TRIBAL SELF-DETERMINATION AND JUDICIAL RESTRAINT: THE PROBLEM OF LABOR AND EMPLOYMENT RELATIONS WITHIN THE RESERVATION

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INTRODUCTION

Since the founding of the Republic, the law of Indian affairs has been marked by a zigzag course over time, a course that reflects the ambivalence, and unresolved "mind," of the United States toward the aboriginal tribal governments that were present in America upon the arrival of Europeans. It has been a schizophrenic mind: on one hand, embracing tribes as separate sovereigns with inherent attributes of self-governance, and, on the other, viewing them as a threat to the natural order of American progress and civilized law, therefore requiring assimilation or destruction.[1] The latter course has, time and again, been discredited on moral grounds, and proven disastrous as a practical policy.[2]

Since 1968, the United States has been in the "modern era" of Indian self-determination.[3] Congress is now firmly committed to promoting strong tribal governments through numerous acts encouraging tribal self-determination and independence.[4] Recognizing Congress's constitutional plenary authority over Indian affairs, the Supreme Court has refused to divest tribes of the attributes of sovereignty, established by treaty and federal common law, without a clear directive from Congress.[5] This judicial restraint against undermining tribal authority is grounded in a tacit separation of powers in the field of Indian affairs by the terms of the Constitution. "The plenary power of Congress" over Indian affairs "is drawn both explicitly and implicitly from the Constitution itself."[6] The Court has consistently emphasized that, where there is any doubt about Congress's intent, it must "guard[] the authority of Indian governments over their reservations."[7] It has refused to construe Congress's enactments in a manner that could turn

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1. *See generally* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 11-33 (4th ed. 2004) (discussing history).

2. *See id.* at 20-21, 24, 29.

3. *See id.* at 29-33.

4. *See* Prairie Band Potawatomi Nation v. Wagnon, 476 F.3d 818, 824 n.9 (10th Cir. 2007) (listing acts of Congress); *infra* text accompanying notes 57-62.

5. *See infra* notes 6-7, 63-64 and accompanying text.

6. Morton v. Mancari, 417 U.S. 535, 551-52 (1974) (citing U.S. CONST. art. I, § 8, cl. 3; art. II, § 2, cl. 2); *accord* United States v. Lara, 541 U.S. 193, 200 (2004); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) ("The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress."); County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973) (citing U.S. CONST. art. I, § 8, cl. 3; art. II, § 2, cl. 2). The Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

7. Williams v. Lee, 358 U.S. 217, 223 (1959).

tribes into little more than "private, voluntary organizations."[8] The Court has acted without a congressional directive to divest tribes of their inherent authority only when the continued exercise of such authority would be incompatible with "the overriding sovereignty of the United States,"[9] but those instances have been rare and limited.[10]

There is potential change afoot, and its impetus is deeply ironic. While Congress remains fully committed to the promotion of tribal self-determination and self-government, the very successes of that policy are placing pressure on the legal underpinnings of tribal self-government, especially with respect to tribal authority over the activities of non-Indians within the reservations.[11] As tribes have gained economic independence under Congress's sweeping Indian Gaming Regulatory Act (IGRA) and other programs to empower tribal governments, non-Indians have entered the reservations in droves to partake of the new economic opportunities there.[12] This prospect has conjured up old fears and mistrust of tribal authority over non-Indians, fears that such authority may be less fair than the authority of the state or federal governments.[13] In this era of unprecedented tribal economic success, some members of the Court have, in the words of Justice Sandra Day O'Connor, been "unmoored from its precedents."[14] Indeed, some have not hesitated to announce broad propositions about the diminishment of tribal authority over nonmembers without regard to the Court's longstanding precedents.[15] These propositions, if accepted, risk setting the judiciary on a course that would undermine established values of tribal self-government without any deference to Congress.[16] Such a direction is at odds with Congress's constitutional plenary authority over Indian affairs.

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8. United States v. Mazurie, 419 U.S. 544, 557 (1975); *accord* United States v. Wheeler, 435 U.S. 313, 323 (1978); Bryan v. Itasca County, 426 U.S. 373, 388 (1976).

9. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209-10 (1978).

10. *See Wheeler*, 435 U.S. at 326; *infra* notes 66-68 and accompanying text.

11. *See infra* text accompanying notes 112-28.

12. The National Indian Gaming Association reports that tribal gaming facilities created 178,000 jobs in 2006 alone. NAT'L INDIAN GAMING ASS'N, THE ECONOMIC IMPACT OF INDIAN GAMING IN 2006, at 6 (2006).

13. *See, e.g.*, Fergus M. Bordewich, *The Least Transparent Industry in America*, WALL ST. J., Jan. 5, 2006, at A20; Joel Millman, *House Advantage: Indian Casinos Win by Partly Avoiding Costly Labor Rules: Sovereignty Helps Shield Them from Unions and Lawsuits, Can Limit Worker Benefits*, WALL ST. J., May 7, 2002, at A1; Donna Leinwand, *Seminoles Fight Sexual Harassment Suit*, MIAMI HERALD, Feb. 12, 1996, at A1. *See also* Scott D. Danahy, *License to Discriminate: The Application Of Sovereign Immunity to Employment Discrimination Claims Brought by Non-Native American Employees of Tribally Owned Businesses*, 25 FLA. ST. U. L. REV. 679 (1998).

14. Nevada v. Hicks, 533 U.S. 353, 387 (2001) (O'Connor, J., concurring).

15. *See infra* notes 113, 126 and accompanying text. *See also infra* note 118.

16. *See infra* text accompanying notes 136-40. *See also infra* note 156 and accompanying text.

No area of law brings this problem into sharper focus than the application of federal labor and employment laws to Indian tribes within Indian reservations.[17] A fundamental attribute of tribal sovereignty is the power to exclude nonmembers[18] from Indian lands and the related authority to condition their presence. This is especially true when they enter tribal lands to exploit, or attain economic advantages from, the reservation environment.[19] This sovereign power is "intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members."[20] Any time nonmembers voluntarily enter an Indian reservation for economic gain, whether they do so by setting up a business or by taking up employment for a tribe, they trigger this essential attribute of tribal sovereignty. Such nonmembers are engaged in the process of extracting value from the reservation, and the rights, remedies, and procedures for governing labor and employment laws directly affect the allocation of such value to the "host" tribe and its members. Thus, the authority of tribes to regulate the labor and employment relations of such nonmember enterprises and employees is tied directly to the inherent authority of tribes to exclude and govern nonmember activity within their reservations.[21]

The Equal Employment Opportunity Commission (EEOC), the Department of Labor (DOL), and the National Labor Relations Board (NLRB) have aggressively sought to impose a federal labor and employment law regime upon tribes in those instances where Congress has failed to expressly exclude tribes from coverage. As agencies of the United States, they are free from the barrier of tribal sovereign immunity and can sue tribes in fed-

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17. The term "labor and employment," as used throughout this Article, encompasses all aspects of labor relations matters, such as unions and collective bargaining and related rights and remedies; fair labor standards laws, including minimum wages and overtime; and occupational safety and health matters; as well as all aspects of employment, including the rights and remedies of employees for workplace discrimination, wrongful discharge, and violations of employment contracts.

18. The term "nonmember" refers to individuals who are not members of a particular Indian tribe. The term "non-Indian," on the other hand, refers to a subcategory of nonmembers: individuals who are not members of any Indian tribe. Both non-Indians and nonmembers could be referred to as "noncitizens" of a given tribe. *See* Buster v. Wright, 135 F. 947 (8th Cir. 1905). This Article sometimes refers to non-Indians, rather than nonmembers, when the concerns at issue are more acute where the subject involves non-Indians. Congress has differentiated between non-Indians and nonmembers with respect to the inherent authority of tribes to prosecute noncitizens. *See* 25 U.S.C. § 1301(2).

19. *See infra* text accompanying notes 76-78, 84-85, 93-103, 141.

20. This formulation is derived from the Indian law treatise most cited by the Supreme Court, FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.), which describes the inherent right of tribes to control outsiders' access to reservation property. *Id.* at 252.

21. *See* NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1192-93 (10th Cir. 2002) (en banc); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1315 (9th Cir. 1990) (citing Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983)).

eral court to seek to impose such laws, even while individuals cannot.[22] The Supreme Court has yet to address the standard governing the outcome of these cases, and the federal circuit courts of appeals are divided on that issue. Some have recognized that the imposition of such laws may upset the inherent authority of tribes to govern their territories and, as such, cannot be applied to tribes without a clear directive from Congress.[23] They hold that congressional silence on the subject will not do.[24] Others have presumed that such laws apply unless they interfere with an express treaty right or a "purely intramural matter."[25]

This Article examines the doctrinal necessity for judicial restraint in undermining the established attributes of tribal sovereignty, focusing in particular on those attributes that establish tribal authority over reservation labor and employment relations.[26] Part I sets forth the law of tribal sovereignty in the modern era of Indian self-determination, focusing on the Supreme Court precedents that underlie the established doctrine of judicial restraint in deference to Congress. Part II discusses how unexamined language in recent opinions of the Court suggests an apparent willingness of several justices to cast aside that doctrine when it comes to tribal power over nonmembers. This direction is incompatible with one of the most fundamental attributes of tribal sovereignty: the authority of tribes to regulate the conduct of nonmembers who voluntarily enter the reservation for economic gain. This Part shows, however, that the underlying reasoning of those opinions leaves that essential attribute of tribal power, and the long-standing precedents supporting it, untouched.

With this context in place, Part III sets forth the doctrinal basis for tribes to govern labor and employment relations within their reservations, both with respect to nonmembers employed by tribes and to the employment relations of nonmember businesses on reservations. This Part offers a

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22. *See infra* note 162.

23. *See infra* notes 165-73, 187-93 and accompanying text.

24. *See id.*

25. *See infra* notes 174-86 and accompanying text.

26. This Article uses the terms "reservation," "trust lands," "Indian land," "tribal land," and "Indian territory" interchangeably to describe lands set aside by Congress, or by treaty, for tribal reservations, or lands held in trust by the United States on behalf of tribes. These lands are to be distinguished from lands that may be held by nonmembers or individual tribal members in fee simple within the exterior boundaries of an Indian reservation. *See* Strate v. A-1 Contractors, 520 U.S. 438, 446 (1997) (distinguishing "non-Indian fee lands" from other lands within reservations); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330-31 (1983) (making distinction between land within exterior boundaries of a reservation owned in fee by nonmembers and "land belonging to the Tribe or held by the United States in trust for the Tribe"). While tribes can be said to "own" such lands, they also exercise their inherent sovereign authority over such lands: "dominion as well as sovereignty." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 146 n.12 (1982) (emphasis, quotations, and citation omitted).

means for reconciling two seemingly inconsistent bases for this authority provided by the precedents of the Court. Part IV then examines the problem of whether the regulatory regimes of certain federal labor and employment laws may be imposed upon Indian tribes within their reservations when Congress fails to address the application of such laws to tribes. It examines the circuit split that has emerged regarding the proper standard that should govern this issue and shows that the standard first articulated by the Tenth Circuit, and followed by the Eighth Circuit, is most consistent with established federal Indian law doctrine and Congress's constitutional plenary authority over Indian affairs. Standards adopted by the Ninth, Second, and D.C. Circuits, on the other hand, are contrary to that doctrine and invite (instead of prevent) the undermining of the essential authority of tribes to govern economic activity and resource allocations within their reservations.

I. TRIBAL SOVEREIGNTY AND THE DOCTRINE OF JUDICIAL RESTRAINT IN THE ERA OF TRIBAL SELF-DETERMINATION

A. The Attributes of Tribal Sovereignty

Prior to the arrival of Europeans in America, "the tribes were self-governing sovereign political communities."[27] Today, despite their partial assimilation into American culture, they retain

> a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.[28]

Indeed, the Court has explained that "[a]s separate sovereigns pre-existing the Constitution," Indian tribes are not constrained by the constitutional provisions "framed specifically as limitations on federal or state authority."[29] In 1968, Congress enacted the Indian Civil Rights Act[30] to impose protections tracking the Bill of Rights and the Fourteenth Amendment

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27. United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

28. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (quotations and citations omitted). The Court often describes Indian tribes as "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991) (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831)); *Mescalero Apache Tribe*, 462 U.S. at 332 (1983); *White Mountain Apache Tribe*, 448 U.S. at 142; *Merrion*, 455 U.S. at 140 (1982); United States v. Mazurie, 419 U.S. 544, 557 (1975). *See also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) ("Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government.") (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832)).

29. *Santa Clara Pueblo*, 436 U.S. at 56.

