TRIBAL SOVEREIGN INTERESTS BEYOND THE RESERVATION BORDERS

by
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After describing how, from a global perspective, traditional concepts of state sovereignty have moved away from being uniquely tied to exclusive control of territories, this Article shows how the United States concept of tribal sovereignty is also no longer tied to territorial sovereignty. This is evident from the fact that, mostly through Supreme Court decisions, tribes have lost much political control over their own reservations. Since this is the case, this Article argues that there is no reason why tribal sovereign interests should be limited to the reservation borders. After describing the various Acts of Congress that recognize tribal sovereign interests beyond tribal territories, this Article explores what limits there might be on the ability of Congress to recognize and protect tribal sovereign interests beyond the reservation. This Article concludes by discussing the economic benefits tribes might derive as well as the issues they might encounter, should they decide to impose a tribal income tax on their members, especially those residing beyond the reservation borders.

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I. INTRODUCTION

In *Nevada v. Hicks*, Justice Scalia asserted that "State sovereignty does not end at a reservation's border."[1] Fair enough. The question I am examining in this Article is whether the same thing should hold true for the tribes' sovereignty, especially when tied to economic interests. In other words, this Article argues that "tribal sovereignty does not end at the reservation border."[2] The United States Supreme Court in *Mescalero Apache Tribe v. Jones,*[3] stated, "Absent express federal law to the contrary, Indians going beyond the reservation boundaries have generally been held subject to nondiscriminatory state law."[4] While I agree that much of the tribe's immunity from state jurisdiction does stop at the reservation border, this does not mean that all such tribal immunity is left at the reservation border. Moreover, this does not mean that the tribes' *sovereignty* is restricted to the reservation border. As Justice Douglas once stated, "There is no magic in the word 'reservation.'"[5] For most Indians, however, the land is sacred, and is culturally very important.[6] I do not want this Article to be interpreted as minimizing or ignoring that fact. Nor am I arguing here that the existence of Indian reservations is not important or that tribal sovereignty within the reservation is not crucial. It is.[7]

Before proceeding to talk about why, legally speaking, Indian tribes venturing beyond the reservation should still be vested with at least some

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[1] 533 U.S. 353, 361 (2001).

[2] Although throughout this article, I use the phrase "beyond the reservation border," what I really mean is "beyond Indian Country." "Indian Country" is a term of art that comes from 18 U.S.C. § 1151 (2000). In addition to all lands within Indian reservations, Indian Country also includes Indian or tribal trust lands not located on Indian reservations, as well as dependent Indian communities.

[3] 411 U.S. 145 (1973).

[4] *Id.* at 148–49.

[5] *Id.* at 161 (Douglas, J., dissenting).

[6] *See* Frank Pommersheim, *The Reservation as Place: A South Dakota Essay,* 34 S.D. L. REV. 246 (1989).

[7] As the editors of the 2005 Cohen's Handbook of Federal Indian Law stated: "Land forms the basis for social, cultural, religious, political, and economic life for American Indian nations." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 965 (LexisNexis 2005) (1941).

attributes of sovereignty, I want to mention three fundamental reasons why that should be so.

First, one has to look at the historical context behind the creation and location of Indian reservations. Indian tribes used to own the whole country, and at least initially were able to reserve substantial amount of lands for themselves in the early treaties. Later on, however, after first being removed to out of the way and distant places, many tribes saw their treaty land base reduced as a result of warfare, and unilateral abrogation by the United States.[8] Finally, the tribes lost around 90 million acres through the allotment process, which also resulted in a large influx of non-Indians within the reservations.[9] Indian reservations during the removal and later periods were never designed with Indian economic development in mind. Quite the contrary, their location was selected, and their size reduced so that non-Indians could proceed with economic development on land previously owned by the tribes.

Second, it has to be understood that, when it comes to economic development, Indian tribes are not just acting as businesses to make money for their shareholders when venturing beyond their reservations. They are in the process of raising governmental revenues because they do not have a tax base on the reservation.[10] They lack such tax base because the Supreme Court has severely curtailed their power to tax non-members,[11] while at the same time allowing state taxation of non-Indians,[12] and Indian land held in fee,[13] located within reservations. In addition, the tribes cannot tax land held in trust by the United States for individual tribal members.

Third, the Supreme Court has driven huge holes through the concept of territorial tribal sovereignty. As one scholar stated, "[T]he Court has recently emphasized the membership-based aspects of tribal sovereignty."[14] At the same time, the Court has allowed a significant amount of state sovereignty inside Indian reservations. In a 1980 case, after stating, "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from

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[8] *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 561, 568 (1903); United States v. Sioux Nation, 448 U.S. 371 (1980).

[9] *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 12–13 (1995).

[10] *See* Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue,* 80 N.D. L. REV. 759, 771 (2004).

[11] *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647 (2001) (holding that tribes cannot tax non-member businesses located on non-member fee land within the reservation).

[12] *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 175 (1989).

[13] *See* Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 115 (1998).

[14] *See* 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, 17 (1993).

state taxation to persons who would normally do their business elsewhere,"[15] the Court allowed state taxation of cigarettes sold by tribes to non-tribal members. Perhaps more than any other case, this case started the huge influx of state regulatory power in Indian Country, thereby dismantling in large part what was remaining of the notion that tribes had exclusive territorial sovereignty within their reservations unless Congress expressly stated otherwise.

The remaining sections of this Article argue that because the concept of territorial sovereignty, both in the United States and abroad, has been significantly eroded or modified, there are no valid reasons why tribal sovereign interests should be strictly limited to the reservation setting. In Part II, after first describing how the general concept of *sovereignty* has evolved from a concept focusing uniquely on territorial sovereignty to a more malleable concept recognizing the interrelationship between various sovereign actors, I briefly explore how the United States Supreme Court has modified the concept of exclusive tribal territorial sovereignty over the reservation. In Part III, I analyze how the United States courts and the Congress view the concept of tribal sovereignty beyond the reservation border. In Part IV, I discuss the limits on the power of Congress to recognize tribal sovereign interests beyond the reservation border. Finally in Part V, I discuss one specific application of tribal economic development beyond the reservation border: Tribal taxation of tribal members, especially those not living within Indian reservations.

II. REDEFINING SOVEREIGNTY: NATIVE, GLOBAL, AND DOMESTIC CONCEPTS

A. Global and Native Concepts of Sovereignty

Native scholars have argued that sovereignty for native people does not and perhaps should not mean the same thing as it does in the Western world.[16] These scholars have called "for a reappraisal of the tribal sovereignty doctrine—one that is based on the conceptions of sovereignty held by Indian nations and which responds to the challenges that confront Indian nations today."[17] It is true that the very word sovereignty was first delineated by a French political scientist in order to justify and legitimize the idea that one person, and one person only, the King, was the repository or the sole possessor of all sovereignty in

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[15] Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980).

[16] *See* Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations,* 12 STAN L. & POL'Y REV. 191 (2001). *See also* Wenona T. Singel, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule,* 15 KAN. J.L. & PUB. POL'Y 357 (2006).

[17] Coffey & Tsosie, *supra* note 16, at 196–97.

France.[18] Historically, the traditional concept of state sovereignty first emerged from the Peace of Westphalia where the sovereignty of some European states were first recognized as a matter of international law.[19] All this historical context has nothing to do with the evolution of an equivalent concept within Native Nations.[20] Thus, Native Scholars have argued that Indian Nations should redefine their sovereignty according to their own cultural norms. As stated by professor Rebecca Tsosie, "Cultural sovereignty, then, is the effort of Native peoples and Native nations to exercise their own norms and values in structuring their collective future. Native sovereignty must be defined from 'within.'"[21] This is different from asserting that in order to be sovereign, Indian Nations have to have their own cultural definition of sovereignty, or be culturally different than the majority culture. As stated by Barsh and Henderson, "Tribal self-government [should not be identical with] cultural fossilization. White self-government does not depend upon the preservation of 'pioneer culture.' . . . Self government transcends culture; it is the right to choose culture."[22] I also do not want to be misunderstood as taking the position that traditional territorial sovereignty is no longer important or meaningful. I am only suggesting here, that as far as Indian tribes are concerned, there can be more than one way to be sovereign.

Native scholars' advocacy for different models of sovereignty based on Indigenous cultural norms is congruent with the evolution of different models of sovereignty globally. Thus, with the advent of the European Union, and the development of cyberspace and the internet, the very concept of sovereignty has evolved and is being challenged.[23] Under traditional understanding of sovereignty as conceptualized by such political philosophers as Hobbes, in order to be sovereign, a state had to have complete and exclusive control of everything within its borders. Under such concepts, tribes and the States, such as Utah or Oregon, could not be considered sovereign. Today, however, Hobbes' concept of territorial sovereignty is on the decline, and scholars have recognized that there is more than one conceptual framework for defining sovereignty.[24] As one scholar stated, "Over the past decade,

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[18] *See* Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229, 239 (2005) (ascribing the term to the sixteenth century French thinker Jean Bodin).

[19] *Id.* at 231.

[20] For an Indian definition of tribal sovereignty, *see* Dagmar Thorpe, *Sovereignty, A State of Mind: A Thakiwa Citizen's Viewpoint*, 23 AM. INDIAN L. REV. 481 (1998–1999).

[21] Rebecca A. Tsosie, *What Does it Mean to "Build a Nation"? Re-Imagining Indigenous Political Identity in an Era of Self-Determination*, 7 ASIAN-PAC. L. & POL'Y J. 38, 59 (2006).

[22] RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 118 (1980). *See also* Sam Deloria, *New Paradigm: Indian Tribes in the Land of Unintended Consequences*, 46 NAT. RESOURCES J. 301 (2006).

[23] *See* David R. Johnson & David G. Post, *The Rise of Law on the Global Network, in* BORDERS IN CYBERSPACE 3, 13 (Brian Kahin & Charles Nesson eds., 1997).

[24] *See* John Alan Cohan, *Sovereignty in a Postmodern World,* 18 FLA. J. INT'L L. 907,

globalization has transformed the territorial and moral status of the nation state."[25] In a world where everything is interconnected,[26] scholars have moved away from the traditional concepts of territorial sovereignty, to a more malleable concept, that might be called *relational* sovereignty.[27]

This new world order of sovereignty has meant, among other things, some loss of exclusive territorial sovereignty for every state. In other words, the world and other nations do have something to say about the genocide in Darfur, the ethnic cleansing in the former Yugoslavia, or the needless death of thousands from the refusal for the Burmese authorities to quickly allow foreign humanitarian aid into their country after a natural disaster.[28] On the other hand it also has meant that nations with less than full sovereignty within their borders, such as Indian nations within the United States, should nevertheless be recognized as sovereigns by the international communities.[29]

The debate surrounding the meaning of sovereignty in a global context and from a tribal perspective is intrinsically linked to the debate surrounding the right to self-determination for indigenous peoples under international law.[30] These two strands of the debate came together in a global context in the recently enacted United Nations Declaration on the Rights of Indigenous Peoples.[31] Although as with other

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908–09 (2006). *See also* Neil MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1 (1993).

[25] Helen Stacy, *Relational Sovereignty,* 55 STAN. L. REV. 2029, 2030 (2003).

[26] *See* Allan R. Stein, *Frontiers of Jurisdiction: From Isolation to Connectedness*, 2001 U. CHI. LEGAL F. 373 (2001).

[27] *See* Stacy, *supra* note 25, at 2031 (stating that "Relational sovereignty proposes that the concepts of the state as a Hobbesian national protectorate and the Lockean limited constitutional state are inadequate because they fail to account for today's historical conditions and intellectual trends. Relational sovereignty instead uses the insights of social theory to observe the multifaceted nature of the activities of citizens and their government under the conditions of globalization. Sovereignty ought to shape itself around these complex interactions and be conceived as a multi-directional social contract.").

[28] Some Native scholars have noted that this globalization of sovereignty will mean that the outside world will take a more intense look at the inner workings of tribal governments. *See* Angela R. Riley, *Indigenous Peoples and the Promise of Globalization, An Essay on Rights and Responsibilities,* 14 KAN. J.L. & PUB. POL'Y 155 (2004); Angela R. Riley, *Good (Native) Governance,* 107 COLUM. L. REV. 1049, 1057–58 (2007).

[29] *See* Austen L. Parrish, *Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights,* 31 AM. INDIAN L. REV. 291 (2007).

[30] For an argument on how international principles should impact domestic United States law, see Philip P. Frickey, *Domesticating Federal Indian Law,* 81 MINN. L. REV. 31 (1996). *See also* S. JAMES ANAYA, INDIGENOUS PEOPLE IN INTERNATIONAL LAW (1996).

[31] The Declaration was adopted in 2007, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 2007; *see* S. James Anaya & Siegfried Weissner, *The U.N. Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment,* JURIST LEGAL NEWS & RESEARCH, (Oct. 2007), *available at* http://www.law.arizona.edu/news/Press/Anaya100307.pdf.

international legal documents,[32] Indigenous people world-wide had an essential role in the formulation of the Declaration,[33] the final document represents years of negotiation and compromises. As a result, it represents more than a strictly indigenous vision of the right of self-determination in international law. The exact meaning of what is encompassed by the right to self-determination was a major point of contention during the debates leading to passage of the Declaration.[34] In many ways, the debate is still going on, and the concept still evolving.[35]

The United States was, along with Australia, New Zealand, and Canada, one of the few countries who voted against the Declaration. [36]Although the United States has, at different times, articulated various and different reasons for its opposition to the Declaration, it seems that one of its concerns is related to its conception that tribal self-determination should only be limited to internal or intramural aspects of self-governance.[37] As shown in the next section, in that respect, the position of the Executive branch of the United States government may be in agreement with the general position of the United States Supreme Court.

