fundamental attributes of state sovereignty guaranteed under the equal footing doctrine.

In *Idaho*, the Coeur d'Alene Tribe argued that Congress intended that the tribe continue owning the lands underneath the waters of Lake Coeur d'Alene even though these waters were navigable and therefore would have passed on to the State of Idaho upon statehood had it not been for the Act of Congress ratifying a previous Executive Order. The Court did a thorough analysis of the historical context at the time Congress enacted the legislation and held that foremost among congressional concerns was a peaceful settlement with the Indians, yet Congress knew that in order to keep the peace, additional land could not be taken from the Indians without their consent. Because there was ample evidence that Congress knew that the Indians would not have consented to relinquish ownership of the lake, the Court was able to derive a specific congressional intent to allow the Indians to maintain

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147. Thus, while Congress could still enact statutes regulating the affairs "with" the Indians, it should not be able to regulate the affairs "of" the Indians. *See* discussion at notes 242 *et. seq. infra*.

148. *See* Getches, *Beyond Indian Law*, *supra* note 9; Phillip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic nature of Federal Indian Law*, 78 CAL L. REV. 1137 (1990).

149. The latest reservation disestablishment cases are South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998), and Hagen v. Utah, 510 U.S. 399 (1994). Although the disestablishment cases provide a good example of the Court's "pragmatic" approach, they also reflect a certain degree of intentionalism since the Court is, in effect, asking itself whether Congress intended to disestablish the reservations. On the other hand, if the Court was consistent with its statutory method of interpretation, the Court should follow the principles of textualism in deciding these reservation disestablishment cases, or at least require Congress to state more clearly that the reservation had been disestablished. Yet these cases do not ask for such evidence. For an insightful discussion of these cases, see Getches, *Beyond Indian Law* at 299-307, *supra* note 9.

150. 526 U.S. 172 (1999).

151. 533 U.S. 262 (2001).

their ownership of the lake even after statehood.

The *Mille Lacs* and *Idaho* cases reflect a concern not only for property rights, in this case tribal property rights, but also a judicial willingness to analyze historical contexts surrounding Acts of Congress interfering with such rights. In this fashion, these cases can be distinguished from cases such as the reservation disestablishment cases that affected the tribes' political rights over the property of non-members. Thus, both the disestablishment cases and the two treaty cases reflect concern for property rights.[152] I do not want to infer here that tribal property rights are as respected as individual property rights or that such tribal rights would always be respected.[153] For instance, in cases involving the issue of whether tribes have inherent powers over non-members, the Court transformed a tribal political power (the right to exclude) into a property law concept to justify the lack of such power,[154] then proceeded to misapply the rule,[155] and finally totally abandoned it.[156]

C. Conclusion to Part II

While the Court has not completely abandoned its willingness to support the political and cultural pluralism models established for Indian tribes during the New Deal, the Rehnquist Court is no longer interested in assuming a leading role in promoting pluralist norms in federal Indian law. Its failure to properly conceptualize Indian tribes as third sovereigns within the United States and its willingness to merge tribal with federal interests has led the Court to focus instead on protecting the interests of non tribal members and the states from perceived tribal and congressional inadequacies in this regard.

The Court is looking for Congress not only to assume more of a role in delineating the rights of states and non-members within Indian country but also to be more specific in its pronouncements. In this fashion, the Court seems to be protecting individual and states' rights in the same manner as it has protected tribal treaty rights from

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152. In the disestablishment cases, interference with non-member property rights can occur because the continued existence of the reservation continues tribal jurisdiction over such lands, although this is a much less likely occurrence after *Strate* and *Hicks*.

153. Tribal property rights were on the losing end in *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865 (1999) and *United States v. Dann*, 470 U.S. 39 (1985). *See also* Rebecca Tsosie, *Land Culture and Community: Reflections on Native American Sovereignty and Property in America*, 34 IND. L. REV. 1291 (2001).

154. *See* Brendale v. Confederated Tribes, 492 U.S. 408 (1980). *See also* C.E. Willoughby, *Native American Sovereignty Tales a Back Seat to the "Pig in the Parlor:" The Redefining of Tribal Sovereignty in Traditional Property Law Terms*, 19 S. ILL. U. L.J. 593 (1995).

155. *See* Strate v. A-1 Contractors, 520 U.S. 438 (1997). *See also* Joseph William Singer, *Sovereignty and Property*, 86 NW. L. REV. 1 (1991) (arguing that the Court misapplied property law concepts in order to deny tribal jurisdiction over non-Indians).

156. *See* Nevada v. Hicks, 121 S. Ct. 2304 (2001); Skibine, *Making Sense out of Hicks*, *supra* note 104.

congressional abrogation.[157] Although the Court seems interested in promoting a dialogue with Congress, whether this willingness can be translated into judicial support for integrating the tribes into the dialogic of federalism is another matter. Although the existence of such a dialogue would seem to contradict Professor Frickey's argument that the Court has taken the lead in implementing the past policies of colonialism,[158] this may not be the case. Whether the Court is, in fact, implementing a neo-colonial agenda can be deduced by analyzing the impact of the Court's decisions on the dialogue. Part III addresses this issue.

III. The Court's New Dialogic Approach and its Impact on the Plenary Power

The Court's decisions in the cases just reviewed can have three types of impact: first, they can encourage a dialogue between the tribes, the Congress, the states, and Courts. Second, they can legally prevent such dialogue as a matter of Constitutional law,[159] or, third, they can dictate the terms of the dialogue. The Court has given plenary power to Congress over Indian affairs, something the text of the Constitution did not mandate. One of the theses of this article is that the Court is now in the process of reassessing that power in light of its suspicion that Congress, as an institution, has not adequately protected the rights of non-tribal members and the States. The decisions reviewed in this part indicate that the Court is in the process of attempting to dictate the term of the dialogue. This part's first section examines how the Court may have narrowed the scope of congressional plenary power by redefining the meaning of the term "Indian Affairs." The second section analyzes the problems raised by the "Duro Fix."[160] At issue in this section is whether Congress can reaffirm the existence of an inherent tribal power previously found by the Court to have been implicitly divested. The last section argues that this reconsideration of the role of Congress should lead the Court to reconsider the "plenary" aspect of Congressional power over the affairs of the Indians.

A. *Seminole Tribe v. Florida* & *Rice v. Cayetano*: Narrowing the Scope of Plenary Power through Redefining the Meaning of "Indian affairs."

157. *See* United States v. Dion, 476 U.S. 734 (1986), in which the Court confirmed that Congress could abrogate Indian treaty rights but required clear indication that Congress actually considered the conflict between the statute and the treaty right but chose to abrogate the treaty.

158. *See* Frickey, *Our Age of Colonialism*, *supra* note 14.

159. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

160. This is the legislation that overturned the Court's decision in Duro v. Reina, 495 U.S. 676 (1990), holding that Indian tribes had no inherent power to exercise criminal jurisdiction over non-member Indians, 25 U.S.C. 1301.

In *Seminole Tribe v. Florida*,[161] the Court held that Congress could not, pursuant to the Indian or Commerce Clauses, abrogate the sovereign immunity possessed by the states pursuant to the Eleventh Amendment. Although the Court remarked that "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,"[162] this proved to be of no avail to Congress in overriding the Eleventh Amendment. Yet at the same time, the Court steadfastly continues to assert that Congress does have plenary power over Indian affairs.[163] Thus, *Seminole Tribe* shows that, while the plenary power of Congress is still being fully recognized over Indian tribes, it is being constrained when it runs against the constitutional rights of states. Subordinating the plenary power over Indian affairs to this new sensitivity towards States' rights made one scholar remark that "the limitation on congressional power that results directly from *Seminole* has potentially far-reaching effects on future congressional regulation of Indian Affairs."[164]

The Court's decision in *Seminole* is ironic. Of all the state jurisdiction cases that have reached the Court,[165] one of the very few and perhaps the greatest Indian victory in this area was *Cabazon Band of Mission Indians v. California*,[166] a gaming case where the Court held that California did not have jurisdiction to regulate gaming on the reservations. *Cabazon* was also directly responsible for Congressional enactment of the Indian Gaming Regulatory Act (IGRA).[167] IGRA is one of two instances in which Congress reasserted primacy over Indian affairs in an area of the law that had been ruled from the bench by decisions based on federal common law.[168] Although some may disagree,[169] IGRA was not anti-tribal legislation just aimed at overturning a pro-Indian decision.[170] It truly was a legislative effort to mediate between the interests of the tribes and the States. Thus, it represented Congress's vision on how to implement a fair solution to tribal and state

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161. 516 U.S. 836 (1996).