30. 25 U.S.C. §§ 1301-03 (2000) (hereinafter ICRA).

upon tribal governments, but, with the exception of habeas corpus relief, those protections may be enforced only in tribal forums.[31] Tribes have their own source of sovereign authority and cannot be compared to states or political subdivisions of states.[32] Indian tribes, moreover, like foreign sovereigns, may ensure that their own tribal members gain employment opportunities within tribal territory before nonmembers, so that the benefits of economic development first accrue to their own citizenry.[33] Nothing in the Constitution or laws of the United States prohibits tribal laws that ensure such employment preferences.[34]

In *United States v. Wheeler*,[35] the Supreme Court summarized the sovereign powers of tribes in relation to the federal government as follows:

> The powers of Indian tribes are, in general, *inherent powers of a limited sovereignty which has never been extinguished*. . . .
>
> [O]ur cases recognize that the Indian tribes have not given up their full sovereignty. . . . [They] are a good deal more than private, voluntary organizations. The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, In-

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31. *Santa Clara Pueblo*, 436 U.S. at 59 ("we have recognized that subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves may undermine the authority of the tribal cour[t] . . . and hence . . . infringe on the right of the Indians to govern themselves.") (alterations in original) (quotations and citations omitted).

32. *See Wheeler*, 435 U.S. at 320.

33. *See* FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990) (holding that tribe has jurisdiction to enforce Indian employment preference law against non-Indian employer on reservation). There are numerous examples of such tribal employment preference laws. *See, e.g.*, Colville Tribal Law and Order Code, tit. 10, ch. 1, *available at* http://codeamend.colvilletribes.com/current.htm#title10 (follow link reading "10-1 Tribal Employment Rights"); Sisseton-Wahpeton Sioux Tribe Employment Rights Code, ch. 59, *available at* http://www.tribalresourcecenter.org/ccfolder/sisseton_wahpeton_codeoflaw-59.htm; White Mountain Apache Labor Code, § 1.4, *available at* http://thorpe.ou.edu/-codes/wmtnapache/labor.html#c14; Eastern Band of Cherokee Indians Code, ch. 95, art. 2, *available at* http://www.tribalresourcecenter.org/ccfolder/eccodech95wages.htm; Navajo Nation Code tit. 15, § 604.

34. As a Minnesota court succinctly explains:

> American Indians who belong to a recognized tribe or sovereign entity are a race and, unlike white, black and yellow, are also part of a bona fide political class. Other races are not designated as independent political entities. A preference given to American Indians, although falling heavily on those individuals affected, is neither new nor startling in view of the policy that while race, color, and creed cannot be the basis for discrimination, membership in a political entity can be.

Krueth v. Indep. Sch. Dist. No. 38, 496 N.W.2d 829, 836 (Minn. Ct. App. 1993). The Supreme Court has said that such laws are fully consistent with "the longstanding federal policy of providing a unique legal status to Indians in matters concerning tribal or 'on or near' reservation employment." Morton v. Mancari, 417 U.S. 535, 548 (1974).

35. 435 U.S. 313 (1978).

> dian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.[36]

The "existing sovereign powers" that tribes "retain" are well-defined as a matter of federal Indian common law. One such attribute is sovereign immunity from suit.[37] "This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress."[38] But unless a tribe or Congress unequivocally waives a tribe's sovereign immunity, it remains intact.[39] As an attribute of inherent sovereignty, the judiciary cannot set tribal sovereign immunity aside by implication. Indeed, just because a tribe acts in a "commercial setting" or even off-reservation, it is not subject to suit, absent its unequivocal waiver or an equally unequivocal directive from Congress.[40]

Another "hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands."[41] "Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct . . . ."[42] The Court has been blunt and unequivocal in this regard: "Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose."[43] Thus, tribes have the "power to manage the use of their territory and resources by both members and nonmembers," and to "regulate economic activity within the reservation."[44]

There are other enumerated attributes of tribal sovereignty established as a matter of federal Indian common law. Tribes have the general "power to make their own substantive law in internal matters, and to enforce that law in their own forums."[45] Their tribal courts are "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians" on Indian reservations.[46] Further, like other sovereigns, tribes have the "power to govern and to raise

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36. *Id.* at 322-23 (alteration in original) (citations and quotations omitted).

37. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 891 (1986).

38. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

39. Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998).

40. *Id.*

41. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982). *Accord* Plains Commerce Bank v. Long Family & Cattle Co., Inc., 128 S. Ct. 2709, 2723 (2008).

42. *Merrion*, 455 U.S. at 144.

43. *Id.* at 147.

44. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335 (1983) (citations omitted).

45. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978) (citations omitted).

46. *Id*. at 65 (footnote and citation omitted).

revenues to pay for the costs of government."[47] This includes the right to generate governmental revenues through gaming within their territorial jurisdictions, free from any state authority, so long as the state where the gaming activity is located does not prohibit all such gaming as a matter of criminal law and public policy.[48]

B. The Doctrine of Judicial Restraint in Indian Affairs

Although not expressly labeled as such, the Supreme Court has developed a doctrine of judicial restraint in cases that present threats to established attributes of tribal sovereignty. This doctrine manifests itself in the longstanding canon that, absent an unequivocal directive from Congress, the Court refrains from diminishing the governmental authority of Indian tribes with respect to their territory and their members.[49] This judicial restraint is grounded in the historical recognition that the sovereignty held by tribes is fragile in the face of external pressures,[50] and that pursuant to the Constitution, Congress has exclusive and plenary authority over Indian affairs.[51]

Such restraint operates when Congress is silent about whether a particular attribute of tribal sovereignty may be undermined by its enactments. The "proper inference" from such silence "is that the sovereign power . . . remains intact."[52] The Court refers to its "admonition" that "a proper re-

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47. *Merrion*, 455 U.S. at 144.

48. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 211, 216-22 (1986). Congress reinforced this attribute of tribal sovereignty through the enactment of the comprehensive IGRA in 1988. *See* 25 U.S.C. § 2701-21. *See* 25 U.S.C. § 2701(5) ("Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.").

49. *See* Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985) (restating the canon); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980) (same). *See also* Kiowa Tribe of Okla. v. Mfg. Techs., Inc, 523 U.S. 751, 758-60 (1998) (deferring to Congress for any diminution of tribal sovereign immunity from suit); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1976) (absent clear directive from Congress, the Court will not construe the ICRA to allow a private right of action in federal court); Williams v. Lee, 358 U.S. 217, 223 (1958) (absent action by Congress, tribal authority over reservation credit transaction involving tribal members remains within the exclusive authority of a tribal court).

50. *See Mazurie*, 419 U.S. at 558 ("[t]he cases in this Court have consistently guarded the authority of Indian governments over their reservations.") (citations omitted). *See also supra* note 49; *infra* note 198.

51. *See supra* note 6. Thus, the Court has repeatedly emphasized that absent governing acts of Congress, tribes retain "all inherent attributes of sovereignty." *Merrion*, 455 U.S. at 149 n.14; Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987); United States v. Wheeler, 435 U.S. 313, 323 (1978) ("until Congress acts, tribes retain their existing sovereign powers."); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983) ("[T]ribes retain any aspect of their historical sovereignty not 'inconsistent with the overriding interests of the National Government.'") (citation omitted).

52. *Iowa Mut. Ins. Co.*, 480 U.S. at 18 (quoting *Merrion*, 455 U.S. at 149 n.14).

spect both for tribal sovereignty itself and for the plenary authority of Congress in [an area where tribal sovereign authority is at stake] cautions that we tread lightly in the absence of clear indications of legislative intent."[53] Further, a tribe need not affirmatively exercise an attribute of its inherent sovereignty to benefit from established law protecting it from external interference without a congressional directive. The attributes of tribal sovereignty are not "use it or lose it" propositions; a tribe's "sovereign power, even when unexercised, is an enduring presence . . . and will remain intact unless surrendered in unmistakable terms."[54]

Another aspect of the doctrine of judicial restraint in the field of Indian affairs is the Court's fastidious protection of tribal government authorities when Congress has expressed a policy to enhance them.[55] In response to the colossal failures of its "termination" policies of the past, Congress has firmly committed the Nation to the policy of tribal self-determination.[56] Examples include the Indian Self-Determination and Education Assistance Act of 1975,[57] in which Congress declared a commitment to "the realization of self-government" for tribes;[58] the Indian Tribal Justice Act of 1993,[59] in which Congress declared that it "has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;"[60] and the Indian Gaming Regulatory Act of 1988,[61] in which Congress declared that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government."[62]

Recognizing that the "tradition of Indian sovereignty" is "reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development," the Court applies the longstanding rule of construction that

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53. *Merrion*, 455 U.S. at 149 (quoting *Santa Clara Pueblo*, 436 U.S. at 60). *See Kiowa*, 526 U.S. at 758-59; *Williams*, 358 U.S. at 223.

54. *Merrion*, 455 U.S. at 148. *Accord* Penobscot Nation v. Fellencer, 164 F.3d 706, 709 (1st Cir. 1999) ("'Neither the passage of time nor apparent assimilation of the Indians can be interpreted as diminishing or abandoning a tribe's status as a self governing entity.'") (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 231 (1986 ed.)). *See also infra* note 110.

55. *See, e.g.*, Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 510 (1991); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 217-20 (1986); Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 892 (1986); *Mescalero Apache Tribe*, 462 U.S. at 336 n.17; White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 n.10 (1980).

56. *See* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973) (recounting history). *See generally* CANBY, *supra* note 1, at 29-33.

57. 25 U.S.C. §§ 450 to 450e-3 (2000).

58. *Id.* § 450(a)(1).

59. 25 U.S.C. §§ 3601-31 (2000).

60. *Id.* § 3601(3).

61. 25 U.S.C. §§ 2701-21 (2000).

62. *Id.* § 2701(4).

"[a]mbiguities in federal law [are] construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence."[63] Absent a clear directive from Congress, the Court has refrained from exposing attributes of tribal self-governance to external authority, especially when Congress has shown its desire to enhance tribal self-determination under contemporary enactments.[64]

C. Three Exceptions to Judicial Restraint under the "Dependent Status" Standard

As stated in *Wheeler*, absent clear action on the part of Congress, Indian tribes "retain their existing sovereign powers," with the narrow exception of those powers that the Court considers to have been implicitly divested "as a necessary result of their dependent status."[65] Thus far, such judicial divestment has occurred with respect to three attributes that the Court has found to be inconsistent with "the overriding sovereignty of the United States."[66] The Court has found "implicit divestiture" with respect to the inherent power of tribes to (1) engage in "direct commercial or governmental relations with foreign nations;" (2) try non-Indian citizens of the United States for crimes committed on the reservation; and (3) alienate tri-

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63. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980). *See* Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 510 (1991) (the Court is "not disposed" to modify an established attribute of tribal sovereignty, given "Congress' desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development'").

64. *See, e.g.*, *Okla. Tax Comm'n*, 498 U.S. at 510 (absent congressional directive, tribal sovereign immunity is intact for tribe's activities of a commercial character); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60, 72 (1976) (to avoid "unsettl[ing] a tribal government's ability to maintain authority," civil rights claims must be resolved within tribal forums unless Congress expressly provides otherwise); Bryan v. Itasca County, 426 U.S. 373, 388 (1976) (without unequivocal clarity from Congress, 28 U.S.C. § 1360(a), which provides for application of state civil laws within Indian country, cannot be construed to allow states to exercise civil jurisdiction over tribes); Williams v. Lee, 358 U.S. 217, 223 (1958) (subjecting a civil dispute arising on the reservation to a state forum "would undermine the authority of the tribal courts over Reservation affairs"; if that authority "is to be taken away . . . , it is for Congress to do it").

65. United States v. Wheeler, 435 U.S. 313, 323 (1978).

66. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209-10 (1978); *Wheeler*, 435 U.S. at 326.

bal lands to non-Indians without federal oversight.[67] In all other respects, "until Congress acts, the tribes retain their existing sovereign powers."[68]

The reasons for the Court's very limited "activism" in these three areas, while not free from criticism, are persuasive. If over 500 Indian tribes could engage in commerce with foreign nations, theoretically under their own currencies and export/import laws, the Nation would face chaos in the management of international trade.[69] If non-Indians could be convicted and incarcerated within tribal territories for criminal offenses that differ (in procedure or substance) from those governing similar conduct under state or federal law, intractable tensions could develop between tribes, states, and the federal government.[70] The last "implicit divestiture" of tribal "authority"—preventing tribes from alienating their lands without federal consent—is a vestige of the federal trust relationship[71] and reflects less the divestment of an attribute of sovereignty and more a lingering paternalism to protect tribal land from encroachment by non-Indians.[72]

In summary, the attributes of tribal sovereignty, identified as a matter of federal common law, are concrete, established, and with the narrow exception of those attributes deemed incompatible with the overriding authority of the National government, remain intact unless divested by Congress. Under the doctrine of judicial restraint, the courts must resolve any doubt about Congress's intentions in favor of leaving these attributes undisturbed. As the *Wheeler* Court made clear, the attributes of tribal sovereignty do not line up under any neat hierarchy, where some are more deserving of protection than others.[73] Critically, the historical lessons drawn from the disas-

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67. *Wheeler*, 435 U.S. at 326 (citations and quotations omitted); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154 (1980).