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[32] The Declaration is not the only international document attempting to define the meaning of indigenous self-determination. *See, e.g.*, the International Labour Organization's Convention 169 on Indigenous and Tribal Peoples, I.L.M. m1382 (June 27, 1989) (entered into force Sept. 5, 1991), the International Covenant on Civil and Political Rights, G.A. Res. 2200, A/RES/2200 (Jan. 12, 1967) (entered into force, March 23, 1976), and the International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, A/RES/2106 (Jan. 19, 1966) (entered into force Jan. 4 1969). *See also* S. James Anaya, *Keynote Address: Indigenous Peoples and Their Mark on the International Legal System,* 31 AM. INDIAN L. REV. 257, 257–58 (2006–2007) (listing the sources of Indigenous rights under international law and describing how one case, involving a claim by the Dann sisters and the Western Shoshones which arose within the United States, shows how the international standards differ from United States internal law). *See* Decision 1(68) of the Committee on the Elimination of Racial Discrimination (CERD).

[33] *See* S. James Anaya, *Indian Givers: What Indigenous People Have Contributed to International Human Rights Law*, 22 WASH. U. J.L. & POL'Y 107, 111–17 (2006).

[34] *See* Lorie M. Graham, *Resolving Indigenous Claims to Self Determination,* 10 ILSA J. INT'L & COMP. L. 385, 392–93 n.22 (2004) (referring to Article III of the U.N. Draft Declaration which declares that "indigenous peoples 'have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'").

[35] *See* Russell A. Miller, *Collective Discursive Democracy as the Indigenous Right to Self-Determination,* 31 AM. INDIAN L. REV. 341 (2006–2007), S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination,* 3 TRANSNAT'L L. & CONTEMP. PROBS. 131 (1993). *See also* Tsosie, *supra* note 21, at 53–55 (explaining the three different concepts of sovereignty and Indigenous self-determination under international law).

[36] Eleven other countries abstained.

[37] *See* Graham, *supra* note 34, at 394.

B. Domestic Law Re-Conceptualization of Tribal Sovereign Authority Over Indian Reservations

The Supreme Court once stated:

> The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits. "The cases in this Court have consistently guarded the authority of Indian governments over their reservations."[38]

Since the Court made this statement in 1980, much has changed. Because there has been much scholarship about the extent of tribal and state jurisdiction within Indian reservations,[39] I will here only briefly summarize the major developments. My purpose here is to show that in the last 30 years or so, the Court's jurisprudence on tribal sovereignty has changed in two fundamental aspects. First, the Court now views tribal sovereignty more as a personal/membership-based concept than a territorial one. The Court has achieved this by redefining the concept and powers of tribal self-government as being limited to governance of internal relations or purely intramural matters such as the powers to define tribal membership or regulate domestic relations. Secondly, except in very few instances, it has reversed presumptions about congressional intent concerning the extent of tribal and state power over non-members within Indian reservations. The presumption now is that it is the states and not the tribes that have such jurisdiction unless Congress has clearly manifested an intent to preempt state power and allow tribal jurisdiction. Even when it comes to state jurisdiction over tribal members and their property, the categorical approach under which there had to be clear indication of congressional intent to allow state jurisdiction is being modified.

1. Inherent Tribal Jurisdiction

When it comes to inherent tribal jurisdiction over non-members, the Court first held in 1978 that through their incorporation into the United States as domestic dependent nations, the tribes have been implicitly divested of all inherent sovereign power to criminally prosecute non-Indians.[40] Three years later, in *United States v. Montana*, the Court extended this principle and took the position that tribes have been

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[38] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980) (quoting United States v. Mazurie, 419 U.S. 544, 558 (1974)).

[39] For two recent examples see Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy,* 85 NEB. L. REV. 121 (2006); Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391 (2007–2008).

[40] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

divested of all inherent "external" sovereignty.[41] Therefore, tribes could only exercise those inherent powers that were necessary to internal tribal self-government. This meant that as a general rule, Indian tribes have been implicitly divested of all inherent powers to civilly regulate non-members within Indian reservations.[42]

The Court initially recognized two exceptions to this general rule: first, if non-members had entered into consensual relations with the tribe or its members, and second, when the activity of non-members has a direct impact on the health and welfare of the tribe, its economic security, or its political integrity.[43] Thus, tribes could still have jurisdiction over non-members even while on non-member fee land. In later cases, however, the Court seriously narrowed this second exception. For instance, after stating that a broad construction of the second exception could swallow the rule, the Court found that tribes could not regulate the conduct of non-members while driving through the reservation, at least while on non-Indian roads because such conduct could not possibly affect the health and welfare of the tribe or its members.[44] Similarly, in *Atkinson Trading v. Shirley,*[45] the Court found that taxing non-members on Indian reservations is not necessary to tribal self-government and held that the Navajo Nation could not tax a trading post owned by a non-member and located on non-member fee land within the reservation.

Finally, in *Plains Commerce Bank v. Long Family Cattle,*[46] the Court seems to have somewhat modified the consensual relations exception to the *Montana* rule. The Court held that a tribal court did not have jurisdiction over a tort case alleging discrimination against tribal members by a non-Indian bank doing business on the reservation. The basis of the claim involved treating tribal members and non-Indians differently in selling a parcel of non-member fee land. As the Court put it, "the Tribal Court lacks jurisdiction to hear the Longs' discrimination claim because the Tribe lacks the civil authority to regulate the Bank's sale of its fee land."[47] Although this language indicates that the case can

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[41] 450 U.S. 544, 565 (1981).

[42] Although initially, this general rule was only applicable when the non-members' activities took place on non-member fee land within the reservation, in *Nevada v. Hicks*, 533 U.S. 353, 360 (2001), the general rule was extended to at least some non-member activity occurring on Indian owned land.

[43] *Montana,* 450 U.S. at 565–66.

[44] Strate v. A-1 Contractors, 520 U.S. 438, 457–59 (1997). In the latest case to comment on this issue, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, the Court seemed to relegate the second *Montana* exception to cataclysmic-type non-member activities when it stated, "The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." 128 S. Ct. 2709, 2726 (2008) (concluding that the sale of formerly Indian-owned land to a third party "cannot fairly be called 'catastrophic' for tribal self-government.").

[45] 532 U.S. 645, 659 (2001).

[46] 128 S. Ct. 2709 (2008).

[47] *Id.* at 2720.

and should be limited to instances where a tribe is trying to regulate the sale of non-member fee land, additional language in the Court's opinion is more ominous and may indicate that the existence of consensual relations is not enough to vest a tribe with jurisdiction unless the tribe can also regulate the underlying conduct giving rise to the claim. Thus, the Court not only restricted the first exception to non-member *conduct*, but also seemed to tie the consensual relation exception to instances where tribal jurisdiction is needed for tribal self-government.[48]

2. Application of Federal Laws of General Applicability to Tribes

The move towards severely narrowing the scope of tribal self-government has also been evident in cases determining whether a federal law of general applicability, but one that never mentions Indian tribes, is nevertheless applicable to Indian tribes, and tribal members inside Indian reservations.[49] There is really no Supreme Court case on point. However, relying on dubious Supreme Court precedent,[50] the lower federal courts have created a presumption that such law applies to tribes unless application of the federal law would either interfere with a specific treaty right, interfere with "purely intramural matters" of tribal self-government, or if there is legislative history indicating that Congress did not intend the statute to apply to Indian tribes.[51]

The problem from a tribal perspective has been that the courts have created an exception for general federal laws interfering with tribal self-government but have construed this concept very narrowly. For example, in *Donovan v. Coeur D'Alene Tribal Farm*,[52] the Ninth Circuit stated "[w]e believe that the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that

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[48] Thus, after remarking that the Tribal respondents and the United States were mistaken in thinking that tribal regulation of the sale of non-Indian fee land through tribal tort law was fully authorized by the first *Montana* exception, the Court stated "*Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests. *Montana* expressly limits its first exception to the 'activities of nonmembers,' . . . allowing these to be regulated to the extent necessary to 'protect tribal self-government [and] to control internal relations[.]'" *Id.* at 2721.

[49] *See generally*, Alex Tallchief Skibine, *Applicability of Federal Laws of General Applicability to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85 (1991).

[50] Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960). In this case, the Court held that the Federal Power Act applied to the *non-reservation* land of tribal members. Furthermore, the Act specifically addressed its applicability to Indian tribes and reservation Indians. However, in dictum, the Court stated that "a general statute in terms applying to all persons includes Indians and their property interests." *Id.* at 116.

[51] The first case to delineate these three "exceptions" seems to have been *United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980), but that case dealt with applicability of a federal criminal statute.

[52] 751 F.2d 1113 (9th Cir. 1985).

otherwise applicable federal statutes apply to Indian tribes."[53] Although Federal courts have come up with different results in applying the self governance exception to the general rule,[54] the trend has favored applying such laws to the tribes. This was evident in a recent decision of the District of Columbia Circuit, *San Manuel Indian Bingo v. Nat'l Labor Relations Board*,[55] where the court upheld a decision of the NLRB to extend application of the NLRA to a tribal casino on an Indian reservation.[56] The court took the position that there might be cases where interference with tribal sovereignty could end up preempting application of the NLRA but this was not such a case. Crucial to the court's analysis was its formulation of a *spectrum* of tribal sovereignty according to which tribal sovereignty is:

> at its strongest when explicitly established by a treaty or when a tribal government acts within the borders of its reservation, in a matter of concern only to members of the tribe. . . . Conversely, when a tribal government goes beyond matters of internal self-governance and enters into off-reservation business transaction with non-Indians, its claim of sovereignty is at its weakest.[57]

Although the court recognized that application of the NLRA might impinge on tribal governmental activities, it concluded that "impairment of tribal sovereignty is negligible in this context, as the Tribe's activity was primarily commercial."[58] The court further remarked that the operation of a casino is not a traditional attribute of tribal self-government and the vast majority of the casino's employees and customers were non-tribal members not living on the reservation.[59]

The Tenth Circuit, on the other hand, adopted a very different vision of tribal sovereignty when it decided not to apply some provisions of the NLRA to the Pueblo of San Juan.[60] The Tenth Circuit held that the NLRA did not preempt the Pueblo from enacting a right to work ordinance within the reservation. Phrasing the "central question" as "whether the Pueblo continues to exercise the same authority to enact

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[53] *Id.* at 1116.

[54] *See* Ann Richard, Note, *Application of National Labor Relations Act and the Fair Labor Standards Act to Indian Tribes: Thwarting the Economic Self-Determination of Tribes*, 30 AM. INDIAN L. REV. 203 (2005–2006).

[55] 475 F.3d 1306 (D.C. Cir. 2007).

[56] For insightful criticisms of the decision see Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413 (2007). S*ee also,* D. Michael McBride III & H. Leonard Court, *Labor Regulation, Union Avoidance and Organized Labor Relations Strategies on Tribal Lands: New Indian Gaming Strategies in the Wake of* San Manuel Band of Indians v. NLRB, 40 J. MARSHALL L. REV. 1259 (2006).

[57] *San Manuel Indian Bingo,* 475 F.3d at 1312–13 (citations omitted).

[58] *Id.* at 1315.

[59] *Id.*

[60] NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002).

right-to-work laws as do states and territories,"[61] the court took the position that because federal preemption of tribal law would infringe on tribal sovereignty, the burden was on the NLRA and the Union to show that Congress clearly intended to preempt such tribal laws. According to the court, federal preemption of such tribal laws interfered with tribal sovereignty because "[i]n addition to broad authority over intramural matters such as membership, tribes retain sovereign authority to regulate economic activity within their own territory."[62]The court acknowledged that tribes have been divested of some external sovereignty, especially related to their dealings with non-members, but stated that none of the cases which had found tribal power implicitly divested were applicable since here the NLRB was seeking a declaratory judgment "prohibiting the application of the [tribal] ordinance to all persons everywhere on the reservation . . . ."[63]

Attempting to summarize the status of the law in this area, the authors of the latest edition of *Cohen's Handbook of Federal Indian Law* took the position that "[c]ourts are less likely to find that a generally worded statute interferes with tribal sovereignty in cases in which the statute regulates the relations between a tribe engaged in business or commercial activities and nonmembers of the tribe, especially in cases involving labor and employment laws . . . ."[64]In other words, the more a statute affects a tribe's external relations with nonmembers, the more it is likely to be applied to Indian tribes. Perhaps deciding applicability of statutes to tribes on this ground is politically expedient and pragmatic but it has nothing to do with Supreme Court jurisprudence. I think a more coherent analysis, or at least one more consistent with the Court's tribal sovereignty jurisprudence, would be for courts to follow the analysis adopted by the court in *Pueblo of San Juan* and ask whether the tribe has any inherent jurisdiction to regulate the type of activity that is being regulated by the federal law of general applicability. If the answer is *yes,*

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[61] *Id.* at 1191. Under Section 14(b) of the NLRA, only states and territories can enact right to work laws prohibiting the establishment of union shops, since Section 8(a)(3) of the NLRA otherwise gives unions and employers the right to enter into such union shop agreements. 29 U.S.C. §§ 151–169 (2000). Under a Union shop agreement, the employer agrees that all hired non-union employees have to join the union in order to continue working for such employer.

[62] *Id.* at 1192–93 (citation omitted).