162. *Id.* at 62.

163. *See, e.g.*, Cotton Petroleum v. New Mexico, 490 U.S. 163, 192 (1989) ("The central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.").

164. Martha Field, *The Seminole Case, Federalism, and the Indian Commerce Clause*, 29 ARIZ. ST. L. J. 2, 19-20 (1997).

165. *See* discussion *supra* notes 53.

166. 480 U.S. 202 (1987).

167. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-1721.) *See* Ronald Santoni, *The Indian Gaming Regulatory Act, How Did We Get Here? Where are we Going?* 26 CREIGHTON L. REV. 387 (1993).

168. The other instance was the *Duro fix* legislation. *See* discussion supra notes 204.

169. *See, e.g.*, for instance Rebecca Tsosie, *Negotiating Economic Survival, The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L. J. 25 (1997).

170. *See* Alex Tallchief Skibine, *Gaming on Indian Reservation: Defining the Trustee's Duty in the Wake of Seminole Tribe v. Florida*, 29 ARIZ. ST. L. J. 121 (1997).

conflicts. It is this vision that the Court attacked and attempted to destroy in *Seminole Tribe.*[171] The case, therefore, provides indications that the Court may not be willing to engage in a free-wheeling dialogue with Congress but may instead impose some limits on Congress's attempts to reassert primacy over areas previously ruled by courts pursuant to federal common law.

If *Seminole* was about protecting states by finding limits on congressional power over Indian Affairs from the Eleventh Amendment, *Rice v. Cayetano*[172] performed the same task for individual non-Indians using the Fifteenth Amendment.[173] The Court in *Rice* held that the State of Hawaii could not restrict the right to vote in a state election to Native Hawaiians even though the election was for an office administering funds only benefitting Native Hawaiians. Because, according to the Court, the classification of Native Hawaiians was a racial classification and the voting restriction concerned a state election, the Fifteenth Amendment to the United States Constitution prohibited such race based restrictions.[174] The Court also stated that the Hawaiian election at issue could not be compared to tribal elections established by Congress, that limit voting to tribal members, because "if non-Indians lack a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi sovereign."[175]

Although *Rice* could be construed as being limited to Native Hawaiian issues, the Court also held that, "even were we to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or Native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort."[176] In other words, even if the same kind of scheme had been devised for Native Americans, it would also have been unconstitutional. *Rice* does continue, therefore, a process started by the Court in *Seminole Tribe* that finds limitations on the power of Congress when actions taken pursuant to its "plenary" Indian Commerce power infringe on other rights guaranteed in the Constitution.

A considerable amount of academic ink has been spent commenting on *Rice v. Cayetano* and whether the case announced the

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171. Under IGRA, states allowing certain gaming activities within their borders had to negotiate gaming compacts with Indian tribes and tribes were allowed to sue states that failed to negotiate such compacts in good faith in federal courts. *Seminole Tribe* held that, under the Eleventh Amendment, Congress did not have the power to allow such suits against non-consenting states.

172. 528 U.S. 495 (2000).

173. For an article that accurately predicted this, see Stuart M. Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L. J.537 (1996).

174. Section 1 of the Fifteenth Amendment states that"[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition or servitude."

175. *Id.* at 520.

176. 528 U.S. at 519.

demise of *Morton v. Mancari*.[177] In *Mancari*, the Court held that Congress had the power to enact a kind of affirmative action program for tribal members seeking employment within the Bureau of Indian Affairs (BIA). The Court based its decision on the plenary power of Congress, which it stated was derived from the Indian Commerce clause and the power to make treaties.[178] It also stated that such preferences were not racial but were given to members of quasi sovereigns with whom the United States has a trust relationship.[179] As such, congressionally granted preference in employment within the BIA would be sustained as long as it is rationally tied to the fulfillment of the trust relationship.[180] In other words, the strict scrutiny test was not applicable.[181] The question being raised after *Rice* is whether it announces a chink in the *Mancari* armor. Thus, if the only reason the strict scrutiny test was not applied in *Mancari* was because the classification was found not to be based on race but rather on a political classification, the argument being raised is that if Native Hawaiians are a racial classification, certainly members of Indian tribes could also be considered as constituting a racial class.

To the apparent regret of some commentators,[182] however, the Court in *Rice* reaffirmed the continuing validity of *Mancari* for programs benefitting members of Indian tribes,[183] although it did emphasize that the *Mancari* Court confined the case to the authority of the BIA, an agency described as "*sui generis*."[184] *Rice* may have, however, announced something more ominous. For instance, it is interesting that the *Rice* Court refused to answer whether Congress could bring Native Hawaiians under its Indian Commerce Clause power by vesting tribal status on them.[185] The Court also refused to shed light on whether its decision casts some doubt on the validity of the underlying structure and trusts which were set out to benefit Native Hawaiians.[186] The refusal to

177. 417 U.S. 535 (1974). *See, e.g.*, John Tehranian, *A New Segregation? Race, Rice v. Cayetano, and the Constitutionality of Hawaiian-only Education and the Kamehameha Schools*, 23 HAW. L. REV. 109 (2000), Kimberly Costello, *Rice v. Cayetano: Trouble in Paradise for native Hawaiians Claiming Special Relationship Status*, 79 N.C. L. REV. 812 (2001), L Scott Gould, *Mixing Bodies and Beliefs*, *supra* n.16.

178. 417 U.S. at 551-52.

179. *Id.* at 554.

180. *Id.* at 555.

181. Although the *Mancari* Court upheld the exercise of congressional power in that case, the decision nevertheless announced the end of an era when the plenary power of Congress over Indian Affairs was extra-constitutional. Under *Mancari*, the power of Congress over Indians is considered derived from the Commerce power and the treaty power. Unless acting pursuant to its treaty power, however, the power of Congress is constrained by the Tenth Amendment and other provisions of the Constitution. *See* Missouri v. Holland, 252 U.S. 416, 434 (1920).

182. L Scott Gould, *Mixing Bodies and Beliefs*, *supra* note 16 (questioning the constitutionality of legislation singling Indians for special treatment because tribal membership is racially based).

183. *Id.* at 519-20.

184. *Id.* at 520.

185. 528 U.S. at 518.

186. *Id.* Also of some importance is the fact that the Court refused to venture an opinion on

utter any pronouncements on such issues raises red flags that perhaps Native Hawaiian Affairs may not be among these "Indian Affairs" over which Congress wields plenary power. Thus, the next item on the Court's agenda may be redefining exactly what are these "Indian Affairs" over which Congress has plenary power.