68. *Wheeler*, 435 U.S. at 322-23. *See also* Rice v. Rehner, 463 U.S. 713, 720 (1983) ("Repeal by implication of an established tradition of [tribal] immunity or self-governance is disfavored.").

69. *See generally* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

70. *See Oliphant*, 435 U.S. 191. *But see* United States v. Lara, 541 U.S. 193 (2004) (confirming that Congress may restore inherent authority of tribes to prosecute nonmember Indians even after the Court has found such authority to have been implicitly divested). *See also* N. Bruce Duthu, Op-Ed., *Broken Justice in Indian County*, N.Y. TIMES, Aug. 11, 2008, at A17 (arguing that Congress should overrule *Oliphant* because reservation crimes by non-Indians go unprosecuted).

71. *See generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 998-1002 (2005 ed.); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

72. *See generally* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) (involving land claims by Oneida Indian Nation for loss of lands without federal oversight).

73. *See Wheeler*, 435 U.S. at 323. *Accord* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 n.14 (1982); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983) ("[T]ribes retain any aspect of their historical sovereignty not inconsistent with the overriding interests of the National Government.") (citation and quotations omitted).

trous policies of "termination" and "assimilation" demand that the authorities of tribes not be reduced to those of mere private property owners or voluntary organizations.[74] This is the mandate of Congress, forged in this era of tribal self-determination. Tribes are not culture clubs. They are governments, with inherent sovereign powers over their members and territories, which have "never been extinguished."[75]

II. THE INHERENT AUTHORITY OF INDIAN TRIBES TO CONDITION THE PRESENCE OF NONMEMBERS WHO ENTER THE RESERVATION FOR PERSONAL GAIN: MAKING SENSE OF SUPREME COURT EQUIVOCATIONS

As described in Part I, one of the most central and well-established attributes of tribal sovereignty is the "power to exclude non-Indians from Indian lands."[76] It is "essential to [a] tribe's identity or its self-governing status."[77] And flowing directly from this essential power is the authority of tribes to govern "the use of their territory and resources by both members and nonmembers."[78] This inherent authority of tribes was confirmed by the Supreme Court in 1832, in *Worcester v. Georgia*,[79] one of its earliest decisions on Indian affairs. In *Worcester*, the Court held that the Cherokee Nation exercised inherent authority over the terms and conditions under which a missionary could remain on the Cherokee reservation, and Georgia's laws could "have no force" with respect to that relationship.[80] Chief Justice Mar-

74. *E.g.*, United States v. Mazurie, 419 U.S. 544, 557 (1975); *Wheeler*, 435 U.S. at 323; Bryan v. Itasca County, 426 U.S. 373, 388 (1976). *See also supra* note 54 and accompanying text.

75. *Wheeler*, 435 U.S. at 323 (quotations and citation omitted).

76. *Merrion*, 455 U.S. at 141. *See* Quechan Tribe of Indians v. Rowe, 531 F.2d 408, 410-11 (9th Cir. 1976) (citing Williams v. Lee, 358 U.S. 217, 219 (1959)); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1833)).

77. Nevada v. Hicks, 533 U.S. 353, 379 (2001) (Souter, J., concurring) (quoting Oliphant v. Schlie, 544 F.2d 1007, 1015 (9th Cir. 1976) (Kennedy, J., dissenting)) (emphasis added). Felix Cohen's *Handbook on Federal Indian Law*, the leading treatise in the field and repeatedly cited by the Supreme Court (*see, e.g.*, *Hicks*, 533 U.S. at 384 (citing Cohen) and Duro v. Reina, 495 U.S. 676, 696 (1990) (same)), states: the inherent right of tribes to control outsiders' access to reservation property is "intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 252 (1986 ed.). *See also Duro*, 495 U.S. at 696 (the power to exclude non-Indians is a "traditional and undisputed" attribute of tribal self-governance) (citations omitted).

78. *Mescalero Apache Tribe*, 462 U.S. at 335 (citations omitted); *Merrion*, 455 U.S. at 141 ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct. . . ."); *accord* Plains Commerce Bank v. Long Family & Cattle Co., Inc., 128 S. Ct. 2709, 2723 (2008); Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 592 (9th Cir. 1983).

79. *Worcester*, 31 U.S. (6 Pet.) 515.

80. *Id.* at 520; *see also Williams*, 358 U.S. at 218-20 (explaining *Worcester*).

shall wrote that the Cherokee Nation, like other recognized Indian tribes, was a "distinct [political] community, occupying its own territory" in which nonmembers "have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress."[81] This recognized attribute of inherent tribal sovereignty has endured, unquestioned, for over 150 years.[82]

While *Worcester* established this principle in the early years of the Republic, the Court's unanimous decision in *Williams v. Lee*[83] confirmed it in the modern era. In *Williams*, the Court held that a nonmember, who operated a grocery store on the Navajo reservation and sought to collect on goods sold to Navajo tribal members on credit, could bring his action only in the Navajo Tribal Court.[84] The Court explained:

> [T]o allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. *It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.* The cases in this Court have consistently guarded the authority of Indian governments over their reservations.[85]

In its 1981 decision in *Montana v. United States*,[86] however, the Supreme Court resorted to some general language, which has resulted in much confusion about this fundamental authority of tribes to regulate the activity of nonmembers within their reservations. *Montana* involved the scope of the Crow Tribe's regulatory authority over hunting and fishing by nonmembers inside their own fee land within the exterior boundaries of the Crow Tribe's "checkerboard" reservation. In that context, the Court stated a "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[87] It quickly added, however, "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians" within the reservation.[88] Indeed, it "readily agree[d]" that the Crow tribe could exclude nonmembers from hunting or fishing on the reservation and "condition their entry by charging a fee or establishing bag or creel limits."[89] For the case

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81. *Worcester*, 31 U.S. (6 Pet.) at 559-60.

82. *See, e.g.*, *Plains Commerce Bank*, 128 S. Ct. at 2723 ("persons are allowed to enter Indian land only with the assent of the [tribal members] themselves") (quoting and citing *Worcester*, 31 U.S. (6 Pet.) at 561) (alteration in original); *Merrion*, 455 U.S. at 152 (reaffirming inherent power to exclude); *Williams*, 358 U.S. at 219-20 (same).

83. *Williams*, 358 U.S. at 217.

84. *Id.* at 223.

85. *Id.* (emphasis added) (citations omitted).

86. 450 U.S. 544 (1981).

87. *Id.* at 565.

88. *Id.*

89. *Id.* at 557.

presented, the Court developed two rules: first, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[90] Second, "[a] tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[91]

Subsequent cases reaching the Court in the 1980s made clear that, contrary to its passing reference to the "general proposition" in *Montana*, an Indian tribe's power to exclude non-Indians from tribal reservation or trust lands[92] and to govern their activities on such lands remained very much intact. In *Merrion v. Jicarilla Apache Tribe*, the Supreme Court addressed a challenge to the Tribe's severance tax, imposed upon a non-Indian corporation's mining activities on the reservation.[93] The mining company argued that the Tribe could not lawfully impose the tax because it had not reserved that authority in the company's lease. The Court rejected that argument, stating that it "confuse[d] the Tribe's role as commercial partner with its role as sovereign."[94] It "denigrates Indian sovereignty," the Court said, to suggest that the Tribe had only those rights of a mere private contracting party.[95] A tribe's "sovereign power," like that of a state or of the federal government, "even when unexercised . . . will remain intact unless surrendered in unmistakable terms."[96] The intact "sovereign power" in question was "[the] *power* to exclude" non-Indians and "the lesser power to place conditions on entry, on continued presence, or on reservation conduct."[97]

In *New Mexico v. Mescalero Apache Tribe*, the Court again reinforced the inherent authority of tribes to govern the activities of nonmembers involved in reservation activities for personal gain.[98] Beset with claims by New Mexico that it could impose its hunting and fishing laws on nonmembers within the Mescalero Apache Reservation, the Tribe brought an action to enjoin the State from enforcing those laws.[99] The Court confirmed the

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90. *Id.* at 556.

91. *Id.*

92. Trust lands are lands held in trust by the United States for the benefit of Indian tribes. *See supra* note 26.

93. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982).

94. *Id.* at 145-46.

95. *Id.* at 146.

96. *Id.* at 148.

97. *Id.* at 144 (emphasis in original).

98. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 337-38 (1983).

99. *Id.* at 329-30. New Mexico conceded that the Tribe exercised exclusive authority over the activities of its members and could also regulate nonmembers, but it claimed a right to exercise concurrent jurisdiction over nonmembers. *See id*. at 330.

Tribe's unquestioned inherent authority to govern the use of its lands and resources by nonmembers,[100] and noted that *Montana* focused only on nonmembers' activities on their own fee lands; it did not address the Crow Tribe's inherent authority over such activity on the Tribe's reservation or trust lands.[101] The Court held that the Mescalero Apache Tribe's authority to govern the use of its territory and resources by non-Indians could not be undermined by the imposition of New Mexico law.[102] The application of state laws, the Court said, would supplant tribal control by imposing an "inconsistent dual system" of rules.[103]

In 1987, in *Iowa Mutual v. LaPlante*, the Court again protected tribal authority over nonmembers by requiring a nonmember insurance company to exhaust proceedings in the Blackfeet Tribal Court in order to challenge that court's jurisdiction over claims against it arising out of a motor vehicle accident on the Blackfeet Indian Reservation.[104] Both the insured and the injured party were Blackfeet tribal members. The insurance company invoked the federal diversity statute[105] and sued the insured tribal members in federal court, seeking a declaratory judgment that their claims fell outside the coverage of the policy. Had Iowa Mutual brought such a claim in the Montana state court, that court would have lacked subject matter jurisdiction.[106] The Supreme Court refused to construe the federal diversity jurisdiction statute in such a manner that would place the federal court "in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs."[107] It observed that the Congress of 1789 that first authorized diversity jurisdiction could not have considered the role of tribal courts, and Congress, in subsequent amendments to the statute, "ha[d] never expressed any intent to limit the civil jurisdiction of the tribal courts."[108] Emphasizing that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," the Court concluded that "the proper inference from silence" on the part of Congress was that the diversity statute would not trump the authority of the tribe to adjudicate its jurisdiction of the case in the first instance.[109] Thus, while the federal court could retain jurisdiction over the dispute under the diversity

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100. *Id.* at 337.
101. *Id.* at 330.
102. *Id*. at 338-41. In addition to regulatory interests, the Court noted the State's interest in generating revenue from licensing fees, which it viewed as the equivalent of a state tax on reservation activities. *See id*. at 343.
103. *Id*. at 339.
104. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19-20 (1987).
105. 28 U.S.C. § 1332 (2000).
106. *See Iowa Mut. Ins. Co.*, 480 U.S. at 13 n.4.
107. *Id.* at 16.
108. *Id.* at 18.
109. *Id.*

statute, it was required to dismiss or stay the case in deference to the exhaustion of tribal court proceedings.[110]

In summary, throughout the 1980s, apart from the Court's "general proposition" in *Montana*, which had no connection to the facts presented, its reasoning in *Merrion*, *New Mexico*, and *Iowa Mutual* and its ready concession in *Montana* that the Crow Tribe retained authority to exclude nonmembers from the reservation and to govern their exploitation of hunting and fishing resources upon entry, are rooted in a central principle of federal Indian law that has endured since *Worcester*. When nonmembers enter the reservation to exploit economic opportunities there, they engage in a process of intimate concern to the tribe: its ability to govern its territory and resources for the welfare of its members. From its earliest decisions in the field of Indian law, reconfirmed in *Williams*, *Merrion*, and *New Mexico*, the Court has left no doubt that Indian tribes retain inherent sovereign power over nonmembers in that setting.[111]

In 1997, the Supreme Court, in an opinion written by Justice Ruth Bader Ginsburg, suggested a radical departure from its precedents in this area. In *Strate v. A-1 Contractors*,[112] the Court abruptly declared that *Montana* was a "pathmarking case concerning tribal civil authority over nonmembers."[113] In doing so, it gave no consideration to its holdings in *Merrion* and *New Mexico*, or to the history of the Court's jurisprudence carefully laid out in *Williams*.

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110. The principle of *Iowa Mutual*, that a federal court should not proceed to adjudicate a claim involving nonmembers over which a tribal court may have jurisdiction, prevents the kind of infringement of tribal authority at issue in *Williams*, albeit, in the context of a federal court jurisdiction statute as opposed to asserted state jurisdiction. *See Iowa Mut. Ins. Co.*, 480 U.S. at 14-16. The principle is so strong that it may operate even in the absence of a parallel proceeding in a tribal court or other tribal forum. *See, e.g.*, Garcia v. Akwesasne Hous. Auth., 268 F.3d 76, 81-82 (2d Cir. 2001); Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 31 (1st Cir. 2000); United States v. Tsosie, 92 F.3d 1037, 1041 (10th Cir. 1996); Crawford v. Genuine Parts Co., 947 F.2d 1405, 1407 (9th Cir. 1991). This principle is consistent with the Court's caution to guard against the infringement of tribes' inherent authority over their reservations, even when such authority is unexercised. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982); United States v. Wheeler, 435 U.S. 313, 322-23 (1978) (the inherent powers of Indian tribes remain intact unless divested by Congress). *See also* Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061, 1065-66 (1st Cir. 1979) ("The mere passage of time with its erosion of the full exercise of sovereign powers of a tribal government cannot constitute an implicit divestiture.").

111. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 520 (1832); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 329-30 (1983); *Merrion*, 455 U.S. at 144-45; Williams v. Lee, 358 U.S. 217, 218-20 (1959). *See also* Plains Commerce Bank v. Long Family & Cattle Co., Inc., 128 S. Ct. 2709, 2721-22 (2008) (reaffirming *Williams*, *Merrion*, and *New Mexico*); United States v. Mazurie, 419 U.S. 544, 558 (1975).

112. Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997).

113. *Id.* at 445.

Strate involved a car accident between nonmembers of the Three Affiliated Tribes of the Fort Berthold Reservation on a North Dakota highway within a state-owned right of way that was crossing the reservation, a situation analogous to *Montana*.[114] One of the injured parties sued the company that owned the truck involved in the accident in the Tribal Court for the Three Affiliated Tribes. The company then brought an action in federal court, seeking to enjoin the tribal court proceeding for lack of jurisdiction. The Court held that *Montana*'s restrictive rules broadly governed the scope of a tribe's inherent authority over nonmembers, unless such activities took place on tribal land over which the tribe possessed "a landowner's right to occupy and exclude."[115] With respect to the latter, the Court said "that tribes retain considerable control over nonmember conduct on tribal land."[116]

The *Strate* Court did not go so far as to suggest that tribes have no greater rights than mere property owners. Such a suggestion would have been contrary to the Court's established precedent confirming that tribes exercise sovereign authority over their territories and are far "more than private, voluntary organizations."[117] The *Strate* Court's opinion, however, was devoid of language about the Court's cautious protection of tribal sovereignty found in *Williams*, *Merrion*, and *New Mexico*, and it hints at that sort of diminishment. Noticeably absent from the Court's parlance are affirmative references to the tribe's "role as sovereign" with respect to nonmember conduct within the reservation found in these earlier cases, language that reflected over a century of Indian law jurisprudence.[118] When limited to its facts, the result in *Strate*, like that in *Montana*, is not surprising; both cases involved nonmember activity on non-Indian land. It is the Court's unexamined language, stated in broad principles, that is most troubling.

In its 2001 decision in *Nevada v. Hicks*,[119] the Court injected new uncertainty into the issue of tribal authority over nonmembers in a case presenting especially unsympathetic facts. Floyd Hicks, a member of the Fal-

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114. *See id.* at 456.

115. *See id.* at 456.

116. *Id.* at 454.

117. *See, e.g.*, United States v. Mazurie, 419 U.S. 544, 557 (1975); United States v. Wheeler, 435 U.S. 313, 323 (1978); Bryan v. Itasca County, 426 U.S. 373, 388 (1976) (quotation and citation omitted).

118. As noted above, even the *Montana* Court took pains to point out that "Indian tribes retain *inherent sovereign power* to exercise some forms of civil jurisdiction over non-Indians on their reservations." *Montana*, 450 U.S. at 565 (emphasis added). In *Strate*, the Court substituted the words "*considerable control* over nonmember conduct on tribal land," (emphasis added) for "inherent sovereign power" in this formulation and proclaimed, in vague but restrictive language, that "a [tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations." *Strate*, 520 U.S. at 454, 446, and 459 (citation omitted) (alteration in original).

119. Nevada v. Hicks, 533 U.S. 353 (2001).

lon Paiute-Shoshone Tribes, allegedly killed a California bighorn sheep, off of the reservation, in violation of Nevada criminal law. On a tip from tribal police officers that Hicks had two mounted sheep heads at his residence on the reservation, Nevada game wardens obtained a search warrant, approved by both the state court and the tribal court, to search Hicks's residence, and they executed that warrant with the cooperation of tribal police. Upon executing the warrant, the tribal and state officers found heads of different sheep, but not of the California bighorn protected by the Nevada law.

Claiming that the officers acted beyond the scope of their warrant and damaged his sheep heads, Hicks sued the state wardens, the tribal police officers, and the tribal court judge, who had approved the warrant, in tribal court. Eventually all of his claims were dismissed by the tribal court, with the exception of certain torts and civil rights claims against individual state officers. After the tribal court ruled that it had jurisdiction to proceed with those claims, the state officers sued Hicks in federal court, seeking a declaration that the tribal court lacked jurisdiction. The Ninth Circuit concluded that the tribal court had jurisdiction. The Supreme Court, in a split decision, reversed.[120]

It issued four separate opinions. Justice Scalia's opinion, joined by Justices Rehnquist and Ginsburg, became that of the majority. He wrote that, under *Montana*, the inherent regulatory authority of tribes over nonmembers is limited to the exercise of authority that is "necessary to protect tribal self-government or to control internal relations," and that there is a general presumption against such authority.[121] In that equation, the Court said, the status of the land where nonmember activity takes place (e.g., reservation, trust, or fee) is not dispositive; rather, it is simply one factor in the mix.[122] Thus, to decide whether the tribal court had jurisdiction over the state wardens, the question was "whether regulatory jurisdiction over state officers in the present context is 'necessary to protect tribal self-government or to control internal relations.'"[123] Justice Scalia held that it was not necessary. Observing that Nevada had criminal jurisdiction over the off-reservation crime at issue, he concluded that its officers' investigation of the crime "no more impair[ed] the tribe's self-government than federal enforcement of federal law [would] impair[] state government."[124]

Justice Souter, joined by Justices Thomas and Kennedy, concurred, arguing that, contrary to the Court's clear distinction of *Montana* in *New Mexico*,[125] the status of the land should make no difference. "It is the mem-

120. *Id.* at 374.
121. *Id.* at 359.
122. *Id.* at 360.
123. *Id.*
124. *Id.* at 364.
125. *See supra* note 101 and accompanying text.

bership status of the unconsenting party, not the status of real property, that counts as the primary jurisdictional fact."[126] They argued that courts should presume that tribes lack authority over nonmembers, even with respect to on-reservation activity, unless one of the two *Montana* "exceptions" applies: (1) the activities of the nonmember relate to a consensual relationship with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements; or (2) they threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[127]

Justice O'Connor, joined by Justices Stevens and Breyer, wrote a second concurring opinion, stating that the majority's reasoning was "unmoored from [the Court's] precedents" and "without cause[] undermines the authority of tribes to 'make their own laws and be ruled by them.'"[128] She asserted that the Court had resolved that *Montana*'s rule governed the case,[129] but noted that, under *Montana*'s exceptions, the tribe could well have concurrent jurisdiction over the state officers' conduct within the reservation.[130]

Importantly, the majority opinion made clear that the Court's holding was limited to the question of tribal court jurisdiction over state officers, and that it was leaving open the question of tribal court jurisdiction over nonmember defendants in general.[131] Justice Ginsburg wrote separately to emphasize this point.[132]

Through its opinions in *Strate* and *Hicks*, the Supreme Court, with no apparent self-awareness, stepped right up to the brink of undermining a "traditional and undisputed"[133] attribute of tribal sovereignty: the authority of tribes to exclude non-Indians from the reservation and to regulate their activities when they enter the reservation for personal economic gain. It is critical to note, however, that neither *Strate* nor *Hicks* involved an affirmative decision by a non-Indian to engage in reservation activity for economic advantage. Indeed, in *Strate*, the Court appeared bothered that an unsuspecting nonmember company could be forced to defend itself in tribal court

126. *Hicks*, 533 U.S. at 382 (Souter, J., concurring).

127. *Id.* at 386-87.

128. *Id.* at 387 (O'Connor, J., concurring).

129. *Id.* (stating that the Court "finally resolves that *Montana* . . . governs a tribe's civil jurisdiction over nonmembers regardless of land ownership") (citation omitted).

130. *Id.* at 395.

131. *Id.* at 358 n.2.

132. *Id.* at 386 (Ginsburg, J., concurring) ("[t]he Court's decision explicitly 'leave[s] open the question of tribal-court jurisdiction over nonmember defendants in general.'") (citation omitted) (alteration in original).

133. *See* Duro v. Reina, 495 U.S. 676, 696 (1990) (tribes "possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands"). *Accord* Plains Commerce Bank v. Long Family & Cattle Co., Inc., 128 S. Ct. 2709, 2723 (2008) (citing and quoting *Duro*, 495 U.S. at 696).

for an accident occurring on a state highway. Applying the second *Montana* test, the Court said, "[R]equiring A-1 . . . to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to 'the political integrity, economic security, or the health or welfare of the [Three Affiliated Tribes].'"[134] Likewise, in *Hicks*, the Court was sympathetic to the fact that the state law enforcement officials, while on the reservation, were exercising their duty to investigate a crime within their jurisdiction. Indeed, they did so in full cooperation with tribal law enforcement officers and with the tribal court's blessing of their warrant.[135] Thus, while the Court, in *Strate* and *Hicks*, used broad language in apparent disregard for the fundamental authority of tribes to exclude and regulate nonmembers, neither *Strate* nor *Hicks* involved the intentional activities of non-Indian entrepreneurs within the reservation. Thus, neither case triggered the fundamental power of tribes over nonmembers at the core of *Worcester*, *Williams*, and *Merrion*, and underlying *Iowa Mutual*.

Nevertheless, the confusion wrought by certain unexamined, broad statements about tribal power over nonmembers in *Montana*, *Strate*, and *Hicks*, when considered in isolation from the Court's precedents in *Worcester*, *Williams*, *Merrion*, *New Mexico*, and *Iowa Mutual*, presents the risk of judicial undermining of the established and critical sovereign power of Indian tribes to exclude nonmembers and to regulate the terms of their continued presence within the reservation.[136] This "fundamental attribute[] of [tri-

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134. Strate v. A-1 Contractors, 520 U.S. 446, 459 (1997) (quotations and citation omitted).

135. In *Hicks*, the tribal court issued an order approving the warrant. Thus, the entry of non-Indian state officials and their conduct on the reservation was regulated by the Tribe, through the tribal court's imprimatur, taking out of play any concern about the principles of *Merrion* and the potential undermining of tribal authority over non-Indian conduct within the reservation. For Justices Scalia, Rehnquist, and Ginsburg, the fact that the tribal court approved the search warrant was of no moment because, under the unique facts of the case, the interests of the State in investigating the crime trumped the Tribe's right to exclude non-Indians from the reservation. Nevada v. Hicks, 533 U.S. 353, 372 (2001) (describing the tribal court's order condoning the state search warrant as "unnecessary"). Justices Souter, Kennedy, and Thomas, on the other hand, described the Tribe's right to exclude as "essential to the tribe's identity or its self-governing [authority]." *Id.* at 379 (Souter, J., concurring). They noted, however, that the tribal court's blessing of the state officers' warrant showed the Tribe's consent to the presence of the officers within the reservation. *See id.* at 386. Justices O'Connor, Stevens, and Breyer showed no indication as to where they stood on the issue of the importance of the tribal court's grant of authority to the state officials' reservation entry through the court's order approving the warrant.

136. Since *Hicks*, the federal courts of appeals have struggled over the question of whether *Montana*'s consensual relationship and tribal self-government standards replace the general authority of tribes to exclude nonmembers from their reservations and govern their activities while they remain. For instance, a Ninth Circuit panel has viewed *Hicks* as limited to the facts of that particular case, addressing only "tribal-court jurisdiction over state officers enforcing state law." McDonald v. Means, 309 F.3d 530, 540 (9th Cir. 2002) (amended opinion). Accordingly, "[t]he limited nature of *Hicks*'s holding renders it inapplicable"

bal] sovereignty," in accordance with the Court's own doctrine of judicial restraint, must remain intact unless "divested by Congress or by necessary implication of the tribe's dependent status."[137] When it comes to nonmember conduct carried out voluntarily and for economic gain within reservation or trust lands, nothing in the Court's precedents suggests that such inherent powers can be considered "lost"—like the power to engage in trade with foreign nations or to prosecute non-Indians—"by necessary implication of tribes' dependent status."[138] Such a view would leave tribes with no leverage over nonmembers' reservation activities other than that of private landowners or contracting parties: little more than a mere "private voluntary organization."[139] For such a view to prevail, the Court would have to overturn over a century of precedent protecting the right of tribes to exercise *governmental* authority over their Indian territories.[140]

As the Ninth Circuit, citing *Merrion*, aptly explains, "[i]f the power to exclude implies the power to regulate those who enter tribal lands, the jurisdiction that results is a consequence of the deliberate actions of those who would enter tribal lands to engage in commerce with the Indians."[141] Congress, not the judiciary, holds plenary authority over that subject by the express terms of the Constitution.[142]

III. THE INHERENT AUTHORITY OF INDIAN TRIBES OVER RESERVATION LABOR AND EMPLOYMENT RELATIONS INVOLVING NONMEMBERS: RECONCILING THE SUPREME COURT PRECEDENTS

Tribes' regulation of labor and employment relations within their reservations can take a variety of forms in a variety of contexts. The focus

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where the issue involves nonmember conduct on tribal land. *Id.* A panel of the Tenth Circuit, on the other hand, has suggested that *Hicks* puts an end to any inherent tribal authority over nonmembers other than through the consensual relationship or tribal self-government "exceptions" set forth in *Montana*. *See* MacArthur v. San Juan County, 497 F.3d 1057, 1069-70 (10th Cir. 2007) (nature of the property may be a determining factor in deciding whether nonmember activity fits within either of Montana's two exceptions, but "the only relevant characteristic for purposes of determining *Montana*'s applicability in the first instance is the membership status of the individual or entity over which the tribe is asserting authority").

137. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 146 (1982).

138. *See supra* text accompanying notes 66-68.

139. *See supra* text accompanying notes 8, 36, 74-75. *See also supra* notes 117-18.

140. *See supra* text accompanying notes 36, 41-44, 76-85, 92-103; note 111 and accompanying text.

141. Smith v. Salish Kootenai Coll., 434 F.3d 1127, 1139 (9th Cir. 2006) (en banc).

142. *See* U.S. CONST. art I, § 8, cl. 3 ("The Congress shall have the Power . . . To regulate Commerce . . . with the Indian Tribes"). *See also supra* note 6 and accompanying text.

here is on two settings: (a) when the tribe itself is the employer;[143] and (b) when a nonmember enterprise locates on the reservation, not on fee lands, and employs tribal members. Tribal authority over unions seeking to represent employees working for the tribe itself is closely related to the first situation, for it involves a nonmember entity operating within the reservation as an agent for employees of the tribe.[144]

The Court's modern precedents in *Williams*, *Merrion*, and *New Mexico* should leave no doubt that tribes have inherent authority to regulate the conduct of nonmembers who voluntarily enter the reservation to exploit reservation resources or otherwise attain economic gain. Whether a tribe affirmatively enacts laws to govern nonmember conduct within the reservation or not, this power remains intact and cannot be undermined absent an express directive from Congress.[145]

Under these mandates, tribes should have inherent authority to regulate their own labor and employment relations with nonmembers who voluntarily enter the reservation for employment.[146] They likewise should have inherent authority to regulate the labor and employment relations of nonmember entities doing business on the reservation and employing tribal members.[147] Further, unions operating within reservations as agents for employees of a tribe remain "subject to the tribe's *power* to exclude them" and "the lesser power to place conditions on" their continued presence.[148] Absent a clear directive from Congress, the Supreme Court's precedent admonishes courts to refrain from allowing external authorities to undermine tribal authority in this area; for it directly implicates tribal control over the reservation community and, more specifically, the allocation of resources from economic activity therein.[149]

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143. Tribes may engage in reservation activities in a variety of forms. The question of which entities deserve consideration as a "tribe," qua tribes, turns on the context of the issue presented and is beyond the scope of this Article. For simplicity, the terms "tribe," and "tribal enterprise" as used here, include those agencies, instrumentalities, and entities of an Indian tribe formed to engage in reservation activities under the control of tribal government. *See generally Salish Kootenai Coll.*, 434 F.3d at 1133-34 (en banc) (discussing standards).

144. Other settings, such as labor and employment relations within a nonmember business located on nonmember fee land within the exterior boundaries of a reservation, or the labor and employment relations within a member's business located on the member's fee land within the exterior boundaries of the reservation, while related, are beyond the scope of this Article.

145. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982) (a tribe's "sovereign power, even when unexercised, is an enduring presence . . . and will remain intact unless surrendered in unmistakable terms."). *See also supra* notes 54, 110.

146. *See* Williams v. Lee, 358 U.S. 217, 223 (1959); *Merrion*, 455 U.S. at 144-46.

147. *See* NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002) (en banc); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990).

148. *See Merrion*, 455 U.S. at 144.

149. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 342-44 (1983) (imposing state law on nonmember fishing rights within reservation would upset authority of

Deriving the authority of tribes to govern nonmember employment relations on tribal lands from *Montana* is more difficult, particularly in light of several Justices' intimations in *Hicks* that *Montana*'s standards may govern the overall scope of tribal authority over nonmembers, whether they are engaged in activity on tribal land or not.[150] The *Montana* framework can be harmonized with the teachings of *Merrion*, however, to establish such authority.

Montana confirmed that tribes have inherent authority to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements."[151] A nonmember employer operating on reservation land will do so only pursuant to some form of a "consensual relationship" with the tribe, whether by lease or contract (express or implied); otherwise, the nonmember would be engaged in a trespass. Under *Merrion*, such a nonmember is always subject to the sovereign power of the tribe to exclude or impose conditions governing continued presence.[152] The "host" tribe may, at any time, regulate the presence of such a nonmember enterprise under tribal employment and labor laws as a condition of its use of Indian territory for economic gain.[153] The

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Tribe); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (state authority over reservation gaming incompatible with authority of Tribe to engage in and control economic activity for welfare of tribal community); *Williams*, 358 U.S. at 223 (state authority over nonmember grocery store owner's claims against tribal members arising on the reservation would "infringe on the right of the Indians to govern themselves"). *See also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 64-65 (1978) (private right of action in federal court for violations of the Indian Civil Rights Act would "undermine the authority of tribal forums"); EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1081 (9th Cir. 2001) (principles of tribal self-government require that tribes be allowed to make "at least certain employment decisions without interference from other sovereigns").

150. *See supra* notes 126, 129 and accompanying text. *See also* Plains Commerce Bank v. Long Family & Cattle Co., Inc., 128 S. Ct. 2709, 2719 (2008) (*Montana*'s "[g]eneral rule restricts tribal authority over non-member activities taking place on the reservation.").

151. Montana v. United States, 450 U.S. 544, 565 (1981). *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), was a case cited by the Court in *Montana* as an illustration of the consensual relationship basis for inherent authority. *See Montana*, 450 U.S. at 565-66. In *Buster*, the Eighth Circuit upheld a permit tax on nonmembers for the privilege of conducting business with members on the reservation. *Buster*, 135 F. at 947. After likening the permit tax to a license, the court concluded that the regulation was permissible because the tribe had inherent authority to "prescribe the terms upon which noncitizens may transact business within its borders." *Id*. at 950. *See also* Strate v. A-1 Contractors, 520 U.S. 438, 457 (1997) (listing examples of relationships within the exception, including those in *Williams v. Lee* and *Buster v. Wright*).

152. *Merrion*, 455 U.S. at 145-47, 146 n.12. *Accord Plains Commerce Bank*, 128 S. Ct. at 2723.

153. *See* NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1192-93 (10th Cir. 2002); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314-15 (9th Cir. 1990). *See also* MacArthur v. San Juan County, 497 F.3d 1057, 1071-72 (10th Cir. 2007) ("[A] tribe only attains

same is true for any nonmember who enters the reservation to work for an enterprise of the tribe, or for the tribal government.[154] Again, absent an express or implied contractual right to enter the reservation for gainful employment, such a nonmember would be subject to exclusion or to conditions the tribe may choose to impose for any continued presence on its land.

In short, an Indian tribe should have authority to regulate the "consensual relationship" (whether express or implied) that allows any nonmember employee of the tribe or such employee's representative (i.e., a union), or any nonmember employer of tribal members, to enter, and remain on, the reservation.[155] *Montana* must be reconciled with *Merrion* in this manner. Otherwise, the "accident" of applying the *Montana* standards to govern nonmember conduct within the reservation (and not restricting them to the facts of that case, involving only conduct on a nonmember's fee land) would run headlong into the Court's admonition in *Merrion* that "[r]equiring the consent of the entrant deposits in the hands of the excludable non-Indian the source of the tribe's power, when the power instead derives from sovereignty itself."[156]

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regulatory authority based on the existence of a consensual employment relationship when the relationship exists between a member of the tribe and a nonmember individual or entity employing the member within the physical confines of the reservation.").

154. An employment relationship between two parties, even if at will, is contractual in nature (consensual). *MacArthur*, 497 F.3d at 1057, 1071.

155. In *Strate*, the Court explained that the existence of a consensual relationship is not alone sufficient to support tribal jurisdiction. *See Strate*, 520 U.S. at 457. The tribal exercise of authority must also take the form of taxation, licensing, or "other means" of regulating the activities of the nonmember. *Montana*, 450 U.S. at 565. This regulation must have some nexus to the consensual relationship. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656 (2001). In other words, a nonmember's consensual relationship in one area "does not trigger tribal civil authority in another." *Id.* at 656 ("*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself."). "A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another—it is not 'in for a penny, in for a Pound.'" *Id*. While not free from doubt, *Merrion* should render this nexus automatic when a nonmember intentionally exploits the reservation for personal gain, for such a nonmember remains subject to any conditions the tribe may impose. *See Merrion*, 455 U.S. at 147. The Court recently suggested that this is the case. *See Plains Commerce Bank*, 128 S. Ct. at 2723 ("The logic of *Montana* is that certain activities of non-Indians [*even*] *on non-Indian fee land* (say, a business enterprise employing tribal members) may be regulated [by Indian tribes].") (emphasis added).

156. *See id*. The risk of this kind of clash between the values of *Merrion* and the *Montana* framework is quite real. After *Strate*, the adequacy of the required "nexus" between a tribe's assertion of authority over a nonmember and the "consensual relationship" between the nonmember and the tribe or tribal members is by no means clear. *See Atkinson*, 532 U.S. at 656. The Court's general statement that a tribe's authority over nonmembers extends no further than what is "necessary to protect tribal self-government or to control internal relations" is vague. *Montana*, 450 U.S. 564-65. *See also* Nevada v. Hicks, 533 U.S. 353, 359 (2001); *See also Strate*, 520 U.S. at 459 (pointing to the *Montana* Court's preface to the self-governance basis for tribal authority over nonmembers: that "'Indian tribes retain

Thus, *Montana* can be harmonized with *Williams*, *Merrion*, and *New Mexico* to support the authority of tribes over reservation employment relations involving nonmembers. The fact that nonmember employees of tribal enterprises within the reservation (and their representatives), as well as nonmember employers operating within the reservation, voluntarily enter, and remain on, the reservation for personal gain is key. Such intentional activity is analogous to that of the nonmembers, who entered the Mescalero Apache Reservation to exploit tribal hunting and fishing resources in *New Mexico*. It is similar to that of the nonmember mining company that entered the Jicarrilla Apache Reservation in *Merrion* to exploit tribal mineral resources. And it is like that of the nonmember store owner, who located his enterprise on the Navajo Reservation to exploit a reservation market for groceries in *Williams*. Nonmembers who enter Indian reservations for the purpose of extracting economic value immediately affect the allocation of resources generated from the reservation environment and, therefore, the essential authority of the tribe over its reservation.[157] The "consensual relationship" with the nonmember is implicit in all such settings, even if not set forth in a formal lease or contract: such a nonmember agrees to remain on the reservation under whatever regulatory authority the affected tribe may choose to impose. If the costs to the nonmember from such tribal authority outweigh the economic benefits of remaining on the reservation, the nonmember is, of course, free to leave.

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their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.'") (quoting *Montana*, 450 U.S. at 564) (alteration in original); Further, its rendition of the self-governance "exception," under *Montana*, leaves that standard narrow and limited. *See Plains Commerce Bank*, 128 S. Ct. 2709 (suggesting that *Montana*'s second exception involves tribal power that is "necessary to avert catastrophic consequences") (quotations and citation omitted); *Atkinson*, 532 U.S. at 657-58 n.12 (*Montana*'s self-governance basis for tribal authority requires nonmember conduct that "threatens" or "imperil[s]" tribal interests) (alteration in original).

157. This is the enduring lesson of *Williams* and *Merrion*. *See supra* notes 85, 97-100, 141 and accompanying text. Indeed, the *Montana* Court cited directly to *Williams* as an example of the type of nonmember activity over which tribes retained inherent regulatory authority for both "exceptions" to its general proposition that tribes do not retain inherent authority over nonmembers. *Montana*, 450 U.S. at 565-66 (citing Williams v. Lee, 358 U.S. 217 (1959)). This reference to *Williams* in *Montana* has not escaped the attention of the Court in more recent years. *See Plains Commerce Bank*, 128 S. Ct. at 2721; *Hicks*, 533 U.S. at 353, 361; *Strate*, 520 U.S. at 457-58.