[63] *Id.* at 1193. The court added that here "the only instance of regulation cited pertains to consensual commercial dealings between the Pueblo and its members on the one hand, and a lumber company operating on lands leased from the tribe on the other." *Id.*

[64] COHEN, *supra* note 7, at 130. Concerning applicability of labor and employment laws, *see* Vicki J. Limas, *Application of Federal Labor Law and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681 (1994).

then courts should look for a clear indication of congressional intent to interfere with such tribal sovereignty.[65]

3. State Jurisdiction Inside Indian Reservations

Another way to think about this issue is in terms of how, legally and politically, the tribes are being integrated or incorporated into the federal system. For instance, if tribes are not part of the system at all, then general federal laws should not be applicable to them unless Congress specifically said so. On the other hand, if tribes are being incorporated as states or local government, then the same rules should be applied to tribes as are applied to such governmental entity.[66] The Tenth Circuit decision in *Pueblo of San Juan* is a good example of a court attempting to integrate tribes in *Our Federalism* on the same par with states, while *San Manuel Indian Bingo* represents the view that, at least when tribes are engaged in commercial activities involving a lot of non-members, they are being incorporated more as private corporate entities.

Along with severely restricting tribal sovereignty over the reservation, the Court has in the last 30 years or so also allowed a significant amount of state jurisdiction inside the reservation. Although initially states had no jurisdiction whatsoever within Indian reservations,[67] in more modern times the Court has allowed some measure of state jurisdiction as long as such jurisdiction did not infringe "on the right of reservation Indians to make their own laws and be ruled by them."[68] Eventually, the Court seemed to settle on a preemption balancing analysis, stating, "State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."[69]

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[65] I realize that whether the tribe has jurisdiction to regulate in this area may differ depending on whether the subjects of the tribal regulation are tribal members or non-members. An answer allowing the federal law to preempt tribal law as to non-members but not members may be cumbersome and perhaps unworkable. For instance it would not be practical to have the Union Shop section at issue in *Pueblo of San Juan* to only be applicable to those employees who are non-members. In such cases, a better option might be to place the burden on the federal government to show that there is a compelling federal interest to apply the federal law to everyone.

[66] *See* Richard, *supra* note 54, at 218.

[67] *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 520 (1832).

[68] Williams v. Lee, 358 U.S. 217, 220 (1959).

[69] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983). I have elsewhere identified five factors or questions as being important to this balancing analysis. The five are: (1) Is there a backdrop or tradition of tribal sovereignty in the area being regulated? (2) Is the state regulation incompatible with an existing federal and/or tribal regulatory scheme? (3) Is there a nexus between the state regulation and state services? (4) Is the tribe marketing an exemption or is the value of the taxed item or activity being regulated generated on the reservation and substantially involving the tribe? (5) Does the activity being regulated have any spillover effect outside the reservation? *See* Skibine, *supra* note 39, at 417–18.

Although, initially, using this balancing preemption inquiry, the tribes were able to successfully fight off the states' assertion of jurisdiction inside the reservations,[70] the last tribal victory using this test at the Supreme Court level occurred more than 20 years ago.[71] Although the Court previously found preemption from general congressional legislation promoting tribal self-government or economic self-sufficiency, recently, the Court seems to have adopted a position requiring specific congressional intent to preempt. Thus later cases, while still mentioning the preemption test, do not really consider the federal and tribal interests at stake,[72] or find ways to avoid using the balancing test altogether.[73]

Finally, although it had in the past adopted a *categorical* approach mandating explicit congressional authorization before allowing direct state taxation of reservation Indians,[74] the Court has recently adopted principles of statutory construction which make it highly likely that lands owned in fee by tribal members will be subject to state taxation.[75] For instance, in *Cass County v. Leech Lake Band of Chippewa Indians*,[76] Justice Thomas writing for the Court took the principle that state taxation of Indians on reservations is not authorized unless Congress "has made its intention to do so unmistakably clear"[77]and transformed it into the principle that when Congress makes Indian land "freely alienable, it is 'unmistakably clear' that Congress intends that land to be taxable by state

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[70] *See* Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Cent. Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980); Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

[71] *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

[72] *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989); Dep't of Taxation and Fin. v. Milhelm Attea & Bros. Inc., 512 U.S. 61 (1994).

[73] *See* Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005) (finding that a state excise tax on fuel sold by a non-Indian distributor to the Potawatomi Nation so that the Nation could sell such fuel at a tribal gas station located on the reservation did not actually take place on the reservation but at the place where the non-Indian distributor first received the fuel from out of state).

[74] In *Oklahoma Tax Commission v. Chickasaw Nation*, the Court stated, "[W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, a more categorical approach: [A]bsent cession of jurisdiction or other federal statutes permitting it, we have held, a State is without power to tax reservation lands and reservation Indians." 515 U.S. 450, 458 (1995) (internal quotations omitted) (quoting County of Yakima v. Confederated Tribes & Bands of the Yakima Nation, 502 U.S. 251, 258 (1992)).

[75] *See* Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 12–15, 83–84 (2008).

[76] 524 U.S. 103 (1998).

[77] *Id.* at 110 (internal quotations omitted).

and local governments, unless a contrary intent is 'clearly manifested.'"[78] Justice Thomas was able to achieve this feat by interpreting Justice Scalia's opinion in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,*[79] as resurrecting dicta found in a 1906 case, *Goudy v. Meath.*[80] Short circuiting Scalia's analysis,[81] Justice Thomas in *Cass County* reinstated the law as it was at the time of *Goudy,*[82] and was able to conveniently discard the contribution to the law made since that case, notably by Justice Thurgood Marshall in cases such as *McClanahan v. Arizona State Tax Commission.*[83]

In conclusion, it can be stated that although there is still some geographical component to tribal sovereignty, the Court has largely destroyed the political integrity of Indian reservations by severely restricting tribal power over non-members and their property while at the same time allowing a significant amount of state jurisdiction not only over non-members but also over tribal members and their property. So the rhetorical question is: If state power no longer stops at the reservation borders, why should tribal sovereignty?

III. DOMESTIC LAW RECOGNITION OF TRIBAL SOVEREIGN

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[78] *Id.* at 113. For a recent judicial interpretation of *Cass County*, see Oneida Tribe v. Village of Hobart, 542 F. Supp. 2d 908 (E.D. Wis. 2008).

[79] 502 U.S. 251 (1992).

[80] 203 U.S. 146 (1906).

[81] In *County of Yakima*, Scalia did mention that in *Goudy v. Meath*, the Court found that Indian-owned fee land was taxable by the state because Section 5 of the IRA had made such land alienable. 502 U.S. at 263–64. However, Scalia had earlier stated that since 1906 the law had evolved, and he remarked that the Court had adopted a "categorical" approach in under which "our cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has made its intention to do so unmistakably clear." *Id.* at 258 (internal quotations omitted) (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), Montana v. Blackfeet Tribe, 471 U.S. 759 (1985), and California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)). That was why Scalia could not rely only on Section 5 of the IRA but had to invoke Section 6 and the Burke Act proviso. As he put it, "The Burke Act proviso, enacted in 1906 made this implication of § 5 explicit, and its nature more clear." *County of Yakima,* 502 U.S. at 264.

[82] After noting that in *Goudy*, the Court found taxability just because it would be "strange" to make the land alienable and not taxable at the same time, Justice Blackmun in his *County of Yakima* dissent stated that "Nor can what this Court finds 'strange' substitute for 'unmistakably clear' intent of Congress." 502 U.S. 251, 273. Justice Blackmun added: "[W]hether *Goudy* would still be good law is questionable in light of the Court's more recent decision in *Bryan v. Itasca County*, 426 U.S. 373 (1976)." 502 U.S. at 272 n.2 (Blackmun, J., dissenting).

[83] 411 U.S. 164 (1973). Some lower courts have found ways to distinguish *Cass County* or limit the decision to its facts. *See* Keeweenaw Bay Indian Cmty. v. Naftaly, 452 F.3d 514, 530 (6th Cir. 2006) (refusing to extend *Cass County* to Indian owned land placed in fee as a result of a treaty); Gobin v. Snohomish County, 304 F.3d 909, 916 (9th Cir. 2002) (refusing to extend *Cass County* to allow state jurisdiction to zone Indian owned fee land within a reservation).

INTERESTS BEYOND THE RESERVATION

A. Treaties and Agreements with and Among Indian Tribes

Treaties entered between the United States and various Indian tribes have been recognized as confirming hunting and fishing rights to tribes beyond their reservations borders.[84] Such treaties have been held to immunize tribal members from some state regulations.[85] In addition, tribes can enforce tribal regulations of treaty rights on their own members beyond the reservation.[86] Such tribal regulations may even, in certain cases, preempt state regulations.[87] Usually, however, because tribal treaty rights outside the reservation are said to be held "in common" with the citizens of the state, states have been given concurrent jurisdiction to regulate treaty hunting and fishing rights for the purpose of conservation.[88] Such state regulations have to be reasonable and necessary,[89] and cannot discriminate against Indians exercising their treaty rights.[90]

Although there may be some limitations derived from the Supreme Court's statement that tribes have been divested of the power to "independently . . . determine their external relations,"[91] tribes can and have entered into binding agreements and treaties with other tribes.[92] In a recent case, a federal district court upheld the power of the Squaxin Island Indian Tribe to enter into an agreement with the Frank's Landing Indian Community, allowing the Squaxin Tribe to collect taxes on cigarette sales which took place within the Frank's Landing Indian Community that had been leased to the Squaxin Tribe by one of that tribe's members who lived within the Frank's Landing Indian community.[93] Although the situation of the Frank's Landing Indian

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[84] *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979). *See also* COHEN, *supra* note 7, at 1142–46.

[85] Antoine v. Washington, 420 U.S. 194, 195 (1975). *See also* State v. Jim, 725 P.2d 372, 373 (Or. Ct. App. 1986) (holding that a tribal member who, while exercising his treaty right, killed a deer on the reservation, could sell its body parts off the reservation even though this was in violation of Oregon law).

[86] *See* Settler v. Lameer, 507 F.2d 231, 231 (9th Cir. 1974).

[87] *See* United States v. Michigan, 653 F.2d 277, 278 (6th Cir. 1981).

[88] Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 398 (1968).

[89] Dep't of Game v. Puyallup Tribe, 414 U.S. 44, 49 (1973).

[90] *Puyallup Tribe*, 391 U.S. at 398. Some courts have adopted a strict and narrow definition of what is necessary for conservation. *See, e.g.*, Sohappy v. Smith, 302 F. Supp. 899, 911 (D. Or. 1969); *Jim*, 725 P.2d at 374 (holding that the state's "[c]onservation purposes are narrowly circumscribed, encompassing only those that are necessary for the perpetuation of the species . . . .").

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

[92] *See* Robert J. Miller, *Inter-Tribal and International Treaties for American Indian Economic Development*, 12 LEWIS & CLARK L. REV. 1103 (2008).

[93] *See* Nisqually Indian Tribe v. Gregoire, No. 08-5069RBL, 2008 WL 1999830, *11

Community is a little peculiar,[94] this agreement, in effect, allowed the Squaxin tribe to exercise sovereign authority beyond its reservation borders. As stated by the court, the issue in the case was "whether Squaxin can exercise its power, as a sovereign, federally-recognized tribe, to tax economic activity occurring on land held in trust by the United States for a member of the Squaxin Tribe—land that is within the territory of a self-governing dependent Indian community."[95]

Finally, tribes can and have entered into compacts with states which have recognized some form of tribal authority over tribal members or exemptions from state power beyond the reservation border. For instance, tribes in Michigan have entered into tax compacts with the state which recognize some tribal exemptions from state taxing authority in "agreement areas." As stated by professor Matthew Fletcher, "[t]he 'agreement area' concept developed over the course of the negotiations in order to smooth over many of the difficulties created by the lack of a clearly designated Indian Country for most Michigan Indian Tribes."[96] Therefore, according to Professor Fletcher "[f]ew of the lines and boundaries affecting the [tax] exemptions contained in the agreement have any relationship whatsoever to reservation boundaries or Indian Country."[97]

B. Legislation Recognizing Tribal (Sovereign?) Interests Beyond the Reservation.

I put a question mark after the word sovereign because one of the issues here is whether this section should be written in terms of tribal sovereignty interests or something else: cultural, religious, or socio-political interests. Talking in terms of sovereignty often invites conflicts because sovereignty is connected with an assertion of *power*, often exclusive power. Framing the discussion about cultural and religious rights, on the other hand, seems less confrontational and more aimed at seeking accommodations. In a perceptive essay, Sam Deloria recently referred to the potential dangers for tribes as being seen as "marketing tribal sovereignty," but took the position that there was nothing wrong

(W.D. Wash. 2008).

[94] Although the United States Congress in 1987 recognized the Frank's Landing Indian Community as a self-governing dependent Indian community, Indian Law Technical Amendments of 1987, Pub. L. No. 100-153, 101 Stat. 886, the court took the position that the legislative history indicated that Congress did not intend to establish Frank's Landing as a federally recognized tribe. In addition, Congress, in 1994, amended the 1987 law to clarify that while the Community was independent from the Nisqually Tribe, whose reservation formerly included the Frank's Landing Indian Community, it was still not a federally recognized Indian tribe. Pub. L. No. 103-435, 108 Stat. 4566 (1994).

[95] *Nisqually Indian Tribe*, 2008 WL 1999830 at *2.

[96] Matthew L.M. Fletcher, The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements, 82 U. DET. MERCY L. REV. 1, 19 (2004).

[97] *Id.* at 21.

with the tribes doing just that. [98] Although it is true that a Supreme Court that is not inclined to give Indian tribes a break by allowing them to "market an exemption" within the reservation,[99] is bound to be skeptical about tribes "marketing" sovereignty outside the reservation, one has to keep in mind that, as one scholar has argued, the Supreme Court is more than willing to switch the debate from sovereignty to other fields, such as property, in order to give tribes the worse of both worlds.[100] Besides, as explained earlier, it is in large part due to the Court's own opinions that the tribes' opportunities to exercise what could be called *economic* sovereignty within their reservations has been severely restricted.