Williams v. Babbitt[187] is illustrative of such a potential case. In *Williams*, the Ninth Circuit speaking through Judge Kozinski, raised legitimate questions concerning the continuing validity of *Mancari* to shield programs giving preference to tribal members from the reach of cases such as *Adarand Constructors v. Pena*.[188] At issue in *Williams* was the legitimacy of an Interior Department's interpretation of the Reindeer Industry Act as allowing only Alaskan Natives to import reindeers from Canada to Alaska.[189] Finding that such interpretation would raise serious constitutional questions concerning the equal protection rights of non-natives, the Ninth Circuit refused to interpret the Act as prohibiting non-natives from importing reindeer. The court remarked that adding to its constitutional doubts about the legitimacy of the government's interpretation was the Supreme Court's recent decision in *Adarand* that subjected any federal racial classification to strict scrutiny.[190] In light of these serious constitutional doubts, the Ninth Circuit limited *Mancari* to "shielding only those statutes that affect uniquely Indian interests."[191] The Reindeer Industry Act was not such a statute since there was nothing traditionally or uniquely "Indian" about the Reindeer industry.[192]

The California state courts' treatment of the Indian Child Welfare Act (ICWA),[193] provides another example of the courts' concern about potential overreaching by Congress beyond strictly "Indian Affairs." ICWA imposes different requirements for the termination of parental rights involving Indian children. The Act also requires state courts to transfer certain Indian child custody proceedings involving Indian children to tribal courts unless certain exceptions apply. In *re Bridget R.*,[194] a California court of appeals held that, without the so-called "existing Indian family" doctrine, ICWA would be unconstitutional as a denial of due process, equal protection, and as an unwarranted extension

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whether Congress could delegate to a State "the broad authority to preserve that status." Although not mentioned by the Court, perhaps some members of the Court thought that such congressional action could involve some difficult Tenth Amendment issues. In other words, Congress may not be able to delegate to the states the power to administer the trust relationship because Congress cannot under the Tenth Amendment commandeer state officials to implement federal programs.

187. 115 F.3d 657 (9th Cir. 1997).

188. 515 U.S. 200 (1995).

189. Reindeer Industry Act of 1937, 25 U.S.C. §§ 500 *et. seq.*

190. 115 F.3d 657, 663-66.

191. *Id.* at 665.

192. The court remarked that reindeers had only recently been introduced to Alaska from Siberia and Scandinavia. *Williams*, 115 F.3d at 660.

193. 25 U.S.C. §§ 1901 *et seq.*

194. 49 Cal. Rptr. 2d 507.

of congressional power beyond its Indian Commerce power thus resulting in a violation of the rights of states guaranteed under the Tenth Amendment.[195] To survive the equal protection challenge, the court held that the different rules applicable to child custody proceedings involving Indian children had to be tied to "the social, cultural, and political relationship between Indian children and their tribes.[196] In other words, the Indian child had to be connected to an existing Indian family. Absent such social, cultural, or political relationship, the special treatment for Indians would only be justified on account on race and, as such, its constitutionality would have to be evaluated under the strict scrutiny test which would most certainly doom such different treatment.

Addressing concerns raised under the Indian Commerce Clause and the Tenth Amendment, the *Bridget R.* court held that because family relations are traditionally reserved to the states, "where it is contended that a federal law must override state law on a matter relating to family relations, it must be shown that application of state law in question would do a major damage to clear and substantial federal interests."[197] After mentioning that the principle of tribal self-government seeks an accommodation between federal and tribal interests on one hand and the state's interest on the other, the court stated that any congressional action interfering with those state interests had to be related to the purpose of acting as a guardian to the tribe.[198] This meant that such congressional action must be done for the purposes of protecting tribal self-government, or at least be tied to a specific ICWA purpose such as promoting the stability and securities of Indian families and Indian tribes. The Court concluded by mentioning that the reasoning of *Lopez v. United States*[199] should logically apply with respect to the power of Congress under the Indian Commerce Clause.[200] In other words, the Court was of the opinion that Congress acts beyond its Indian Commerce power whenever there is no adequate nexus between the enumerated power and the legislation it enacted. The California court found no such nexus when there is no "Indian" family in that the family of the child maintains no social, political, or cultural connection with the Indian community.[201]

Indeed, the Commerce Clause purports to give Congress authority over Indian "tribes," and does not give Congress any separate authority over individual Indians, at least not over issues not also affecting tribes

195. *Id.* at 1502-11.
196. *Id.* at 1508.
197. *Id.* at 1510, citing Rose v. Rose, 481 U.S. 619, 625 (1987).
198. *Id.* at 1511.
199. 514 U.S. 540 (1995).
200. *Id.*
201. *Id.* For scholarship critical of the exemption, *see* Sandra C. Ruffin, *Posmodernism, Spirit Healing, and the Proposed Amendments to the Indian Child Welfare Act*, 30 MCGEORGE L. REV. 1221 (1999); Samuel Prim, *The Indian Child Welfare Act and the Existing Indian Family Exception: Rerounting the Trail of Tears?*, 24 LAW & PSYCHOL. REV. 115 (2000)

generally. Congress, for instance, could not require Indians to sit in the proverbial back of the bus. Acknowledging that there has to be "some limits on Congress's power to declare an individual or group Indian and to justify special legislation . . . on this basis,"[202] Professor Carole Goldberg in a recent article has identified three responses to what she called "anti-preference attacks."[203] After finding problems with what she termed the "strict scrutiny" and "citizenship" responses,[204] she settled on the "Indian Commerce Clause" response as the most promising one. This response rests "on a claim that the equal protection requirements of the Constitution have only limited applications for federal legislation, because the Indian Commerce Clause of the Constitution specifically authorizes the exercise of federal power with respect to tribes in particular."[205] In other words, because the Constitution itself sets out Indian tribes for special treatment in the Commerce Clause, the fact that tribal members can be racially identified as "Indians" should not be an issue when Congress treats "Indians" differently in legislation enacted pursuant to the Clause.

Realizing that the most serious argument that can be raised against this response is whether it can be extended to legislation directed at individual Indians rather than tribes, but aware of the problems generated by the implementation of the existing Indian family doctrine in California,[206] Professor Goldberg suggested that "the Indian Commerce Clause response requires the application of a criterion of "Indianness," and a nexus between benefiting individual Indians and benefiting a tribe."[207] She further clarified that, "[u]nder the requirement of an articulated tribal interest, a preference for individuals could not pass legal muster unless Congress identified the tribal interest that justified the enactment."[208] Although made in the context of defending congressional action from attacks raising equal protection challenges, Goldberg's argument also provides a good answer to those who see a need to prevent Congress from overreaching by arbitrarily extending the definition of "Indian Affairs." Thus, under her model, Congress could not, purporting to enact legislation under its Indian commerce power,

202. Carole Goldberg, *American Indians and "Preferential Treatment,"* 49 U.C.L.A L. REV. 943, 970-71 (hereinafter, *Preferential Treatment*). The Court recognized such limits early on when it stated in *United States v. Sandoval* that "it is not meant by this that Congress may bring a community or body or people within the range of this power, by arbitrarily calling them an Indian tribe." 231 U.S. 28, 46.

203. *Id.*

204. Goldberg believes that the government would have problems meeting the narrow tailoring prong of the strict scrutiny test. She also objects to the fact that the use of the test presupposes that Indians are merely another racial minority. Finally, she finds fault with the citizenship response in that it insists that Indians can never be a racial category since they are a political classification. *Id.*

205. Goldberg, *Preferential Treatment*, 49 U.C.L.A. L. REV. at 966, *supra* note 202.

206. *Id.* at 971.

207. *Id.* at 970-71.

208. *Id.* at 973.

enact preferential rights for individual Indians or affect the rights of states outside the reservations unless there was a nexus between the legislation and the role of Congress as a trustee for Indian tribes. Therefore, under Goldberg's thesis, there would still need to be an "existing Indian family" requirement under ICWA, but she would give deference to Congress and/or the tribes in determining whether in fact there was such an existing Indian family in a particular case.[209]

The same reasoning should also justify the constitutionality of statutes that carve exemptions for tribal members practicing traditional Indian religions such as the 1994 amendments to the American Indian Religious Freedom Act.[210] Enacted as a response to the Court's decision in *Oregon v. Smith*,[211] the amendments provide members of Indian tribes practicing traditional Indian religions with immunity from federal and state laws restricting the use of Peyote even if such use occurred off Indian reservations. Although lower courts have been struggling with whether such an exemption either denies non-tribal members equal protection of the law or violates the Establishment Clause, the majority of courts have relied on *Morton v. Mancari* to protect such legislation from equal protection claims.[212] These courts have also dismissed Establishment Clause claims by taking the position that, in carving out an exception for tribal members, Congress attempted to protect Indian culture and not Indian religion *per se*.[213] Thus, as long as the special treatment is viewed as granting cultural rights to a political entity, it should be upheld.[214]

The criminal regulation of drugs is a core state function. Such legislation, however, should be able to withstand Tenth Amendment challenge because there is a nexus between the exemption provided to individuals and tribal interests because Congress was providing the exemption to protect tribal cultures. The exemption, therefore, is rationally tied to the fulfillment of Congress' unique obligations to the tribes pursuant to the trust relationship.