IV. ASSESSING THE RULE FOR WHEN FEDERAL LABOR AND EMPLOYMENT LAWS OF GENERAL APPLICATION MAY BE IMPOSED ON TRIBES: THE NECESSITY OF JUDICIAL RESTRAINT

A. The Problem

Congress has not seen fit to impose federal labor and employment laws that generally apply to private employers to Indian tribes within their reservations. Indeed, Congress expressly excluded Indian tribes from federal employment discrimination laws under Title VII of the Civil Rights Act of 1964.[158] It has likewise expressly excluded tribes from the employment discrimination provisions of the Americans with Disabilities Act.[159] As noted in Part I, while Congress enacted the Indian Civil Rights Act of 1968 to impose provisions equivalent to the Bill of Rights and the Fourteenth Amendment upon tribes, the Supreme Court has held that, with the exception of habeas corpus relief, the ICRA provides no private right of action for individuals to sue tribes in non-Indian forums. Thus, whereas employees of states and local governments can invoke the Constitution's Equal Protection and Due Process clauses to sue governmental employers,[160] employees of tribes have no such rights unless they invoke the ICRA within a tribal forum. Congress has not seen fit to change this state of the law in the face of proposals to do so.[161]

Congress, of course, often fails to consider tribes in enacting its laws. This is the case for a variety of general federal laws regulating labor and employment. The National Labor Relations Act (NLRA), the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA), the Family Medical Leave Act (FMLA), and the Age Discrimination in Employment Act (ADEA), amongst others, are silent with respect to their application to Indian tribes. It is clear, nevertheless, that none of these laws—insofar as they provide for private lawsuits—can be enforced against

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158. 42 U.S.C. § 2000e(b) (2000). Senator Mundt of South Dakota, who introduced this provision, stated that it was to allow tribes to "conduct their own affairs" without facing the liabilities imposed under the Act. 110 CONG. REC. 13702 (1964). Congress likewise exempted non-Indian employers on or near Indian reservations from Title VII when such employers give preferential treatment "to any individual because he is an Indian living on or near a reservation." 42 U.S.C. § 2000e-2(i).

159. *See* 42 U.S.C. § 12111(5)(B)(i) (2000).

160. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Knox County Educ. v. Knox County Bd. of Educ., 158 F.3d 361 (6th Cir. 1998); Notari v. Denver Water Dep't, 971 F.2d 585, 587 (10th Cir. 1992).

161. A bill introduced in 1998 to amend ICRA to waive tribal sovereign immunity for ICRA claims and allow federal courts to review tribal court ICRA decisions died in committee. *See* S. 2298, 105th Cong. (2d Sess. 1998) ("A Bill to Provide for Enforcement of Title II of the Civil Rights Act of 1968," commonly known as the "Indian Civil Rights Act," introduced by Senator Gorton on July 14, 1998).

a tribe by individuals because Congress did not waive tribes' sovereign immunity from suit under these laws. Tribes may face lawsuits by the agencies that administer these laws, however, because courts have held that tribes do not have sovereign immunity from lawsuits brought by the United States and its agencies.[162] When this happens, it falls to the judiciary to decide whether the federal law should be imposed upon the tribe in question.

This Part considers this problem only in reference to the imposition of such laws on the labor and employment relations of tribes within their reservations, not with respect to nonmember enterprises within the reservation, although the lessons drawn from the earlier discussion of tribal authority over these nonmember enterprises in Part III may well be implicated.[163] A potential displacement of tribal authority is at stake when federal agencies seek to impose federal laws upon the reservation employment relations of Indian tribes. The Supreme Court has yet to address the issue, however, and the circuit courts are split in their approach to its resolution.[164]

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162. *See* EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1075 (9th Cir. 2001); *see also* United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380 (8th Cir. 1987).

163. The most extensive treatment to date of the potential infringement of tribal authority over nonmember enterprises as a result of the application of general federal labor law is in the Tenth Circuit's decision in *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (en banc).

164. While the term "split" is used to describe the differing approaches of the Circuit Courts of Appeals, this is not meant to imply that differences are of such nature that the Supreme Court would consider there to be a "split" for the purpose of granting a petition for writ of certiorari. *See* SUP. CT. R. 10(a). The differing approaches of the courts have spurred a rich body of scholarship. *See, e.g.*, William Buffalo & Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. MEM. L. REV. 1365 (1995); Kristen E. Burge, Comment, *ERISA and Indian Tribes: Alternative Approaches for Respecting Tribal Sovereignty*, 2000 WIS. L. REV. 1291 (2000); Maureen M. Crough, Note, *A Proposal for Extension of the Occupational Safety and Health Act to Indian-Owned Businesses on Reservations*, 18 U. MICH. J.L. REFORM 473 (1985); Helen M. Kemp, *Fallen Timber: A Proposal for the National Labor Relations Board to Assert Jurisdiction Over Indian-Owned and Controlled Businesses on Tribal Reservations*, 17 W. NEW ENG. L. REV. 1 (1995); Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681 (1994); Brian P. McClatchey, *Tribally-Owned Businesses Are Not "Employers": Economic Effects, Tribal Sovereignty, and* NLRB v. San Manuel Band of Mission Indians, 43 IDAHO L. REV. 127 (2006); Mitchell Peterson, The Student Article, *The Applicability of Federal Employment Law to Indian Tribes*, 47 S.D. L. REV. 631 (2002); Ann Richard, Note, *Application of the 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); Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691 (2004); Kaighn Smith, Jr., *Tribal Sovereignty and Economic Development: The Structure of Tribal Enterprises, Sovereign Immunity, and the Application of Federal Labor and Employment Laws*, Conference Paper, ABA Fifth Annual Natural Resources Management & Environmental Enforcement on Indian Lands Conference, Albuquerque, NM, 1993 (on file with Michigan State Law Review); Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85

B. The Circuit Split

The Tenth Circuit first confronted the issue in 1982, in *Donovan v. Navajo Forest Products Industries*.[165] The U.S. Department of Labor (DOL) sought to impose OSHA on the Navajo Forest Products Industries (NFPI), an enterprise wholly owned and operated by the Navajo Nation. The Nation, through NFPI, engaged in logging operations and the manufacturing of wood products on the Navajo reservation, and employed both members and nonmembers.[166] While NFPI fit the definition of "employer" under OSHA, the Tenth Circuit found that the entry of OSHA officials onto the reservation to regulate NFPI would violate an article of the Navajo treaty, permitting only limited entry for officials dealing with Indian matters and excluding others without the express permission of the Tribe. This entry also violated the inherent authority of the Tribe, even apart from the treaty, to exclude nonmembers from the reservation as confirmed in *Merrion*.[167]

The DOL relied on *Federal Power Commission v. Tuscarora Indian Nation*, where the Supreme Court upheld the taking of land owned by the Nation pursuant to the Federal Power Act.[168] The Court had held that the land at issue, far from the Nation's reservation, did not fall within the Federal Power Act's exclusion of "reservations" from takings under the Act. While the Nation owned the land at issue, there was no treaty or statute confirming that it was part of its reservation or was held in trust by the United States.[169] Thus, as a matter of law, the Nation could not exercise governmental authority over the land. By way of *dictum*, and without explanation, the Supreme Court said, "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."[170] The *Tuscarora* Court said nothing about the application of such laws to reservation or trust lands over which tribes exercise inherent governmental authority; the case had nothing to do with that issue.

The Tenth Circuit rejected the DOL's reliance on *Tuscarora*. First, it noted that *Tuscarora* did not involve the application of a federal law in vio-

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(1991); Julie Thompson, Comment, *Application of the National Labor Relations Act to Indian Tribes: Preserving Indian Self-Government and Economic Security*, 27 U. DAYTON L. REV. 189 (2001); Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413 (2007).

165. 692 F.2d 709, 710 (10th Cir. 1982) [NFPI].

166. *Id.*

167. *Id.* at 711-13.

168. 362 U.S. 99 (1960).

169. *See id*. at 105-06.

170. *Id.* at 116.

lation of an express treaty provision.[171] Second, it concluded that any force of the *Tuscarora* dictum was rendered inoperative by *Merrion*, where the Court made clear that "an Indian tribe's power to exclude non-Indians from tribal lands is an inherent attribute of tribal sovereignty, essential to a tribe's exercise of self-government and territorial management."[172] The Tenth Circuit reasoned that congressional silence about the application of OSHA to an Indian tribe could not operate to undermine that power and force the imposition of the OSHA regulatory infrastructure into and upon the Navajo reservation.[173]

Three years later, in *Donovan v. Coeur d'Alene Tribal Farm*,[174] the Ninth Circuit disagreed with the Tenth Circuit's approach. *Donovan* involved a farm, owned and operated by the Coeur d'Alene Tribe.[175] DOL agents inspected the farm's grain elevators and issued citations and a penalty for OSHA violations.[176] While, like NFPI, the farm fit the definition of "employer" under OSHA, the Tribe argued that its "inherent sovereign powers bar[red] application of [OSHA] to its activities absent an express congressional decision to that effect."[177] The Ninth Circuit conceded that the Tribe had an "inherent sovereign right to regulate the health and safety of workers in tribal enterprises," but framed the issue as "whether congressional silence [on the application of OSHA to tribes] should be taken as an expression of intent to exclude tribal enterprises from the scope of an Act to which they would otherwise be subject."[178] Contrary to the Tenth Circuit, the Ninth Circuit took as its starting point the *Tuscarora* dictum that "'federal laws generally applicable throughout the United States apply with equal force to Indians on reservations.'"[179] However, the court recognized three exceptions to this general proposition:

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171. *NFPI*, 692 F.2d at 711.

172. *Id*. at 712 (emphasis omitted) (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982)).

173. *See id.* at 712-13. The Tenth Circuit read *Merrion* as clarifying the inherent authority of tribes to regulate the entry and presence of non-Indians within the reservations. *Id.* at 713. Since the Navajo Nation's power to control its lands is an inherent attribute of tribal sovereignty that would be threatened by the application of OSHA, the court refused to impose that law upon the Nation "[a]bsent some expression of . . . legislative intent" to divest tribes of their "attributes of sovereignty." *Id.* at 714. *See also id.* at 712 (a construction of OSHA to divest the Navajo Nation of its sovereign authority to exclude or regulate the presence of non-Indians within the reservation would "dilute the recognized 'attributes of [Indian tribal] sovereignty over both their members and their territory'") (alteration in original) (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)).

174. 751 F.2d 1113 (9th Cir. 1985).

175. *Id*. at 1114.

176. *Id*.

177. *Id*. at 1115.

178. *Id*.

179. *Id*. (quoting Fed. Power Comm'n v. Tuscarora, 362 U.S. 99, 116 (1960)).

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . ." In any of these three situations, Congress must *expressly* apply a statute to Indians before we will hold that it reaches them.[180]

These identified "exceptions" had been developed by Ninth Circuit Judge Herbert Y. C. Choy, writing only for himself, in one of three concurring opinions in *United States v. Farris*.[181] *Farris* was a criminal case involving the application of federal criminal laws to individual Indians. The defendants asserted an essentially meritless argument that they could not be prosecuted under the Organized Crime Control Act, 18 U.S.C. § 1955, for running illegal gambling operations on the reservation.[182] In his concurring opinion, Judge Choy wrote,

> [T]here seem to be three exceptions to [the rule that federal laws generally apply with equal force to Indians on reservations] . . . . First, reservation Indians may well have exclusive rights of self-governance in purely intramural matters . . . . Second, it is presumed that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws . . . .
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> . . . .
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> Finally, if appellants could prove by legislative history or some other means that Congress intended § 1955 not to apply to Indians on their reservations, we would give effect to that intent.[183]

No other judge on the panel, including then-Ninth Circuit Judge Anthony Kennedy, joined in this view of the operation of the *Tuscarora* dictum. And nothing in the case suggested that it could have any bearing on the application of federal civil laws to Indian tribes, as opposed to individual Indians, within their territorial jurisdictions.[184]

By adopting this arguably inapposite standard in *Coeur d'Alene*, the Ninth Circuit, contrary to the approach of the Tenth Circuit, set the presumption in favor of applying general federal labor and employment laws to Indian tribes when Congress was silent on the subject. This imposed the burden upon the Tribe to fit into one of the *Farris* exceptions. Lacking an

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180. *Id*. at 1116 (alteration and omission in original). The Second Circuit adopted the Ninth Circuit's approach in *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996), holding that OSHA applied to a reservation construction business owned and operated by the Mashantucket Pequot Tribal Nation.

181. 624 F.2d 890 (9th Cir. 1980).

182. *See id.* at 892-99.

183. *Id*. at 893-94 (Choy, J., concurring).