A while ago, while making a presentation at a symposium on religion, pluralism, and the relationship between dominant state actors and non-state religious actors, professor Perry Dane opted to deliver a paper on Native American sovereignty. His article, titled *The Maps of Sovereignty: A Meditation,*[101] is about mutual recognition between the state as the ultimate sovereign and other non-state actors that are perhaps not totally sovereign, as is the case with Indian tribes. In explaining why what he termed "sovereignty talk" is important, Dane wrote:

> Sovereignty-talk is a distinct form of argument. It is the demand that one legal system recognize the prerogatives of another. Tribal sovereignty is more than a right of association, or a right to contract . . . Sovereignty . . . is less a grant of freedoms or privileges than the power to define freedoms and privileges.[102]

According to professor Dane, "sovereignty-talk" is important to the tribes because it was the concept and word used to describe the initial relationship between the tribes and the United States. I think talking in terms of sovereignty highlights three fundamental notions important to Indian tribes. First, tribes were once fully independent sovereigns and their sovereignty predated the creation of the United States. Second, present day recognition that tribes still possess attributes of their original sovereignty means that they are not mere federal instrumentalities. In

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[98] Sam Deloria, *New Paradigm: Indian Tribes in the Land of Unintended Consequences*, 46 NAT. RESOURCES J. 301, 311 (2006).

[99] *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (allowing state taxation of cigarettes sold by tribes to non-tribal members within the reservation because tribes should not be able to market an exception from state taxes applicable outside the reservation).

[100] *See* Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 3 (1991).

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

[102] *Id.* at 966–67. Dane also stated, "Sovereignty, as an idea in relations among legal orders, is a general, potentially elastic, legal category . . . It captures a form of talk found in a variety of settings . . . . Sovereignty, whether it takes that name or some other name, is a socially constructed category. . . . Sovereignty is tied to power, cohesion, identity, culture, faith, community, and ethnicity, among other things. But it is more than the sum of those parts." *Id.* at 966.

other words, they are not creatures of the federal government. They have an existence independent of the federal or state governments. Third, although Dane is correct that "sovereignty" should be a flexible concept that could be applied to religious entities,[103] tribes are the only political entities or groups, besides the federal government and the states, to be formally recognized as possessing some degree of inherent sovereignty within the United States. In other words, this makes them unique and different from all the other non-state actors claiming some autonomous rights in the United States.

Whether described in term of sovereignty, religious and human rights, or just cultural resources, the United States Congress has enacted a substantial amount of legislation aimed at protecting such off-reservation tribal interests. In this section, the order in which the various Acts of Congress are examined is determined by how close they are related to tribal sovereign interests. Although placement and position on the list is somewhat subjective, legislation most directly implicating tribal sovereignty is discussed first.

Perhaps the most far reaching legislation recognizing tribal sovereign interests beyond the reservation borders is the Indian Child Welfare Act (ICWA) of 1978.[104] In addition to mandating exclusive tribal court jurisdiction over certain child custody proceedings when the Indian child is domiciled on the reservation, the ICWA allows for concurrent tribal and state jurisdiction in such proceedings for Indian children residing off the reservation. Furthermore, the Act allows for transfer of cases from state to tribal courts in the absence of good cause or objections by either parent. As pointed out by professor Patrice Kunesh, one section of the ICWA recognized exclusive tribal court jurisdiction over non-reservation Indian children when these children are "wards" of the tribal court.[105] Furthermore, professor Kunesh also demonstrated that even before the passage of ICWA, some courts, using what she termed the *Williams-McClanahan* construct of analysis[106] instead of the *Mescalero* construct,[107] had recognized exclusive tribal court

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[103] *See infra* Part V, pp. 1041–44. (discussing the churches in Germany). For an interesting essay on the interrelationship between state and religious sovereignty, *see* Bernard Roberts, Note, *The Common Law Sovereignty of Religious Lawfinders and the Free Exercise Clause*, 101 YALE L.J. 211 (1991).

[104] 25 U.S.C. §§ 1901–1963 (2000).

[105] 25 U.S.C. § 1911(a)(2000). *See* Patrice Kunesh, *Borders Beyond Borders—Protecting Essential Tribal Relations Off Reservation Under the Indian Child Welfare Act*, 42 NEW ENG. L. REV. 15, 53–57 (2007) (arguing that there should not be any fixed boundaries delimiting tribal jurisdiction over Indian children who are wards of the tribal court).

[106] According to Kunesh, this construct, named after *Williams v. Lee*, 358 U.S. 217 (1959), and *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), "is premised on the principles highly protective of tribal self-government over internal reservation affairs and essential tribal relations." Kunesh, *supra* note 105, at 19.

[107] Named after *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), this construct

jurisdiction in such off reservation child custody proceedings.[108] Having stated that the unique tribal interest in its Indian children "coalesces with the essentiality of tribal governance in child welfare matters, to compose an uber-tribal interest that transcends territorially-defined jurisdictional limits,"[109] professor Kunesh concluded that "[t]he welfare of Indian children lies at the heart of tribal sovereignty. Thus, there are no real boundaries to protecting these essential tribal relations . . . ."[110]

Just as was done in the ICWA, Congress has also enacted federal legislation mandating that full faith and credit be given by federal and state courts to certain orders of tribal courts.[111] Examples of such legislation are the Child Support Orders Act,[112] the Violence Against Women Act,[113] the Indian Land Consolidation Act,[114] National Indian Forest Management Act,[115] the American Indian Agricultural Management Act,[116] and arguably the Parental Kidnaping Act.[117] These statutes are important to the issue being discussed here because their ultimate effect is to extend the sovereign actions of Indian tribes beyond the reservation borders. In addition, as professor Robert Clinton has argued, legislation providing for full faith and credit, rather than comity, more clearly "integrate" Indian tribal courts into *Our Federalism* on the same par with state and federal courts.[118]

Congress has also enacted amendments to federal environmental statutes such as the Clean Air Act,[119] Clean Water Act,[120] and the Safe Drinking Water Act,[121] providing for treatment of tribes as states (TAS). Such treatment as states allows Indian tribes to extend the reach of their

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"recognizes the supremacy of state law over the off-reservation conduct of Indians." Kunesh, *supra* note 105, at 19.

[108] Kunesh cites *Wisconsin Potowatomies v. Houston*, 393 F. Supp. 719 (W.D. Mich. 1973); *Wakefield v. Little Light*, 347 A.2d 228 (Md. 1975); and *In re Buehl*, 555 P.2d 1334 (Wash. 1976). Kunesh, *supra* note 105, at 25–30.

[109] Kunesh, *supra* note 105, at 51.

[110] *Id.* at 78.

[111] 25 U.S.C. § 1911(d) (2000).

[112] 28 U.S.C. § 1738B (2000).

[113] 18 U.S.C. § 2265 (2000).

[114] 25 U.S.C. § 2207 (2000).

[115] 25 U.S.C. § 3106 (2000).

[116] 25 U.S.C. § 3713 (2000).

[117] 28 U.S.C. § 1738A (2000). *See* Eberhard v. Eberhard, 24 Ind. L. Rep. 6059, 6066 (Chy. Riv. Sx. Ct. App. 1997).

[118] *See* Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 863, 901 (1990).

[119] 42 U.S.C. § 7601(d)(2) (2000). *See* Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1294 (D.C. Cir. 2000) (upholding EPA's decision to extend tribal authority under the CAA to "informal" reservations).

[120] 33 U.S.C. § 1377(e) (2000).

[121] 42 U.S.C. 300j-11(a) (2000). *See also* Hazardous Materials Transportation Act, 49 U.S.C. § 5101 *et seq.*; Nuclear Waste Policy Act, 42 U.S.C. § 10101 *et seq.* (2000).

sovereignty beyond the reservation borders. As the Seventh Circuit stated in *Wisconsin v. EPA*, "once a tribe is given TAS status, it has the power to require upstream off-reservation dischargers, conducting activities that may be economically valuable to the state . . . to make sure that their activities do not result in contamination of the downstream on-reservation waters."[122] The Seventh Circuit also acknowledged that even though "this was a classic extraterritorial effect,"[123] it was not prohibited by the *Oliphant-Montana* line of cases which implicitly divested tribes of the power to independently control their external relations.[124]

Perhaps the most important statute focusing on tribal cultural interests is the Native American Graves Protection Act of 1990 (NAGPRA).[125] Once described as human rights legislation,[126] NAGPRA not only provides for the repatriation of Native American human remains and cultural items[127] in the possession of Federal agencies and museums to the tribes,[128] but also gives certain protections to Native American graves and burial grounds located on tribal and federal lands. Under NAGPRA, if an Indian burial ground is discovered during excavation activities, the appropriate tribes have to be notified. Once a tribe is notified, however, it only has thirty days to decide how to remove, or otherwise make provisions for the disposal of, human remains and cultural items associated with the burial site. After the thirty day period, activities around the site may resume.[129]

Tribal interests in off-reservation sites were also recognized in the 1979 Archeological Resource Protection Act (ARPA)[130] and the 1966 National Historic Preservation Act (NHPA).[131] ARPA prohibits the removal and excavation of "archeological resources" from federal and Indian land without a permit.[132] Under the Act, the appropriate Indian

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[122] Wisconsin v. EPA, 266 F.3d 741, 748 (7th Cir. 2001). *See also* City of Albuquerque v. Browner, 97 F.3d 415, 423–24 (10th Cir. 1996).

[123] *Id.*

[124] *See also* Ann E. Tweedy, *Using Plenary Power as a Sword: Tribal Civil Regulatory Jurisdiction Under the Clean Water Act After* United States v. Lara, 35 ENVTL. L. 471 (2005).

[125] Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2000).

[126] *See* Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background & Legislative History*, 24 ARIZ. ST. L.J. 35, 59 (1992).

[127] Besides human remains, "cultural items" are defined in the statute as including funerary objects, sacred objects, and objects of cultural patrimony. 25 U.S.C. § 3001 (2000).

[128] "Museum" is defined in the Act as any institution receiving federal funds. 25 U.S.C. § 3001(8) (2000).

[129] 25 U.S.C. § 3002 (d)(1); 43 C.F.R. 10.4(d)(2) (2007).

[130] 16 U.S.C. § 470aa (2000).

[131] 16 U.S.C. § 470a (2000). NHPA was significantly amended in 1980, 94 Stat. 2987, and 1992, 106 Stat. 4753.

[132] "Archeological resources" include "any material remains of past human life

tribe has to be notified if the issuance of a permit could result in harm or destruction to any site, considered as having some cultural or religious importance to that tribe.[133] Under the 1992 amendments to NHPA, federal agencies have to consult with the appropriate tribes if a federal undertaking is likely to affect a historic property of religious or cultural significance to that tribe.[134] However, while consultation allows tribes to be involved in the process, it does not give them a right to veto any federal undertakings.[135]

It is important to note that neither NAGPRA, ARPA, nor NHPA provide total protection to Native American *sacred* sites as such.[136] Although Native Americans could seek protection for such sites located on public lands using the Free Exercise Clause of the United States Constitution,[137] albeit not very successfully,[138] the Supreme Court's 1988 decision in *Lyng v. NW. Indian Cemetery Protective Ass'n.*[139] foreclosed this avenue. The Court in *Lyng* held that the free exercise clause was not applicable to challenge the federal management of federal lands because such federal actions did not prohibit Native American practitioners from exercising their religion since they did not force or compel them to do anything against their religion.[140] However, responding to another Supreme Court decision, *Employment Division v. Smith*,[141] Congress enacted the Religious Freedom Restoration Act (RFRA).[142] The Act restored the application of strict scrutiny to test the validity of general

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or activities which are of archeological interest" and over 100 hundred years old. 16 U.S.C. § 470bb(1) (2000). *See also* 43 C.F.R. 7.3(a) (2007).

[133] 16 U.S.C. § 470cc(c) (2000).

[134] 16 U.S.C. § 470a(d)(6) (2000).

[135] *See generally*, Sandra B. Zellmer, *Sustaining Geographies of Hope: Cutural Resources on Public Land,* 73 COLO. L. REV. 413 (2002).

[136] *See generally*, Kristen A. Carpenter, *Old Ground and New Directions at Sacred Sites on the Western Landscape,* 83 DEN. L. REV. 981 (2006).

[137] The First Amendment to the United States Constitution provides in part that Congress "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. Under the strict scrutiny test, the government cannot substantially burden someone's free exercise of religion unless it is protecting a compelling governmental interest, using the least restrictive means.

[138] *See, e.g.*, Sequoyah v. Tenn. Valley Auth., 480 F. Supp. 608, 611–612 (E.D. Tenn. 1979); Badoni v. Higginson, 455 F. Supp 641, 644 (D. Utah 1977); Wilson v. Block, 708 F.2d 735, 739 (D.C. Cir. 1983); Crow v. Gullett , 541 F. Supp. 785, 791 (D.S.D. 1982).

[139] 485 U.S. 439 (1988).

[140] *Id.* at 453. *See* Kristen A. Carpenter, *In the Absence of Title; Responding to Federal Ownership in Sacred Sites Cases,* 37 NEW ENG. L. REV. 619, 623 (2003).

[141] 494 U.S. 872 (1990) (holding that the strict scrutiny test was not applicable to challenge on free exercise grounds, a federal law of general applicability; in this case a law prohibiting the use of peyote, which only incidentally burdened someone's religion).