As previously discussed, starting in 1978, the Court gradually

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209. *See* Goldberg, *Preferential Treatment*, 49 U.C.L.A. L. REV. at 973, *supra* note 202 (stating that "[t]hus I suggest considerable judicial deference to congressional choices about the class of individuals subject to Indian legislation under the Indian Commerce Clause, and assessment of those choices in relation to the tribal interest advanced by the legislation. The requirement of a tribal interest in legislation directed at individual Indians should be analyzed with tribal governments, culture, and economies in mind.")

210. 42 U.S.C. § 1996a (1994).

211. 494 U.S. 872 (1990).

212. *See, e.g.* Peyote Way of God v. Thornburg, 922 F.2d 1210 (5th Cir. 1991); United States v. Warner, 595 F. Supp. 595 (D.N.D. 1984).

213. *See* Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989); Rupert v. Fish & Wildlife Serv., 957 F.2d 32 (1st Cir. 1992) (Tribal member exemption for possession of eagle feather).

214. On the other hand, if it is viewed as giving either racial or religious preference, the legislation might be suspect. *See* Larkin v. Grendel's Den Inc., 459 U.S. 116, 127 (1982); Christopher Parker, Note, *A Constitutional Examination of the Federal Exemptions for Native American Religious Peyote Use*, 16 B.Y.U. J. PUB. L. 89 (2001).

eroded the inherent sovereignty of Indian tribes by finding that in many instances, tribes had been implicitly divested of the power to assume jurisdiction over non-members located on Indian reservations.[215] In the next section, this article continues to assess the Court's dialogic approach to federal Indian law by analyzing whether the Court will allow Congress to reassert its primacy over Indian affairs by enacting legislation authorizing the tribes to reassume jurisdiction over such non-members.

B. The Duro Fix and the Power of Congress to Confirm or Delegate Governmental Power to the Tribes.

In *Duro v. Reina*,[216] the Court held that Indian tribes had been implicitly divested of the inherent sovereign power to criminally prosecute non-member Indians. A year later, Congress responded to the decision by amending the Indian Civil Rights Act of 1968 to make sure that included in the Acts' definition of "tribal powers of self-government" was the "inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[217] Because Congress is reaffirming a tribal power that is not subject to constitutional constraints except through the Indian Civil Rights Act,[218] I believe that the Court's general focus on protecting individual rights, its belief that such rights are not adequately considered or protected by the Congress, as well as its belief that such rights would not be protected by the tribes since non-members cannot vote in tribal elections, all indicate that the Court will eventually seriously scrutinize the power of Congress to either reaffirm the existence of such inherent power or delegate such power to the tribes. In light of the rumored tribal effort to legislate a "Hicks Fix,"[219] and the judicial trend to find new limits on the power of Congress over Indian Affairs, the on-going debate concerning the legitimacy of the Duro Fix assumes even more importance.

There are two issues here. First, subjecting non-member Indians, but not other non-Indians to tribal jurisdiction may be a denial of equal protection because it amounts to racial discrimination that cannot be justified under the strict scrutiny test. The second issue is whether Congress can authorize tribes to prosecute non-members without affording them the full constitutional protection of the Bill of Rights.

1. *Subjecting non-member Indians to tribal jurisdiction may be a denial of equal protection*

215. *See* discussion *supra* notes 74.
216. 495 U.S. 676 (1990).
217. 25 U.S.C. § 1301 (1991).
218. 25 U.S.C. § 1301. See also Talton v. Mayes, 163 U.S. 376 (1896).
219. *See* discussion of Nevada v. Hicks, *supra* notes 92-100.

On the first issue, I have previously argued that, consistent with the Court's decision in *Mancari*, Congress could confer such jurisdiction to the tribes without offending the Equal Protection Clause as long as the legislation was rationally tied to the enforcement of the trust relationship.[220] Others have disagreed,[221] and although I have since reconsidered some of my initial thinking on this issue, I still believe that the Duro-fix would survive an equal protection challenge. What some of *Mancari*'s[222] detractors have failed to appreciate was that when the *Mancari* Court held that the preference in employment within the BIA was not given to Indians as a racial group, but because they were members of political organizations, it did not take the position that laws singling out Indians could never be held as having been made on racial grounds. The Court just held that they were not made on racial grounds in that particular case because the purpose of the law was to promote tribal self-government through the hiring of tribal members to administer federal programs benefiting Indian reservations. If the preference had not been tied to the advancement or benefit of tribes, and was only given to advance the career of individual Indians, it would have reverted back to having been made along racial lines and the strict scrutiny test would have been applicable. While the Duro-fix legislation does treat non-member Indians differently than non-Indians, the classification can be said to be made along political membership in Indian tribes and not along racial lines because there is no question that the legislation was enacted for the purposes of protecting tribal self-government.

2. *Tribal prosecution of non-member Indians without constitutional protection*

The second issue, whether Congress can authorize the tribes to prosecute United States citizens without affording them the full protection of the United States Constitution, is tied to whether Congress can reaffirm a tribal power as being inherent or whether Congress can only grant such power by delegation of federal authority to the tribes. The distinction between delegation and reaffirmation assumes some importance if one takes the view that while Congress cannot delegate what it does not itself possess, i.e. the power to prosecute U.S. citizens without affording them all constitutional protections. The problem disappears if Congress merely reaffirms a previously existing tribal

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220. *See* Alex Tallchief Skibine, *Duro v. Reina and the Legislation That Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767 (1993) (hereinafter, *Constitutional Dimensions*).

221. *See* L. Scott Gould, *The Congressional Response to Duro v. Reina, Compromise, Sovereignty, and the Constitution*, 28 U.C. DAVIS L. REV. 53 (1994).

222. Morton v. Mancari, 417 U.S. 535 (1974).

power because tribal governments are not bound by the Bill of Rights.[223]

Some courts have taken the position that the Duro Fix cannot be a confirmation of tribal authority, but rather has to be viewed as a delegation of federal authority to the tribes.[224] Arguing against the power to reaffirm, the panel decision in *United States v. Weaselhead* stated that:

> Ascertainment of first principles regarding the position of Indian tribes within our constitutional structure of government is a matter ultimately entrusted to the Court and thus beyond the scope of Congress's authority to alter retroactively by legislative fiat. Fundamental, *ab initio* matters of constitutional history should not be committed to "shifting legislative majorities" free to arbitrarily interpret and reorder the organic law as public sentiment veers in one direction or another.[225]

The Ninth Circuit, however, in an *en banc* decision disagreed with this position in *United States v. Enas*.[226] The problem with the majority opinion in *Enas*, however, is that it anchored its belief that Congress could reaffirm inherent tribal sovereignty on the notion that the Supreme Court's decisions in *Duro* and *Oliphant v. Suquamish Indian Tribe*[227] were based on a federal common law interpretation of the history of tribal criminal jurisdiction.[228] In fact, neither Justice Kennedy's opinion in *Duro*, nor Rehnquist 's opinion in *Oliphant*, are based solely on the history of tribal criminal jurisdiction. To be sure, such history was used to show that a "commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians carries a considerable weight."[229] The *Oliphant* Court also stated, however, that "even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress."[230] Thus, the Court held that it is because the tribes' status

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223. *See* Talton v.Mayes, 163 U.S. 376 (1896).

224. *See* Means v. N. Cheyenne, 154 F.3d 941 (9th Cir. 1998); United States v. Weaselhead, 165 F.3d 1209 (8th Cir. 1999). So far, the cases that have debated this issue have done so only in the process of deciding whether the double jeopardy clause was applicable to bar subsequent tribal or federal prosecutions, or whether the law could be applied retroactively so as to allow a tribe to prosecute non-members for a crime which had been committed before the Duro fix was enacted.