184. *See id*. at 899-900. *See generally* Singel, *supra* note 164, at 703-04 (Tuscarora dictum is "relevant to rights of Indians as individuals rather than as governments").

applicable treaty provision, the Coeur d'Alene Tribe set out to prove that its farm should be considered a "purely intramural matter." The court easily rejected that attempt, stating "[t]he operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government. . . . [I]ts operation free of federal health and safety regulations is 'neither profoundly intramural . . . nor essential to self-government.'"[185] Recognizing that its conclusion was at odds with the Tenth Circuit's opinion in *NFPI*, the Ninth Circuit said that it disagreed with the Tenth Circuit's decision to the extent that the decision was "not tied to the existence of an express treaty right" to exclude nonmembers from the reservation.[186]

In 1989, the Tenth Circuit clarified its position in *EEOC v. Cherokee Nation*.[187] That case involved an age discrimination charge brought against the Cherokee Nation under the ADEA, a statute (like OSHA) that is silent with respect to its application to tribes. The Tenth Circuit agreed with the Tribe that it was free from the imposition of the law. While the Tribe had documented its right to exclude in a treaty, the Tenth Circuit wrote,

> [N]ormal rules of construction do not apply when Indian treaty rights, *or even non-treaty matters* involving Indians, are at issue.
>
> . . . .
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> We believe that unequivocal Supreme Court precedent dictates that in cases where ambiguity exists (such as that posed by the ADEA's silence with respect to Indians), and there is no *clear* indication of congressional intent to abrogate Indian sovereignty rights (as manifested, *e.g.*, by the legislative history, or the existence of a comprehensive statutory plan), the court is to apply the special canons of construction to the benefit of Indian interests. We conclude that, in this case, the bases for inferring congressional intent were not so clear as to overcome the burden which the EEOC was required to carry.[188]

Thus, under *NFPI* and *Cherokee Nation*, the Tenth Circuit approach, in contrast to that of the Ninth Circuit, is first to consider whether the imposition of a federal labor or employment law of general application would interfere with attributes of tribal sovereignty established by treaty or common law. If it would, the Tenth Circuit holds the law inapplicable absent a clear directive from Congress. By adopting the *Tuscarora* dictum with the qualifications stated by Judge Choy in *Farris*, the Ninth Circuit presumes that such laws apply to tribes unless a tribe establishes one of the three exceptions.

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185. *Coeur d' Alene*, 751 F.2d at 1116 (second omission in original) (quoting *Farris*, 624 F.2d at 893-94).

186. *Id*. at 1117 n.3.

187. 871 F.2d 937 (10th Cir. 1989).

188. *Id*. at 939 (first emphasis added) (citation omitted).

The Eighth Circuit followed the Tenth Circuit's approach in *EEOC v. Fond du Lac Heavy Equipment and Construction Co.*,[189] where the EEOC brought suit against a reservation-based construction company, owned by the Fond du Lac Tribe, on behalf of a tribal member who claimed age discrimination. The court rejected the EEOC's assertion that the Tenth Circuit's decision in *Cherokee Nation* was distinguishable "because it was based on a treaty right of self-governance."[190] The court said, "'The identical right should not have a different effect because it arises from general treaty language rather than recognized, inherent sovereign rights.'"[191] It held that the Tribe had the "inherent" right to resolve the dispute without interference from external authority; "[b]ecause the tribe's specific right of self-government would be affected, the general rule of applicability does not apply."[192] Thus, "absent a clear and plain congressional intent," the Eighth Circuit would not impose the ADEA upon the tribe and its reservation-based construction enterprise.[193]

The D.C. Circuit more recently set forth a third approach in *San Manuel Indian Bingo and Casino v. N.L.R.B.*[194] The court held that an Indian tribe's gaming operation under the IGRA, involving the employment of non-Indians, does not present a case in which the application of the NLRA will interfere with tribal self-government. While conceding that such gaming is "governmental" because its purpose is to generate revenue to support tribal government services, the court nevertheless characterized it as principally "commercial" in nature and, therefore, not sufficiently central to tribal sovereignty to warrant protection from the imposition of the NLRA.[195] To arrive at this conclusion, the court suggested that the attributes of tribal sovereignty can be evaluated along a continuum, with "traditional customs and practices" within the reservation at the core, and "commercial enterprises that tend to blur any distinction between tribal government and a private corporation" at the periphery.[196] Those at the core could warrant protection, but, depending on the facts presented, those at the periphery might not.[197]

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189. 986 F.2d 246 (8th Cir. 1993).
190. *Id*. at 249 n.4.
191. *Id*. (citation omitted).
192. *Id*. at 249.
193. *Id. See also* Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 494-96 (7th Cir. 1993) (Posner, J.) (Congressional silence about application of FLSA to tribal game wardens, involving regulatory functions within the "inherent authority" of tribes, generated "extrinsic ambiguity" with respect to Congress's intent; agreeing with Tenth Circuit's approach in *Cherokee Nation*).
194. 475 F.3d 1306 (D.C. Cir. 2007).
195. *Id.* at 1312-14.
196. *See id.* at 1312-13.
197. *See id.* at 1314-15.

C. The Assessment

The Ninth Circuit's "accident" in adopting Judge Choy's *Farris* standard and its uncritical acceptance of the *Tuscarora* dictum as its starting point, without observing, as the Tenth Circuit did, the Court's clarity in *Merrion*, sets the issue presented in these cases in the wrong framework. These cases present the problem of when courts may allow inherent tribal authority to be undermined. This problem is similar to those presented in *Williams*, *New Mexico*, and *Iowa Mutual*. The question, in fine, is, "When may an external authority (here federal authority imposed by a federal agency) operate to govern reservation affairs otherwise falling within the scope of an Indian tribe's inherent authority?" As discussed in Parts II and III, under *Worcester*, *Williams*, *Merrion*, *New Mexico*, and their reconciliation with *Montana*, tribes clearly possess the sovereign power to govern their employment relations, not only with their own members, but within the reservation enterprises of nonmembers. As discussed in Part I, under the doctrine of judicial restraint, absent a clear congressional directive, courts may not allow the undermining of such authority, particularly if it could hamper Congress's ubiquitous goal of promoting tribal self-government in the modern era.[198]

Absent from Judge Choy's *Farris* standard is any assessment of potential infringement of the attributes of tribal sovereignty that results from the imposition of OSHA or any other federal labor or employment law of general application. Under that standard, in the absence of an express treaty right, tribes must prove that such an imposition affects a "purely intramural matter" or, contrary to the doctrine of judicial restraint, that Congress exhibited some intent *not* to apply a general law affecting a tribe's labor and employment relations to the reservation setting. The "purely intramural matter" formulation virtually eliminates from consideration the "essential," "traditional," and "undisputed" sovereign power of tribes to control the presence of nonmembers within the reservation.[199] Under *Worcester*, *Wil-*

198. *See supra* notes 49-64 and accompanying text. Simply stated, when Congress fails to endorse an infringement of inherent tribal authority over nonmember reservation activity through the clear imposition of external control (by means of state or federal authority), courts must protect against the potential infringement. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 337-40 (1983) (imposition of state authority over nonmember hunting and fishing on reservation would infringe on inherent authority of tribe); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) (absent clear directive from Congress, the diversity jurisdiction statute will not be interpreted to allow an undermining of a tribal court's sovereign authority over reservation affairs); Williams v. Lee, 358 U.S. 217, 223 (1958) (tribe's inherent authority over nonmember's debt collection effort against tribal member arising out of reservation transaction cannot be undermined by state authority absent a clear directive from Congress).

199. *See supra* note 77 and accompanying text and note 133.

liams, and *Merrion*, however, the imposition of external authority over reservation employment relations should be immediately recognized as an infringement on the attributes of tribal sovereignty. Once nonmembers enter the reservation to take advantage of opportunities there for personal gain, the "authority of Indian governments over their reservations" is implicated.[200] Their status as nonmembers is "immaterial" to the judicial obligation to protect that authority from infringement by outside authority.[201] If Congress has failed to make itself clear, the courts must exercise judicial restraint to await that clarity.

The inherent authority of tribes to maintain the integrity and order of their reservations is infringed by the imposition of federal labor and employment laws of general application. This infringement involves the imposition of a foreign coercive power (federal administrative agencies) without regard to the tribe's own internal processes or forums. It involves the imposition of external legal requirements that directly affect the allocation of economic value generated within the reservation by the tribe.[202] Whether the imposed law involves minimum wages or overtime pay under the FLSA, rights and remedies under the FMLA or the ADEA, or coercive penalties under OSHA, there is an impact upon the allocation of value generated by the tribe's use of reservation resources. This affects the ability of a tribe to determine how best to order its affairs and provide rights and remedies affecting its reservation's economic efforts and goals.

Such an infringement could not be more pronounced when the NLRA is applied to a tribe's reservation labor relations. A tribe beset with the mandatory requirements of the NLRA must allow unions (i.e., nonmember enterprises) to operate within its reservation by mandate of external author-

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200. *Williams*, 358 U.S. at 223; *see* Plains Commerce Bank v. Long Family & Cattle Co., Inc., 128 S. Ct. 2709, 2723 (2008) ("The tribe's traditional and undisputed power to exclude persons from tribal land . . . gives it the power to set conditions on entry to that land . . . .") (citations and quotations omitted); Merrion v. Jicarillo Apache Tribe, 455 U.S. 130, 147 (1982) (explaining that the "nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose").

201. *Williams*, 358 U.S. at 223.

202. For example, application of the Ninth Circuit's "purely intramural matter standard" unsettles the ability of tribes to maintain order within their reservations under their own standards. Indeed, it sets up a bias in favor of imposing external authority when nonmember employees are affected, but not when reservation labor or employment relations involve only member employees because the latter situation more readily fits within the notion of a "purely intramural matter." *See* EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071 (9th Cir. 2001) (age discrimination suit involving tribal member considered purely intramural). This bias creates disequilibrium in the allocation of reservation resources by providing federal law rights and remedies to nonmember employees (and imposing the attendant transaction costs upon tribes and their enterprises) while exempting tribal member employees from the same. *See also* Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 495 (7th Cir. 1993) (discussing "debate" about resource allocations affected by FLSA).

ity, thus surrendering its fundamental right to exclude nonmembers who seek to prosper from their self-interested activities within the reservation. The tribe must comply with a foreign authority's mandatory subjects of bargaining, regardless of its own policy concerns about what might, or might not, be appropriate subjects of bargaining, given its assessment of how best to allocate resources derived from the reservation economy.[203] It must bargain in good faith in accordance with the standards and authority of an external tribunal, the National Labor Relations Board, notwithstanding its own internal forums for resolving disputes. And it must face the prospect of a strike against its reservation operations, thus affecting its very ability to maintain order within its territory.[204]

By imposing the NLRA upon the Tribe in *San Manuel*, the D.C. Circuit allowed a direct infringement upon the right of the San Manuel Band to govern itself and its territory, without the considered judgment of Congress. The fact that the subject matter of the Band's activity within its reservation involved the operation of a casino under the terms of the IGRA should be irrelevant.[205] The court's suggestion that the operation of a casino is not a "traditional attribute of self-government,"[206] like the "purely intramural matters" formulation of the Ninth Circuit,[207] places the issue presented in the

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203. Two mandatory subjects of bargaining, the testing of employees for drug use and seniority considerations for layoffs and/or reinstatement of workers, are ready examples of how the imposition of the NLRA interferes with the intimate reservation affairs of an Indian tribe. Tribal communities are uniquely vulnerable to the devastating effects of alcohol and drug abuse. Thus, they have reasons to govern workplace drug testing on their own terms, formed out of their unique concerns in that area. By virtue of their status as separate sovereigns, tribes may give preference to their own tribal members when layoffs or reinstatement of workers occur within any enterprise on the reservation. *See supra* note 33 and accompanying text. By imposing a mandatory bargaining duty upon tribes in these areas, the NLRA directly undermines the protected authority of tribes, quite apart from their general power to exclude and condition the presence of any nonmembers who enter the reservation for personal gain.

204. No other government, state, local, or federal, faces the prospect of a right to strike. It is anathema to the concept of government—whether it is engaged in "traditional governmental activities" or not—that its activities could be brought to a halt as the result of a labor strike. *See* N.Y. City Off-Track Betting Corp. v. Am. Fed'n, 416 N.Y.S.2d 974 (1979) (strike against state off-track betting facility forbidden). *See generally* 5 U.S.C. § 7311(3) (prohibiting strikes against the federal government); Bd. of Educ., Twp. of Middletown v. Middletown Twp. Educ. Ass'n, 800 A.2d 286, 288 (N.J. Super. Ct. Ch. Div. 2001) ("[I]t has long been well-established in this Nation, either by judicial decision or statute, that public employees may not strike unless expressly authorized by law.").

205. It is also patently incorrect. Tribes engage in reservation gaming pursuant to their inherent governmental authority. *See supra* notes 47-48 and accompanying text; *infra* note 209 and accompanying text.

206. *See* San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306, 1315 (D.C. Cir. 2007).

207. *See* Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).

wrong framework. First, there is no hierarchy of protection owed to the established attributes of tribal sovereignty.[208] Second, even if there were, the attribute in jeopardy as a result of the application of the NLRA and other general federal labor and employment laws to tribes within their reservations is central to tribal self-government. It involves the power to control the use and allocation of reservation resources, by and between members and nonmembers, generated from a tribal enterprise.[209]

The Tenth Circuit's approach in *NFPI* and *Cherokee Nation* and the Eighth Circuit's similar approach in *Fond du Lac* are true to the established necessity of protecting the attributes of tribal sovereignty (whether confirmed by treaty or common law) from external interference, absent a clear directive from Congress. Consistent with *Merrion*, the Tenth Circuit in *NFPI* readily recognized that the application of OSHA to NFPI would portend the undermining of the inherent and treaty-confirmed authority of the Navajo Nation to govern nonmembers' entry and presence on the reservation. Thus, consistent with *Merrion* and the Court's subsequent decision in *Iowa Mutual*, the Tenth Circuit refused to impair that authority in the face of congressional silence. While both *NFPI* and *Cherokee Nation* involved treaty rights, the Tenth Circuit clearly signaled its intent to also apply its approach to the attributes of tribal authority confirmed by common law.[210]

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208. *See supra* notes 50-51, 73 and accompanying text.