[142] 42 U.S.C. § 2000bb-1–2000bb-4 (2000).

federal laws and actions having a substantial impact on religious rights.[143] Recently, however, in an *en banc* decision the Ninth Circuit reversed a panel decision that had held that, notwithstanding the Court's holding in *Lyng*, RFRA allowed tribes to invoke a version of strict scrutiny to test the validity of federal actions impacting sacred sites located on federal lands.[144]

In an even more direct response to the Court's decision in *Employment Division v. Smith,* Congress in 1994 amended the American Indian Religious Freedom Act,[145] to protect from federal or state law, the use of peyote by Indians in connection with the practice of a traditional Indian religion. Although this legislation is more clearly involved with the protection of religious and cultural rights than tribal sovereignty, as mentioned earlier, the question is whether any of the statutes described above should be viewed as connected to tribal sovereignty or whether they should be viewed as only cultural and religious rights, or even property interests.[146] The special status of Indian tribes as quasi-sovereign entities is, after all, one reason why some governmental practices, this time favorable to Indian religious practitioners, have been able to overcome attacks that they ran afoul of the Establishment or Equal Protection clauses of the United States Constitution. For instance, in *Peyote Way Church of God Inc. v. Thornburgh,*[147] the Fifth Circuit held that granting an exception only to Native American religious practitioners from laws penalizing the possession of peyote was not a violation of the Establishment Clause because such special treatment could be justified based on the quasi-sovereign status of Indian tribes and the existence of a trust relationship between the federal government and such tribes.[148]

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[143] Under RFRA, federal action that substantially burdens someone's religion must be narrowly tailored to protect a compelling governmental interest. *Id.* § 2000bb-1(b).

[144] *See* Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024 (9th Cir. 2007), *rev'd en banc*, Navajo Nation v. U.S. Forest Serv., Nos.06-15371, 06-15436, 06-15455 (August 8, 2008).

[145] 42 U.S.C. § 1996a(b)(1) (2000).

[146] *See* Kristen A Carpenter, *A Property Rights Approach to Sacred Sites: Asserting a Place for Indians as Nonowners,* 52 UCLA L. REV. 1061 (2005). *See also* Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the native American Graves Protection Act,* 34 COLUM. HUM. RTS. L. REV. 49 (2002) (arguing that human rights and property rights are inextricably linked in the context of grave protection).

[147] 922 F.2d 1210 (5th Cir. 1991).

[148] *Id.* at 1217. *See also* Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F. Supp. 2d 1448 (D. Wyo. 1998), *aff'd*, 175 F.3d 814 (10th Cir. 1999); Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969 (9th Cir. 2004); Rupert v. U.S. Fish & Wildlife Serv., 957 F.2d 32 (1st Cir. 1992).

C. Judicial Recognition

There are two distinct but interrelated issues here. One is recognizing tribal sovereign power beyond the reservation. The other is recognizing tribal immunity from state jurisdiction beyond the reservation. Tribal sovereignty can be recognized in tribal regulations of tribal members, which could be concurrent with state jurisdiction. This should not represent a controversial legal or political issue. The real problems arise in connection with recognizing tribal sovereign interests while at the same time granting tribes a certain immunity from state regulations.

As far as giving tribes immunity from state regulations, the United States Supreme Court in *Mescalero Apache Tribe v. Jones*,[149] has stated that "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law."[150] Furthermore, in the recently decided *Plains Commerce Bank v. Long Family Land and Cattle Co.* case,[151] the Court remarked in dicta that tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation."[152] As this section will show, however, "generally" does not mean "always," and the fact that tribal sovereignty centers on tribal members within the reservation does not mean that it does not exist anywhere else. In this section, I argue that the membership prong of tribal sovereignty allows some tribal sovereign interests to be recognized beyond the reservation's borders.

One clear example where tribal immunity from state power has survived even outside the reservation is in the doctrine of tribal sovereign immunity from suit.[153] Thus in *Kiowa Tribe v. Manufacturing Technologies,*[154] the Supreme Court upheld the sovereign immunity of the tribe even though the tribe was being sued over commercial activities which had occurred off the reservation. The majority specifically refused the dissent's invitation to limit the tribe's sovereign immunity to non-commercial tribal affairs occurring on the reservation.[155]

The peculiar situation of Alaskan tribes provides a fertile ground to debate the extent of tribal sovereignty beyond the reservation borders. As a result of the Supreme Court decision in *Alaska v. Native Village of*

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[149] 411 U.S. 145 (1973).

[150] *Id.* at 148–49.

[151] 128 S. Ct. 2709 (2008) (holding that the tribal court did not have jurisdiction over a case alleging discrimination against tribal members by a non-Indian bank in a transaction involving the sale of non-member fee land).

[152] *Id.* at 2718.

[153] *See generally* Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty,* 37 TULSA L. REV. 661 (2002).

[154] 523 U.S. 751 (1998).

[155] *Id.* at 760–64 (Stevens, J. dissenting).

Venetie,[156] the Native Tribes in Alaska have been described as "sovereigns without territorial reach."[157] Yet in spite of *Venetie*, the Alaska Supreme Court, in *John v. Baker*,[158] allowed a tribal court jurisdiction over a child custody dispute between tribal members, even in the absence of any Indian country falling under the jurisdiction of that tribe.[159] After stating that "[t]he federal decisions discussing the relationship between Indian country and tribal sovereignty indicate that the nature of tribal sovereignty stems from two intertwined sources: tribal *membership* and tribal *land*," [160]the Alaska Supreme Court held that Alaska Native villages have inherent, non-territorial sovereignty allowing them to resolve domestic disputes between their own members.[161] Although the decision has been criticized,[162] it is now almost ten years old and has not been modified.

The Alaska Supreme Court relied on precedents such as *Wheeler*,[163] *Montana*,[164] *Merrion*,[165] *Fisher*,[166] and *Iowa Mutual Insurance Co. v. LaPlante*,[167] to find that under United States Supreme Court jurisprudence, "The key inquiry . . . is not whether the tribe is located in Indian country, but rather whether the tribe needs jurisdiction over a given context to secure tribal self-governance."[168] After observing that in *Oklahoma Tax Commission v. Sac & Fox Nation*,[169] the United States Supreme Court "specifically declined to answer the question of 'whether the Tribe's right to self-governance could operate independently of its territorial jurisdiction to pre-empt the state's ability to tax income . . .

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[156] 522 U.S. 520 (1998) (arguably wiping over 45 million acres of "Indian Country" in Alaska by finding that lands assigned to Native Villages under the Alaska Native Claims Settlement Act (ANCSA), 85 Stat. 339, 43 U.S.C. §§ 1601-28, could not constitute dependent Indian Communities under 28 U.S.C. § 1151, the Indian Country statute).

[157] *Id.* at 526.

[158] 982 P.2d 738 (Alaska 1999).

[159] The legal issue in *John v. Baker* was not pre-determined by the Supreme Court decision in *Venetie* since *Venetie* only dealt with tribal jurisdiction over a non-Indian entity.

[160] *John*, 982 P.2d at 754.

[161] *Id.* at 758.

[162] *See* David M. Blurton, John v. Baker *and the Jurisdiction of Tribal Sovereigns Without Territorial Reach*, 20 ALASKA L. REV. 1 (2003) (arguing that the decision does not conform to supreme court precedents but acknowledging the need for legislation to confirm the tribes' jurisdiction). *See also* 2004 Op. Alaska Atty. Gen. No. 1 (Oct. 1, 2004) (taking the position that Alaskan tribes lack sovereign authority over child protection issues).

[163] United States v. Wheeler, 435 U.S. 313 (1978).

[164] Montana v. United States, 450 U.S. 544 (1981).

[165] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

[166] Fisher v. Dist. Court, 424 U.S. 382 (1976).

[167] 480 U.S. 9 (1987).

[168] John v. Baker, 982 P.2d 738, 756 (Alaska 1999).

[169] Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993).

when the employee does not reside in Indian country,'"[170] the Alaskan Court observed that in a later case, *Oklahoma Tax Commission v. Chickasaw Nation*,[171] the U.S. Supreme Court "implied that a tribe's ability to retain fundamental powers of self-governance,"[172] is more important than the principle first stated in *Mescalero Apache Tribe v. Jones* that "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."[173] Finally, relying on *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*,[174] the Alaskan Court concluded:

> Decisions of the United States Supreme Court support the conclusion that Native American nations may possess the authority to govern themselves even when they do not occupy Indian country. . . . Decisions like *Chickasaw Nation* and *Sac and Fox Nation* suggest that tribes without Indian country do possess the power to adjudicate internal self-governance matters.[175]

Importantly, tribal jurisdiction in this case did not displace concurrent state jurisdiction. State courts should, however, in the absence of compelling circumstances, usually give comity—and in some cases full faith and credit—to the decisions of tribal courts.[176] Furthermore, a good argument can be made that even if state courts take

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[170] *John*, 982 P.2d at 758 (quoting *Sac & Fox*, 508 U.S. at 126). Generally speaking, Indians who ventured outside the reservation are usually held subject to state regulations, such as taxation. *See* George v. Tax Appeals Tribunal, 548 N.Y.S.2d 66 (N.Y. App. Div. 1989). However, one scholar has recently taken the position that there is no clear answer whether an Indian who earns income within a reservation, but lives outside of it, can be taxed by the state. *See* Jensen, *supra* note 75, at 63 (citing Jefferson v. Comm'n of Revenues, 631 N.W. 2d 391 (Minn. 2001)).

[171] 515 U.S. 450, 464 (1995).

[172] *John*, 982 P.2d. at 758. In *Chickasaw Nation,* the Supreme Court held that while the State could not collect a state tax on Indians living in Indian Country, it could collect on Indians living outside of it. However, relying on the fact that the Supreme Court, in explaining its rational, stated that in this case "[n]otably, the Tribe has not asserted here, or before the Court of Appeals, that the State's tax infringes on tribal self-governance," *Chickasaw Nation*, 515 U.S. at 464, the Alaskan Court concluded that the *Chickasaw* Court "implied that its result would be different had the parties' dispute implicated the tribal self-governance concerns raised by a family law matter integral to tribal self-governance." *John,* 982 P.2d. at 758.

[173] 411 U.S. 145, 148–49 (1973).

[174] 523 U.S. 751, 760 (1998) (upholding tribal sovereign immunity from suit even when a tribe is engaged in commercial activities outside the reservation).

[175] *John*, 982 P.2d at 759.

[176] No comity will be given tribal courts, however, if the state court finds that the tribal court did not have either subject matter or personal jurisdiction over the parties, or if the state court finds that the tribal court order violated the due process rights of one of the parties. *See* Starr v. George, 175 P.3d 50 (Alaska 2008). One commentator has suggested that the due process clause of the Indian Civil Rights Act may impose some limits on the personal jurisdiction of tribal courts. *See* David A. Castleman, Comment, *Personal Jurisdiction in Tribal Courts,* 154 U. PA. L. REV. 1253, 1254 (2006).

the case, they should apply tribal law if the lawsuit involves tribal members and the issue is one involving internal matters of tribal self-governance. This would be even more true in the lower 48 states if the case arose within an Indian reservation but ended in state court because the tribe lacked jurisdiction over the non-member party.[177]

The Alaskan example is important beyond Alaska, as any extra-territorial tribal power recognized in Alaska should also be recognized in the lower 48 states. In an insightful and well reasoned article, two co-authors have argued that in addition to child custody disputes, the jurisdiction of Native Tribes in Alaska should extend to determining tribal membership; the form of tribal government; as well as enacting laws necessary to determine and govern "internal affairs," including enforcement and regulation of hunting and fishing treaty rights; the power to levy taxes; and the regulation and protection of tribal property.[178] Beside the retention of tribal sovereign immunity from suits, among other important tribal powers these authors identify as not having been lost as the result of *Alaska v. Native Village of Venetie* are the power to create corporations, the power to issue tax exempt bonds under the Indian Tribal Government Tax Status Act,[179] and the power to banish tribal members who misbehave.[180] These authors also suggest that the tribes in Alaska may still have the tribal power to prescribe inheritance rules,[181] obtain jurisdiction over non-members who consent, as well as asserting jurisdiction over all domestic relations including marriage and divorce.[182]

An important question here is whether the Indian preemption test can ever be applied to immunize Indian tribes and their members from otherwise applicable state regulations.[183] Whether the preemption test should be used came to the fore in *Prairie Band Potawatomi Nation v. Wagnon*, a case where the Prairie band of the Potawatomi Nation of Kansas was attempting to fend off Kansas's attempts to issue traffic citations to tribal members for driving off the reservation with only tribally issued license plates.[184] In that case, the Tenth Circuit first applied a traditional Indian preemption analysis, balancing the federal and tribal interests against the state interests to find that Kansas had to

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[177] *See* Katherine J. Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts,* 55 AM. U. L. REV. 1627, 1649 (2006).

[178] *See* Geoffrey D. Strommer & Stephen D. Osborne, "*Indian Country*" *and the Nature and Scope of Tribal Self-Government in Alaska*, 22 ALASKA L. REV. 1, 11 (2005).

[179] 26 U.S.C. § 7871 (2000).

[180] Strommer & Osborne, *supra* note 178, at 15. On banishment, see Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems,* 37 N.M. L. REV. 85 (2007).

[181] Strommer & Osborne, *supra* note 178, at 16.

[182] *Id.* at 15.

[183] *See* discussion at notes 72–78.

[184] 402 F.3d 1015, 1016 (10th Cir. 2005).

recognize the validity of the tribal license plates. Therefore, tribal members with tribal license plates did not also have to get license plates issued by the state of Kansas. However, after that decision was vacated and remanded by the United States Supreme Court,[185] for reconsideration in light of another case by the same name but dealing with state taxation of fuel sold on the reservation,[186] the Tenth Circuit decided to change its approach and this time around, used an equal protection argument to essentially come up with the same result and uphold the tribal position.[187] In doing so, it adopted the argument proposed by Judge McConnell in a concurring opinion before the decision was remanded from the Supreme Court.[188] Using an equal protection mode of analysis, the Tenth Circuit held that Kansas did not have a rational basis for treating license plates issued by tribes located in Kansas differently from any other license plates issued by non-Kansas governmental entities, which included non-Kansas-based Indian tribes.