225. City of Boerne v. Flores, 521 U.S. 507, PP (1997) *and* U.S. v. Weaselhead, 156 F.3d 818, 824 (8th Cir. 1998) (reversed *en banc*, 165 F.3d 1209). *See also* Means v. N. Cheyenne Tribal Court, 154 F.3d 941 (9th Cir. 1998) (finding that the Duro Fix had to be a delegation of federal authority to the tribes).

226. 255 F.3d 662 (9th Cir. 2001).

227. 435 U.S. 191 (1978).

228. 255 F.3d at 668-69.

229. 435 U.S. 191 at 206.

230. *Id.* at 208.

is one of domestic dependent nations that "their exercise of separate power is constrained so as not to conflict with the interest of [the United States'] overriding sovereignty."[231] Indian tribes, therefore, necessarily gave up their power to try non-Indian citizens of the United States "except in a manner acceptable to Congress."[232] The *Oliphant* Court analyzed the "history" of tribal criminal jurisdiction mostly to see if it contained anything that could be interpreted as signifying that the exercise of tribal jurisdiction was conducted in a manner acceptable to Congress.

An analysis of *Duro v. Reina*[233] confirms the idea that the Court relied on more than the history of how tribal criminal jurisdiction had been treated under federal common law. In reaching its conclusion that "in the area of criminal enforcement, tribal power does not extend beyond internal relations among members,"[234] Justice Kennedy mentioned that respondents and *amici* had argued that a review of history required the assertion of tribal jurisdiction. Answering this particular argument, the Court stated that "[t]he historical record in this case is somewhat less illuminating than in *Oliphant* but tends to support the conclusion we reach."[235] The Court also concluded, however, that:

> Whatever might be said of the historical record, we must view it in light of petitioner's status as a citizen of the United States . . . [c]riminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indians citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United states. We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them.[236]

Justice Brennan, in dissent, was frustrated by the majority's approach. He believed the majority was misapplying and perverting the true holding of *Oliphant* which, according to Brennan, "was based on an analysis of Congress' actions with respect to non-Indians."[237] Unlike the

231. *Id.* at 209.

232. *Id.* at 210

233. 495 U.S. 676 (1990).

234. *Id.* at 688.

235. *Id.* at 688-89.

236. *Id.* at 692-693. Justice Kennedy concluded that "[t]he retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members . . . . A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority." *Id.* at 693.

237. *Id. at* 701. Brennan also stated that "[i]n *Oliphant*, the Court relied on statutory background to conclude that the exercise of tribal jurisdiction over non-Indians was inconsistent with the tribes' dependent status. *Id.* at 702-703.

Enas majority, however, Brennan fully realized the true implication of Justice Kennedy's holding when, profoundly disagreeing with him, he wrote "[s]tated differently, the Court concludes that regardless of whether tribes were assumed to retain power over nonmembers as a historical matter, the tribes were implicitly divested of this power in 1924 when Indians became full citizens."[238]

The "implicit limitations" on the tribes' sovereignty found in both *Oliphant* and *Duro* are not solely derived from the history of the federal Common law inasmuch as they are derived from the status of Indian tribes as domestic dependent nations. That status was first enunciated by Justice Marshall in *Cherokee Nation v. Georgia*,[239] a decision that turned not only on the history of the relationship between the tribes and the colonial powers, but also on an analysis of the position of tribes within the structure of the Constitution.[240] *Oliphant* and *Duro* just built on *Cherokee Nation* by further holding that, because Indian tribes were domestic dependent nations, they could not, without prior congressional consent, continue to exercise criminal jurisdiction over non-member Indians who had become United States citizens because that inherent power was inconsistent with the overriding sovereign interests of the United States. The reason it was inconsistent with such sovereignty was that "from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected from unwarranted intrusions on their personal liberty."[241]

Judge Pregerson's concurrent opinion in *Enas* gets around this problem by stating that "[w]e are not convinced that for Congress to recognize and confirm inherent tribal criminal jurisdiction over nonmembers Indians, Congress must rely on a particular view of history."[242] Although he is correct on this issue, the majority opinion is also correct when it stated that Judge Pregerson's analysis conflated

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238. *Id.* at 706 (emphasis added).

239. 30 U.S. (5 Pet.) 1,17 (1831).

240. Thus Marshall stated "[b]e this as it may, the peculiar relations between the United States and the Indians occupying are such, that we should feel much difficulty in considering them designated by the term *foreign state,* were there no other part of the Constitution which might shed light on the meaning of these words. But we think that in construing them, considerable aid is furnished by that clause in the eighth section of the third article; which empowers Congress to 'regulate commerce with foreign nations, and among the several states, and with Indian tribes.'" *Id.* at 18.

241. Oliphant v. Suquamish Indian Tribe, 435 U.S. at 210. The reason that citizens could be subject to such "unwarranted intrusions" was that under *Talton v. Mayes*, 163 U.S. 376 (1896), tribal prosecutions do not have to afford the accused all the protection of the Bill of Rights.

242. U.S. v. Enas, 255 F.3d at 682, n.8. The *Enas* majority thought that, had *Oliphant* and *Duro* been based on constitutional history, it would have been another matter because "were this an issue of constitutional history, the outcome would be different. It cannot be the case that Congress may override a constitutional decision by simply rewriting history upon which it is based." Perhaps Judge Pregerson thought that *Cherokee Nation v. Georgia* came too close to being based on constitutional history.

delegation with affirmation.[243] Nevertheless, both the majority and Judge Pregerson reached the correct result. Congress can reaffirm such tribal power even though the Court has previously held such power to have been implicitly divested. I have argued this position elsewhere,[244] and will here only add some additional observations. To start with, the text of the *Duro-fix* is not inconsistent with the Court's holding in *Duro* because the statute never says either that this inherent tribal power continued to exist after the incorporation of the tribes into the United States nor that tribes can exercise such inherent powers without Congressional authorization.[245] In other words, the language does not imply that the inherent tribal powers to prosecute non-member Indians who had become United States citizens was not suspended upon the incorporation of Indian tribes within the geographical limits of the United States. The language should be construed as just authorizing the tribes to reassume an inherent sovereign power they had possessed before being incorporated within the United States. I do not see why this language has to be treated as a delegation of federal authority to the tribes instead of a congressional reaffirmation that such pre-existing tribal authority has from now on, been re-established.

This would not mean that Congress is disagreeing with the Court as to the status of Indian tribes as domestic dependent nations. Instead, this would amount to a congressional declaration that the assumption of tribal criminal jurisdiction over non-member Indians is no longer in conflict with the overriding sovereignty of the United States. Although the Court would probably have serious reservations as to why Congress now believes that tribal prosecutions could no longer result in an "unwarranted intrusion into the personal liberty" of non-member Indians, that fact should not allow the Court to strike the law as unconstitutional.[246] There could, of course, be numerous reasons for such a congressional belief. One such reason could be a congressional finding that, because tribal judiciaries have now attained a higher level of sophistication and because the Indian Civil Rights Act,[247] which made most of the provisions of the Bill of Rights applicable to tribal prosecutions, also gives federal courts habeas corpus review of any tribal decisions alleged to be in violation of the Act. Such potential

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243. *Id.* at 670.

244. *See* Alex Tallchief Skibine, *Making Sense out of Hicks: A Reinterpretation*, 14 ST. THOMAS L. REV. 347, 362-70 (2001) (arguing that some inherent tribal powers, such as criminal jurisdiction over non-member citizens, should be conceived as being held in trust by the United States for the benefit of the tribes, which would mean that tribes would need congressional authorization before exercising such powers).

245. The language of the statute amended the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 (1991), by amending the definition of "power of self-government" to make sure that such powers include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."

246. *See* discussion *supra* note 227.