209. *See supra* text accompanying notes 146-49, 152-56, 202 and accompanying text. Ironically, when examining sovereign immunity—an attribute of tribal sovereignty no more or less deserving of judicial protection than tribal control of economic resources generated by tribal enterprises within the reservation—the Ninth Circuit recently described an Indian casino in the following terms:

> [T]he Casino is not a mere revenue-producing tribal business (although it is certainly that). The IGRA provides for the creation and operation of Indian casinos to promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). One of the principal purposes of the IGRA is "to insure that the Indian tribe is the primary beneficiary of the gaming operation." *Id.* § 2702(2). The compact that created the Gold Country Casino provides that the Casino will "enable the Tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenues to support the Tribe's government and governmental services and programs."
>
> With the Tribe owning and operating the Casino, there is no question that these economic and other advantages inure to the benefit of the Tribe. Immunity of the Casino directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general.

Allen v. Gold Country Casino, 464 F.3d 1044, 1046-47 (9th Cir. 2006) (citations omitted). *See* Cohen v. Little Six, Inc., 543 N.W.2d 376, 379 (Minn. Ct. App. 1996) ("Raising revenue and redistributing it for the welfare of a sovereign nation is manifestly a governmental purpose.").

210. *See* Donovan v. Navajo Forest Prods. Indus. [NFPI], 692 F.2d 710, 712-13 (10th Cir. 1982) (rejecting Secretary's contention that nothing in the Navajo Treaty or "*principles of tribal sovereignty and self-government*" bar the application of OSHA to NFPI, and pro-

And, the Eighth Circuit expressly did so in *Fond du Lac*.[211] Because tribes' common law attributes of sovereignty deserve as much protection from impairment as treaty rights,[212] the Tenth and Eighth Circuits have articulated the correct approach. Until Congress makes its intent clear, the courts are not free to condone the infringement of tribal self-government that attends the imposition of general federal labor and employment laws upon the reservation enterprises of Indian tribes.[213]

SUMMARY AND CONCLUSION

The doctrine of judicial restraint in Indian affairs reflects the Constitution's allocation of plenary authority over Indian tribes to Congress. The Supreme Court and lower federal courts play a significant role in shaping federal Indian law by filling out its contours, where they are not expressly addressed by treaties or congressional enactment. The resulting body of federal Indian common law, forged from the resolution of cases and controversies within the Court's jurisdiction, has defined the attributes of inherent tribal sovereignty. But once a tradition of tribal sovereignty is established, the judiciary must defer to Congress if it is to be undermined; for Congress is best positioned to "weigh and accommodate the competing policy concerns and reliance interests."[214]

The only exception to this tacit separation of powers with respect to Indian affairs is the Court's seldom-used authority to declare an attribute of tribal sovereignty to have been implicitly divested on the ground that it is incompatible with the overriding sovereignty of the United States. But such judicial activism is, and (under the allocation of powers by the Constitution) should be, disfavored.[215] Congress sets the Nation's policies with respect to

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ceeding to address the necessity of protecting the non-treaty, inherent right of tribes to exclude nonmembers, confirmed in *Merrion*) (emphasis added).

211. EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 248 (8th Cir. 1993) (protecting the tribe's right of self-government established by "federal common law"). The Seventh Circuit takes this approach as well. *See* Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 495-96 (7th Cir. 1993).

212. *See* EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1080, 1082 (9th Cir. 2001); *Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d at 494 (regulatory function within the "inherent authority" of tribes cannot be impaired by application of FLSA in absence of express directive by Congress even in the absence of a specific treaty right); *NFPI*, 692 F.2d at 712-13 (discussing *Merrion*). *See also supra* note 51; *supra* notes 188, 191, 198 and accompanying text.

213. United States v. Wheeler, 435 U.S. 313, 323 (1978); Williams v. Lee, 358 U.S. 217, 223 (1959).

214. Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 758-60 (1998). *See also* United States v. Lara, 541 U.S. 193, 199-204 (2004) (discussing Congress's restoration of inherent tribal authority).

215. *See* Rice v. Rehner, 435 U.S. 713, 720 (1983). Indeed, Congress will restore an attribute of inherent tribal sovereignty when it considers the Court to have erred in deeming

Indian affairs and has decided that it is in the Nation's best interest to promote strong tribal governments and tribal economic independence. The judiciary is obliged to ensure that its decisions are consistent with this course.[216] The Supreme Court's narrow leeway to divest tribal authority over nonmembers under the "implicit divesture" rationale, however, presents the risk that this obligation can be avoided.

Congress's policy of promoting tribal economic independence and self-governance has been successful, but it has starkly exposed this risk. Nonmembers now participate within tribal reservation economies, both as employees of tribal enterprises and as employers of tribal members and others, more than at any time in the Nation's history. In doing so, they trigger the inherent power of tribes to regulate the terms and conditions of their presence because they affect the allocation of resources belonging to, or generated by, the tribe.

The Court, however, has laid a foundation for undermining this "traditional" and "essential" attribute of tribal sovereignty[217] by declaring *Montana*'s "general proposition"—that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe"—to be "pathmarking."[218] Several Justices have thereby intimated that, whether nonmember activity takes place on their own fee lands or within tribal lands, tribal authority may extend to such activity only if it fits one of the two *Montana* "exceptions," and involves the regulation of either (a) a consensual relationship with the nonmember, or (b) nonmember conduct that threatens the political integrity or economic security of the tribe.[219] Such a limitation on tribal authority over nonmember reservation activity, depending upon how it is construed, could be wholly incompatible with the fundamental authority of tribes to exclude nonmembers they deem undesirable from the reservation.

If *Montana* requires tribes to point to a clear consensual relationship, along with a tribal law with a nexus to such a relationship, to establish the "consensual relationship" exception, or a clear and present danger to the reservation community posed by a nonmember's reservation presence to establish the second, the extension of *Montana* to limit tribal authority over

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the attribute to have been "implicitly divested." *See* 25 U.S.C. § 1301(2) (2000) (restoring inherent authority of tribes to prosecute nonmember Indians); *Lara*, 541 U.S. at 199-204 (confirming congressional authority to restore attributes of inherent authority that the Court has deemed implicitly divested).

216. *See supra* notes 63-64 and accompanying text.

217. *See supra* note 77 and accompanying text and note 133.

218. *See supra* note 113 and accompanying text. *See also* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 650 (2001) (describing *Montana* as "the most exhaustively reasoned of our modern cases" addressing the inherent or retained authority of Indian tribes).

219. *See supra* notes 126, 129 and accompanying text. *See also supra* notes 136, 150.

nonmembers on tribal land could undermine *Worcester* at its root, and the 150 years of Indian law jurisprudence it has spawned.[220] Indeed, if that is how *Montana* works, Samuel A. Worcester, the Vermont missionary, who preached the gospel on the Cherokee reservation in *Worcester v. Georgia*,[221] would not have had the requisite consensual relationship with the Cherokee to trigger *Montana*'s first "exception,"[222] nor would he have engaged in any threatening practice to trigger its second.[223]

On the other hand, any nonmember who enters an Indian reservation and remains there for personal gain, including Samuel Worcester, who, after all, did so for his personal salvation, may be viewed as engaging in "dealings" with a tribe or tribal members to trigger *Montana*'s consensual relationship "exception" and the inherent authority of a tribe to regulate such reservation activity.[224] *Montana*'s consensual relationship can be implied in such situations. Furthermore, as the Court made clear in *Merrion*, the affected tribe's inherent power to govern that activity should endure whether expressly exercised or not.[225] Thus, should the Supreme Court expressly hold that *Montana* governs tribes' civil regulatory authority over nonmembers on tribal land, the Court's precedents can be harmonized to preserve the inherent authority of tribes to govern nonmembers who engage in reservation activity for economic gain.

The split within the circuit courts of appeals over the standard governing whether federal labor and employment laws of general application may be imposed on tribes or tribal enterprises within their reservations reflects the modern tensions in play with respect to inherent tribal authority over nonmembers. The unremarkable proposition of *Tuscarora*, that "a general statute in terms applying to all persons includes Indians and their property interests," *is* remarkable when extended to Indian tribes by the Ninth Circuit, especially when tribes would have sovereign immunity from suit for any individual seeking to enforce such a general statute upon them.[226] The Ninth Circuit's "purely intramural matter" exception to the *Tuscarora* dictum leaves tribes subject to the imposition of federal laws by federal agencies to govern reservation employment relations whenever they involve nonmembers. The regulation of labor and employment relations involving

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220. *See supra* text accompanying notes 80-111; *see also supra* notes 54, 110.

221. 31 U.S. (6 Pet.) 515 (1832).

222. *See supra* notes 155-56.

223. *See supra* note 156.

224. Nevada v. Hicks, 533 U.S. 353, 372 (2001) (discussing the kinds of "dealing" and "arrangements" by which nonmembers may voluntarily submit to the civil jurisdiction of tribes); *id.* at 386 (Ginsburg, J., concurring) (noting that the Court did not reach the question of whether tribes may have civil jurisdiction over state officials "engaged on tribal land in a venture or frolic of their own").

225. *See supra* note 96 and accompanying text. *See also supra* notes 54, 110.

226. *Compare supra* note 209, *with* text accompanying notes 174-86.

nonmembers within tribal enterprises on the reservation, however, directly involves the allocation of value derived from the reservation environment and the order of economic activity therein.[227] This is so whatever labor or employment regulation is at issue: whether it involves the establishment of rights and remedies for workplace discrimination, minimum wages, or the subjects of mandatory bargaining and unfair labor practices for collective bargaining. The imposition of external (i.e. federal agency) authority upon such matters directly interferes with the ability of tribes to control the integrity and order of their reservations.

The judicial imposition of such authority upon tribes sweeps aside the "fundamental" power of tribes to exclude or condition the presence of nonmembers who intentionally enter the reservation to extract value for personal gain.[228] It threatens the ability of tribes to determine, in accordance with the values of their own communities, the rights and remedies that should attend reservation labor and employment relations. And it thwarts the ability of tribes to resolve disputes within the judicial and other forums they have established for themselves. The judicial activism, currently exhibited by the D.C. Circuit,[229] the Ninth Circuit,[230] and the Second Circuit,[231] essentially treats Indian tribes as "little more than private voluntary organizations."[232] The direction taken by these courts is contrary to the judiciary's obligation to defer to Congress's modern goal of promoting tribal self-determination and economic independence.[233] The judicial restraint exercised by the Tenth Circuit,[234] and the Eighth Circuit,[235] and the Seventh Circuit,[236] on the other hand, is true to that essential obligation.

Unless the Supreme Court disavows *Worcester*, *Williams*, *Merrion*, and *New Mexico* (and the essential underpinnings of *Iowa Mutual*), courts must not impose federal labor or employment laws of general application upon the employment relations of tribes within the reservation without a clear directive from Congress. Congress's silence about the application of

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227. *See supra* notes 157, 202-209 and accompanying text.

228. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 146 (1982); *supra* notes 157, 202-209 and accompanying text.

229. *See supra* text accompanying notes 194-97.

230. *See supra* text accompanying notes 174-86.

231. *See supra* note 180.

232. *See supra* note 8. *See also* text accompanying notes 74, 117, 139.

233. *Id. cf.* Bryan v. Itasca County, Minn., 426 U.S. 373, 389 n.14 (1976) (Courts "'are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.'") (alteration in original) (quoting and citing Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975)).

234. *See supra* text accompanying notes 165-73, 187-88.

235. *See supra* text accompanying notes 189-93.

236. *See supra* notes 193, 211.

such laws to tribes renders its intent ambiguous because of the undermining of tribal self-government that attends such application.[237] Nonmember employees of tribes are free to leave the reservation if they so choose. And if tribes are unable to attract and retain nonmember employees because they fail to implement labor and employment laws providing workplace rights and remedies similar to those provided by federal law, the tribes can enact these types of laws in the exercise of self-determination that Congress promotes. In the meantime, the federal courts should stay out of this area and leave it to Congress to address the competing policy concerns involved in the imposition of federal labor and employment laws on tribal enterprises within the reservation.

237. *See* Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 494-95 (7th Cir. 1993) (Congress's silence on the imposition of the FLSA upon the inherent regulatory authority of tribes presents the "statutory analogue of extrinsic ambiguity"); E.E.O.C. v. Fond du Lac Heavy Equipment & Const. Co., 986 F.2d 246, 251 (8th Cir. 1993); E.E.O.C. v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989). *See also supra* text accompanying notes 188, 192-93.