The reason Judge McConnell had not wanted to use the Indian preemption analysis was that "[t]he State of Kansas has not attempted to project its jurisdiction over the on-reservation activities of the tribal vehicle registration and titling office. . . . The sole issue in the case is whether, when tribal members drive their vehicles off reservation onto Kansas roads, this can be regulated by the State."[189] According to McConnell, therefore,"Because the issue here is the regulatory authority of the State over activity by tribal members *outside the reservation*, the proper analysis is . . . that set forth in *Mescalero Apache Tribe v. Jones*."[190] In its initial opinion before the Supreme Court remand, Judge McKay, writing for the Tenth Circuit, had asserted that this was a reservation case because "the activity at issue in this case, licensing and titling of vehicles, takes place on the reservation. Even though this case implicates the off-reservation activity of driving on Kansas roads when vehicles leave the

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[185] Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 1072, 1072–73 (2005).

[186] *See* Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 115 (2005). In that case, the Supreme Court held that the Indian preemption balancing test could not be applied because the event the state was attempting to tax was held to have occurred off the reservation.

[187] Prairie Band Potawatomi Nation v. Wagnon, 476 F.3d 818, 827 (10th Cir. 2007).

[188] *Prairie Band of Potawatomi Nation*, 402 F.3d at 1028–31, (McConnell, J., concurring). That approach had initially been applied by the Ninth Circuit in an earlier case, *Cabazon Band of Mission Indians v. Smith*, 388 F.3d 691 (9th Cir. 2004) (holding that a county refusal to allow tribal law enforcement vehicles to display light bars on their roofs while traveling off the reservation to go from one area of the reservation to another was a denial of equal protection since other law enforcement agencies from other counties or other states were allowed to display such light bars even though they were similarly situated to the Tribe's law enforcement agency).

[189] *Prairie Band of Potawatomi Nation*, 402 F.3d at 1029 (McConnell, J., concurring).

[190] *Id.* at 1028.

reservation for various reasons, 'we deem it an on-reservation case for purposes of preemption because the essential conduct at issue occurred on the reservation.'"[191]

Although the Tenth Circuit on remand was able to conveniently abdicate from its original position while still being able to reach the same result,[192] the question left unanswered is whether the Indian preemption test can ever be applied to situations involving tribal immunity from state regulation for conduct or issues arising off the reservation.[193] In *Wagnon v. Prairie Band Potawatomi Nation*, the Supreme Court case responsible for the remand on the tribal license plates case, the issue was whether the preemption balancing test could be applied to a state tax that the Court found was imposed off the reservation. After first remarking that "[t]he *Bracker* interest-balancing test has never been applied where, as here, the State asserts its taxing authority over non-Indians off the reservation. And although we have never addressed this precise issue, our Indian tax immunity cases counsel against such an application,"[194] Justice Thomas, writing for the Court, stated "Limiting the interest-balancing test exclusively to *on-reservation* transactions between a nontribal entity and a tribe or tribal member is consistent with our unique Indian tax immunity jurisprudence."[195] The only normative reason for never using the interest

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[191] *Id.* at 1022 (quoting from *In re* Blue Lake Forest Prods. Inc., 30 F.3d 1138, 1141 (9th Cir. 1994)).

[192] On remand from the Supreme Court, the Tenth Circuit, gave a somewhat ambivalent explanation as to why it was changing its previous analysis, stating, "The fact that motor vehicle titling and registration is a traditional government function . . . makes clear that the issue does not concern the location of any individual vehicle or residency of any individual driver, but the sovereign right to make equally enforceable and equally respected regulations in an arena free of discrimination . . . . Accordingly, we must no longer concern ourselves with the severity of the effect of the State's regulation on the [Potawatomie] Nation's sovereign interests, but determine whether the State's law discriminates against the Nation's right to make such regulations vis-a-vis other sovereigns." *Prairie Band of Potawatomi Nation*, 476 F.3d at 823–24.

[193] The Tenth Circuit on remand seemed a bit reluctant to adopt the equal protection rationale over its previous analysis. Thus it noted its endorsement of a prior decision of the Ninth Circuit, *Queets Band of Indians v. Washington*, 765 F.2d 1399 (9th Cir. 1985), which had held that the State of Washington's refusal to recognize a tribe's license plates was in violation of the Supremacy clause of the United States Constitution even though there was no specific congressional legislation preempting state law. Although the court acknowledged that *Queets Band of Indians* had been vacated as moot, 783 F.2d 154 (9th Cir. 1986), and therefore could not be used as precedent, it stated that "[h]owever, the reasoning remains persuasive." *Prairie Band of Potawatomi Nation*, 476 F.3d at 823 n.7.

[194] Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 110 (2005).

[195] *Id.* at 112. However, in one of the first cases to use the Indian preemption doctrine, *Warren Trading Post Co. v. Arizona State Tax Commission*, the state tax was being imposed on on-reservation activities and the Court stated, "Moreover, we hold that Indian traders trading on a reservation with reservation Indians are immune from a state tax like Arizona's, not simply because those activities take place on a

balancing test in off reservation situations given by Justice Thomas in *Prairie Band Potawatomi Nation v. Wagnon,* was that such an interest balancing test is premised on a backdrop of tribal sovereignty.[196]

The fact that, arguably, the Indian preemption balancing test should not be used in off reservation settings, should not be confused with the power of Congress to expressly preempt state jurisdiction in issues involving Indian affairs, even if beyond the reservation border. The next Part of this Article will examine that issue.

IV. THE EXTENT OF CONGRESSIONAL POWER TO PREEMPT STATE LAW BEYOND THE RESERVATION BORDER

As discussed above, the United States can, through treaties with Indian tribes, preempt state regulations affecting off-reservation treaty rights.[197] For instance, in *United States v. Forty-Three Gallons of Whiskey,* the issue was whether the United States and the Red Lake and Pembina Band of Chippewa Indians could by treaty agree that federal laws prohibiting liquor on the reservation would continue in full force on lands ceded by the tribe in that treaty. These ceded lands were now part of an organized county of the state of Minnesota but the Court held that it was within the power of Congress to enter into such a treaty clause.[198]

This section discusses the limits on congressional power to preempt state regulations for conduct occurring beyond the reservation borders. In his *Mescalero Apache Tribe v. Jones*[199] dissenting opinion, after remarking that the "power of Congress granted by Art. 1, § 8 '[t]o regulate Commerce . . . with the Indian Tribes' is an exceedingly broad one,"[200] Justice Douglas cited cases holding that the power "reached acts even off Indian reservations in areas normally subject to the police power of the States."[201] Justice Douglas took the position that Congressional power extended to Indian economic activities outside the reservation as long as the power was being exercised "for the benefit of its Indian wards."[202]

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reservation, but rather because Congress in the exercise of its power granted in Art. I, § 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject." 380 U.S. 685, 691 n.18 (1965).

[196] According to Justice Thomas, that was because it is the doctrine of tribal sovereignty "which historically gave state law no 'role to play' within a tribe's territorial boundaries." *Wagnon*, 546 U.S. at 112.

[197] *See, e.g.*, Tulee v. Washington, 315 U.S. 681, 684–85 (1942).

[198] 93 U.S. 188, 189 (1876).

[199] 411 U.S.145, 159 (Douglas, J., dissenting).

[200] *Id.*

[201] *Id.* (citing Perrin v. United States, 232 U.S. 478 (1914); Gritts v. Fisher, 224 U.S. 640, 642–43 (1911); United States v. Thomas, 151 U.S. 577, 585 (1893); United States v. McGowan, 302 U.S. 535, 538 (1937)).

[202] *Id.* at 160. Although Justice Douglas also took the position that "the powers of Congress 'over Indian affairs are as wide as State powers over non-Indians'" he did

Older cases support this position. Perhaps the first case to recognize such off reservation Congressional power was *United States v. Holliday*,[203] which upheld the power of Congress to enact an 1862 statute preempting state law and prohibiting the sale of liquor to individual Indians in a county where there was no Indian reservation.[204] Thus, the *Holliday* Court stated:

> [I]f commerce, or traffic, or intercourse, is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a State. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on.[205]

The issue of federal power to prohibit liquor in areas ceded by Indian tribes was revisited in *Perrin v. United States*.[206] Although the Court in *Perrin* essentially reaffirmed *Holliday* and *Forty Three Gallons of Whiskey*, as well as other precedents,[207] it did comment that there were some limits to such congressional power:

> As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis.[208]

Although the Court did state that such arbitrary federal regulations "would involve an unjustifiable encroachment upon a power obviously residing in the State,"[209] it also specified that "[i]t must also be conceded that, in determining what is reasonably essential to the protection of the

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acknowledge that the powers of Congress were subject to the limitations of the Bill of Rights. *Id.* at 161.

[203] 70 U.S. (3 Wall.) 407, 419 (1865).

[204] *See also* United States v. Nice, 241 U.S. 591, 598–99 (1916) (holding that whether the Indians had become United States citizens was inconsequential a far as the existence and extent of the power of Congress over them).

[205] 70 U.S. (3 Wall.) at 418. While parts of the *Holliday* decision were reversed by *In Re Heff*, 197 U.S. 488, 509 (1905) (holding that Indians who had become citizens of the United States were no longer subject to congressional legislation regulating Indians), *Heff* was overruled. *Nice*, 241 U.S. at 601.

[206] 232 U.S. 478, 486 (1914).

[207] *See* Dick v. United States, 208 U.S. 340 (1908); Bates v. Clark, 95 U.S. 204 (1877); Clairmont v. United States, 225 U.S. 551 (1912).

[208] *Perrin*, 232 U.S. at 486. The Court also made the following interesting comments: "[A] prohibition valid in the beginning doubtless would become inoperative when in regular course the Indians affected were completely emancipated from Federal guardianship and control." *Id.*

[209] *Id.*

Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts."[210]

It seems that, as far as recognizing the extent and scope of congressional power beyond the reservation borders, the difference between the Court's analysis in *Holliday*, as opposed to *Perrin*, is that the *Holliday* Court focused on whether the congressional regulation could be considered as pertaining to commerce with the tribes while the *Perrin* Court focused on the trust doctrine and considered whether the federal regulation was necessary for the protection of the Indians, as wards of the Government. This change in focus can be attributable to the fact that, unlike *Perrin, Holliday* was decided before the Supreme Court's landmark decision in *United States v. Kagama*,[211] where the Court relied on the trust doctrine and not the Commerce power in order to justify plenary Congressional power over Indian tribes.[212]

More recent Supreme Court cases have been a bit more cautious about extending the power of Congress beyond the reservation borders. For instance, in *Organized Village of Kake v. Egan*, the Court held that the Secretary of Interior could not permit the Alaskan Native Village of Angoon to operate fish traps located outside of any Indian reservations and in violation of Alaska's conservation laws.[213] Although the Court did state that "[s]tate authority over Indians is yet more extensive over activities, such as in this case, not on any reservation,"[214] the Court did not hold that Congress could never pre-empt such state authority. Thus, although the Secretary could not grant such rights to Alaskan Natives in this case, that was only because the statutory authority claimed by the Secretary, the White Act,[215] and the Alaska Statehood Act,[216] did not confer such authority.

States have recently been engaged in what seems a concerted effort to argue that the Tenth Amendment imposes some limits on the power of Congress to preempt state law while regulating Indian Affairs off the reservation.[217] For instance, in *City of Roseville v. Norton,*[218] and *Carcieri v.*

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[210] *Id.* For a comprehensive treatment of the issue of liquor control within Indian reservations, see Robert J. Miller & Maril Hazlett, *The "Drunken Indian": Myth Distilled into Reality Through Federal Indian Alcohol Policy*, 28 ARIZ. ST. L.J. 223 (1996).

[211] 118 U.S. 375, 384 (1886).

[212] The Court in *Kagama* held that Congress could enact laws giving federal courts jurisdiction over a crime committed by one tribal member against another, even though such laws could not be considered as involving "commerce" with Indian tribes. *Id.* at 383.

[213] 369 U.S. 60, 62 (1962).

[214] *Id.* at 75.

[215] 43 Stat. 464 (1924) (codified as amended at 48 U.S.C. §§ 221–228 (2000)).

[216] 37 Stat. 512 (1912) (omitted in 1958 when Alaska was admitted to statehood under PL 85-508, codified at 48 U.S.C. § 21 (1958)).

[217] The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

Norton,[219] states argued that, because of the Tenth Amendment, the Secretary of the Interior could not take land in trust for the benefit of Indians, using authority delegated to her in the Indian Reorganization Act of 1934. In both cases the States were not successful. In *Carcieri v. Norton,* the court dismissed the argument, stating that "[t]he Supreme Court has interpreted the Tenth Amendment to be a mirror of the enumerated powers embodied in Article I . . . . Therefore, because the power to regulate Indian affairs is conferred on Congress, its exercise does not offend the Tenth Amendment."[220] In *Prairie Band Potawatomi Nation v. Wagnon*,[221] the state of Kansas argued that the injunctive relief prayed for by the tribe—forcing the state to recognize the validity of license plates issued by Kansas tribes, so as not to require tribal members having these tribal plates to also have valid Kansas plates on their vehicle while driving off the reservation—violated the Tenth Amendment "because it is effectively a mandate by Congress to recognize the Tribe's motor vehicles licenses and titles."[222] Distinguishing cases where the federal government was attempting to compel the state to enact or enforce federal programs,[223] the Tenth Circuit stated that here "plaintiff is merely asking the Court to enjoin the defendants from enforcing a *state* law that allegedly infringes on rights guaranteed to plaintiff by federal law."[224]

The state of California's reliance on the Tenth Amendment was more successful in *Agua Caliente Band of Cahuilla Indians v. Superior Court*. At issue in the case was whether the Fair Political Practice Committee (FPPC), a state agency, could sue the Tribe to force it to comply with the reporting requirement for campaign contributions contained in the Political Reform Act (PRA).[225] Invoking tribal sovereign immunity, the Tribe argued it was immune from such a lawsuit. Relying on the Tenth Amendment and the Guarantee Clause,[226] the California court carved a

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[218] 219 F. Supp. 2d 130, 138–39 (D.D.C. 2002), *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003).