247. 25 U.S.C. §§ 1301, *et. seq.*

"unwarranted intrusions into personal liberty," therefore, would now be highly unlikely.[248]

Once it is established that Congress can reaffirm the existence of such tribal power, the next issue is whether Congress actually intended to do so. It seems that courts have been more inclined to find "delegation" of authority in cases where they could have as well concluded that Congress confirmed or reaffirmed a pre-existing tribal power.[249] Whether a delegation or a reaffirmation, while perhaps there need not be "express" congressional language to this effect, it does seem the courts will want to reassure themselves that Congress actually considered the rights of non-Indians and decided to subject them to tribal jurisdiction.[250]

The previous sections have indicated that there are restrictions on the plenary power of Congress over Indian affairs when such power infringes on rights guaranteed to states and individuals by other clauses of the Constitution. Furthermore, this article has shown a trend aimed at putting limits on the power of Congress pursuant to the Indian Commerce Clause by restricting the meaning of "Indian Affairs." The next section will question why such developments have not, as they should have, corresponded to a narrowing of the power of Congress over the affairs of the Indian tribes.

C. The Next Logical Step: Restricting Congressional Plenary Power Over the Affairs of the Indians

In spite of nearly universal and long standing condemnation within the academy, there has not been any recent shift in the Court's position concerning restricting congressional plenary power over the affairs of the Indians.[251] Although the Court's position did evolve in the 1970s,[252] the

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248. The Court could, of course, adopt a new position and declare that such tribal prosecutions amount to a denial of fundamental constitutional rights. Even if this was the case, the problem could be cured by following the canon of statutory construction, which requires courts to construe statutes so as to avoid serious constitutional problems. Thus even under that scenario, the Court could read into the Duro fix an implied requirement that non-member Indians be given all their constitutional rights when prosecuted by Indian tribes.

249. *See, e.g.*, United States v. Mazurie, 419 U.S. 544 (1975); Rice v. Rhener, 463 U.S. 713 (1983); Bugenig v. Tribal Court of the Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001).

250. The Ninth Circuit recently found clear indication of congressional intent to delegate in *Bugenig v. Tribal Court of the Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001). The D.C. Circuit found such delegation of federal authority to the tribes in *Arizona Pub. Service Co. v. EPA*, 211 F.3d 1280 (2000).

251. *See* RUSSELL BARSH AND JAMES Y. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY (1980) (hereinafter, THE ROAD); Robert Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and self Government*, 33 STAN. L. REV. 979 (1981); Nell Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U PA. L. REV. 195 (1984); Milner S. Ball, *Constitution, Courts, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 3 (1987).

252. The Court overruled *Lonewolf v. Hictchcok*, 187 U.S. 553 (1903), in *Delaware Business Committee v. Weeks*, 430 U.S. 73, 84 (1977). In *Lonewolf*, the Court held that congressional action over Indian tribes was not judicially reviewable because it was a political

Court has not really changed its position about Congress being able to enact legislation beyond its apparent constitutional grant of authority of regulating commerce with the Indian tribes.[253] Therefore, as long as Congress is not impacting the property rights of individuals,[254] or the constitutional rights of states,[255] it still has plenary power to act beyond its power to regulate "commerce with the Indian tribes" and can, apparently, deny constitutional rights to the tribes as long as the congressional action is rationally tied to the trust relationship.[256]

Many scholars have already commented on the discrepancy between the Court's willingness to impose limits on congressional power pursuant to the interstate commerce
power, as evidenced by such cases as *United States v. Lopez*[257] and *United States v. Morrison*,[258] and its refusal to extend such thinking to limit congressional power over the affairs of Indian tribes.[259] Thus, in a recent article, Professor Robert Clinton persuasively argued that:

> Applying a similar approach to the Indian Commerce Clause suggests that this clause grants Congress no power whatsoever to regulate Indian tribes and their members and that the exercise of congressional Indian commerce authority is limited to nonmembers subject to federal authority who deal with tribes and to the management of federal relations with the tribes.[260]

According to Professor Clinton, the power granted under the Indian Commerce Clause was "a power to regulate commerce *with* the tribes, not the commerce *of* the tribes."[261] Stating that "the values usually associated with federalism—accountability, experimentation, and local diversity—apply in spades to tribal governments,"[262] Professor

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question. The Court in *Weeks* stated that it would not be deterred "particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment." *Weeks*, 430 U.S. at 84.

253. *See. e.g.*, statements made in Washington v. Confederated Tribes, 439 U.S. 463, 501 (1979); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); Cotton Petroleum v. New Mexico, 490 U.S. 163, 192 (1988).

254. *See* Hodel v. Irving, 481 U.S. 704 (1987) *and* Babbitt v. Youpee, 519 U.S. 234 (1997).

255. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

256. *See* Sioux Nation v. United States, 448 U.S. 371 (1980). *See also* Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Lands: An analysis of the Sioux Nation Rule*, 61 ORE. L. REV. 235 (1982) (criticizing the rule adopted in *Sioux Nation*).

257. 514 U.S. 540 (1995).

258. 120 S. Ct. 1740 (2000).

259. *See* Robert N. Clinton, *There is no Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 254 (2002)(hereinafter, *No Federal Supremacy*); Richard Garnett, *Once More Into the Maze, United States v. Lopez; Tribal Self Determination and Federal Conspiracy Jurisdiction in Indian Country*, 72 N. DAK. L. REV. 433 (1996).

260. Clinton, *No Federal Supremacy*, 34 ARIZ. ST. L.J. at 254, *supra* note 259.

261. *Id.* (emphasis added)

262. T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY 131 (2002).

Aleinikoff recently argued that cases such as those that prohibit the federal government from commandeering state officials for federal duties could easily be applied to restrict federal power over Indian tribes.[263] The problem is that although these cases could and should be made applicable to Indian tribes, the Court does not seem to believe that the tribes are part of "Our Federalism."[264]

While I am in general agreement with scholars such as Clinton who have criticized the Court's unwillingness to reject the notion that Congress has plenary power over the affairs of the Indians, these criticisms, including my own,[265] seem to have taken the Court's statements at face value when it first stated in *Kagama v. United States* that plenary power was derived primarily from the trust relationship.[266] The Court later modified that position stating that the source of the plenary power stemmed instead from the Commerce Clause and the Treaty power in *Morton v. Mancari*.[267] Taking those statements as true, many scholars concluded that if the trust relationship was the source of power, it logically should follow that this relationship should also be the source of the limitation.[268] Thus, I have previously argued that any Congressional action regulating the affairs *of* the Indians instead of the affairs *with* the Indians should at least be rationally tied to the fulfillment of Congress's unique trust obligations towards the Indians.[269] Others have gone further and argued that the trust doctrine could be used to prevent any congressional interference with tribal self-government.[270] The problem with these arguments is that they all assume that the reason for the plenary power is the trust relationship or the Commerce Clause.

According to Professor Frickey, however, *Kagama* is a confusing

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263. Among the cases cited by Professor Aleinikoff are Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); and Florida Prepaid Post-Secondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999).

264. *See* Frank Pommersheim, *Our Federalism in the Context of Federal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. COLO. L. REV. 123 (2000); Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267 (2000).

265. *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).

266. 118 U.S. 375 (1886) (holding that Congress could extend federal jurisdiction to reach crimes committed among members of the same tribe).

267. 417 U.S. 535 (1974).

268. *See* Reid Peyton Chambers, *Judicial Enforcement of the Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975), Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1502-04, 1508-13 (1994) (criticizing the fact that the trust doctrine is cited as a source of power for the Congress when it should be a source of constraint on the power).

269. *See* Skibine, *supra* note 222, at 794-96.