[219] 290 F. Supp. 2d 167, 179 (D.R.I. 2003), a*ff'd on reh'g en banc on other grounds*, 497 F.3d 15 (1st Cir. 2007), *cert. granted in part on other grounds*, Carcieri v. Kempthorne, 128 S. Ct. 1443 (2008).

[220] 423 F.3d 45, 58 (1st Cir. 2005) (citing New York v. United States, 505 U.S. 144, 156 (1992) for the proposition that "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States"). *See also Roseville*, 219 F. Supp. 2d at 153–54 (adopting essentially the same argument).

[221] 476 F.3d 818 (10th Cir. 2007).

[222] *Id.* at 829.

[223] *New York,* 505 U.S. at 149, and Printz v. United States, 521 U.S. 898, 935 (1997).

[224] *Prairie Band Patawatomi Nation*, 476 F.3d at 829.

[225] Agua Caliente Band of Cahuilla Indians v. Superior Court, 148 P.3d 1126, 1138–39 (Cal. 2006).

[226] U.S. Constitution Article IV, Section 4, reads in part "The United States shall

narrow exception to the tribal sovereign immunity doctrine. The court held that because "[a]llowing tribal members to participate in our state electoral process while leaving the state powerless to effectively guard against political corruption puts the state in an untenable and indefensible position without recourse,"[227] the Guarantee Clause, together with the rights reserved under the Tenth Amendment, provide the state agency authority under the federal constitution to bring suit against the Tribe in its enforcement of the PRA. The court distinguished *City of Roseville* and *Carcieri* because such cases involved congressional legislation regulating Indian tribal activity occurring on or near a reservation. In *Agua Caliente*, on the other hand, there was no federal legislation and, according to the California court, the activity being regulated had nothing to do with commerce with Indian tribes, but involved state authority in political "matters resting firmly within [the states'] constitutional prerogatives."[228]

While the court did not have to confront the more interesting question of how the issue would have been resolved had Congress opted to specifically grant sovereign immunity to the tribe in such cases, the whole tone of the court's discussion indicates that the end result may have been the same. For instance, the court cited with approval Professor Merritt's article suggesting that two recent supreme court cases, *Gregory v. Ashcroft*,[229] and *New York v. United States*,[230] indicate that "the Supreme Court may be poised to recognize a new meaning of the guarantee clause: a promise by the national government to avoid interfering with state governments in ways that would compromise a republican form of government."[231]

The California court may have been overreaching here. To start with, the United States Supreme Court has always held that questions arising under the Guarantee Clause are political in nature, and therefore not justiciable under the political question doctrine.[232] While other

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guarantee to every State in this Union a Republican Form of Government . . ." U.S. CONST. art. IV, § 4.

[227] *Agua Caliente*, 148 P.3d at 1138.

[228] *Id.*

[229] 501 U.S. 452 (1991). Considering *Gregory v. Ashcroft* as a case endorsing the justiciability of the clause is somewhat of a stretch. In that case, the Court held that in order to protect the states' rights under the Tenth Amendment, before the ADEA could be held applicable to state judges, there had to be a clear statement from Congress that it was its intent to apply the Act to such state employees. *Id.* at 460.

[230] 505 U.S. 144, 183–84 (1992).

[231] *Agua Caliente*, 148 P.3d at 1138 (citing Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815 (1994)).

[232] *See* Luther v. Borden, 48 U.S. (7 How.) 1, 46–47 (1849); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149 (1912); Ohio *ex rel.* Bryant v. Akron Metro. Park Dist., 281 U.S. 74, 79–80 (1930); Colegrove v. Green, 328 U.S. 549, 556 (1946); City of Rome v. United States, 446 U.S. 156, 182 n.17 (1980).

prominent scholars have also argued that Guarantee Clause cases should be justiciable,[233] that view is far from unanimous.[234] Even if a state agency was able to overcome the initial justiciability issue, the link between not being able to sue tribes to force them to report their political contributions, and a failure to ensure a republican form of government, is tenuous, at best.[235] Besides not addressing what the drafters of the Constitution actually meant by a "Republican" form of government, the California court never articulated any judicial standards determining in what situation the State "Republican" form of government could be considered jeopardized to such extent as to require some form of judicial intervention.[236]

It would seem that, at the least, the Guarantee Clause should be invoked to strike a federal statute or, as is the case here, a federal common law immunity, only in the most compelling of situations. Not being able to compel the disclosure of some tribal political contributions in a state election does not appear to create such a threat.[237] For instance, in *New York v. United States,*[238] after striking part of a statute on Tenth Amendment grounds because the federal government cannot commandeer state legislatures to implement and enforce federal regulatory programs,[239] Justice O'Connor did evaluate other parts of that statute under the Guarantee Clause. She concluded, however, that they could not "reasonably be said to deny any State a republican form of government."[240]

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[233] *See e.g.*, Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849 (1994).

[234] *See* Ann Althouse, *Time for the Federal Courts to Enforce the Guarantee Clause?—A Response to Professor Chemerinsky*, 65 U. COLO. L. REV. 881, 883 (1994).

[235] That argument was in fact made by Judge Moreno in his dissenting opinion in *Agua Caliente*, 148 P. 3d at 1144–45.

[236] The lack of adequate judicial standards is one reason why the Supreme Court has found Guarantee Clause arguments not justiciable. *See* Reynolds v. Sims, 377 U.S. 533, 582 (1964); Baker v. Carr, 369 U.S. 186, 217–232 (1962). *See also* Jonathan Toren, Note, *Protecting Republican Government from Itself: The Guarantee Clause of Article IV, Section 4*, 2 N.Y.U. J.L. & LIBERTY 371 (2007) (summarizing the issues and scholarly debate surrounding the Guarantee Clause and arguing against justiciability).

[237] For instance, in *Largess v. Supreme Judicial Court for Massachusetts*, 373 F.3d 219 (1st Cir. 2004), Massachusetts state legislators brought an action in federal court claiming that when the state Supreme Court ordered recognition of same sex marriage, it unlawfully infringed on the prerogative of the legislature and was; therefore, a violation of the Guarantee Clause. Stating, "If there is any role for federal courts under the Clause, it is restricted to real threats to a republican form of government," the federal court rejected the challenge. *Id.* at 227.

[238] 505 U.S. 144, 183–84 (1992).

[239] This anti-commandeering principle was applied to federal attempts to commandeer state employees in *Printz v. United States*, 521 U.S. 898, 935 (1997).

[240] *New York*, 505 U.S. at 185. For an early case making a similar effort and still finding no violation of the Guarantee clause, see *Minor v. Happersett*, 88 U.S. (11 Wall.) 162 (1874).

Nevertheless, because the United States Supreme Court did not grant the tribe's petition for certiorari in *Agua Caliente*, we may expect states to be emboldened by the decision and attempt to extend such arguments to areas beyond tribal reporting of political contributions in state elections.[241] Such other areas may involve litigation under the Indian Child Welfare Act (ICWA).[242] California courts, for instance, were among the first to invoke the Tenth Amendment as mandating the existence of an Existing Indian Family (EIF)[243] before some provisions of ICWA could be invoked.

Enacted in 1978, ICWA regulates the termination of parental rights involving Indian children.[244] The Act generally provides for exclusive tribal court jurisdiction over Indian child custody proceedings if the child is domiciled on the reservation.[245] However, even for Indian children not domiciled on the reservation, the Act mandates that such proceedings be transferred from state to tribal courts in the absence of parental objections or good cause to the contrary.[246] The Existing Indian Family doctrine requires that in addition to the child being Indian,[247] Congress cannot constitutionally divest state courts of any Indian child custody proceedings unless there is an existing Indian family. For instance, in *In re Santos Y.*,[248] after stating that under United States Supreme Court Tenth Amendment jurisprudence, "Congress exceeds its enumerated authority when it legislates in matters generally left to the jurisdiction of the states unless the legislation bears a substantial nexus to the enumerated power under which the legislation is enacted,"[249] the Court held that unless there was an existing Indian family,

> [a]pplication of the ICWA to a child whose only connection with an Indian tribe is a one-quarter genetic contribution does not serve the purpose for which the ICWA was enacted, "to protect the best

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[241] This should not in any way indicate that this author condones what the tribe attempted to do here. If the California Supreme Court had dismissed the case on tribal sovereign immunity grounds, the large California delegation in the United States Congress would have almost certainly introduced a bill abrogating tribal sovereign immunity, and there is no way to know whether such legislation would have been limited to abrogating the immunity solely where tribes refuse to abide by state laws regulating state election laws.

[242] 25 U.S.C. §§ 1901–1923 (2000).

[243] *See In re* Bridget R., 49 Cal. Rptr. 2d 507 (Cal. 1996).

[244] *See generally* COHEN, *supra* note 7, at 819–856.

[245] 25 U.S.C. § 1911(a) (2000).

[246] 25 U.S.C. § 1911(b) (2000).

[247] Under the Indian Child Welfare Act, a child is an Indian child if he is a member of an Indian tribe or eligible to become a member of an Indian tribe. 25 U.S.C. § 1903(4) (2000).

[248] *In re* Santos Y., 112 Cal. Rptr. 2d 692 (Cal. 2002).

[249] *Id.* at 731.

> interests of Indian children and to promote the stability and security of Indian tribes and families."[250]

As stated in another California decision, "[W]here 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 major damage to clear and substantial federal interests."[251] In the context of ICWA, this means that any congressional action interfering with such state interests had to be tied to Congress acting as a guardian or trustee protecting tribal interests.

While the EIF doctrine has many problematic issues[252] and undertaking an in-depth critical assessment of the doctrine is beyond the scope of this Article,[253] perhaps the biggest problem with the doctrine is determining what constitutes an "Indian" family, and even more importantly, who gets to decide what is or is not an Indian family.[254] Furthermore, while the Court has held that congressional power over Indian affairs is limited by the Eleventh Amendment,[255] it has never mentioned, let alone ruled on any limitations pursuant to the Tenth Amendment. Yet, in *United States v. Lara*,[256] while upholding the power of Congress to reaffirm the inherent power of tribes to prosecute non-member Indians,[257] the Court seemed to fire a warning shot at Congress when it stated:

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[250] *Id.* (citing 25 U.S.C. § 1902).

[251] *In re* Bridget R., 49 Cal. Rptr. 2d 507, 510–11 (Cal. 1996).

[252] Besides the Tenth Amendment, some courts have also held that the EIF doctrine is mandated by substantive due process because a child has a constitutional right to a stable family. In fact, the United States Supreme Court has never recognized the existence of such fundamental right. Courts have also held that the EIF doctrine is mandated under the Equal Protection Clause because the special treatment for Indian children "triggered by an Indian child's genetic heritage, without substantial social, cultural or political affiliations between the child's family and a tribal community, is an application based solely, or at least predominantly, upon race and is subject to strict scrutiny under the equal protection clause." *In re Bridget R.*, 49 Cal. Rptr. 2d at 528. Under this argument, without an existing Indian family, there would be no compelling federal interest to satisfy the strict scrutiny test. However, the Supreme Court has stated that the classification of "Indian" is political and not racial since it is derived from membership in a quasi-sovereign entity with a government to government relationship with the federal government. *See* Morton v. Mancari, 417 U.S. 535 (1974). *See also* Carole Goldberg, *American Indians and "Preferential" Treatment,* 49 U.C.L.A. L. REV. 943 (2002).

[253] For such critical analysis, *see* Sandra C. Ruffin, *Postmodernism Spirit Healing, and the Proposed Amendments to the Indian Child Welfare Act,* 30 MCGEORGE L. REV. 1221 (1999).

[254] Goldberg, *supra* note 252, at 970–72.

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

[256] 541 U.S. 193 (2004).

[257] In 1990, Congress amended 25 U.S.C. § 1301(2) of the Indian Civil Rights Act of 1968 by stating that "the inherent power of Indian tribes, hereby recognized and affirmed," include the "exercise [of] criminal jurisdiction over all Indians." Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511 Sec.

> [T]he change at issue here is a limited one . . . . [I]t concerns a tribe's authority to control events that occurred upon the tribe's own land . . . . [W]e are not now faced with a question dealing with potential constitutional limits on congressional efforts to legislate far more radical changes in tribal status. In particular, this case involves no interference with the power or authority of any State.[258]

Although not directly related to the Tenth Amendment or preemption of state laws off the reservations, similar issues have surfaced concerning the power of Congress to treat Indians differently in off-reservation settings while staying clear of any violation of the Equal Protection Clause. The issue here is whether treating Indians differently amounts to discrimination based on race, thereby calling for such classification to be tested under the strict scrutiny test.[259] In *Morton v. Mancari,*[260] the Supreme Court held that when Congress allowed for a form of affirmative action in granting members of Indian tribes preference in employment with the federal Bureau of Indian Affairs, this did not amount to a classification based on race but one based on a political status; specifically, membership in quasi-sovereign entities having a trust relationship with the United States. Therefore, the strict scrutiny test was not applicable, and the classification was upheld because it was rationally tied to the fulfillment of the trust relationship.[261] In another case, the Court remarked that "[f]ederal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a "'racial' group consisting of 'Indians' . . . ."[262]

However, it seems that the classification of "Indians" can, at times, be based on race, especially if it concerns off-reservation issues and is neither connected to Indian tribes nor commerce. For instance, in *Williams v. Babbitt*,[263] the Ninth Circuit refused to follow a Department of Interior's interpretation of the Reindeer Industry Act as prohibiting non Natives from entering the reindeer industry in Alaska because such interpretation would raise serious constitutional doubts concerning its validity since it would amount to a classification based on race. Although the court at first seemed to limit the power of Congress to brand the classification of Indians as a political and not a racial one to a reservation

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8077(b)-(d), 104 Stat. 1892–93 (1990).