270. *See* Janice Atkin, *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. (1997) (arguing that treaties provide a basis for using the trust relationship as a limit on congressional power under a social contract theory).

decision that has been misunderstood as resting the argument for plenary power on the existence of a trust relationship.[271] Frickey suggested instead that *Kagama* "indicates that Congress has power over Indian affairs based more on inherent notions of centralized national power in a colonial government than on a strict construction of congressional powers enumerated in the Constitution."[272] Comparing plenary power over Indian affairs with plenary power over immigration, he argued that under *Kagama* the notion of plenary power is inherent and emanates from the structure of the Constitution, not outside of it.[273] Other scholars such as professors Rotunda and Nowak have come to similar conclusions.[274]

Professor Frickey also argued, however, that in order to be consistent with Justice John Marshall's original conception of tribal status, norms of international human rights law should "provide an interpretive backdrop" to construe such inherent congressional power.[275] The problem with attempting to incorporate norms of international human rights law is that the Supreme Court has never felt compelled to use such norms, even as a backdrop, in limiting the extent of congressional power.[276] Perhaps one of the reasons for the Court's reluctance to undertake this overdue correction about plenary power stems from its concern that once the power of Congress is held to be limited, it might be difficult to find a limiting principle. I believe, however, that a constitutional justification for such a limit on congressional power, as well as a self-limiting principle, can be extrapolated from both federal common law and the Constitution.

1. *Deriving the tribal right of self-government from the structure of the constitution*

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271. Philip Frickey, *Domesticating Federal Indian Law*, 81 MINN L. REV. 21, 59 (1996).

272. *Id.* at 59.

273. Frickey also stated that "[a] rather conventional route to this conclusion is that a centralized plenary authority over colonization was 'necessary and proper.'" *Id.* at 69. Even the broad construction given the Necessary and Proper Clause in cases such as *McCullouch v. Maryland*, 17 U.S. 316 (1819), however, has limits. As stated by Laurence Tribe, "the power to do what is necessary and proper . . . for carrying into execution another, more specific power is not, and must not be confused with, a power to do whatever might bear some possible relationship to one of those specific power." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (3d ed.), 801-02.

274. *See, e.g.*, Nowak and Rotunda, CONSTITUTIONAL LAW (6th ed.) 155.

275. *Id.* at 78-79. According to Frickey, "if the only legitimate constitutional justification for an expansive federal power over Indian affairs lies in interpreting the Constitution against a back drop of international law, international law should also provide the limits upon such power." *Id.* at 74-75. It is important to note that Frickey's "argument does not ask American courts to enforce international human rights norms directly as a matter of domestic law," but "expressly links one area of international human rights—that involving indigenous peoples—directly to the Constitution, rather than viewing it as merely a universal normative backdrop." *Id.* at 78-79.

276. *See* Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous People*, 5 HARV. HUM. RTS. J. 5 (1992); Natsu Taylor Saito, *Asserting Plenary Power over the "Other": Indians, Immigrants, Colonial Subjects and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427 (2002).

In *Worcester v. Georgia*,[277] the State of Georgia made the argument that it could impose its laws inside Cherokee territory because the Cherokee Nation had relinquished its right of self-government in its treaties with the United States.[278] According to Georgia, the Cherokees were no longer an "Indian tribe" in the constitutional sense because they had lost their power of self-government. Thus, Congress could no longer use its constitutional authority to regulate commerce with Indian tribes in order to preempt state jurisdiction. The Court found that the treaties made with the Cherokee Nation had not taken away the Cherokees' right to self-government, and thus congressional power to preempt state jurisdiction was still valid; therefore, Georgia law did not apply inside Cherokee territory.[279] From this case, it can be argued that to qualify as an "Indian tribe" under the Constitution, a tribe has to possess a right of self-government. The drafters of the Constitution must have realized that in order for Congress to have the exclusive power to regulate and enter into commercial relations with another political entity, that entity must also possess a certain amount of independent authority. The right of tribal self-government is, therefore, derived from the structural position of tribes as domestic dependent nations under the Constitution.[280]

Professor Frickey correctly asserts that Justice John Marshall used international law in developing his ideas regarding the status of tribes as domestic dependent nations.[281] Thus, it is not surprising that the only other significant "inherent" congressional power is the power over foreign relations.[282] As evidenced by the fact that the United States entered into treaties with Indian tribes, the political relationship with Indian tribes began as one dealing with sovereign entities that were not integrated into the United States political system.[283] Thus, it was not

277. 31 U.S. 515 (1832).

278. *Id.* at 554. Interestingly, one of the facts this argument relied on was the fact that in one of the treaties, the Cherokees surrendered to Congress the right of "managing all their affairs." Even though this language is considerably broader than the one contained in the Commerce Clause of the United States Constitution, the Court interpreted these words as relinquishing only management of their affairs connected with trade. *Id.*

279. *Id.* at 556, 560-61.

280. It is also true that, as a matter of constitutional interpretation, if the drafters would have wanted Congress to have full authority over the Indian tribes, they could have easily provided that "Congress shall have plenary authority over the internal affairs of the Indian tribes." For instance, the District of Columbia Clause provides in part that Congress shall have the power "to exercise exclusive legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." U.S. CONST. Art. I, § 8, cl. 17.

281. *See also* Stephen B. Young, *Indian Tribal Sovereignty and American Fiduciary Undertakings*, 8 WHITTIER L. REV. 825, 858 (1987) *and* Skibine, *supra* note 222, at 795-96.

282. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, (3rd ed., Vol 1) at 806.

283. Thomas Jefferson stated in his *Manual of Parliamentary Practice* that a treaty "must concern the foreign-nation party to the contract or it would be a nullity." *See* S. DOC. NO. 92-1, (1971) 516-18. If treaties not made with foreign nations are "a nullity," one wonders whether it follows that all treaties made with Indian nations after 1831 are unconstitutional because that was the date when the Supreme Court in *Cherokee Nation v., Georgia*, 30 U.S. 1 (1831), held that Indian

unreasonable to equate Congress's power over Indian tribes with its power over foreign affairs and to conceive of its power as limitless or, at least, not subject to judicial review. Congress ended the treaty relationship with the tribes in 1871,[284] however, and made all tribal members United States citizens in 1924.[285] Justice Brennan observed in his *Duro* dissent that, according to the majority, the tribes implicitly lost jurisdiction over non-member Indians when these members became U.S. citizens.[286] It would seem only fair to conclude that when tribes and tribal members became incorporated in the United States, the Court should have recognized that Congress implicitly lost the limitless aspect of its inherent power. Now that Indian tribes and their members are part of the U.S. political system, there should be limits on Congressional power to freely interfere with tribal self-government.

Recognizing that Indian tribes do have a right to tribal self-government, which like the Congressional power over them emanates from the very structure of the Constitution,[287] does not mean that the right is open-ended. The right is contingent upon defining the limit of tribal self-government. I believe that a self-limiting principle that would be acceptable to the Court can be found in the Court's own conceptual definition of tribal self-government. The Court has already held that Indian tribes have lost the power to independently determine their external relations.[288] Neither can they exercise powers of self-government, which would conflict with the overriding sovereign interests of the United States.[289] From such inherent limitations, we can conclude that although Congress cannot as a rule freely interfere with the internal affairs of Indian tribes, it does have the power to enact laws applicable to Indian tribes and their members that may interfere with such internal affairs if the laws are necessary to protect the overriding sovereign interests of the United States.[290] Under this theory, before Congress could interfere with tribal self-government, it must demonstrate that such interference was necessary, as well as rationally and reasonably tied to the protection of an overriding sovereign interest of the United States.

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tribes were not foreign nations but domestic dependent nations. Should this be true, does it follow that all the lands acquired from Indian tribes through treaties after 1831 revert back to the Indian tribes?

284. 25 U.S.C. § 71 (2001).

285. 8 U.S.C. § 1401(b) (1999).

286. 495 U.S. 676, 706 (1990).

287. *See* Frickey, *Domesticating Federal Indian Law*, *supra* note 275.

288. *See* United States v. Wheeler, 435 U.S. 313, 326 (1978).

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

290. Although my proposal puts forth the theoretical justification for preventing the federal government from interfering with tribal rights if it cannot show an overriding sovereign interest, Professor Nell Newton had expressed similar thinking as early as 1984 when she wrote: "[t]ribes can rely on the apportionment clauses and the Indian commerce clause to argue that Indian tribes on tribal land have some rights of local self-government that have been recognized by the Constitution an cannot be infringed by government, *at least not without an overriding justification.*" Nell Jessup Newton, *Federal Power over Indians*, *supra* note 2, at 261, (emphasis added).