[258] *Lara*, 541 U.S. at 204–05.

[259] Under that test, the legislation will be upheld only if the government has a compelling interest that is being protected by the least restrictive means. *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

[260] 417 U.S. 535 (1974).

[261] *Id.* at 555. Some have called this test "rational basis plus." *See* Romer v. Evans, 517 U.S. 620 (1996).

[262] United States v. Antelope, 430 U.S. 641, 646 (1977) (quoting Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974)).

[263] 115 F.3d 657 (9th Cir. 1997).

context,[264] the court eventually acknowledged that: "While *Mancari* is not necessarily limited to statutes that give special treatment to Indians on Indian land, we do read it as shielding only those statutes that affect uniquely Indian interests."[265] The Reindeer Act, applicable throughout Alaska, was not such a statute since there was nothing uniquely Indian about reindeer or the reindeer industry.[266] In *American Federation of Government Employees v. United States*,[267] however, the issue was whether certain preferences given to tribally owned firms entering into contracts with the Air Force amounted to discrimination based on race. The D.C. Circuit acknowledged that the preference went beyond those at issue in *Morton v. Mancari* since it was not limited to contracts and programs solely benefitting Indians. Nevertheless, noting that the preference was given to *tribally* owned entities, the court stated:

> The critical consideration is Congress' power to regulate commerce "with the Indian Tribes." While Congress may use this power to regulate tribal members, regulation of commerce with tribes is at the heart of the Clause, particularly when the tribal commerce is with the federal government. . . .[268]

Whether it is the power of Congress to preempt state law involving conduct off the reservation, or treating Indians differently while staying clear of racial classifications, this Article takes the position that there has to be some limits to such congressional power. For instance, while Congress has the exclusive constitutional power to regulate commerce with Indian tribes, it would seem that it cannot exercise this power by arbitrarily defining an area or issue as involving Indian affairs when in fact, the subject matter does not remotely concern Indian affairs.[269] However, any limits just requiring that congressional action be tied to the federal Indian trust relationship may be a retreating mirage if one takes the position that any statute enacted by Congress concerning Indians is *per se* related to the trust relationship. Requiring the congressional action to have a substantial nexus to the enumerated power, in this case, the commerce power, would impose more definite limitations as long as the

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[264] The court stated, "Legislation that relates to Indian land, tribal status, self-government or culture passes *Mancari*'s rational relation test because 'such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions.' As "a separate people" Indians have a right to expect some special protection for their land, political institutions . . . and culture." *Id.* at 664 (citations omitted).

[265] *Id.* at 665.

[266] *Id.* at 666.

[267] 330 F.3d 513, 516 (D.C. Cir. 2003).

[268] *Id.* at 521 (citation omitted).

[269] For instance, in *United States v. Sandoval*, while it acknowledged Congress' broad power and discretion in regulating Indian affairs, the Court stated "it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe . . . ." 231 U.S. 28, 46 (1913). *See also* Baker v. Carr, 369 U.S. 186, 216 (1962).

Court is willing to impose on the Indian commerce power the same kind of limit that it has imposed on the interstate commerce power.[270] The Court has, however, been notorious in refusing to impose such limits, at least when it comes to finding limits on congressional power inside Indian reservations.[271]

A close examination of the precedent leads to the following conclusion. Congress does have the power to preempt state law off the reservation when, acting as a trustee, it is attempting to protect the tribes' culture, religion, or internal powers of self-government. The normative justification being that in such cases, tribal members' conduct outside the reservation can have a clear impact within the reservation. Such is the case for domestic relations, especially in cases involving child custody proceedings. In cases not involving internal tribal culture or matters of self-governance, Congress has the power to regulate Indian affairs and preempt state law as long as the regulation is substantially tied to "commerce" with Indian tribes.

V. A PRACTICAL APPLICATION PROMOTING ECONOMIC DEVELOPMENT BEYOND THE RESERVATION BORDER: TRIBAL TAXATION OF MEMBERS NOT RESIDING ON THE RESERVATION

The Supreme Court in *Oklahoma Tax Commission v. Chickasaw Nation,*[272] held in part that Oklahoma could tax the income of tribal members who worked for the tribe on the reservation but lived off the reservation, within the state of Oklahoma. The Court stated that under principles of interstate and international taxation, a jurisdiction "may tax *all* the income of its residents, even income earned outside the taxing jurisdiction . . . ."[273] Similarly, the United States does not totally exempt its citizens living and working abroad from the federal income tax.[274] Why should tribes not tax the income earned by tribal members living and

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[270] *See* United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

[271] *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (stating that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."). *See generally*, Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes,* 34 ARIZ. ST. L.J. 113, 114–115 (2002) (arguing that the Court should impose some limits on the power of Congress over Indian tribes, but so far has refused to do so).

[272] 515 U.S. 450 (1995).

[273] *Id.* at 462–63.

[274] The *Chickasaw* Court also stated that "[a]lthough sovereigns have authority to tax all income of their residents, including income earned outside their borders, they sometimes elect not to do so, and they commonly credit income taxes paid to other sovereigns. But '[i]f foreign income of a domiciliary taxpayer is exempted, this is an independent policy decision and not one compelled by jurisdictional considerations.'" *Id.* at 463 n.12 (citing the AMERICAN LAW INSTITUTE, FEDERAL INCOME TAX PROJECT: INTERNATIONAL ASPECT OF UNITED STATES TAXATION 6 (1987)).

working off the reservation? Most of them are wealthier than the average reservation Indian, and many tribes have a significant percentage, and in many cases a majority, of members not living on trust or reservation lands. One may legitimately ask: what are these members actually contributing, economically speaking, to the welfare of their tribes? Most, if not all, Indian tribes do not impose an income tax and tribes cannot tax trust land owned by individual tribal members. In addition, the Supreme Court has severely restricted the power of tribes to tax non-members, either by claiming that this tax power was implicitly divested,[275] or by allowing concurrent taxation by the states.[276]

My proposal is simple: persuade the tribes that they should tax not only their members living on the reservations, but also members living off the reservation. The tribes may also want to recruit the federal government in assisting them in collecting the tax. There are many ways this could be done. In conformity with my position that Indian tribes should be incorporated into the federal system under a third sphere of sovereignty,[277] and therefore, whenever possible, be treated as states; the tribal income tax should be treated the same as state income taxes relative to the federal income tax and should be deducted from the amount of tax owed to the federal government. Because this integration of tribal tax systems into the federal system would be a major step, legislation should be enacted by Congress providing a mechanism for the United States to approve each tribal income tax scheme. Such approval could be made by either the Secretary of the Interior or the Internal Revenue Service. The United States should also be able to verify that the tribal taxes are in fact being assessed and collected.

There are, of course, several issues related to the tribes' capability to enforce such taxes on off-reservation tribal members. Tribes may come up with penalties such as temporarily suspending the tribal membership of delinquent members. Another potential solution to this particular problem would be for the federal government to enact a statute allowing tribes to enforce such tax liability in federal court, or allow full faith and credit to be given to the orders of tribal courts attempting to enforce such tax liability.

Although by far the simpler plan would be to have the tribe collect the tax themselves, another avenue would be to enlist the help of the federal government and have the tribal tax collected as part of the federal income tax. In this respect, it is useful to study the system presently existing in Germany relating to the collection of a church tax. Similar church taxes once existed in the Colonies and even the United

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[275] *See* Atkinson Trading v. Shirley, 532 U.S. 645 (2001).

[276] *See* Cotton Petroleum v. New Mexico, 490 U.S. 163 (1989); *and* Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980).

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

States, although they were finally abolished by 1833.[278] Under the German system, the government collects a tax for the churches and distributes the revenues generated by this church tax to the designated churches. The German system was first codified after World War I in the Constitution of the Weimar Republic.[279] These constitutional articles were then incorporated after World War II in the Grundgesetz, Constitution of the Federal Republic of Germany.[280] Under that Constitution, the churches were considered public law corporations with specifically enumerated rights to tax their members.[281] Just like Indian tribes, public law corporations in Germany enjoy special exemptions from taxation.[282]

While some may argue that involving the government to collect taxes for tribes may give the government too much power and influence over tribes or allow for government's interference in tribal affairs, the German system does provide for separation of church and state and has not resulted in governmental interference in internal church governance. Professor Hoffer noted that an important difference between the early American church tax and the German system is that the early American church tax made the church subservient to the local governments while the German tax system places the taxing power with the religious organizations, thus ensuring that they retain their independence from the state.[283] There is a provision, however, mandating that churches for whom the tax is collected cannot adopt positions that are directly contrary to the German Constitution.[284] Furthermore, under the German system, the tax ordinances adopted by a church must be approved by the State.

A salient feature of the German church tax is that it is an opt-in system. Another important feature is that church taxes "are fully deductible against income for purposes of calculating the federal income

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[278] *See* Stephanie Hoffer, Caesar as God's Banker: A Comparison of Church Taxes in Germany and the Early United States (Nov. 08, 2007) (unpublished manuscript, on file with author) (citing Joel Swift, *To Insure Domestic Tranquility: The Establishment Clause of the First Amendment,* 16 HOFSTRA L. REV. 473, 473 n.2 (1988); *and* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty,* 137 U. PENN. L. REV. 1559 (1989)). Most of the debate which led to the abolition of the church taxes in the United States centered on the Establishment Clause of the United States Constitution. *See* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic,* 2004 B.Y.U. L. REV. 1385, 1576 (2004).

[279] *See* Weimarer Reichsverfassug Art. 137.

[280] Grundgesetz, Article 140.

[281] *Id.*

[282] *See* Hoffer, *supra* note 278, manuscript at n.41.

[283] *Id.*, manuscript at 36.

[284] *See* Der religionsgemeinschaft der Zeugen Jehovas in Deutschland e. v. Vertreten durch das Prasidium, 2 BvR 1500 para. 95 (1997). *See also* Hoffer, *supra* note 278, manuscript at n.41.

tax."[285] In Germany, churches may chose to have either an income tax, a wealth tax, a tax on real property, or a congregation specific tax. While some churches have decided to impose a tax that is not dependent on income but is more like a flat fee, others have decided to tax each member at a certain percentage of the member's federal income tax liability.[286] Finally, some German statutes charge religious organizations with administration and collection of the tax, and religious organizations "can and generally do, enlist the state in their collection efforts."[287] In such cases, the state seemed to be charging an administrative fee of four or five percent of the amount collected.[288]

In comparing the German and the American religious tax system, Professor Hoffer made the interesting observation that one of the differences between the two was the German government's recognition of "religious sovereignty" and the fact that the German tax system had its origins in "treaties concluded during the Holy Roman Empire's devolution into regional rule."[289] This devolution apparently started the trend of treating churches as quasi-state actors. Thus, under German law today, "religious organizations that are treated as public law corporations possess some measure of sovereignty."[290] As one can see, this is a situation not totally unlike Indian tribes within the United States.

Finally, the churches in the German system set the boundaries of the tax. The churches decide whether to levy the tax, and decide whether the state will help in collecting the tax. Similarly, if this model is adopted, the tribes would decide whether to opt-in, would determine the form of the tax (flat fee or percentage of federal taxable income), and would decide how and whether to enforce collection. In return, however, the tribes should expect to have total transparency in how their tax revenues are allocated and spent. This does not mean that the federal government will have anything to say about how the tax revenues should be spent. It should mean that tribal members are able to find out how the tax revenues are allocated.

V. CONCLUSION

The last thirty years have witnessed an unprecedented assault on the political integrity of Indian tribes within their own reservations, especially when it comes to controlling the activities of non-members. For some of the same reasons that states have been allowed to control the activities of

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[285] *See* Hoffer, *supra* note 278, manuscript at 11 n.69.

[286] Usually, this means eight or nine percent of the federal tax liability.

[287] Hoffer, *supra* note 278, manuscript at 11–12.

[288] *Id.*, manuscript at nn.74, 77 (citing Christine R. Barker, *Church and State Relationships in German "Public Benefit" Law,* 3 INTL. J. OF NOT-FOR-PROFIT L., Dec. 2000), http://www.icnl.org/knowledge/ijnl/vol3iss2/art_1.htm.

[289] *Id.*, manuscript at 34.

[290] *Id.*, manuscript at 34–35.

non-tribal members within Indian reservations, tribes should be recognized as having some sovereign powers to regulate and protect their members outside the reservations, especially when such activities have an impact on the internal affairs of the tribes within the reservations. In some instances, such tribal power should be able to preempt state power. To the extent that the courts are not willing to protect such tribal powers without legislation, this Article has shown that Congress should be recognized as having broad powers to protect tribal interests even beyond the reservation borders.

Finally, Indian tribes are governments, and all governments raise revenues through some form of taxation. It is unfortunate that the Supreme Court has severely restricted the ability of tribes to tax on-reservation business transactions involving non-members, or the real property of non-members. In addition, the trust status of most lands owned by tribal members on the reservation has removed a major source of tax revenues from tribal governments. A tribal tax levied on the income of all tribal members has the potential of raising much needed revenues for tribal governments. Of course, politically speaking, the success of the tribal tax would be considerably improved if the tribal members could have their tribal taxes deducted from their federal tax liability.