This proposed test is not different from strict scrutiny in that the federal government would not have to show that its overriding interest is being protected by the least restrictive means. It is, in some manner, similar to an intermediate level of scrutiny under a test advocated in the next section of this article.

2. *The Right of Tribal Self-Government as a First Amendment Associational Right*

Another promising theory available to impose restrictions on the plenary power stems from associational rights under the First Amendment. Arguing that the right of tribal self-government should be recognized as a fundamental right entitled to constitutional protection, Professor Nell Newton previously advocated intermediate scrutiny to determine the legitimacy of congressional action that interferes with the sovereign rights of Indian tribes.[291] Newton argued that a fundamental constitutional right to tribal self-government can be derived from the fact that appropriate limits on substantive due process have come from paying careful respect to the values that underlie our society, such as the "morality of promise-keeping" and our respect for cultural diversity and pluralism.[292] Although the Supreme Court has briefly considered the issue and quickly discarded it,[293] I agree with Newton that the right of tribal self-government could be viewed as a constitutional right subject to intermediate scrutiny. I also agree, however, with Professor Kevin Worthen that it would be more appropriate to conceptualize this constitutional right as an associational right derived from the First Amendment.[294] As recently argued by one scholar, the Rehnquist Court has been very receptive to constitutional claims of groups based on the right of association.[295] The Court should not, therefore, be reluctant to expand its associational rights jurisprudence to cover claims made by Indian tribes as outlined below.

It is not unreasonable to assume that tribal members continue their membership in a tribe in order to protect their political rights on Indian reservations and ensure the preservation of their unique tribal culture. Living a distinct cultural life as an Indian on an Indian reservation can be

291. Newton, *supra* note 2 at 198.

292. *Id.* at 261-64. Newton also argued that the relationship between tribal members and their tribes should lead to recognition of a right of privacy and autonomy. *Id.* at 244-45.

293. *See* Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979) (rejecting a fundamental right to self-government and upholding the constitutionality of Public Law 280.)

294. *See* Kevin J. Worthen, *Sword or Shield: The Past and Future Impact of Western Legal Thought on American Indian Sovereignty*, 104 HARV L. REV. 1372, 1384-92 (1991) (reviewing Robert A Williams Jr., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990)).

295. *See* John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 487, 526-43 (2002).

viewed as a form of expression protected by the First Amendment, which is jeopardized any time the federal government interferes with the "right of Indians to make their own laws and be ruled by them."[296]

Even if not directly related to free speech *per se*, associating for the preservation of cultural identity and political rights should come under the umbrella of recognized associational rights. As stated by some scholars, "perhaps it is best to think of associational rights as proceeding on a continuum from the least protected form of association in commercial activities to the most protected forms of association to engage in political or religious speech."[297] Any time the federal government interferes with internal tribal self-governance, it interferes with the tribe's political rights and its ability to maintain its cultural distinctness. Under this view, the strict scrutiny test would not be applicable unless the interference was directly related to speech. If the interference is aimed at the existence of political rights or the preservation of district tribal culture, a lesser form of scrutiny such as Newton's intermediate scrutiny should be applied.

The cases relating to state interference with the associational rights of political parties provides a meaningful analogy that can be helpful in devising an applicable level of scrutiny when the Congress interferes with tribal self-government. In those cases, if the state interference with the political parties' associational rights is "severe," strict scrutiny applies. On the other hand, if the interference is not severe, a balancing test is applicable. According to that test,

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the first and fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the state as justifications of the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights.[298]

The reason that a balancing test is appropriate in these election cases is that the states have a specific constitutional right to regulate the "Times, Places, and Manner of holding Elections for Senators and Representatives."[299] Similarly, Congress has an assigned constitutional role in regulating Indian affairs. By analogy, if the federal interference with the right of tribal self-government is severe, a higher level of

296. William v. Lee, 358 U.S. 217, 220 (1959).

297. Nowak and Rotunda, *supra* note 274 at 1203.

298. Burdick v. Takushi, 504 U.S. 428, 434. *See also* Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).

299. U.S. Const. art. I, § 4.

scrutiny should apply. If the interference is not severe the lesser type of scrutiny should be applicable.

While I agree with those who have advocated a return to the treaty relationship,[300] and with those who have argued for a constitutional amendment as a way to confirm the status of Indian tribes as the "third sovereigns" within our political system,[301] these solutions are political. What has been advocated here are judicial solutions, integrating limits on congressional power with other aspects of the Court's federal Indian law and constitutional jurisprudence.

IV. Conclusion

The Court seems unable to conceive of tribes as truly third sovereigns existing within the political system of the United States. While Indians have been integrated into the political system of the United States by becoming United States citizens,[302] Indian tribes as political organizations never formerly were integrated,[303] except perhaps for those tribes who have signed treaties with the United States.[304] The treaty relationship has ended, however, and the Court has refused to allow Indian tribes to benefit from its federalism jurisprudence. On the other hand, the new federalism has been responsible for a new judicial attitude towards congressional power in Indian affairs when such power comes into conflict with the rights of individuals or states. Thus, except when construing treaties, the Court seems to have abandoned the Indian liberal construction rule in statutory interpretation.

At the same time, the Court is demanding clearer evidence of congressional intent in order to find state jurisdiction preempted. Similarly, the Court may also be looking for more specific indications that Congress intended to authorize tribes to assume jurisdiction over non-members, or at least was aware and implicitly condoned such exercise of tribal jurisdiction. Yet, the Court has refused to enter into any kind of meaningful dialogue about reducing congressional plenary

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300. See Clinton, *No Federal Supremacy*, *supra* note 253; Alex Tallchief Skibine, *Reconciling Federal and State Power Inside Indian Reservations with the Right of Self-Government and the Process of Self Determination*, 1995 UTAH L. REV. 1105, 1156 (1994).

301. *See* FRANK POMMERSHEIM, BRAID OF FEATHERS 56; *Democracy, Citizenship, and Indian Law Literacy: Some Initial Thoughts*, 14 T.M. COOLEY L. REV 457, 460-63 (1997).

302. Indian Citizenship Act of 1924, 8 U.S.C. §1401(b). *But see* Robert Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous People*, 15 HARV. BLACKLETTER L.J. 107 (1999) (arguing that the 1924 Act is unconstitutional because the Indians never consented to it.)

303. *See* Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 3 (1987).

304. *See* Richard 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 the foundation of the inclusion of tribes into Federalism). Of course this does not solve the problem for the substantial number of tribes that never had a treaty relationship with the United States.

power over the affairs of the Indians even though there are sound theories to do so.

In the last twenty years or so, Congress has shown a willingness to enact pro-tribal legislation either placing tribes in quasi-parity with states or giving rights to tribes that have not been given to any other non-sovereign entity or group. As a result, the Court's federal common law jurisprudence concerning the political status of tribes within the United States is totally disconnected from the current policies of Congress. In an effort to reign in the Court's renegade policies on Indian affairs, the tribes and their congressional allies are about to engage in a comprehensive political effort to have some of the most detrimental Supreme Court decisions overturned. While I believe this to be a worthy effort, I am not optimistic about its chance of success. This article has been more concerned about showing that the Court's Indian affairs jurisprudence is also disconnected from its jurisprudence in other fields. Such jurisprudence, whether it is about favoring associational rights, formalism, or devolution of centralized power to local governments, should have favored the tribes' quest towards greater self-government.

In the end, the Court's refusal to properly integrate tribes in its federalism jurisprudence has to do with its failure to properly conceptualized the nature and place of tribes within "Our Federalism." Unfortunately, this Article has shown that such failure has generated some justified accusations that the Court is just anti-Indian and is using federalism in order to prevent Congress from asserting or, in some cases re-asserting, primacy in an area constitutionally assigned to it.